A Sentencing Guidelines Council for Victoria
Issues Paper
The Sentencing Advisory Council bridges the gap between the community, the courts and the government by informing, educating and advising on sentencing issues.

The Sentencing Advisory Council is an independent statutory body established in 2004 under amendments to the Sentencing Act 1991. The functions of the Council are to:

- provide statistical information on sentencing, including information on current sentencing practices
- conduct research and disseminate information on sentencing matters
- gauge public opinion on sentencing
- consult on sentencing matters
- advise the Attorney-General on sentencing issues
- provide the Court of Appeal with the Council’s written views on the giving, or review, of a guideline judgment.

Council members come from a broad spectrum of professional and community backgrounds. Under the Sentencing Act 1991, Council members must be appointed under eight profile areas:

- two people with broad experience in community issues affecting the courts
- one senior academic
- one highly experienced defence lawyer
- one highly experienced prosecution lawyer
- one member of a victim of crime support or advocacy group
- one person involved in the management of a victim of crime support or advocacy group who is a victim of crime or a representative of victims of crime
- one member of the police force of the rank of senior sergeant or below who is actively engaged in criminal law enforcement duties
- the remainder must have experience in the operation of the criminal justice system.

For more information about the Council and sentencing generally, visit: www.sentencingcouncil.vic.gov.au
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## Glossary

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td><strong>Accused</strong></td>
<td>A person who is charged with a criminal offence.</td>
</tr>
<tr>
<td><strong>Executive</strong></td>
<td>Distinguished from the legislature and the judiciary, the executive is the arm of government that implements the law. The executive in Victoria comprises the Premier as Head of Government and his or her ministers and includes all the instrumentalities of government under the ministers.</td>
</tr>
<tr>
<td><strong>Guidelines council jurisdiction</strong></td>
<td>A jurisdiction that incorporates a sentencing guidelines council.</td>
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<tr>
<td><strong>Guideline judgment</strong></td>
<td>In Victoria, a decision made by the Court of Appeal under Part 2AA of the <em>Sentencing Act 1991</em> (Vic). A guideline judgment provides broad sentencing guidance beyond the facts of a particular case, and can apply generally to a particular or class of court, offence or penalty or to a particular class of offender.</td>
</tr>
<tr>
<td><strong>Higher courts</strong></td>
<td>In this issues paper, the County Court of Victoria and the Supreme Court of Victoria.</td>
</tr>
<tr>
<td><strong>Instinctive synthesis</strong></td>
<td>The approach to sentencing used by the courts in Victoria by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to the appropriate sentence given all the factors of the case. Instinctive synthesis is distinguished from a staged decision-making process by which the sentencer first determines the upper and lower limits of an appropriate sentence based on offence severity, and then modifies the sentence by reference to other considerations.</td>
</tr>
<tr>
<td><strong>Judiciary</strong></td>
<td>Distinguished from the legislature and the executive, the judiciary is the arm of government comprising the system of courts that interprets and applies the law. In Victoria, the judiciary comprises all the judicial officers appointed to the various courts in Victoria.</td>
</tr>
<tr>
<td><strong>Legislature</strong></td>
<td>Distinguished from the executive and the judiciary, the legislature is the arm of government with the authority to make laws. In Victoria, the Parliament of Victoria is the legislature.</td>
</tr>
<tr>
<td><strong>Offender</strong></td>
<td>A person who has been found guilty of a criminal offence.</td>
</tr>
<tr>
<td><strong>Sentencing guideline</strong></td>
<td>Guidance issued by a sentencing guidelines council to assist courts in sentencing offenders. Sentencing guidelines provide for structured decision-making while retaining judicial discretion to impose an appropriate sentence that takes into account all the relevant circumstances of the individual case.</td>
</tr>
<tr>
<td><strong>Separation of powers</strong></td>
<td>The distribution of state power between three arms of government: the legislature, the judiciary and the executive.</td>
</tr>
</tbody>
</table>
Call for submissions

The Sentencing Advisory Council is seeking submissions on the issues raised, and questions posed, in this issues paper.

The deadline for submissions is **Friday 22 December 2017**.

When making a submission to the Sentencing Advisory Council, please identify how you would like your submission to be treated, according to the following three categories:

- **Public submission** – the Sentencing Advisory Council may refer to, or quote directly from, the submission, and name the source of the submission in relevant publications. Public submissions may also be published on the Sentencing Advisory Council’s website and provided to any person or organisation that requests a copy, at the completion of the reference.

- **Anonymous submission** – the Sentencing Advisory Council may refer to, or quote directly from, the submission in relevant publications, but will not identify the source of the submission. Anonymous submissions, with all identifying information removed, may also be published on the Sentencing Advisory Council’s website and provided to any person or organisation that requests a copy, at the completion of the reference.

- **Confidential submission** – the Sentencing Advisory Council will not refer to, or quote directly from, the submission in any report or publication. Confidential submissions will only be used to inform the Sentencing Advisory Council generally in their deliberations of the particular issues under investigation. Confidential submissions will not be published on the Sentencing Advisory Council’s website and will not be provided to any person outside the Sentencing Advisory Council.

The Sentencing Advisory Council reserves the right to not use or publish any submission that it considers may be defamatory or offensive.

To make a submission, please use one of the following methods:

- Email: contact@sentencingcouncil.vic.gov.au
- Post: Sentencing Advisory Council
  3/333 Queen Street
  Melbourne VIC 3000
- Fax: 03 9908 8777
- Phone: 1300 363 196
Summary of issues

On 25 May 2017, the Victorian Government announced that it would introduce legislation in 2018 to establish a sentencing guidelines council in Victoria. In July 2017, the Attorney-General asked the Sentencing Advisory Council to advise him on the most suitable model following broad stakeholder and community consultation.

This issues paper is designed to facilitate that consultation. It provides background information about sentencing guidelines councils in other jurisdictions, especially England and Wales, Scotland and New Zealand. It also discusses what the Sentencing Advisory Council believes are the key issues that will need to be addressed in establishing a sentencing guidelines council in Victoria.

On some of these issues, the Sentencing Advisory Council has offered a preliminary proposal, based on the Sentencing Advisory Council’s initial research, along with preliminary consultations. These preliminary proposals are by no means set in stone and are very much live topics for discussion. They have been provided primarily as a means of giving consultees the opportunity to comment on a specific issue.

On other issues, the Sentencing Advisory Council has not offered a preliminary proposal, and instead invites stakeholders to submit their views.

What is a sentencing guidelines council?

A sentencing guidelines council is a statutory body that publishes sentencing guidelines to assist judges in the sentencing exercise, promote consistency in sentencing and increase public confidence in the criminal justice system.

A sentencing guidelines council is normally constituted by a combination of judicial members, legal members and community members. It is also normally chaired by a senior judge, who oversees the work of the sentencing guidelines council.

What are sentencing guidelines?

Defining sentencing guidelines is no easy task, as each jurisdiction takes a slightly different approach. In some jurisdictions, sentencing guidelines refer to ‘grids’ that allocate specific lengths of imprisonment (or non-custodial sanctions) to certain factors, such as the number of relevant prior convictions in an offender’s prior history. These are not the types of sentencing guideline discussed in this issues paper, nor would such guidelines be appropriate in Victoria.

The sentencing guidelines discussed in this issues paper are designed to guide the decision-making processes that underlie sentencing. They are not designed to detract from a judicial officer’s ability to impose individualised sentences. Sentencing guidelines are not strictures with predetermined outcomes, nor are they to be followed blindly without exception.
Instead, the sentencing guidelines discussed in this issues paper are intended to be guides for sentencing courts, that structure, rather than remove, discretion. Depending on the types of sentencing guidelines published, sentencing guidelines tend to have one or more of the following features:

- a decision-making process that judicial officers should follow (unless doing so would not be in the interests of justice);
- a comprehensive and non-exhaustive set of relevant considerations that judicial officers should take into account (unless doing so would not be in the interests of justice); and
- starting points and sentencing ranges based on that detailed set of relevant considerations (which judicial officers can depart from if doing so would be in the interests of justice).

**Constitutional issues**

Establishing a sentencing guidelines council in Victoria raises a number of constitutional issues. This is on the basis that the sentencing guidelines council would most likely include judicial members and would develop sentencing guidelines that would be capable of affecting the sentencing process in Victoria.

There are constitutional limitations on the functions that a Victorian judicial officer can perform, even when acting in a personal or non-judicial capacity. Similarly, there are constitutional limitations on the functions that a state court can perform. State courts are vested with federal jurisdiction, and so must maintain ‘institutional integrity’ in a way that is consistent with the exercise of those federal powers under the Australian Constitution.

This paper raises issues on the constitutionality of the sentencing guidelines council in Victoria, including the nature and status of a sentencing guideline as a legal instrument and the sentencing guidelines council as an entity. The constitutionality of both the sentencing guidelines council and the sentencing guidelines it produces will most likely depend on such things as the composition, functions and processes of the sentencing guidelines council.

The Sentencing Advisory Council will seek expert constitutional advice prior to providing its final advice to the Attorney-General.

**Purposes of the sentencing guidelines council**

The first issue that the Sentencing Advisory Council seeks stakeholders' views on relates to the guiding purposes of the sentencing guidelines council in Victoria. The Sentencing Advisory Council considers this to be a crucial question for consultation. Other considerations – the membership of the sentencing guidelines council, its functions and how it carries them out – should flow from, and build on, the guiding purposes. The Sentencing Advisory Council has offered a preliminary proposal that the sentencing guidelines council in Victoria would be guided by two overarching purposes (Question 1):

1. promoting consistency of approach in sentencing; and
2. promoting public confidence in the criminal justice system.

Importantly, it is not proposed that the sentencing guidelines council would or should aim to create consistency in sentencing outcomes.
Composition of the sentencing guidelines council

The second issue relates to the composition (or membership) of the sentencing guidelines council in Victoria. Allowing non-judicial members the opportunity to contribute to sentencing policy is intended to improve the community’s confidence in the criminal justice system. Non-judicial members bring with them a unique set of knowledge and experience that would contribute to the functions of the sentencing guidelines council.

It is also equally important that there be a prominent judicial voice on the sentencing guidelines council, particularly given that such a voice would represent those who would ultimately need to apply any published guidelines.

The Sentencing Advisory Council proposes a membership structure for the sentencing guidelines council that includes:

- seven judicial members, who would represent each of the key criminal jurisdictions in Victoria (the Supreme Court, the County Court, the Magistrates’ Court and the Children’s Court); and
- six legal and community members, who would have expertise, knowledge or skills relevant to sentencing and criminal justice and the work of the sentencing guidelines council.

The Sentencing Advisory Council has also proposed that a judicial member from the Supreme Court would be the Chair of the body (Question 2).

In addition to seeking stakeholders’ views on who should be a member of the sentencing guidelines council in Victoria, the Sentencing Advisory Council also seeks views on how those members should be nominated and appointed (Question 3). The Sentencing Advisory Council has offered a preliminary proposal – based on the appointment process in the guidelines council jurisdictions in the United Kingdom— that the appointment process in Victoria for judicial members would be distinct from the appointment process for non-judicial members.

Judicial members would be nominated by the relevant heads of jurisdictions after consultation with the Attorney-General. Non-judicial members would be nominated by the Attorney-General. The chairperson would be one of the judicial members, nominated by the Chief Justice of the Supreme Court after consultation with the Attorney-General. All nominations would be made to the Governor in Council, who would then formally make the appointments.

Functions of the sentencing guidelines council

It is proposed that the sentencing guidelines council’s role would be the development of sentencing guidelines after consultation, as well as any related functions, such as publishing and publicising sentencing guidelines (Question 4).

In some other guidelines council jurisdictions, sentencing guidelines councils carry out functions very similar to the functions of the Victorian Sentencing Advisory Council, publishing independent research into sentencing matters. However, for the constitutional reasons discussed in this paper (see [1.14]–[1.47]) it is considered desirable that the functions of a Victorian sentencing guidelines council with sitting judicial members be limited, to protect the institutional integrity of the courts.
Developing sentencing guidelines

There are three distinct steps in developing a sentencing guideline, and the Sentencing Advisory Council seeks stakeholders’ views on all three. First, the process of developing a sentencing guideline must be initiated. Second, there would need to be consultation. Third, a sentencing guideline would need to be finalised and approved for commencement.

Initiation

In the guidelines council jurisdictions examined, the equivalents of Victoria’s Attorney-General and Court of Appeal are permitted to request that the sentencing guidelines council develop a particular sentencing guideline. In all but one instance, the sentencing guidelines council has discretion whether to accede to that request. The only exception is in Scotland, where the sentencing guidelines council must comply with a request from the appellate courts.

The Sentencing Advisory Council is seeking views on a preliminary proposal that, in Victoria, the Attorney-General would be able to request the development of a sentencing guideline, and that complying with such a request would be optional for the sentencing guidelines council (Question 5). This would not exclude other interested parties or organisations from sending informal requests for the development of a specific sentencing guideline. Instead, allowing the Attorney-General to request a sentencing guideline would recognise the Attorney-General’s authority on matters of criminal justice in Victoria.

The sentencing guidelines council would also be required to publish reasons for refusing such a request. Notably, the Sentencing Advisory Council has not recommended that courts would be able to expressly request the development of a sentencing guideline. Instead, it is suggested that courts could (as they do now) make note in published judgments about possible areas that would benefit from guidance.

Consultation

Once the decision has been made to develop a sentencing guideline, the sentencing guidelines council would then need to engage in a comprehensive consultation process. Some other jurisdictions have permitted sentencing guidelines to be developed without consultation if ‘urgently’ required. However, the Sentencing Advisory Council considers consultation to be such a crucial process in the development of any sentencing guideline in Victoria that it has proposed that there be no exceptions to the requirement to consult, even if the matter appears urgent. The Sentencing Advisory Council is therefore seeking views on a preliminary proposal that, at a minimum, the sentencing guidelines council be required to consult with courts, government departments, other interested parties and the general community (Question 6). This would most likely entail the publication of a draft guideline that consultees could comment on, after which (taking into account all feedback and submissions received) an amended and final guideline would be published.

Without offering any preliminary views, the Sentencing Advisory Council further seeks stakeholders’ views on whether any specific bodies or individuals should be consulted for each sentencing guideline, and whether the sentencing guidelines council should be required to publish an impact or resource assessment alongside draft and final guidelines (Question 6). In most other guidelines council jurisdictions, the consultation process requires the sentencing guidelines council to publish an impact or resource assessment in order to inform stakeholders about the likely effect of the draft guideline on, for example, the prison population or the workload of correctional officers.
Finalisation, approval and commencement

In relation to the finalisation, approval and commencement of a sentencing guideline, the Sentencing Advisory Council seeks stakeholders’ views on several options, while noting that, depending on the particular accompanying features, each carries constitutional risks (Question 7).

First, the Court of Appeal could be required to consider and then formally approve, approve with modification or reject sentencing guidelines. Sentencing guidelines would thereby become, in effect, part of the common law. This ‘court-approval model’, however, would carry a risk of being construed as imposing a duty on the Court of Appeal to carry out what may be seen as an impermissible function.

Second, the sentencing guidelines council itself could finalise sentencing guidelines, without approval by any other body. This ‘council-approval model’ carries the risk that any sentencing guidelines intended to overrule the common law might be characterised as delegated legislation, which might in turn prohibit judicial officers from membership of the sentencing guidelines council. Further, a sentencing guideline may be seen as an impermissible interference with the judicial process.

Alternatively, sentencing guidelines may be seen as a novel legal instrument (neither common law nor delegated legislation). This appears to be the approach adopted in England and Wales, though the nature and status of sentencing guidelines as a legal instrument are yet to be tested in that jurisdiction. Even if sentencing guidelines are held to be a novel legal instrument, there is still a risk that judicial officers might be prohibited from membership if membership of a body that creates that legal instrument is considered incompatible with the role of a judicial officer.

The model of approval will most likely affect the type of sentencing guideline that may be produced. If sentencing guidelines were not to be binding (that is, if a court were not required to ‘follow’, ‘have regard to’ or ‘sentence in a manner consistent with’ a sentencing guideline) then it would be more likely that judicial officers could be members of a sentencing guidelines council that allowed for council approval of sentencing guidelines, without approval by the Court of Appeal. Further, such an instrument might not be seen as directing a judicial outcome. A non-binding sentencing guideline, however, would most likely not achieve the intended purposes of a sentencing guidelines council.

The Sentencing Advisory Council invites views from stakeholders on which of these approval models would be most appropriate in light of the purposes of the sentencing guidelines council, and the constitutional limitations.

In addition to seeking stakeholders’ views on the manner in which sentencing guidelines should be approved, the Sentencing Advisory Council also seeks stakeholders’ views on whether sentencing guidelines should take effect immediately after they are published, or after a period of time to allow stakeholders to adjust (Question 7). The Sentencing Advisory Council also seeks stakeholders’ views on what notice requirements should apply to the finalisation and approval of sentencing guidelines in Victoria (Question 8).

Content of sentencing guidelines

As described above, there are three key features of sentencing guidelines in the guidelines council jurisdictions examined: a decision-making process, a non-exhaustive set of considerations, and sentencing ranges and starting points.

The decision-making process describes the steps a court should take when sentencing a relevant offence, and the general order in which to take them. The considerations are the factors a court should take into account when sentencing, such as whether the offending occurred in the context of an ‘abuse of trust’, whether the offender pleaded guilty or whether the offender is a youthful offender.
The most novel feature of sentencing guidelines in Victoria would be the provision of sentencing ranges and starting points. There are two types of ‘sentencing ranges’: offence ranges and category ranges. The offence range describes the entire spectrum of sentences for an offence envisaged by a sentencing guideline, which could (for example) range from a non-custodial sanction to 20 years’ imprisonment. The category range describes a more narrow range for categories of offending. For example, an offender might be identified as having high culpability but causing a low level of harm, resulting in a category range of one to four years’ imprisonment and a starting point of two years’ imprisonment.

The starting point in the relevant category range would then serve as the ‘jumping off’ point, from which a court could then either move within that range by taking mitigating and aggravating factors into account, or even move entirely outside that range if the facts of the case warranted a higher or lower sentence. In this way, sentencing guidelines do not dictate a particular outcome, but instead structure the manner in which courts apply their sentencing discretion.

The Sentencing Advisory Council has offered a preliminary proposal in relation to the desirable content of a sentencing guideline in Victoria. Specifically, the sentencing guidelines council should have the discretion to determine, on a guideline-by-guideline basis, which of the above three features would be included in a sentencing guideline (Question 9).

Applying sentencing guidelines

A key question in this issues paper is the extent to which sentencing guidelines in Victoria should be binding upon courts, and in which circumstances a Victorian court could depart from the sentencing guidelines (Question 10).

When sentencing guidelines were first introduced in England and Wales, courts were required to ‘have regard to’ them, but could depart from them so long as they explained their reasons for doing so. This afforded the courts considerable discretion in how they used the sentencing guidelines. Scotland now uses this approach.

In New Zealand, where draft guidelines were created but never finalised, courts would have been required to sentence offenders in a manner ‘consistent with’ the sentencing guidelines. This is a stricter requirement, in that courts would not have been allowed to sentence inconsistently with the relevant sentencing guidelines (without good reason).

England and Wales now utilise a stricter approach, in that courts are required to ‘follow’ relevant sentencing guidelines. As a result, the offender or the prosecution are able to appeal the sentence if the court has failed to adhere to the sentencing guidelines (without good reason). In England and Wales, courts are permitted to depart from the sentencing guidelines if doing so is ‘in the interests of justice’.

A further question arises about the extent to which sentencing guidelines should have retrospective application in Victoria (Questions 11 and 12). On the one hand, sentencing guidelines are intended to align current sentencing practices with contemporary community standards, suggesting that sentencing guidelines should have retrospective effect. Further, it would appear incongruous for two offenders to be sentenced on the same day for the same type of offending, but to receive a different outcome because of the application of different sentencing standards. On the other hand, this would also mean that offenders could be subject to sentencing regimes different from those that were applicable at the date of their offence.

The Sentencing Advisory Council also seeks stakeholders’ views on the effect that sentencing guidelines should have on existing common law precedents (Question 13) and whether the introduction of the sentencing guidelines council should affect the Court of Appeal’s current power to deliver a guideline judgment (Question 14).
1. Project background, scope and approach

1.1 This issues paper is divided into five chapters:

- this introductory chapter sets out the background to this project and discusses the Sentencing Advisory Council's approach to the project, the scope of this issues paper and the key constitutional issues;
- Chapter 2 outlines the possible purposes of the Victorian sentencing guidelines council;
- Chapter 3 discusses the possible composition and functions of the Victorian sentencing guidelines council;
- Chapter 4 discusses the possible format and structure of sentencing guidelines in Victoria; and
- Chapter 5 discusses the possible application of sentencing guidelines in Victoria.

Background to the project

1.2 In June 2016, the Sentencing Advisory Council published its Sentencing Guidance in Victoria: Report. The aim of that report was to provide advice to the Attorney-General on the most effective legislative mechanism to provide sentencing guidance to courts in Victoria in a way that would:

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

1.3 The Sentencing Advisory Council made 18 recommendations, including repealing the baseline sentencing provisions, enhancing the existing guideline judgment scheme and introducing a standard sentence scheme (should the government introduce a legislative guidepost for sentencing).2

1.4 The Sentencing Advisory Council also discussed the possibility of a sentencing guidelines council in Victoria, providing an ‘aspirational model’ for such a body.3 Sentencing guidelines councils are bodies, separate from the legislature and the judiciary, that publish sentencing guidelines. Those guidelines provide a comprehensive and methodical framework to guide courts in the sentencing process. A number of other jurisdictions – most notably England and Wales, Scotland and New Zealand – have enacted legislation to introduce sentencing guidelines councils.4

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2. The Victorian Government has passed legislation to implement these recommendations: Sentencing Amendment (Sentencing Standards) Act 2017 (Vic) (not yet in operation).
4. While legislation providing for a sentencing guidelines council was passed in New Zealand, the council was never established. Further, a number of jurisdictions in the United States have introduced sentencing guidelines, but most of these are overly prescriptive and would not be appropriate in the Victorian context.
1.5 The Sentencing Advisory Council suggested that after the recommended reforms described above had been implemented and evaluated, further consideration could be given to the introduction of a sentencing guidelines council. Sentencing guidelines could potentially:

- provide comprehensive sentencing guidance on offences in Victoria, allowing other sentencing schemes to be repealed and thereby simplifying the sentencing task;
- overcome the sporadic nature of guidance delivered through guideline judgments by allowing for more frequent development and delivery of guidance;
- improve the extent to which sentencing guidance is informed by public engagement and community testing; and
- provide a more rigorous means of setting appropriate sentence levels, grounded by a rational and holistic consideration of offence seriousness and informed by public opinion.5

1.6 Because a sentencing guidelines council was outside the scope of the terms of reference, the Sentencing Advisory Council made no recommendations in relation to the model. The Sentencing Advisory Council did, however, note that there were several constitutional issues that would need to be resolved, that sentencing guidelines would represent a significant departure from the current sentencing framework in Victoria, and that further consideration would be required before implementation.6

Request for advice

1.7 On 25 May 2017, the Victorian Government announced its intention to create a sentencing guidelines council to engage with the community and provide guidance to the courts on sentencing for specified crimes. The government stated that:

The Victorian model will be based on the highly successful sentencing councils in the United Kingdom and will be made up of judges and magistrates, victims of crime representatives, the Director of Public Prosecutions, Victoria Police, legal stakeholders and academia.

It is intended that the Victorian Sentencing Guidelines Council will develop sentencing guidance for the courts, after engaging in wide consultation with the Victorian community.7

1.8 On 12 July 2017, the Attorney-General asked the Sentencing Advisory Council to prepare an issues paper to examine and evaluate the two models of sentencing guidelines councils in the United Kingdom – the Scottish Sentencing Council and the Sentencing Council for England and Wales – and to explore which features of these models would be most suitable for Victoria.

1.9 This issues paper forms the basis for engagement and consultation with the judiciary, criminal justice stakeholders and the broader community about the preferred features of the sentencing guidelines council in Victoria.

1.10 The Sentencing Advisory Council is required to report to the Attorney-General by 29 March 2018.

5. Sentencing Advisory Council (2016), above n 1, 199.
Scope of the request for advice and the Sentencing Advisory Council’s approach

1.11 In the request for advice, the Attorney-General asked that the Sentencing Advisory Council develop and publish an issues paper that would discuss:

- the composition of the sentencing guidelines council;
- the role of the judiciary, and a judicial majority, on the sentencing guidelines council;
- how a sentencing guideline would be developed; and
- how sentencing guidelines would apply to individual cases.

1.12 This issues paper discusses each of these key components and describes the approach taken in England and Wales, Scotland and New Zealand. The Sentencing Advisory Council has included New Zealand in its examination because it is a common law jurisdiction similar to Australia, and the legislation creating the sentencing guidelines council in that jurisdiction (although never established) was based on, and has subsequently influenced, the law on sentencing guidelines in England and Wales.8

1.13 Two key issues are not canvassed in this issues paper:

- First, the Sentencing Advisory Council will not be seeking feedback about the threshold issue of the appropriateness or desirability of a sentencing guidelines council in Victoria. The government has committed to introducing such a body.
- Second, given the potential for conflict of interest, the Sentencing Advisory Council will not be seeking submissions on the governance model of the sentencing guidelines council, insofar as the governance model would relate to the existing functions of the Sentencing Advisory Council. The Sentencing Advisory Council will make a separate submission to the Attorney-General on this issue after providing its final advice in March 2018.

Constitutional issues

1.14 In discussing a sentencing guidelines council as an 'aspirational model' for sentencing guidance in its Sentencing Guidance in Victoria: Report, the Sentencing Advisory Council acknowledged that, while such a body has been seen as a success in the United Kingdom, it could potentially encounter issues of constitutional validity in Australia.9 In this issues paper, the Sentencing Advisory Council has revisited and considered these issues further.

1.15 While the Sentencing Advisory Council raises a number of constitutional risks that are associated with a sentencing guidelines council, it has not reached a settled position, and will seek expert legal advice prior to providing its final advice to the Attorney-General in March 2018.

1.16 The constitutionality of a sentencing guidelines council will most likely hinge on the particular combination of features of such a council, including its composition, functions, the model for approval of a guideline and the form, content and binding nature of a sentencing guideline. This issues paper seeks stakeholders’ views on each of these elements as a precursor to the determination of what may be constitutionally permissible, in light of the intended purposes of the sentencing guidelines council.

8. In 2009, legislation in England and Wales introduced the requirement for a court to ‘follow’ a sentencing guideline (rather than ‘have regard to’ as was previously required), in part based on the language used in the legislation establishing the New Zealand sentencing guidelines council: see [5.11].

1.17 It is likely that the sentencing guidelines council would be a statutory body, independent from government but still part of the executive.10 The sentencing guidelines council would include judicial members and would develop and publish sentencing guidelines capable of affecting the sentencing process carried out by courts in Victoria. This structure raises potential constitutional issues, including issues regarding the separation of powers.11

1.18 Although a strict separation of powers is not required at the state level,12 state courts are vested with federal jurisdiction; they may oversee legal proceedings involving the application of federal legislation. Because of this, the High Court has held that it would be contrary to the Australian Constitution for a state to confer upon a state court any function that would impair the ‘institutional integrity’ of the court in such a way as to be repugnant to, or incompatible with, the court’s role as a repository of federal judicial power.13 This is known as the Kable principle.

1.19 That principle was summarised by the High Court as follows:

[B]ecause the Constitution establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer a power or function which substantially impairs the court’s institutional integrity, and which is therefore incompatible with that court’s role as a repository of federal jurisdiction, is constitutionally invalid.14

1.20 The Kable principle requires that Victorian courts must only exercise powers, and further, must appear to be only exercising powers, consistent with the defining and essential characteristics of a court of law. For example, the role of courts is to apply the law to the facts of a case, and this role requires that courts have discretion to decide whether, on the evidence, the legal requirements have been met in any particular case.

1.21 Whether or not legislation is considered repugnant to the institutional integrity of a court turns on the defining characteristics of a court. In turn, what those characteristics might be are decided on a case-by-case basis. The two characteristics of a court (and its officers) that are most often considered essential are its impartiality and its independence (in both substance and perception).

10. Public Administration Act 2004 (Vic) s 5 (defining ‘public entity’).
11. See the glossary for a definition of ‘separation of powers’.
13. Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51. For illustrations of how the Kable principle has been applied, see for example, Attorney-General (NT) v Emmerson (2014) 253 CLR 393; Assistant Commissioner Condon v Pompano (2013) 252 CLR 38; Mancolovic v The Queen (2011) 245 CLR 1; Kirk v Industrial Court (NSW) (2010) 239 CLR 531; North Australian Aboriginal Legal Aid Service Inc v Bradley (2004) 218 CLR 146.
1.22 These two features of a court – impartiality and independence – do not, though, exhaustively define what might be classified as ‘essential characteristics’ of a court. For example, in Wainohu v State of New South Wales, the High Court determined that the requirement to give reasons for decisions is such an essential characteristic of the functions of a court that legislation purporting to exempt a court from having to give reasons was repugnant to the institutional integrity of the court. The court in Wainohu further held that if courts and judicial officers were asked to participate in decision-making that does not require adherence to principles of procedural fairness or open justice, this would be indicative of that function not sufficiently bearing the essential characteristics of a court.

1.23 A further characteristic that is often seen as integral to a court is the ability to exercise discretion. Courts cannot be left with such little discretion that the outcome of a proceeding is effectively predetermined. For example, the High Court overturned a law that required the Supreme Court of New South Wales to make an order restraining certain persons from using or disposing of property solely on the basis of an affidavit saying that the person was suspected of participating in criminal activities and that there were reasonable grounds for that belief. The problem in that case was that the law had ‘conscripted’ the New South Wales court into making a mandatory order at the discretion of the executive.

1.24 In a similar case, the High Court overturned a law that required courts in South Australia to make certain orders in respect of persons whom the executive had declared to be members of a criminal organisation. The problem in that case was that the court was given no role in determining whether the person had any actual connection with criminal activities.

1.25 In the context of sentencing guidelines, the Kable principle suggests that the legislation establishing the sentencing guidelines council should not encroach on the independence of Victorian courts by:

- requiring judicial members of the sentencing guidelines council to do the government’s bidding, or to be involved in functions closely associated with those of the legislature and the executive;
- enlisting the Court of Appeal to carry out a function that does not bear the essential characteristics of a court;
- requiring the sentencing guidelines council to prepare a sentencing guideline at the request of the Court of Appeal or the Attorney-General without the ability to refuse that request; or
- permitting the creation of sentencing guidelines that limit judicial discretion such that courts cannot impose an appropriate sentence given all the relevant circumstances of the case.

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15. Forge v Australian Securities and Investments Commission (2006) 228 CLR 45, [64] (‘It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court’), cited with approval in North Australian Aboriginal Justice Agency Limited v Northern Territory [2015] HCA 41, [121] (‘Institutional attributes can too readily be taken for granted until such time as they are seen to come under threat’).


17. Wainohu v State of New South Wales [2011] 243 CLR 181, [44], citing Leeth v The Commonwealth (1992) 174 CLR 455; International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319; Dickason v Dickason (1913) 17 CLR 50; Russell v Russell (1976) 134 CLR 495. See also Kuczborski v Queensland (2014) 254 CLR 51 (‘as the decisions in Kable, International Finance, Totani and Wainohu show, not only the task which is given to a State court, but also the manner in which that Court is required to perform the task, may require the conclusion that the legislation in question is invalid’).


1.26 Whether or not the sentencing guidelines council would impermissibly engage in any of these activities would depend on the nature and status of sentencing guidelines as legal instruments. There is, in the Sentencing Advisory Council’s view, a live question about the nature and status of sentencing guidelines as legal instruments in Victoria.

1.27 This is particularly relevant in determining the process for finalisation and approval of sentencing guidelines. If a sentencing guideline is finalised and approved by the sentencing guidelines council itself, then a sentencing guideline might be characterised either as delegated legislation or as a novel legal instrument that is without precedent in Victoria.

1.28 On this point, Professor Andrew Ashworth has suggested that sentencing guidelines do not have a settled status in England and Wales:

A second constitutional issue concerns the ‘definitive guidelines’ that the [Sentencing Guidelines Council] has issued and the [Sentencing] Council will issue. What kind of law are these? They are not primary legislation, delegated legislation, or part of the judgment of a court. They have authority by virtue of the duty of sentencers to have regard to (or ‘follow’) definitive guidelines, but it is not clear in what other way their statutory authority is manifest … So, just as in the 1980s and 1990s judicial sentencing guidelines seemed to acquire binding force even though in substance they were obiter dicta in relation to the case in which they were set out, it also appears that definitive guidelines will acquire their authority partly through the legislative origin of the power to create them, and partly through enforcement by the Court of Appeal.20

1.29 Alternatively, if a sentencing guideline is finalised and approved by the Court of Appeal, it might be characterised as a judgment of the court and form part of the common law. The constitutional issues relating to each of these models are discussed below.

**Council-approved guidelines**

1.30 The Sentencing Advisory Council has identified two constitutional risks that arise if sentencing guidelines are finalised and approved by the sentencing guidelines council without the need for approval by another body. First, if the guidelines are both binding on courts and prescriptive in form and content, this might result in impermissible interference with how the court carries out its functions. Second, there is a risk that sentencing guidelines might be characterised as delegated legislation, or instruments that have a legislative character.21

1.31 For example, in order to have an effect on sentencing in Victoria, sentencing guidelines would need to be binding on courts to some degree (such as where the court must ‘have regard to’ a guideline). As an independent statutory body constituted by some judicial members, governmental control over decisions of the sentencing guidelines council would not be appropriate. Further, the sentencing guidelines council would be required to consult widely, take various considerations into account when finalising guidelines and publish a finalised version of the sentencing guideline. These are all features of an instrument that is legislative in character.

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1.32 If sentencing guidelines are identified as being of a legislative character, this may affect the constitutional permissibility of judicial officers being members of the sentencing guidelines council. The High Court has previously held that judicial officers can only perform a function (even *persona designata*, that is, sitting in a personal capacity and not as a judicial officer) if:

- that function is not an integral part of, or closely connected with, the functions of the legislature and the executive government;
- that function is required to be performed independently of the government’s instructions, advice or wishes; and
- any discretion purportedly possessed by the judge is not to be exercised on political grounds.

1.33 There is a risk that it would be constitutionally impermissible for a judicial officer to sit as a member of a body that creates instruments that are of a legislative character and that overrule the common law of sentencing in Victoria. This is on the basis that the creation of such instruments is a function that is closely connected with the functions of the legislature and the executive government and therefore may be incompatible with the role of a judicial officer.

1.34 It is possible for the Governor in Council to exempt a class of legislative instrument (such as sentencing guidelines) from the standard requirements of delegated legislation, such as parliamentary scrutiny. However, exemption from legislative requirements may not be seen to change the fundamental character of a sentencing guideline as a legislative instrument, and so may fail to remedy the issue that, typically, judges are not permitted to be members of a body that creates instruments of a legislative character.

1.35 Similarly, it is also possible for the Governor in Council to prescribe a class of instrument as not being a legislative instrument. This may address the issue of judicial membership in a body that creates instruments that have the legal effect of overruling common law precedents. However, given the necessary characteristics and functions of sentencing guidelines in Victoria, this in and of itself may also not be sufficient to avoid the substantive characterisation of sentencing guidelines as having a legislative character, and therefore having the same impermissible effect. The Sentencing Advisory Council also considers that there is a question about whether such a reclassification would withstand appellate review, particularly given the sorts of instruments that are usually prescribed as not being legislative instruments.

1.36 A further possibility is that sentencing guidelines in Victoria might be considered a novel legal instrument (that is, not delegated legislation and not part of the common law). The Sentencing Advisory Council understands that this is the approach currently adopted in England and Wales. It is possible that the unique features of sentencing guidelines – the judicial membership of the sentencing guidelines council, the lack of governmental control, the powers authorised by primary legislation, the ability of guidelines to affect the common law, the obligation to consult and the binding nature of the instruments issued – might collectively indicate that sentencing guidelines are neither delegated legislation nor common law, but are instead a unique legal instrument that is without precedent in Victoria (or possibly Australia).

22. *Subordinate Legislation Act 1994* (Vic) s 3 (defining ‘legislative instrument’).


26. For all instruments that have been prescribed as not constituting legislative instruments, see *Subordinate Legislation (Legislative Instruments) Regulations 2011* (Vic) r 5.
1.37 If this is the case, and if those legal instruments are constitutionally permissible, then judicial officers could perhaps be members of the sentencing guidelines council without the risk of being seen as interfering with the institutional integrity of the courts in which they sit. However, even if this is so, the creation of sentencing guidelines might still be considered an impermissible non-judicial function, and therefore inhibit the ability of judicial officers to be members of the sentencing guidelines council.

1.38 The capacity for a sentencing guideline to affect the common law and the presence of judicial members on the sentencing guidelines council are most likely necessary to achieve the intended purposes of the sentencing guidelines council.

**Court-approved guidelines**

1.39 Alternatively, if the sentencing guidelines council could draft, but not itself approve, sentencing guidelines, this obstacle to judicial membership might be overcome. For example, legislation might prescribe that sentencing guidelines only come into effect if they are approved by the Court of Appeal. However, while this model may address the concern relating to judicial membership, it raises a new issue, in that the legislation requiring approval of a sentencing guideline by the Court of Appeal might be perceived as conferring a constitutionally impermissible function on the court.

1.40 Requiring the Court of Appeal to approve a sentencing guideline might be considered repugnant to, or incompatible with, the institutional integrity of the court. This is on the basis that such approval could involve judicial officers in the exercise of executive powers (the issuing of a sentencing guideline potentially constituting an exercise of executive power).

1.41 In contrast with guideline judgments, which are drafted and issued by the court, a sentencing guideline under this model would be drafted by an independent statutory body and then submitted to the court for approval. That executive–judicial overlap in the creation of sentencing guidelines creates the following risks:

- the approval process might be perceived as judicial ‘rubber-stamping’ exercises of executive power;
- the approval process might create a judicial function that does not have the defining characteristics of the judicial process; and
- the approval of sentencing guidelines might improperly result in the court ‘making’, rather than ‘applying’, the law.

1.42 If this court-approval model were implemented in preference to the council-approval model, there would need to be clear legislative articulation of the process through which the sentencing guidelines council would present sentencing guidelines to the Court of Appeal for approval. For example, it might be that, unless there is a hearing in open court with arguments from interested parties, the Court of Appeal’s approval of a sentencing guideline would constitute a non-judicial function.

1.43 Further, there would also need to be clear legislative articulation of the criteria against which the Court of Appeal would determine whether to approve or reject (or possibly modify) the sentencing guidelines presented to it. For example, if the Court of Appeal could not modify a sentencing guideline, and the criteria against which the sentencing guideline could be assessed were too broad, this might be perceived as the Court of Appeal being given no option but to ‘rubber-stamp’ a sentencing guideline presented to it.
Further, one of the key aims of sentencing guidelines is to ensure greater community involvement in setting sentencing guidance, and it is questionable whether a judge-led body, creating an instrument to be approved or rejected by a court, would satisfy that objective.

The Sentencing Advisory Council has taken a cautious approach to the constitutional issues discussed above, and will deliver its recommendations to the Attorney-General after receiving expert constitutional advice and stakeholders’ views.

The Sentencing Advisory Council acknowledges that for some options (such as the issue of finalisation and approval), significant constitutional risks may remain whichever option is chosen. While these risks might be mitigated, this mitigation may affect the prescriptiveness and type of sentencing guideline that may then be produced and will necessarily have a bearing on whether the sentencing guidelines council can achieve its intended purposes.

The particular issues relating to the constitutionality of different features of the sentencing guidelines council are discussed in the relevant sections of this issues paper.

Human rights considerations

As a public statutory authority, the Sentencing Advisory Council is required, in making a decision, to give proper consideration to relevant human rights. To that end, in developing its advice, the Sentencing Advisory Council has had regard to the rights contained in the Charter of Human Rights and Responsibilities Act 2006 (Vic).

In this respect, the Sentencing Advisory Council has specifically considered the human rights implications of the sentencing guidelines council in Victoria, including and especially the right to equality, the right not to receive a greater penalty for a criminal offence than the penalty that applied to the offence when it was committed, and the right to receive a reduced penalty if the penalty for an offence is reduced before the person is sentenced.

Preliminary research and consultation

This issues paper draws from preliminary research conducted by the Sentencing Advisory Council into the characteristics of international sentencing guidelines councils.

The Sentencing Advisory Council has also conducted preliminary consultations with selected key stakeholders to discuss the scope of the project and identify the issues that would accompany the introduction of the sentencing guidelines council in Victoria.

Throughout this issues paper, the Sentencing Advisory Council sets out proposals for some of the different elements of the sentencing guidelines council in Victoria. These proposals are based on the Sentencing Advisory Council’s initial consultation and research. They are not intended as a finalised or definitive view, but as a starting point for discussion and debate, and the Sentencing Advisory Council welcomes differing views from stakeholders. The Sentencing Advisory Council is not, however, seeking views on the threshold question of the appropriateness or desirability of a sentencing guidelines council in Victoria, as the government has already announced its intention to create such a body.

Next steps

1.53 In November 2017, the Sentencing Advisory Council will be holding a series of consultation events, including a discussion panel for the broader community, to provide opportunities for consultation on the matters raised in the issues paper. The Sentencing Advisory Council will also be seeking written submissions, including through an online survey.

1.54 The Sentencing Advisory Council is required to provide its final advice on the proposed features of the sentencing guidelines council in Victoria to the Attorney-General by 29 March 2018.
2. Purposes of the sentencing guidelines council in Victoria

Overview

2.1 Different jurisdictions have introduced sentencing guidelines for different reasons. In the United States, for example, sentencing guidelines have been in large part driven by the need to reduce disparities in the sentencing of racial minorities. In England and Wales, because the Crown Court has been under no obligation to publish sentencing remarks in each case, guidelines have been in part considered a way of improving the transparency and accountability of sentencing decisions.

2.2 This chapter discusses the express or implied legislative purposes of sentencing guidelines councils in the United Kingdom and New Zealand. It then considers the appropriate purposes of the sentencing guidelines council in Victoria.

Purposes of the Sentencing Council for England and Wales

2.3 The Sentencing Council for England and Wales was established to promote greater transparency and consistency in sentencing, while maintaining the independence of the judiciary.

2.4 When introducing the sentencing guidelines legislation, the then Secretary of State for Justice and Lord Chancellor, Jack Straw, elaborated on the objectives of the Sentencing Council for England and Wales and its predecessors, stating:

The truth is that sentencing practice is complicated and is bound to be so, but I found that, without any other information, neither the public nor sentencers had a clear idea of the penalties for particular types of behaviour. That explains the significant variation in the attitude of the courts to similar offences and similar offenders. My view was that we needed a more explicit process, but one that fully respected the independence and discretion of judges and magistrates at the point of sentence.

2.5 The legislation does not expressly state the purposes of the Sentencing Council for England and Wales. However, it does state that, in carrying out its duties, the Sentencing Council for England and Wales must have regard to the ‘need to promote consistency … [and] public confidence’ in sentencing.


35. Coroners and Justice Act 2009 (UK) s 120(1).
Purposes of the Scottish Sentencing Council

2.6 According to the policy memorandum annexed to the legislation introducing it, the purpose of the Scottish Sentencing Council is to:

help ensure greater consistency, fairness and transparency in sentencing and thereby increase public confidence in the integrity of the Scottish criminal justice system.36

2.7 The Scottish legislation expressly provides that the purposes (described as ‘objectives’) of the Scottish Sentencing Council, in carrying out its functions, are to:

• promote consistency in sentencing practice;
• assist the development of policy in relation to sentencing; and
• promote greater awareness and understanding of sentencing policy in practice.37

Purposes of the New Zealand Sentencing Council

2.8 In 2006, the Law Commission of New Zealand recommended the introduction of a sentencing guidelines council to address inconsistencies in sentencing and to improve the government’s ability to predict correctional resource requirements.38

2.9 The Law Commission further recommended that a sentencing guidelines council should have certain purposes.39 Those recommended purposes were all enshrined in the legislation. Excluding the peripheral purposes related to the New Zealand Parole Board, which are not relevant here, the purposes of the New Zealand Sentencing Council would have been to:

• promote consistency in sentencing practice between different courts and judges;
• ensure transparency in sentencing policy;
• facilitate the provision of reliable information to enable penal resources to be effectively managed;
• enable the development of sentencing policy to be based on a broad range of experience and expertise;
• inform members of parliament and policymakers about sentencing and reform options; and
• inform and educate the public about sentencing and decision-making, with a view to promoting public confidence in the criminal justice system.40

2.10 Although the legislation was passed, the New Zealand Sentencing Council was never funded nor established (despite developing a comprehensive set of inaugural sentencing guidelines), and the legislation was repealed in June 2017.41

37. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 2.
40. Sentencing Council Act 2007 (NZ) s 8 (repealed).
41. Statutes Repeal Act 2017 (NZ) s 3(1).
2. Purposes of the sentencing guidelines council in Victoria

2.11 As discussed at [1.14]–[1.47], there are constitutional limitations on the functions of the sentencing guidelines council in Victoria that are not relevant in other jurisdictions. England and Wales, for example, do not have a federated system of government.

2.12 A body that includes sitting judicial members must be independent of parliament and the government (both in appearance and in practice). As a consequence, the Victorian sentencing guidelines council could not conduct any activity that:

- is an integral part of, or closely connected with, the functions of the legislature or the executive;
- involves giving advice to the government; or
- is at the behest or direction of the government.

2.13 The purposes of the sentencing guidelines council for Victoria should reflect these limitations.

Preservation of judicial independence and discretion

2.14 An essential element of sentencing guidelines in England and Wales is the preservation of judicial discretion. This principle and the associated (but broader) principle of judicial independence will underpin the constitutionality of the Victorian sentencing guidelines council and its sentencing guidelines. It may be appropriate to indicate that one of the purposes of the establishing Act is to preserve judicial independence and judicial discretion.

Considerations for giving a guideline judgment

2.15 Since 2004, the Court of Appeal in Victoria has had the explicit power to deliver guideline judgments. Guideline judgments provide for ‘guidelines to be taken into account by courts in sentencing offenders’. They can apply generally or to a particular offence, penalty, court or class of offender. The permissible content of a guideline judgment is outlined in section 6AC of the Sentencing Act 1991 (Vic), and new legislation will soon expand that content to expressly include ‘guidelines as to the appropriate level or range of sentences for a particular offence or class of offence’.

2.16 The Sentencing Act 1991 (Vic) provides that, in considering whether to give or review a guideline judgment, the Court of Appeal must have regard to:

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

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44. Sentencing Act 1991 (Vic) s 6AA.
45. The permissible content of a guideline judgment includes criteria to be applied in selecting from various sentencing alternatives, the weight to be given to the various purposes for which a sentence may be imposed, the criteria by which a sentencing court is to determine the gravity of an offence, the criteria a sentencing court may use to reduce the sentence for an offence, the weighting to be given to relevant criteria and any other matter consistent with the principles in the Sentencing Act; Sentencing Act 1991 (Vic) s 6AC.
47. Sentencing Act 1991 (Vic) s 6AE. The Court of Appeal must also have regard to any views stated by the Sentencing Advisory Council, any submissions made by the Director of Public Prosecutions and any lawyer representing Victoria Legal Aid.
2.17 The purposes of the sentencing guidelines council in Victoria should perhaps mirror these same two overarching purposes. This would also be consistent with the legislative purposes of sentencing guidelines in other jurisdictions.

2.18 There are, however, several purposes included in other jurisdictions that are not proposed for the Victorian sentencing guidelines council. For example, the Scottish Sentencing Council has the additional purpose of assisting in the development of policy in relation to sentencing.\(^{48}\) Further, the New Zealand legislation included a purpose of the Sentencing Council as being to facilitate the provision of reliable information to enable penal resources to be effectively managed.\(^{49}\)

2.19 The Sentencing Advisory Council’s preliminary view is that both of these express purposes carry too high a risk of overstepping the constitutional boundaries of the sentencing guidelines council in Victoria. In particular, if either were made express purposes of the sentencing guidelines council in Victoria, this could result in (or be perceived as) the sentencing guidelines council acting at the behest of, or providing direct advice to, the government.

Proposal

2.20 In light of the purposes of sentencing guidelines councils in other jurisdictions, the constitutional limitations on the sentencing guidelines council’s functions, and the desirability of having the purposes of sentencing guidelines mirror the current purposes of guideline judgments, it is proposed that the purposes of the sentencing guidelines council for Victoria be as follows:

- To produce sentencing guidelines that:
  - promote consistency of approach in sentencing; and
  - promote public confidence in the criminal justice system.

Question 1: Guiding purposes of the sentencing guidelines council

Are the proposed purposes of the sentencing guidelines council appropriate?

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

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\(^{48}\) Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 2(b).

\(^{49}\) Sentencing Council Act 2007 (NZ) s 8(a)(iv) (repealed).
3. Composition and functions of the sentencing guidelines council in Victoria

Overview

3.1 This chapter examines the composition and functions of the sentencing guidelines councils in England and Wales, Scotland and New Zealand, and discusses the possible composition and functions of the sentencing guidelines council in Victoria.

Composition

3.2 The composition of the sentencing guidelines council in Victoria is likely to be a key factor in determining its perceived legitimacy (by judicial officers, criminal justice stakeholders and the wider community) as well as its future success.

Composition of the Sentencing Council for England and Wales

3.3 The Sentencing Council for England and Wales comprises eight judicial members and six legal and community members. Eligible judicial members are from each of the court jurisdictions in England and Wales and include judges of the Court of Appeal and the High Court, Circuit judges, District judges and lay justices. The judicial membership must include at least one Circuit judge, one District judge and one lay justice. One of the judicial members is appointed as Chair.

3.4 Eligible legal and community members are persons with experience in one or more of the following areas:
   - criminal defence;
   - criminal prosecution (including the Director of Public Prosecutions);
   - policing;
   - sentencing policy and the administration of justice;
   - the promotion of the welfare of victims of crime;
   - academic study or research relating to criminal law or criminology;
   - the use of statistics; or
   - the rehabilitation of offenders.

50. Coroners and Justice Act 2009 (UK) sch 15 cls 1, 3.
3.5 The Lord Chief Justice has the title of ‘President’ of the Sentencing Council for England and Wales, but is not a member of the Sentencing Council.53 As President, the Lord Chief Justice appoints judicial members and provides oversight to the Sentencing Council, which includes having an observer attend meetings.54

Composition of the Scottish Sentencing Council

3.6 The Scottish Sentencing Council comprises six judicial members and six legal and community members. The Lord Justice Clerk is, by right of office, a judicial member and Chair of the Sentencing Council.55 The remaining five judicial members are:
- one judge who normally sits as a judge of the Outer House of the Court of Session or the High Court of Justiciary;
- one sheriff (other than a sheriff principal);56
- two summary sheriffs or justices of the peace; and
- one other person holding any of the judicial offices above, or the office of sheriff principal.57

3.7 The six non-judicial members comprise three legal members and three community members. The three legal members include:
- one prosecutor;
- one practising advocate (other than a prosecutor); and
- one practising solicitor (other than a prosecutor).58

3.8 The three community members include:
- one police constable;
- one person with knowledge of the issues faced by victims of crime; and
- one other person who is not qualified for appointment as a judicial or legal member.59

3.9 The Scottish legislation expressly prohibits any elected representative (of the United Kingdom, the Scottish or European Parliaments or any local government council), Minister of the Crown, or member of the Scottish Executive, from being appointed to the Scottish Sentencing Council.60

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55. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) sch 1 cl 1(2).
56. In Scotland, ‘sheriffs’ are judicial officers that deal with the majority of civil and criminal court cases. In the criminal jurisdiction, sheriffs hear both summary matters sitting alone and more serious offences sitting with a jury of 15 people. A sheriff principal is a judge with judicial, quasi-judicial and administrative responsibilities in charge of one of six ‘sheriffdoms’ judiciary of Scotland. Judicial Office Holders’ (scotland-judiciary.org.uk, 2017) <www.scotland-judiciary.org.uk/18/0/Judicial-Office-Holders> at 16 October 2017.
57. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) sch 1 cl 1(3).
58. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) sch 1 cl 1(4).
59. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) sch 1 cl 1(5).
60. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) sch 1 cl 3.
Composition of the New Zealand Sentencing Council

3.10 In New Zealand, the proposed sentencing guidelines council was to have comprised an equal number of judicial and non-judicial members, including:

- one judge of the Court of Appeal;
- one judge of the High Court;
- two District Court judges;
- the Chair of the Parole Board (a judge or former judge of the High Court or District Court);\(^61\) and
- five non-judicial (legal and community) members.\(^62\)

3.11 A judicial member was to be appointed as Chair.\(^63\) The five legal and community members were not further defined by reference to any particular experience or expertise.

Constitutional issues around composition

3.12 According to the *Kable* principle (discussed at [1.18]–[1.25]), a sitting judicial officer, even when performing a non-judicial function, may not act as a mere instrument of government policy or merely give effect to a predetermined executive decision. To do so would be repugnant to the institutional integrity of the state court to which that judicial officer is appointed, as the court must administer not only state laws but also federal laws, in a way that is compatible with the Australian Constitution.

3.13 Whether it is constitutionally permissible for members of the Victorian judiciary to be members of the sentencing guidelines council is likely to turn on the precise functions required of judicial members on the council, and the independence of the council from government direction. The presence of members of the executive (for example, representatives of the Department of Justice and Regulation) on the sentencing guidelines council could negate the perception of the independence of the council from the government, and could risk the sentencing guidelines council being seen as acting at the direction of the government.

3.14 Similarly, there is a risk that judicial membership may be construed as impermissible if the sentencing guidelines council’s functions are seen as too closely connected with a function of the legislature or the government.

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Judicial members

3.15 Judicial officers are essential to the functioning of the sentencing guidelines councils in the United Kingdom. In Victoria, judicial officers would similarly be essential to the proper functioning of the sentencing guidelines council, on the basis that judicial officers:

- are the acknowledged subject matter experts in sentencing practice and the interpretation and application of sentencing law;
- are already tasked with ‘establishing standards of sentencing or by indicating an appropriate sentence range or a category of seriousness of an offence’ (especially at the level of the Court of Appeal); and
- will ultimately be responsible for the application of sentencing guidelines when sentencing offenders in court.

3.16 Representation from all court levels is considered particularly important, on the basis that sentencing guidelines would be capable of application across all courts. For example, sentencing guidelines on the appropriate discount for a guilty plea, or on totality, would be relevant across all court levels.

3.17 Further, the Magistrates’ Court sentences the overwhelming majority of criminal charges (and offenders) in Victoria, and is also tasked with the committal process for all indictable offences. Based on sheer volume, magistrates would most likely need to apply sentencing guidelines in more cases than any other court.

3.18 Similarly, representation from the Children’s Court is desirable because of the specialised expertise that judicial officers practising in that jurisdiction could bring to any consideration of sentencing guidelines involving children or young people.

3.19 It is not proposed that the heads of each jurisdiction be automatically appointed as members of the sentencing guidelines council by virtue of their roles, for two key reasons:

- first, in recognition of the significant demands that are already placed on each of the heads of jurisdiction – in addition to their work as a judge or magistrate and the necessary administrative work that their role demands, the heads of jurisdiction are often required to sit on numerous committees and commissions; and
- second, to allow for flexibility in the appointment of judicial officers, on the basis that particular judicial officers may have greater interest or experience in the work of the sentencing guidelines council and greater capacity to contribute to its functioning.

3.20 It is not intended, however, that the heads of jurisdiction be prohibited from sitting on the sentencing guidelines council as one of the judicial members for their jurisdiction, should they choose to take up an appointment and so long as they are appointed in accordance with whatever appointment process is selected (see [3.29]–[3.34]).

64. Nguyen v The Queen [2016] VSCA 198 (11 August 2016) [103].
65. See for example, Sentencing Advisory Council, Secondary Offences in Victoria (2017) 48–49 (finding that the Magistrates’ Court sentenced 294,238 charges in 2015–16, whereas the Children’s Court and higher courts sentenced 20,878 and 6,379 charges, respectively, in the same year).
67. The heads of the various court jurisdictions include the Chief Magistrate of the Magistrates’ Court of Victoria, the President of the Children’s Court of Victoria, the Chief Judge of the County Court of Victoria and the Chief Justice of the Supreme Court of Victoria.
3. Composition and functions of the sentencing guidelines council in Victoria

Judicial majority

3.21 As described above, the Sentencing Council for England and Wales has a judicial majority of members, while the Scottish Sentencing Council has an equal number of judicial and non-judicial members (as would also have been the case for the New Zealand Sentencing Council).

3.22 A judicial majority for the Sentencing Council for England and Wales has been seen as a key factor in ensuring the independence of a sentencing guidelines council, and in ensuring that it does not become politicised or encroach on a function of the government or parliament.\(^{68}\) For example, in the Second Reading Speech for the Coroner’s and Justice Act 2009 (UK), the then Secretary of State for Justice and Lord Chancellor, Jack Straw, stated:

> The majority of the council’s members will be judges or magistrates. It will have a permanent judicial majority, which is one important reassurance.\(^{69}\)

3.23 Others, however, have argued that the equal membership model in Scotland (and New Zealand) gives the community a greater say in sentencing.\(^{70}\)

3.24 If the council-approved model is utilised in Victoria (see [1.30]–[1.38]), a judicial majority of members of the sentencing guidelines council would most likely affirm the independence of the sentencing guidelines council from the government.

3.25 Aside from the constitutional reasons, however, a judicial majority would also assist in ensuring that the sentencing guidelines council performs its functions in a way that maintains the confidence of the broader judiciary (who will be tasked with using sentencing guidelines) as well as of criminal justice stakeholders.

Legal and community members

3.26 Alongside the acknowledged expertise of judicial members, the presence of legal and community members is considered essential to the effective functioning of the sentencing guidelines council, and in particular, to fulfilling a key purpose of promoting community confidence in the criminal justice system. The legal and community members of the sentencing guidelines council should represent a diverse range of experience and views.

3.27 It is proposed that the legal and community members would be selected based on their expertise, knowledge or skills relevant to sentencing and criminal justice. Structuring the desirable expertise in this way would not preclude officeholders such as the Director of Public Prosecutions from membership on the sentencing guidelines council; however, it may emphasise that members are not representing their respective organisations, but act in their personal capacity, bringing their own expertise, knowledge and skills to the work of the sentencing guidelines council.

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68. See for example, Roberts (2012), above n 42, 343 (identifying the involvement of the senior judiciary in the development of guidelines as a key reason for the success of the Sentencing Council for England and Wales).


Proposal

3.28 In light of the Sentencing Advisory Council’s research and its analysis of other jurisdictions, the constitutional issues, and considerations of the Victorian context, the following is proposed as the composition of the sentencing guidelines council:

- Seven judicial members, who would comprise:
  - two justices of the Supreme Court (including at least one justice of the Court of Appeal);
  - two judges of the County Court of Victoria;
  - the President or a magistrate of the Children’s Court of Victoria; and
  - two magistrates of the Magistrates’ Court of Victoria.
- 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 two justices of the Supreme Court appointed as a member of the sentencing guidelines council would also be appointed to act as Chair.

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?

Nomination and appointment of members

3.29 In England and Wales, judicial members are appointed by the Lord Chief Justice (the equivalent of Victoria’s Chief Justice) with agreement from the Lord Chancellor (the equivalent of Victoria’s Attorney-General). The reverse applies for legal and community members, who are appointed by the Lord Chancellor with agreement from the Lord Chief Justice.71

3.30 In Scotland, judicial and legal members are appointed by the Lord Justice General (the equivalent of Victoria’s Chief Justice) after consulting with the Scottish Ministers (members of the executive). Community members are appointed by the Scottish Ministers after consulting the Lord Justice General.72

3.31 In New Zealand, the judicial members were to be appointed by the respective heads of jurisdiction.73 That is, the Court of Appeal member was to be appointed by the President of the Court of Appeal in consultation with the Chief Justice, and the High Court and District Court judges were to be appointed by the Chief Judges of those courts in consultation with the Chief Justice. The five non-judicial members were to be appointed by the Governor-General on the recommendation of the House of Representatives.74

72. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) sch 1 cl 2.
73. Sentencing Council Act 2007 (NZ) ss 10(1)(a)–(c) (repealed).
74. Sentencing Council Act 2007 (NZ) s 10(1)(e) (repealed).
3. Composition and functions of the sentencing guidelines council in Victoria

3.32 As a matter of law in Victoria, it is likely that the members of the sentencing guidelines council would be appointed by the Governor in Council. It is desirable, however, for the legislation to specify on whose recommendation such appointments are made.

3.33 The Sentencing Advisory Council is of the preliminary view that the heads of each jurisdiction should recommend the appointment of their respective judicial members. So, for example, the Chief Justice would recommend the appointment of the judicial members from the Supreme Court of Victoria (including the Court of Appeal), while the Chief Judge of the County Court of Victoria would recommend the appointment of members from the County Court. This process of appointment would be similar to the existing process for the appointment of judicial members to the Adult Parole Board of Victoria.

3.34 Similarly, in respect of legal and community members, it would be appropriate for the Attorney-General to recommend to the Governor in Council the appointment of such members.

Consultation on appointments

3.35 In England and Wales, legislation for the appointment of judicial and non-judicial members requires agreement between the Lord Chief Justice and the Lord Chancellor. In Scotland, there is a requirement for the equivalent offices to consult with one another about appointments.

3.36 The Sentencing Advisory Council’s preliminary proposal is that the various heads of jurisdiction would be required to consult with the Attorney-General in Victoria before recommending the appointment of a judicial officer to the Governor in Council. Aside from the practical benefits of consultation, such as identifying issues of availability and interest, consultation may promote greater confidence in the capacity of the sentencing guidelines council to fulfil its purposes. It is not, however, proposed that the Attorney-General would be under an equivalent obligation to consult with the various heads of jurisdiction before recommending the appointment of non-judicial members to the Governor in Council.

Nomination and appointment of the Chair

3.37 Although most sentencing guideline council jurisdictions do not provide for it in legislation, by convention (or by standing orders), the Chair would lead meetings, coordinate communication between members and any supporting secretariat, and cast a deciding vote wherever there was a split opinion.

3.38 In England and Wales, the Chair is appointed by the Lord Chief Justice (the equivalent of Victoria’s Chief Justice) with agreement from the Lord Chancellor (the equivalent of Victoria’s Attorney-General). In Scotland, the Chair of the Scottish Sentencing Council is held by the Lord Justice Clerk (a senior judicial officer in the equivalent of Victoria’s Supreme Court), by right of office. In New Zealand, the Chief Justice would have appointed one of the judicial members as Chair of the Sentencing Council.

75. Constitution Act 1975 (Vic) s 88.
76. For heads of the various court jurisdictions, see above n 67.
77. Corrections Act 1986 (Vic) ss 61(2)(a)–(c).
78. See for example, Scottish Sentencing Council, Standing Orders (2017).
80. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 1 cl 1(2).
81. Sentencing Council Act 2007 (NZ) s 10(2) (repealed).
3.39 If the Chair were to be a senior judicial member of the sentencing guidelines council in Victoria, it would perhaps be appropriate for the Chair to be appointed by the Governor in Council on the recommendation of the Chief Justice.

Proposal

3.40 It is proposed that members of the sentencing guidelines council are nominated and appointed as follows:

Judicial members

- The Governor in Council would appoint the judicial members of the sentencing guidelines council on the recommendations of the respective heads of jurisdiction.
- Each of the heads of jurisdiction would consult with the Attorney-General about the nomination and appointment of judicial members from their respective jurisdictions to the sentencing guidelines council.

Legal and community members

- The Governor in Council would appoint the legal and community members of the sentencing guidelines council on the recommendation of the Attorney-General.

Chair

- The Governor in Council would appoint one of the judicial members as Chair of the sentencing guidelines council on the recommendation of the Chief Justice.
- The Chief Justice would consult with the Attorney-General about the nomination and appointment of the Chair of the sentencing guidelines council.

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?

If not, what process would you suggest?
Functions

3.41 The primary function of the Sentencing Council for England and Wales is to develop and publish sentencing guidelines.\textsuperscript{82} The Sentencing Council also has a number of other functions:

- publishing impact or resource assessments for both draft and definitive guidelines;
- monitoring the operation and effect of sentencing guidelines;
- publishing information on sentencing practices for both the Magistrates’ Court and the Crown Court (equivalent to Victoria’s higher courts);
- reporting annually on ‘non-sentencing factors’ (factors that do not relate to the sentencing practice of the courts, including such things as cancellation of parole, breach offences, patterns of reoffending and use of remand); and
- assessing the likely effects of any government proposal (when referred by the Lord Chancellor) that may have a significant effect on the resources required for prison, probation or youth justice services.\textsuperscript{83}

3.42 The Sentencing Council for England and Wales may also ‘promote awareness’ of matters related to sentencing more generally, including on issues such as:

- sentences imposed;
- the cost of different sentencing orders and their relative effectiveness in preventing reoffending; and
- the operation and effect of sentencing guidelines.\textsuperscript{84}

3.43 The primary function of the Scottish Sentencing Council is to prepare sentencing guidelines for approval of the Scottish High Court of Justiciary.\textsuperscript{85} The legislation provides for the necessary processes of consultation, approval and publication.\textsuperscript{86} The Sentencing Council must also publish any guideline judgments given by the High Court of Justiciary or Sheriff Appeal Court.\textsuperscript{87}

3.44 In addition to publishing sentencing guidelines and guideline judgments, the Sentencing Council may:

- publish information about sentencing matters;
- provide advice or guidance of a general nature about sentencing matters; or
- conduct research into sentencing matters.\textsuperscript{88}

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\textsuperscript{82} Coroners and Justice Act 2009 (UK) s 120.
\textsuperscript{83} Coroners and Justice Act 2009 (UK) ss 127–132.
\textsuperscript{84} Coroners and Justice Act 2009 (UK) s 129.
\textsuperscript{85} Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 3.
\textsuperscript{86} Criminal Justice and Licensing (Scotland) Act 2010 (Scot) ss 4–5.
\textsuperscript{87} Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 9.
\textsuperscript{88} Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 11.
Constitutional issues around the functions of the sentencing guidelines council

3.45 The Kable principle imposes limitations on the functions that the sentencing guidelines council may perform (see [1.32]). In order for a body that includes sitting judicial members to be independent of the legislature and the executive (both in appearance and in practice), the sentencing guidelines council should not conduct any activity that:

- is an integral part of, or closely connected with, the functions of the legislature or the executive;
- involves the giving of advice to the government; or
- is at the behest or direction of the government.

3.46 The Sentencing Advisory Council has formed the preliminary view that, unlike the additional functions relating to evaluation and advice of the sentencing guidelines councils in the United Kingdom, the functions of the sentencing guidelines council in Victoria should be strictly confined to the development of sentencing guidelines (and any necessary associated functions). In particular, the sentencing guidelines council should not be permitted or required to provide advice to government.

Proposal

3.47 It is proposed that the functions of the sentencing guidelines council in Victoria should be:

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

QUESTION 4: Functions of the sentencing guidelines council

Are the proposed functions of the sentencing guidelines council appropriate?

If not, what alternative or additional functions should the sentencing guidelines council have?
4. Development and content of sentencing guidelines in Victoria

Overview

4.1 This chapter discusses:

• how sentencing guidelines should be developed in Victoria, including:
  – how a sentencing guideline should be initiated;
  – the consultation processes that the sentencing guidelines council should be required to engage in;
  – the process for final approval of a sentencing guideline; and
• the form and content of sentencing guidelines in Victoria, including:
  – the permissible content of a sentencing guideline; and
  – the possible features of a sentencing guideline (principled guidance, a staged decision-making process and/or numerical guidance).

Initiation of sentencing guidelines

4.2 In each of the guidelines council jurisdictions examined, the sentencing council can prepare sentencing guidelines on its own motion.89 This means, for example, that if a sentencing guidelines council has identified a category of offences (such as certain sexual offences) that it believes may benefit from a sentencing guideline, it can begin developing a guideline, or guidelines, on that category of offences.

4.3 There is also the potential for other interested stakeholders to request that the sentencing guidelines council develop a particular sentencing guideline. However, complying with such a request would need to be optional for the sentencing guidelines council in Victoria. If the Court of Appeal or Attorney-General were able to require the sentencing guidelines council to develop a particular sentencing guideline, this could be seen as the sentencing guidelines council acting ‘at the behest of’ the government, or the courts.

Initiation of sentencing guidelines in other jurisdictions

4.4 In England and Wales, the Lord Chancellor (the equivalent of the Victorian Attorney-General) may propose that a sentencing guideline be developed or revised, and the Sentencing Council is then required to ‘consider’ the request.90 The Court of Appeal (Criminal Division) may also propose a sentencing guideline, but only in respect of a relevant offence (or category of offences) that is the subject of a sentence appeal before the court.91 In both circumstances, the Sentencing Council is not required to comply with the request.

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89. Coroners and Justice Act 2009 (UK) s 120(4); Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 3; Sentencing Council Act 2007 (NZ) s 9 (repealed).
90. Coroners and Justice Act 2009 (UK) s 124(5).
91. Coroners and Justice Act 2009 (UK) ss 124(2)–(3).
4.5 Similarly, in New Zealand, the legislative framework provided for a number of specified judicial officers and members of the executive (as well as the President of the New Zealand Law Society) to request a sentencing guideline be developed or revised. The Sentencing Council would then have been required to consider that request, and the reasons for it, but was not required by the legislation to comply with it.

4.6 In Scotland, the Scottish Ministers (members of the executive) may ask the Scottish Sentencing Council to consider preparing or revising sentencing guidelines on any matter. The Sentencing Council must have regard to any request; if it decides not to comply, it must provide the Scottish Ministers with reasons.

4.7 Unlike in other jurisdictions, in Scotland the appellate courts (the High Court of Justiciary and the Sheriff Appeal Court) may, when pronouncing a decision relating to an appeal against conviction or sentence, require the Scottish Sentencing Council to prepare or review a particular sentencing guideline. The Scottish Sentencing Council must then, in complying with that request, have regard to the High Court of Justiciary’s reasons for making the request. This unique feature in Scotland is in the context of all sentencing guidelines requiring final approval by the High Court of Justiciary.

Initiation of sentencing guidelines in Victoria

4.8 In light of the discussion above, there appear to be two permissible ways in which a sentencing guideline could be initiated in Victoria:

- by the sentencing guidelines council on its own motion; and
- at the request of another individual or organisation, so long as complying with that request is optional.

4.9 Many individuals and organisations may have an interest in requesting the development or review of a particular sentencing guideline in Victoria. Certain judicial officers might perceive a sentencing disparity, between judges or between courts, for a particular category of offences. Victims’ representatives, such as the Victims of Crime Commissioner or others, may identify the need for a sentencing guideline to address particular sentencing standards. Similarly, the Law Institute of Victoria or the Criminal Bar Association might identify a need for more comprehensive guidance on a certain sentencing principle. Further, a body tasked with prosecuting a particular category of offences, such as WorkSafe Victoria, might perceive a need for clearer sentencing guidance.

4.10 Requests by interested individuals or organisations for a particular sentencing guideline are likely to be made through informal correspondence and submissions made directly to the sentencing guidelines council.

4.11 The Sentencing Advisory Council is of the preliminary view that the legislation should provide a formal process for the Attorney-General to request that the sentencing guidelines council initiate the development of a sentencing guideline. For the constitutional reasons discussed above (see [1.32]), the sentencing guidelines council would not be required to comply with that request.

93. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 7(1).
94. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) ss 7(2)–(3).
95. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) ss 8, 8A.
4.12 The Sentencing Advisory Council is also of the preliminary view that it would not be appropriate for the Court of Appeal (or any other court in Victoria) to have the authority to request a sentencing guideline, regardless of whether the sentencing guidelines council would be required to comply. This is because such a request risks creating the appearance of the court carrying out a non-judicial function.

4.13 There would be no restriction, however, on the Court of Appeal indicating in obiter comments in judgments where a sentencing guideline would be helpful, as it does presently. For example, in Director of Public Prosecutions v Rapid Roller Co Pty Ltd,96 the Director of Public Prosecutions appealed against a fine imposed on an organisation for health and safety offences. The Court of Appeal dismissed the case on procedural grounds, but agreed that there was a need for appellate guidance on those particular offences, and that ‘this 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’97. Such obiter comments might prompt the sentencing guidelines council to initiate the development of a sentencing guideline specifically addressing that category of offence.

4.14 The final decision about whether to initiate the development of a sentencing guideline should be guided by the prescribed purposes of the sentencing guidelines council. If those purposes, for example, are to promote consistency in approach to sentencing and public confidence in the criminal justice system, the sentencing guidelines council should only initiate the development of a sentencing guideline if it would achieve one or both of those purposes.

Proposal

4.15 It is proposed that a Victorian sentencing guideline would be initiated:

• on the sentencing guidelines council’s own motion; or
• at the request of the Attorney-General, provided that the sentencing guidelines council is not required to comply with that request.

4.16 It is further proposed that the decision to initiate the development of a sentencing guideline would be determined by reference to the legislatively prescribed purposes of the sentencing guidelines council.

QUESTION 5: Initiation of sentencing guidelines

Is the proposed process for initiating a sentencing guideline appropriate?

If not, what other process should the sentencing guidelines council have for initiating a sentencing guideline?

97. Director of Public Prosecutions v Rapid Roller Co Pty Ltd [2011] VSCA 17 (2 February 2011) [15].
Consultation

4.17  Community engagement and input will be central to the development of sentencing guidelines in Victoria. Consultation ensures that any final guidelines take into account community perspectives, and enable subsequent public debates about consistency and fairness in sentencing. Australian research has shown that the more information members of the community have about sentencing, the more likely they are to reach sentencing decisions that are very similar to those handed down by judicial officers. Consultation also supports the proposed aim of the sentencing guidelines council to increase public confidence in the criminal justice system.

4.18  The ability of the sentencing guidelines council to engage in consultation, especially with consultees having access to a draft version of a sentencing guideline, is considered to be one of the key advantages of a sentencing guidelines council, compared to the power of the courts to issue a guideline judgment.

4.19  When it has decided to give or review a guideline judgment, the Court of Appeal in Victoria is required to consult with the Sentencing Advisory Council (and to permit sufficient time for the Sentencing Advisory Council to conduct broader consultation), and to give the Director of Public Prosecutions and a lawyer representing Victoria Legal Aid an opportunity to appear before the court and make submissions. A sentencing guidelines council, however, would have the requirement, the time and the resources to engage in much broader and extensive consultation than the Court of Appeal.

Consultation on sentencing guidelines in other jurisdictions

4.20  The sentencing guidelines councils in the United Kingdom are required to undertake consultation in the development of sentencing guidelines.

4.21  In England and Wales, the Sentencing Council is required to first publish a draft version (or draft revision) of a sentencing guideline for consultation. The Sentencing Council must then consult with the Lord Chancellor (the equivalent of the Victorian Attorney-General), such persons as the Lord Chancellor directs, the Justice Select Committee of the House of Commons, and any other persons the Sentencing Council considers appropriate.

4.22  In Scotland, the Sentencing Council is required to publish a draft guideline, and consult the Scottish Ministers (members of the executive), the Lord Advocate (the equivalent of the Victorian Attorney-General) and other such persons as it thinks appropriate. The Scottish Sentencing Council must then have regard to any comments made on the draft guidelines before finalising a guideline for submission to the High Court of Justiciary.

98. Young and King (2013), above n 70, 207 (identifying ‘extensive public and political consultation’ as a key ingredient of success for any sentencing guidelines council).


102. Sentencing Act 1991 (Vic) s 6AD.

103. Coroners and Justice Act 2009 (UK) s 120(5).

104. Coroners and Justice Act 2009 (UK) s 120(6).

105. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 4(1).

106. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 4(2).
4. Development and content of sentencing guidelines in Victoria

4.23 In New Zealand, the consultation requirement was not prescriptive. The sentencing guidelines council was given the discretion to consult ‘with any person or body, by any appropriate means’.107 There was no requirement to engage in such consultation.

Consultation with parliament

4.24 The Sentencing Advisory Council seeks stakeholders’ views on whether the sentencing guidelines council in Victoria should similarly be required to consult with a committee of parliament on draft guidelines.

4.25 On the one hand, expressly providing for this scrutiny in the development of each sentencing guideline may mitigate the risk of the legislature being dissatisfied with a sentencing guideline and seeking to overturn it. On the other hand, a mandatory requirement to consult with a legislative committee could risk creating a perception that the sentencing guidelines council is not sufficiently independent.

Urgent guidelines

4.26 In England and Wales, if the Sentencing Council considers that a sentencing guideline needs to be developed or revised urgently, it can do so without conducting any consultation other than with the Lord Chancellor.108

4.27 The Sentencing Advisory Council seeks stakeholders’ views on whether the sentencing guidelines council in Victoria should be empowered to bypass some of its consultation requirements to publish a sentencing guideline ‘urgently’. The Sentencing Advisory Council’s preliminary view is that broad consultation ought to be an indispensable component of the development of a sentencing guideline. Further, the Sentencing Advisory Council does not foresee a situation in which an urgent guideline would be required.

Resource assessments

4.28 Each of the sentencing guidelines councils examined in this issues paper is under an obligation, when publishing a draft or final guideline, to publish an impact or resource assessment about the likely effect of the guideline. In England and Wales, this includes the likely effect of the sentencing guideline on the resources required to provide prison places, probation and youth justice services.109

4.29 Similarly, but more broadly, the Scottish Sentencing Council is required to prepare an assessment of the costs and benefits of each sentencing guideline and its likely effect on the criminal justice system generally.110 In New Zealand, the functions of the sentencing guidelines council included assessing and taking into account the overall costs and benefits of the sentencing guidelines, and providing (in relation to both draft and final guidelines) a statement of the sentencing guidelines’ likely effect on the prison population.111

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108. Coroners and Justice Act 2009 (UK) ss 123(2)–(3).
109. Coroners and Justice Act 2009 (UK) s 127. As an example, the resource assessment for the sexual offences definitive guideline forecast that the guideline would result in a moderate increase in sentence length of an average of approximately six months (before guilty plea discounts), and that between zero and 180 additional prison places would be required (correlating to £0–£5 million per annum in additional resources); see Sentencing Council for England and Wales, Final Resource Assessment: Sexual Offences (2013) S.
110. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 3(5).
111. Sentencing Council Act 2007 (NZ) ss 9(1)(c)–(d) (repealed).
4.30 It has been suggested that the requirement for sentencing guidelines councils in other jurisdictions to publish impact or resource assessments means that consultees responding to a draft guideline are better informed about its likely effects.\textsuperscript{112}

4.31 In Victoria, however, a requirement for the sentencing guidelines council to provide an impact or resource assessment could raise a constitutional risk. Although such an assessment would be used as an aid to consultation and would likely be of interest to a broad range of stakeholders, it might be considered that the primary audience for such an assessment would be the government, and therefore it might be considered ‘advice’ to the government. The Sentencing Advisory Council seeks stakeholders’ views on whether it is appropriate for the sentencing guidelines council to produce impact or resource assessments or not.

Consultation on sentencing guidelines in Victoria

4.32 A robust consultation process is critical to both of the proposed purposes of the sentencing guidelines council in Victoria – promoting consistency of approach in sentencing and promoting public confidence in the criminal justice system.

4.33 Consultation should be public, and it should enable input from all sectors, including courts, legal practitioners, victims of crime, academic experts and the wider community.\textsuperscript{113} The consultation process could cover a wide range of activities, such as publication of a consultation paper, public submissions and seminars, face-to-face meetings, focus groups, social research on community attitudes to sentencing for particular offences and case study testing.

4.34 Like the sentencing guidelines councils in other jurisdictions, the sentencing guidelines council in Victoria should be required to publish draft guidelines and consider all the formal and informal submissions and comments made during consultation in finalising a sentencing guideline.\textsuperscript{114}

4.35 As a comparable point of reference, the Sentencing Advisory Council is under a statutory obligation to engage in consultation on sentencing matters. Specifically, it must consult ‘with government departments and other interested persons and bodies as well as the general public’.\textsuperscript{115} This language mandates broad-based consultation with key stakeholders, including the general community, while also allowing the Sentencing Advisory Council the discretion to identify which persons or organisations are relevant in the circumstances.

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\textsuperscript{113} Sentencing Advisory Council (2016), above n 1, 198–199.
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\textsuperscript{114} Coroners and Justice Act 2009 (UK) ss 120(5)–(8); Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 4(2).
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\textsuperscript{115} Sentencing Act 1991 (Vic) s 108C(1)(e).
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Proposal

4.36 The Sentencing Advisory Council is of the preliminary view that the sentencing guidelines council in Victoria should, at a minimum:
   - publish draft guidelines; and
   - be required to consult with:
     - the general community;
     - the courts;
     - government departments; and
     - other interested persons or bodies.

4.37 The Sentencing Advisory Council is also of the preliminary view that consultation in the development of sentencing guidelines is critical, and that the sentencing guidelines council in Victoria should therefore not be permitted to bypass consultation requirements in order to publish an urgent sentencing guideline.

4.38 The Sentencing Advisory Council further seeks stakeholders’ views on whether the sentencing guidelines council should:
   - be expressly required to consult with any additional persons or organisations in relation to any draft or final guidelines; and
   - be required to publish an impact or resource assessment alongside any draft or final guideline.

QUESTION 6: Consultation on 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?

Should the sentencing guidelines council be required to consult with any additional persons or organisations (including parliament) in relation to any draft or final guideline? Why/why not?

Should the sentencing guidelines council be required to publish an impact or resource assessment alongside any draft or final guideline? Why/why not?
Finalisation, approval and commencement of sentencing guidelines

4.39 In establishing a process for developing and publishing sentencing guidelines in Victoria, it will also be important to determine how and when those guidelines come into operation.

Finalisation and approval

4.40 In England and Wales, after consultation and after making any amendments to the draft guidelines, the Sentencing Council must issue sentencing guidelines as definitive guidelines.116

4.41 In New Zealand, the legislation provided that a finalised sentencing guideline had to be presented to the House of Representatives of the New Zealand Parliament for consideration.117 The legislature then had 15 sitting days to vote to ‘disapply’ (veto) the sentencing guideline as a whole.118 If the legislature did not disapply the sentencing guideline, it would come into effect 20 working days after the final date on which it could have been disapplied.119

4.42 The Sentencing Advisory Council is of the preliminary view that it would be undesirable to expressly grant the legislature a power to modify or disallow sentencing guidelines, as would have been the case in New Zealand, as this could impermissibly politicise the process.

4.43 In Scotland, sentencing guidelines must be approved by the High Court of Justiciary.120 In its 2016 report on sentencing guidance, the Sentencing Advisory Council considered this court-approval model to be the preferable approach for sentencing guidelines in Victoria, with the Court of Appeal formally approving a published guideline.121

Commencement

4.44 In England and Wales, the legislation does not specify when the sentencing guidelines are to come into effect. In practice, however, the Sentencing Council specifies a date on which the sentencing guidelines will commence.122 That date is usually around three months after publication, and has ranged from 35 days after publication (for the definitive guideline for drug offences)123 to 132 days after publication (for the definitive guideline on fraud, bribery and money laundering offences).124 In Scotland, sentencing guidelines become effective on a day specified by the court.125

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116. Coroners and Justice Act 2009 (UK) s 120(8).
117. Sentencing Council Act 2007 (NZ) s 17 (repealed). New Zealand has a unicameral legislature; the House of Representatives has been the sole legislative chamber since 1951.
118. Sentencing Council Act 2007 (NZ) s 19 (repealed).
120. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 5(1).
122. Coroners and Justice Act 2009 (UK) s 120(8) (providing that the Sentencing Council ‘may, after making … amendments, issue them as definitive guidelines’).
125. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 5(5).
4.45 Another possibility in Victoria could be for sentencing guidelines to come into effect immediately after publication. It is not unusual for changes to the law to take effect immediately in common law jurisdictions. This is, for example, how common law case precedent operates, as a judgment is legally binding immediately after it has been delivered.

4.46 There are benefits, however, in allowing a period of time between the publication of a sentencing guideline and its commencement date. This would allow legal stakeholders, and the wider community, an opportunity to familiarise themselves with a new sentencing guideline before it comes into operation. This is also consistent with the approach taken in other guidelines council jurisdictions.

### Constitutional issues and policy objectives

4.47 The Sentencing Advisory Council offers no preliminary view on whether it would be more appropriate for sentencing guidelines to be approved by the sentencing guidelines council itself or by the Court of Appeal.

4.48 Both the council-approved and the court-approved models carry unique risks (see [1.30]–[1.47]), and the extent to which those risks can be weighed and considered will very much depend on the final aims, functions and composition of the sentencing guidelines council.

4.49 Further, the adoption of either mechanism for finalisation and approval will very likely affect the type of sentencing guideline that can be produced, and the prescriptiveness of such a guideline. This in turn will affect the capacity for sentencing guidelines to achieve their intended objectives.

4.50 Whichever approach is considered appropriate, the Sentencing Advisory Council is of the preliminary view that sentencing guidelines should come into effect on a date determined by whichever body approves the guidelines (whether it be the sentencing guidelines council or the Court of Appeal), rather than taking effect immediately upon publication.

### 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?

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?
Notice requirements for sentencing guidelines

4.51 A primary aim of producing sentencing guidelines is to promote public confidence in the criminal justice system. One means by which sentencing guidelines can achieve this is by being easily accessible. It is therefore important to determine the notice requirements that would apply to the publication of a sentencing guideline.

4.52 In Scotland, the Sentencing Council is required to first submit a draft guideline to the High Court of Justiciary for approval, and to publish a copy of that draft.126 If the sentencing guideline is then approved, the Sentencing Council must publish the final guideline and the date on which it takes effect, in whatever manner it thinks appropriate.127 The Sentencing Council recently published a draft guideline on the principles and purposes of sentencing (alongside a consultation paper and draft impact assessment) and made a copy freely available on their website on 1 August 2017.128

4.53 In England and Wales, the Sentencing Council is required to ‘publish’ all draft guidelines and to then ‘issue’ all definitive guidelines. The legislation does not specify the manner in which these actions are to occur. The Sentencing Council publishes all draft and final guidelines (and other key documents) in a comprehensive, searchable and freely available database on their website.129 In practice, issuing a sentencing guideline serves two purposes: it publishes the sentencing guideline and dictates when it will come into operation.

4.54 Although never put into practice, the legislative framework in New Zealand provided that details about a final guideline were to be published as soon as possible after the last day on which the sentencing guideline could have been disapplied (in the House of Representatives).130 The Sentencing Council would then have been required to publish the final guideline both in the Gazette and on the internet, downloadable free of charge.

4.55 In Victoria, the Government Gazette (which is published once a week) provides official notification of decisions or actions taken by government authorities and departments. This includes notices required under particular Acts.

4.56 The Sentencing Advisory Council seeks stakeholders’ views on the appropriate notice requirements for the publication of a sentencing guideline by the sentencing guidelines council in Victoria.

126. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 4(1)(a).
127. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) ss 5(7)–(8).
130. Sentencing Council Act 2007 (NZ) s 23 (repealed).
Proposal

4.57 The Sentencing Advisory Council is of the preliminary view that the sentencing guidelines council should publish all draft and final guidelines on its website, downloadable free of charge. The sentencing guidelines council should also publicise the publication of a sentencing guideline by:

- sending a copy of the sentencing guideline to all heads of jurisdiction and the Judicial College of Victoria;
- informing the judiciary, the profession and all interested stakeholders through email; and
- issuing a media release.

QUESTION 8: Notice requirements for sentencing guidelines

Is the proposal for publishing draft and final guidelines by the sentencing guidelines council sufficient? If not, what additional or alternative notice requirements would be appropriate?

Form and content of a sentencing guideline

4.58 This section discusses the form and content of sentencing guidelines in the United Kingdom and New Zealand, and considers a proposal for the form and content of sentencing guidelines in Victoria.

4.59 In the guidelines council jurisdictions examined, there are three features of sentencing guidelines: principled guidance, numerical guidance and a staged decision-making process.

Sentencing guidelines in England and Wales

4.60 The Sentencing Council for England and Wales has a broad discretion to develop guidance that is 'general in nature' (including principle-based guidelines) or that is limited to particular offences or offence categories (offence-based guidelines). 131

4.61 Where a sentencing guideline relates to a particular offence, the Coroners and Justice Act 2009 (UK) directs that the Sentencing Council should consider developing a sentencing guideline structured in the manner specified in the Act. 132

4.62 When the Sentencing Council was established in 2010, the legislation required it to prepare sentencing guidelines on:

- the reduction in sentences for guilty pleas; and
- the application of any rule of law regarding the totality of sentences. 133

4.63 It could otherwise prepare sentencing guidelines on any other matter, 134 including ‘allocation’ guidelines, which relate to decisions as to whether an offence is more suitable for trial in the summary jurisdiction or on indictment. 135

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131. Coroners and Justice Act 2009 (UK) s 120(2).
132. Coroners and Justice Act 2009 (UK) s 121(1).
133. Coroners and Justice Act 2009 (UK) ss 120(3)(a)–(b).
134. Coroners and Justice Act 2009 (UK) s 120(4).
**Principle-based guideline**

4.64 The Sentencing Council for England and Wales has produced a number of principle-based guidelines. The first two were expressly required by the legislation and addressed guilty plea discounts and totality. The Sentencing Council has also produced principle-based guidelines on community and custodial sentences (to assist courts in considering whether a custodial or a non-custodial sentence is appropriate), as well as on the sentencing of children and young people.

4.65 In addition to publishing guidelines that are exclusively related to statements of principle, offence-based guidelines in England and Wales also include statements of principle. Those statements are designed to support the numerical guidance within each sentencing guideline. For example, the sentencing guideline for rape offences includes commentary about how the court should treat previous good character and/or exemplary conduct:

> Previous good character/exemplary conduct is different from having no previous convictions. The more serious the offence, the less the weight which should normally be attributed to this factor. Where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed and such conduct may constitute an aggravating factor.

4.66 This would be particularly important in the Victorian context, as any prescriptive or numerical guidance in a sentencing guideline would need to outline the principles on which that guidance is based.

**Offence-based sentencing guideline**

4.67 Appendix 2 of this issues paper contains the sentencing guideline from England and Wales for the offence of rape. This is an example of an offence-based guideline that has been developed in accordance with the structure outlined in section 121 of the Coroners and Justice Act 2009 (UK), which provides that sentencing guidelines should, if reasonably practicable:

- describe different categories of cases involving the commission of the offence that illustrate the varying degrees of seriousness with which the offence may be committed, by reference to:
  - the offender’s culpability;
  - the harm caused (or intended, or which was foreseeable); and
  - any other factors relevant to the seriousness of the offence;
- specify the appropriate range of sentences (‘the offence range’);
- specify the appropriate range of sentences for each category (‘the category range’) if the guidelines describe different categories of case;
- identify the starting point within either the offence range or the category range if such ranges are provided and the starting point does not account for:
  - any aggravating or mitigating factors (beyond those taken into account in determining the category range); or
  - any discount an offender may receive for pleading guilty;
- list any additional aggravating or mitigating factors that the court should take into account; and
- include criteria, and provide guidance, for determining the weight to be given to previous convictions of the offender and any other aggravating or mitigating factors.

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139. Ibid 9–12.
140. Coroners and Justice Act 2009 (UK) ss 121(1)–(10).
The sentencing guideline in Appendix 2 creates a staged decision-making process for sentencing, involving nine steps. In summary, those steps are:

1. **Offence category**: the court determines which categories of harm and culpability the offence falls into by reference to tables of factors.

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. Once the starting point has been determined, step two allows further adjustment for aggravating or mitigating features.

3. **Factors that indicate a reduction**: the court considers any factors that indicate a reduction, such as assistance to the prosecution.

4. **Reduction for guilty pleas**: the court determines the appropriate reduction in sentence (where relevant) according to the guideline for guilty pleas.

5. **Dangerousness**: the court considers whether, according to a statutory scheme relating to dangerous offenders, a life sentence is appropriate.

6. **Totality**: when sentencing an offender for more than one offence, or where the offender is already serving a sentence, the court considers whether the total sentence is just and proportionate to the offending behaviour.

7. **Ancillary orders**: the court must consider making ancillary orders (including those that automatically apply).

8. **Reasons**: the court must give reasons and explain the effect of the sentence.

9. **Time spent on bail**: the court must consider whether to give credit for time spent on bail.

These nine steps (except for the specification of ranges and starting points at step 2) essentially codify a set of considerations already made by judicial officers in Victoria when sentencing, and in an order in which most courts already apply them.

For example, Victorian sentencing courts are required to consider the maximum penalty, the nature and gravity of the offence, current sentencing practices and the offender’s culpability and degree of responsibility for the offence (steps 1 and 2). Then, while there is no ‘standard’ discount for an offender undertaking to assist authorities, courts in Victoria take this into account in sentencing (step 3). Courts are also required to consider whether the offender pleaded guilty, and if so, at what stage of the proceedings (step 4). Courts are required to comply with statutory schemes, such as the ‘serious offender’ provisions in the Sentencing Act 1991 (Vic) (step 5). Courts are also required, when there are multiple offences (or where the offender is already serving a sentence), to ensure that the total sentence is ‘just and proportionate’, and in all the circumstances ‘is not excessive’ (step 6). Courts regularly make ancillary orders such as forensic sample orders, sex offender registration orders, and compensation and restitution orders (step 7). There are multiple requirements in Victoria for sentencing courts to give
reasons for certain decisions (step 8). Further, courts in Victoria are required to declare any pre-sentence detention to be deducted from a sentence of imprisonment (step 9).

4.71 In effect, even with a sentencing guideline similar to those issued in England and Wales, the only feature that courts in Victoria would not already be familiar with (or required to comply with) would be the provision of starting points and category ranges.

Sentencing guidelines in Scotland

4.72 The governing legislation for the Scottish Sentencing Council provides that it may develop sentencing guidelines in relation to:

- the principles and purposes of sentencing;
- sentencing levels;
- the particular types of sentence that are appropriate for particular types of offence or offender; or
- the circumstances in which the guidelines may be departed from.

4.73 The sentencing guidelines may be general in nature, or may relate to a particular category of offence or offender, or a particular matter relating to sentencing.

4.74 Unlike in England and Wales, in Scotland the legislation does not specify the manner in which an offence-based guideline is to be structured. Indeed, the Scottish Sentencing Council’s Business Plan 2015–2018 outlines that one of their key priorities is the development of a ‘framework for guidelines’, described as a ‘methodology for the drafting and development of guidelines … setting out what form and style guidelines should take and the process for their preparation’.

4.75 The first draft guideline released for consultation by the Scottish Sentencing Council is a principle-based guideline that proposes principles and purposes of sentencing. The draft guideline is in the form of a numbered list, which articulates a proposed ‘core principle of sentencing’ and four ‘purposes of sentencing’.

Sentencing guidelines in New Zealand

4.76 The Sentencing Council Act 2007 (NZ) was also silent as to the form or structure of a sentencing guideline produced by the Sentencing Council. The permitted content, however, was expressly stated, and allowed for sentencing guidelines relating to:

- sentencing principles;
- sentencing levels;
- particular types of sentences;
- other matters relating to sentencing practice; and
- grounds for departure from the sentencing guidelines.

150. See for example, Sentencing Act 1991 (Vic) ss 9(3) (reasons for imposing an aggregate sentence), 18G (reasons for indefinite sentence), 85J (reasons for granting or refusing an application for a compensation order).


152. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 3(3).

153. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 3(4).


155. Scottish Sentencing Council, Principles and Purposes of Sentencing: Draft Sentencing Guideline (2017); unlike in Victoria, in Scotland the purposes of sentencing are not legislated.

156. Sentencing Council Act 2007 (NZ) s 9(1)(a) (repealed).
4.77 It was expressly stated that any sentencing guidelines produced by the Sentencing Council had to be consistent with the relevant governing legislation.157

Draft sentencing guidelines

4.78 In New Zealand, draft inaugural sentencing guidelines were developed by a ‘Sentencing Establishment Unit’ at the Law Commission of New Zealand. At least one of the sentencing guidelines was a principle-based guideline (covering guilty pleas),158 and was referred to in the case of Hessell v The Queen,159 in which the New Zealand Court of Appeal decided to issue a guideline judgment on sentence reductions for guilty pleas after it became apparent that the Sentencing Council would not be established.160

Sentencing guidelines in Victoria

4.79 In developing any sentencing guideline, the bounds of a sentencing guideline in Victoria, as in other guidelines council jurisdictions, would be determined by the substantive law set by parliament. A Victorian sentencing guideline could not exceed those bounds (for example, by proposing a penalty higher than the maximum prescribed in legislation) and similarly would need to take into account all the relevant provisions – including existing limitations on sentencing discretion – contained in the Sentencing Act 1991 (Vic).

Existing considerations in the Sentencing Act 1991 (Vic)

4.80 Section 5 of the Sentencing Act 1991 (Vic) currently provides for a large number of requirements that must be considered by a court when sentencing. Among other things, it sets out the only five purposes for which a sentence may be imposed.161

4.81 It also requires sentencing courts to consider a range of factors, including:

- the maximum penalty for the offence;
- the standard sentence for the offence;
- current sentencing practices;
- the nature and gravity of the offence;
- the offender’s culpability and degree of responsibility for the offence;
- whether the offending was motivated by racial hatred;
- the impact of the offence on any victims;
- the victims’ personal circumstances;
- any injury, loss or damage resulting directly from the offence;
- whether the offender pleaded guilty (and when);
- the offender’s previous character; and
- any other aggravating or mitigating factors.162

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4.82 Section 5 also goes on to outline the circumstances in which a court may take into account:

- any forfeiture orders;\(^{163}\)
- any orders or conditions imposed under various legislative instruments relating to sex offenders;\(^{164}\)
- the conduct of the offender during and related to the trial;\(^{165}\)
- the offender’s assistance in locating the body of a deceased (in homicide cases);\(^{166}\)
- the totality of the circumstances involved in a course of conduct offence;\(^{167}\) and
- whether particular custodial sentences are mandated.\(^ {168}\)

4.83 Section 5 also specifies that courts must not impose a sentence that is more severe than is necessary.\(^ {169}\)

4.84 The introduction of a sentencing guideline would most likely affect the court’s consideration of section 5. If, for example, a principle-based guideline were published in relation to the principle of parsimony, this would overlap with the provisions in subsections (3) to (7).

4.85 All sentencing guidelines in Victoria would need to be consistent with all the considerations required of the court by section 5 of the Sentencing Act 1991 (Vic).

**Existing sentencing schemes in the Sentencing Act 1991 (Vic)**

4.86 The Sentencing Act 1991 (Vic) also contains a number of sentencing schemes that limit judicial discretion in respect of the manner in which a particular sentencing order can be made, or its availability for particular offences.

4.87 The Sentencing Act 1991 (Vic) includes such sentencing schemes as:

- **Serious offender provisions**, which allow a court to depart from the presumption of concurrency, and cumulate sentences of imprisonment on a repeat offender for particular offences;\(^ {170}\)
- **Continuing criminal enterprise provisions**, which provide for the maximum penalty to be doubled for particular offences when committed by a repeat offender;\(^ {171}\)
- **Statutory minimum sentences**, which apply to particular offences and prescribe a minimum non-parole period to be imposed unless there are special reasons;\(^ {172}\)
- **Standard sentences**, which provide a new guidepost to the court when considering the objective seriousness of specified offences;\(^ {173}\)

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166. Sentencing Act 1991 (Vic) s 5(2CA).
168. Sentencing Act 1991 (Vic) ss 5(2G)–(2H). These provisions require all Category 1 and 2 offences (all of which are serious offences) to be sentenced to an order under Division 2 of Part 3 of the Sentencing Act 1991 (Vic).
170. Sentencing Act 1991 (Vic) pt 2A.
171. Sentencing Act 1991 (Vic) pt 2B.
172. Sentencing Act 1991 (Vic) ss 9C, 10, 10AA, 10AB, 10AC, 10AD.
4. Development and content of sentencing guidelines in Victoria

- Prescribed minimum non-parole periods for standard sentence offences, which provide that, unless it is in the interests of justice, a court must impose a minimum non-parole period (as a proportion of the total effective sentence) on an offender sentenced to imprisonment for a standard sentence offence.\(^{174}\)

- Prohibitions on the use of non-custodial sentences, which prohibit a court from imposing either a non-custodial sentence for particular offences or a non-custodial sentence except where there are special reasons for particular offences;\(^{175}\) and

- Presumptions around cumulation, which apply to sentencing particular offences, such as offences committed while on bail or on parole.\(^{176}\)

4.88 In England and Wales, a number of sentencing schemes have continued to apply, despite the subsequent introduction of sentencing guidelines. For example, although there is a definitive guideline on drug offences,\(^ {177}\) there is a mandatory minimum sentence of seven years for an adult who is convicted on three separate occasions of dealing in a particular class of drugs.\(^ {178}\) Similarly, although there is a definitive guideline on burglary offences,\(^ {179}\) there is a mandatory minimum sentence of three years for any person convicted for a third time of burglary of a dwelling.\(^ {180}\)

4.89 As a further example, another sentencing regime – involving the classification of an offender as a ‘dangerous offender’ – continues to apply in England and Wales. That scheme permits indeterminate (life) sentences of imprisonment to be imposed on the basis of a need for public protection, and extends sentences of imprisonment for dangerous sexual or violent offenders.\(^ {181}\)

4.90 Offence-based sentencing guidelines produced by the Sentencing Council for England and Wales are therefore developed consistent with the existing statutory limitations on sentencing discretion. Indeed, offence-based guidelines in England and Wales expressly include a stage at which the court must consider whether the offender is classified as a dangerous offender.

4.91 In Victoria, a similar approach would be required. For example, a sentencing guideline on the offence of rape could not suggest an offence range that included non-custodial sentences, as rape is classified as a ‘Category 1’ offence, which requires courts to impose a custodial order.\(^ {182}\)

Existing content of a guideline judgment

4.92 The content of a sentencing guideline prepared by the sentencing guidelines council could potentially be based on the existing permissible content for a guideline judgment in Victoria, but a sentencing guideline could also include additional content (such as ‘allocation’ guidelines – see [4.66]).

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\(^{174}\) Sentencing Amendment (Sentencing Standards) Act 2017 (Vic) pt 3 (not yet in operation).

\(^{175}\) Sentencing Act 1991 (Vic) ss 5(2G)–(2H).

\(^{176}\) Sentencing Act 1991 (Vic) s 16(1A)(e), (3B).

\(^{177}\) Sentencing Council for England and Wales (2012), above n 123.

\(^{178}\) Power of Criminal Courts (Sentencing) Act 2000 (UK) s 110.


\(^{180}\) Power of Criminal Courts (Sentencing) Act 2000 (UK) s 111.

\(^{181}\) Criminal Justice Act 2003 (UK) ch 5, ss 225(2), 226(2).

\(^{182}\) Sentencing Act 1991 (Vic) s 5(2G).
4.93 The Sentencing Act 1991 (Vic) provides that a guideline judgment may set out:

- criteria to be applied in selecting among various sentencing alternatives;
- the weight to be given to the various purposes specified in section 5(1) for which a sentence may be imposed;
- the criteria by which a sentencing court is to determine the gravity of an offence;
- the criteria that a sentencing court may use to reduce the sentence for an offence;
- the weighting to be given to relevant criteria; and
- any other matter consistent with the principles contained in the Sentencing Act 1991 (Vic).

4.94 Amendments to that section (which have been passed, but not yet commenced) extend those matters to include:

- guidelines as to the appropriate level or range of sentences for a particular offence or class of offence; and
- guidelines for sentencing offenders for standard sentence offences.

**Constitutional issues**

4.95 As a result of its research, the Sentencing Advisory Council has formed the preliminary view that the creation of sentencing guidelines that are numerically prescriptive might be permissible so long as the courts applying the guidelines retain discretion to reach an appropriate sentence that takes into account all the relevant circumstances of each individual case, and the guidelines explain the principles on which the numerical guidance is based.

4.96 It is one of the essential characteristics of a court that its decisions are premised on the interpretation and application of identifiable and explicable principles. The provision of solely numerical guidance without explanation of the principles underpinning those numbers would most likely be incapable of application.

4.97 As a result, to have a sentencing guideline in the form of a mere sentencing grid, with starting points and ranges determined according to a single factor (such as the quantity of a drug) or a limited set of considerations (such as offence seriousness and prior offending), would most likely not be permissible.

4.98 It is more likely to be permissible to have a sentencing guideline in a form similar to that of an offence-based guideline produced by the Sentencing Council for England and Wales, which comprehensively articulates factors that must be considered by the court when determining a sentencing range and starting point.

4.99 In relation to the possible inconsistency between the introduction of a staged decision-making process and the current approach of ‘instinctive synthesis’ in Victoria, the Sentencing Advisory Council considers that there is no impediment to the legislature overriding instinctive synthesis so long as it does so with unambiguous clarity. For example, the High Court has held that approaches to sentencing offenders other than instinctive synthesis are permissible in Australia.

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183. Sentencing Act 1991 (Vic) s 6AC. Excluded from this list are guidelines for sentencing offenders for baseline offences, which will soon be repealed: Sentencing Amendment (Sentencing Standards) Act 2017 (Vic) s 7 (not yet in operation).

184. Sentencing Amendment (Sentencing Standards) Act 2017 (Vic) s 40 (not yet in operation).

185. Sentencing Amendment (Sentencing Standards) Act 2017 (Vic) s 20 (not yet in operation).

186. See the glossary for a definition of ‘instinctive synthesis’.

187. Muldoon v The Queen (2011) 244 CLR 120.
4.100 As a matter of practicality, it is likely that instinctive synthesis would only be overridden to the extent that it applies to offences or principles governed by sentencing guidelines. There would, especially initially, be a number of offences and principles not covered by sentencing guidelines, and courts would need to apply instinctive synthesis in the interim.

**Discretion to develop appropriate sentencing guidelines**

4.101 The Sentencing Advisory Council notes that it would be prudent for legislation to provide explicitly that the sentencing guidelines council may develop comprehensive offence-based guidelines, involving both a staged decision-making process, and sentencing ranges and starting points. It is not suggested, however, that this is the only appropriate form of offence-based guidelines that the sentencing guidelines council could develop. Some offending, for example, may lend itself to less structured offence-based guidelines, or even to simply principle-based guidelines.

4.102 The Sentencing Advisory Council is of the preliminary view that, in order to ensure that the sentencing guidelines council in Victoria has the discretion necessary to tailor a sentencing guideline to the particular needs of the issue or offence concerned, the legislation establishing the sentencing guidelines council should set the outer bounds of what is permissible in terms of the form and content of a sentencing guideline. The sentencing guidelines council could then determine which features a particular sentencing guideline should have.

**Proposal**

4.103 It is proposed that the sentencing guidelines council be able to prepare sentencing guidelines, consistent with the *Sentencing Act 1991* (Vic), that set out:

- the appropriate level or range of sentences for a particular offence or class of offence;
- criteria to be applied in selecting from various sentencing alternatives;
- the weight to be given to the various purposes specified in the *Sentencing Act 1991* (Vic) for which a sentence may be imposed;
- the criteria by which a sentencing court is to determine the gravity of an offence;
- the criteria that a sentencing court may use to reduce the sentence for an offence;
- the weight to be given to relevant criteria;
- any other matter consistent with the principles of the *Sentencing Act 1991* (Vic); and/or
- a non-exhaustive list of permissible reasons to depart from a sentencing guideline.

4.104 It is further proposed that, in providing that the sentencing guidelines council be able to prepare offence-based guidelines, setting out the appropriate level or range of sentences for a particular offence or class of offence, the legislation should provide such detail as is necessary to allow the sentencing guideline to:

- be structured in a form similar to that of an offence-based guideline produced by the Sentencing Council for England and Wales;
- preserve judicial discretion; and
- 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.
4.105 In the proposed model, the sentencing guidelines council would retain discretion to determine the appropriate form and content of a sentencing guideline (within the bounds set by legislation) according to the specific needs of the issue or offence concerned.

**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? If not, what other form(s) or content should a sentencing guideline have?
5. Application of sentencing guidelines in Victoria

5.1 This chapter discusses issues around the application and effect of sentencing guidelines, including:

- whether courts should:
  - be required to ‘have regard to’ a sentencing guideline;
  - be required to ‘follow’ a sentencing guideline; or
  - sentence in a manner ‘consistent with’ a sentencing guideline;
- whether a sentencing guideline should operate retrospectively (and if so, to what extent);
- the effect of a sentencing guideline on a court’s consideration of existing provisions in the Sentencing Act 1991 (Vic) (including current sentencing practices); and
- the effect of a sentencing guideline on the guideline judgment provisions and on common law precedents.

Effect of sentencing guidelines

5.2 The guidelines council jurisdictions examined by the Sentencing Advisory Council have taken three separate approaches to the effect of sentencing guidelines on courts when sentencing. In those jurisdictions, courts are variously required to:

- ‘have regard to’ a sentencing guideline;
- ‘follow’ a sentencing guideline; or
- sentence in a manner ‘consistent with’ a sentencing guideline.

5.3 The question about the extent to which sentencing guidelines should bind courts in Victoria is critical. The answer affects the weight sentencing courts would need to give a sentencing guideline, the weight to be given to pre-guideline sentencing practices, the enforceability of a sentencing guideline on appeal and the consistency and predictability of sentencing outcomes.188

5.4 The features of a sentencing guideline – for example, whether it includes a staged decision-making process, starting points and sentencing ranges, or only principled guidance – may determine what is considered appropriate in terms of how binding that guideline should be. The Sentencing Advisory Council also seeks stakeholder’s views on the form and content of a sentencing guideline. This is discussed at [4.58]–[4.105].

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5.5 Of the three approaches, the least binding option would be to require a court to ‘have regard to’ a sentencing guideline. This would seem to imply that courts need only consider a sentencing guideline (and show that it has been considered) but need not adhere to it (see, however, [5.8]). In turn, this would mean that failing to follow a sentencing guideline would not constitute a specific error of law,189 sufficient to justify a sentence appeal.

5.6 This was the approach previously adopted in England and Wales; prior to 2010 courts were only required to ‘have regard to’ any relevant sentencing guidelines, and to give reasons if they departed from them.190 This approach, however, led to ambiguity about how sentencing guidelines were to be applied. On the one hand, the Court of Appeal (Criminal Division) indicated that, barring any unusual circumstances, ‘it is sensible for [a guideline] to be adopted’.191 On the other hand, the same court, differently constituted a few months later, indicated that ‘guidelines … are guidelines: no more, no less’.192

5.7 A similar approach is now prescribed in Scotland; there, courts need only ‘have regard to’ relevant sentencing guidelines,193 and give reasons if they depart from them.194 The Scottish approach is untested to date.

5.8 The Sentencing Advisory Council notes that, when courts in England and Wales were under an obligation to ‘have regard to’ relevant sentencing guidelines, the guidelines still carried considerable weight in sentence appeals. For example, in R v Smith and Others,195 the Court of Appeal (Criminal Division) determined an appeal against sentence by an offender sentenced under the definitive guideline on robbery offences.196 The offender argued that the sentencing judge’s starting point was too high because he had not sufficiently taken the relevant guideline into account, and that the offending should have been classified as a ‘level 2 robbery’. Despite the relatively non-binding nature of the sentencing guidelines at the time, the appellate court agreed:

[A]lthough in one sense to reduce the sentence by the amount that we have in mind could be seen as tinkering with the sentence, we work on the basis of our conclusion that this is a case in which the range of sentence is that indicated by the Sentencing Guidelines Council … [A]lthough the sentence which we shall now order is reduced by only one year, it brings the sentence within what we regard as the top end of the appropriate bracket for this offence.197

5.9 In Victoria, a requirement for the court to ‘have regard to’ a sentencing guideline might have a similarly binding effect, so that a sentencing guideline would not simply be ‘just another factor to be taken into account’198 in the sentencing process.

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193. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 6(1). This requirement was considered an important means of preventing an increase in the number of sentence appeals: Sentencing Commission for Scotland, The Scope to Improve Consistency in Sentencing (2006) 26.
194. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 6(2).
Courts must ‘follow’ a sentencing guideline

5.10 In contrast, a more binding option would be to require courts to ‘follow’ a sentencing guideline.\(^{199}\) In practical terms, what it means to ‘follow’ a sentencing guideline would be determined by the content of the guideline. For a principle-based guideline, courts would be required to adhere to those principles. For an offence-based guideline that specifies starting points and category ranges, courts would be required to identify and adhere to the appropriate starting point and category range. For a sentencing guideline that specifies a staged decision-making process, courts would be required to adhere to those steps, in the prescribed order.

5.11 After a legislative change inspired by the New Zealand legislation,\(^{200}\) courts in England and Wales are now required to ‘follow’ relevant sentencing guidelines.\(^{201}\) The primary aim of this change appears to be to structure how courts engage in the sentencing exercise, not to dictate the outcomes of the sentencing exercise.

5.12 To illustrate, the Sentencing Council for England and Wales can issue (and has issued) sentencing guidelines involving all three possible components of a guideline: a staged decision-making process, a set of considerations, starting points and category ranges. This means, for example, that when sentencing an offender who has pleaded guilty to a charge of rape, the court is presumptively required to engage in all nine steps in the definitive guideline for rape, including:

- weighing culpability and harm to ascertain what the appropriate starting point and category range should be;
- sentencing the offender within the range of available sentences (from four to 19 years’ imprisonment); and
- applying the appropriate sentence reduction in accordance with the guilty plea guideline.

5.13 These duties are not, however, as onerous as they may initially appear. First, courts are permitted to engage in a process different from the nine steps of the rape guideline (or potentially even not apply one of the steps) if doing so would be ‘in the interests of justice’ and the court explains its reasoning.\(^{202}\)

5.14 Second, there is considerable overlap between the category ranges, and the Court of Appeal (Criminal Division) has specifically commented that defendants cannot simply appeal their sentence in the hope of moving between the category ranges, without demonstrating that the sentence imposed is unjust and disproportionate.\(^{203}\)

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\(^{199}\) This obligation extends only to final guidelines. The Court of Appeal in England and Wales has specified that consultation guidelines should not be taken into account because it would be ‘unwise to attempt to anticipate the contents of the final publication’: \(R\ v\ Williams\ [2011]\ EWC\ Crim\ 2126\ (2\ September\ 2011)\ [19];\ Attorney\ General’s\ Reference\ Nos\ 61,\ 62\ and\ 63\ [2011]\ EWC\ Crim\ 2619\ (27\ October\ 2011)\ [37],\ citing\ \(R\ v\ Valentas\ and\ Tabuns\ [2010]\ EWC\ Crim\ 200\ (3\ February\ 2010)\).\n

\(^{201}\) Coroners and Justice Act 2009 (UK) s 125(1).


\(^{203}\) See for example, \(R\ v\ AO\ [2016]\ EWC\ Crim\ B4\ (16\ December\ 2016)\). See also [5.20].
5.15 Third, not only are courts given broad discretion to impose a sentence within the entire offence range, but they are also permitted to impose a sentence outside that range if doing so would be ‘in the interests of justice’. Indeed, certain offence guidelines (including the definitive guideline for rape) specifically anticipate circumstances in which a sentence outside the offence range would be appropriate. This is consistent with comments from the Court of Appeal (Criminal Division) that sentencing guidelines are not to be applied mechanistically or construed as a statute. Similarly, the sentencing guideline for guilty plea discounts also expressly anticipates circumstances in which, despite a plea of guilty, an offender may not be entitled to a sentence discount.

5.16 Although courts in England and Wales are required to ‘follow’ the guidelines, it can be seen that, in effect, they retain very broad sentencing discretion.

**Appeals from sentencing guidelines decisions**

5.17 There appear to be three overarching circumstances in which sentencing courts in England and Wales have been found to have not followed a sentencing guideline:

- **Misapplication**: this involves the court applying the steps out of order; or applying a step incorrectly, in a way that both affects the sentencing exercise and is not in the interests of justice (such as taking totality into account too early in a way that makes sentences for individual charges manifestly excessive).

- **Starting point outside offence range**: this involves the court identifying a starting point outside the broad range of sentences accounted for within a sentencing guideline, in circumstances in which it is not in the interests of justice to do so (such as using 20 years’ imprisonment as a starting point for an offender convicted of rape – a starting point that is outside the offence range of four to 19 years’ imprisonment – when it is not in the interests of justice to do so); and

- **Lack of transparency**: this involves the court failing to explain how it has applied a sentencing guideline, so that even though the outcome might have been appropriate, the lack of clarity renders the outcome *prima facie* inappropriate (such as failing to explain why an offender has not been given the allocated reduction for a guilty plea).

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204. Sentencing Council for England and Wales (2013), above n 138, 11 (specifying that although the offence range is between four and 19 years’ imprisonment, there may be legitimate circumstances, such as a ‘campaign of rape’, in which a sentence of 20 years’ imprisonment or more might be appropriate). See for example, *R v Sienkiewicz* [2016] EWCA Crim 2117 (9 November 2016) (the appellate court finding no error in the sentencing judge concluding that a starting point of 20 to 22 years each for two counts of rape was appropriate, despite being above the offence range in the guidelines).

205. For example, *R v Tata Steel UK Ltd* [2017] EWCA Crim 704 (7 June 2017) [47].

206. See for example, *Sentencing Council for England and Wales, Reduction in Sentencing for a Guilty Plea: Definitive Guideline* (2017) 8 (‘Whereas a court should consider the fact that an offender has pleaded guilty to murder when deciding whether it is appropriate to order a whole life term, where a court determines that there should be a whole life minimum term, there will be no reduction for a guilty plea.’). In the Victorian context, this would be consistent with the recent decision in *R v Cordmore* [2017] VSC 493 (25 August 2017).

207. See for example, *R v Kudriakov* [2016] EWCA Crim 164 (19 October 2016) (the appeal court overturned the sentence on the basis that the sentence for two counts of assault was manifestly excessive because it failed to reflect certain mitigating features); *Sentencing Council for England and Wales, Assault: Definitive Guideline* (2011). See also the following cases in which the offender argued that the court had mischaracterised the harm or culpability level: *R v Igol* [2017] EWCA Crim 1145 (7 July 2017); *R v Shahadat* [2017] EWCA Crim 822 (27 June 2017); *R v Humphrey* [2017] EWCA Crim 852 (8 June 2017); *R v Gilmore* [2017] EWCA Crim 509 (12 April 2017).

208. In England and Wales, a court will only have ‘departed’ from a guideline when the sentence is outside the entire offence range, as opposed to the narrower category range, *Coroners and Justice Act 2009* (UK) s 125(3).

209. See for example, *R v Sienkiewicz* [2016] EWCA Crim 2117 (9 November 2016) (the appellate court in this case refused to overturn the sentence, but only because a starting point outside the offence range was considered ‘in the interests of justice, presumably because there were two counts of rape’); Sentencing Council for England and Wales (2013), above n 138, 9–12.

210. See for example, *R v Thomas* [2016] EWCA Crim 2223 (21 December 2016) (the appellate court overturned the sentence on the basis that the court had failed to outline why it had not given the offenders full credit for their guilty plea in accordance with the guilty plea guideline); *R v Fountain* [2017] EWCA Crim 967 (27 June 2017) [15] (the appellate court criticised the sentencing court for seemingly aggravating two separate offences because of the same prior convictions).
5.18 In England and Wales, appeals against sentence are not limited to those that fall outside the very broad range of sentences available within a sentencing guideline. There are many examples in England and Wales of both successful\(^{211}\) and unsuccessful\(^{212}\) appeals by offenders against the imposition of a sentence that was within the offence range.

5.19 Sentencing guidelines in England and Wales often appear to be used by the appellate court primarily as a tool for reviewing whether the sentencing court adopted the proper starting point, or took into account or neglected certain aggravating or mitigating factors. Even then, the list of aggravating and mitigating factors specified in sentencing guidelines is not exhaustive, and courts are permitted to take into account factors not specified in the guidelines.\(^{213}\)

5.20 The most common basis on which defendants in England and Wales have alleged that the sentencing court failed to follow the guidelines has been that the court failed to appropriately apply what is usually step 2, and in so doing identified an incorrect starting point or category range. This argument has had some success.\(^{214}\) However, the Court of Appeal (Criminal Division) has stressed that, even if a defendant can establish that they more properly fall within a category range different from the one identified by the sentencing court, this does not automatically render the sentence unjust:

> [T]he categories are not hermetically sealed boxes from which defendants in criminal cases can seek to hop with the prospect of substantially reducing a starting point.\(^{215}\)

5.21 The test for sentence appeals in England and Wales therefore remains essentially the same as the most common ground for sentence appeals in Victoria: that the sentence imposed was manifestly inadequate or manifestly excessive.\(^{216}\) When a sentencing court has exercised a discretion in Victoria, an appellate court can only interfere with that discretion and impose an alternative sentence if the sentencing court has made an error in exercising its discretion,\(^{217}\) and there is a reasonable prospect of the total effective sentence being changed.\(^{218}\) One such error is the imposition of a sentence that is manifestly inadequate or excessive, which indicates that there is a reasonable prospect of a higher or lower total effective sentence.

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\(^{211}\) See for example, R v Fountain [2017] EWCA Crim 967 (27 June 2017); R v Burke [2017] EWCA Crim 848 (7 June 2017); R v Gilmore [2017] EWCA Crim 509 (12 April 2017); R v Thomas [2016] EWCA Crim 2223 (21 December 2016); R v Calvert and Another [2016] EWCA Crim 1519 (23 September 2016).

\(^{212}\) See for example, R v Borkauskas [2017] EWCA 1210 (8 August 2017); R v Newton [2017] EWCA Crim 874 (4 July 2017); R v Hutchinson [2017] EWCA Crim 1283 (4 July 2017); R v Magee [2017] EWCA Crim 972 (29 June 2017); R v Shahdad [2017] EWCA Crim 822 (27 June 2017); R v Morns [2017] EWCA Crim 966 (27 June 2017); R v Humphrey [2017] EWCA Crim 852 (8 June 2017); R v Tata Steel UK Ltd [2017] EWCA Crim 704 (7 June 2017); R v Khan [2017] EWCA Crim 440 (6 April 2017); R v Clarke [2017] EWCA Crim 393 (6 April 2017); R v Cummings [2017] EWCA Crim 457 (28 March 2017); R v Lai [2017] EWCA Crim 373 (22 February 2017); R v Hj [2017] EWCA Crim 64 (3 February 2017); R v AO [2016] EWCA Crim B4 (16 December 2016); R v Sienkiewicz [2016] EWCA Crim 2117 (9 November 2016); R v Anderson and Another [2016] EWCA Crim 1624 (2016); R v Stansvik [2016] EWCA Crim 1520 (20 September 2016).


\(^{214}\) See for example, R v Gilmore [2017] EWCA Crim 509 (12 April 2017); R v Calvert and Another [2016] EWCA Crim 1519 (23 September 2016).


\(^{217}\) See Wang v The Queen (2001) 207 CLR 584, 604: ‘Appellate intervention is not justified simply because the result arrived at … is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons.’

\(^{218}\) Criminal Procedure Act 2009 (Vic) s 280. See for example, Till v The Queen [2017] VSCA 224 (29 August 2017).
While the default requirement is adherence to sentencing guidelines, each guidelines council jurisdiction provides for circumstances in which the court need not ‘follow’ a guideline. In New Zealand, courts would have been permitted to depart from a relevant sentencing guideline if it were in ‘the interests of justice to do so’. Likewise, in England and Wales the court must, in sentencing an offender, follow any sentencing guideline that is relevant to the offender’s case, unless the court is satisfied that it is ‘contrary to the interests of justice’ to do so.

An alternative test may be considered appropriate in Victoria, so that permissible departures would be measured against something other than the ‘interests of justice’. For example, courts might be required to follow all relevant guidelines unless there were ‘substantial and compelling reasons’ or ‘exceptional circumstances’ not to do so.

It is not suggested, however, that sentencing guidelines in Victoria should 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, the Sentencing Advisory Council would caution against a test that was more restrictive of judicial discretion than ‘the interests of justice’ test.

Under the New Zealand legislation passed in 2007, courts would have been required to impose a sentence that was ‘consistent with’ any relevant sentencing guideline, unless it was ‘contrary to the interests of justice to do so’. Although this language inspired the change in England and Wales, where courts are now required to ‘follow’ relevant guidelines, there is arguably a key difference between the two requirements. The requirement to impose a sentence ‘consistent with’ relevant guidelines might be less strict than the requirement to ‘follow’, so that sentencing processes and outcomes that are reasonably close to, but not directly in accordance with, a sentencing guideline might be more likely to withstand challenge.

Unlike in England and Wales, in New Zealand the legislation did not expressly indicate whether a court should impose a sentence consistent with either the broader offence range or the narrower category range within an offence-based guideline. It has been suggested, however, that the courts would have been restricted to the narrower category range within an offence-based guideline, significantly narrowing the discretion of the sentencing judge.

Former Deputy President of the Law Commission (NZ) Warren Young and criminal law policy expert Andrea King have argued that this limitation was implicit in the legislation, and expressly provided for in the draft inaugural guidelines. They have further argued that this framework was preferable to the one used in England and Wales. This is because it provided more clarity around the structure that a sentencing guideline imposed on judicial decision-making, while still allowing the judicial officer the necessary discretion to impose an individualised sentence, and to depart from the guideline if doing so was in the interests of justice.
5.28 The Sentencing Advisory Council notes the advantages of requiring sentencing courts to sentence within the ‘category range’ of an offence-based guideline, unless it is not in the interests of justice to do so. This requirement might produce more consistent and predictable sentencing outcomes. Such a benefit, however, must be weighed against the overarching caution that sentencing guidelines should not limit judicial discretion, but should instead structure it by providing guidance to courts.

Effect on current sentencing practices

5.29 Consistent with the proposed purposes of the sentencing guidelines council, it is intended that sentencing guidelines in Victoria could address any issues relating to current sentencing practices for particular offences.

5.30 If courts were required to ‘follow’, ‘have regard to’ or ‘sentence in a manner consistent with’ a sentencing guideline, the sentencing guideline would most likely overrule or at least influence a court’s consideration of any inconsistent current sentencing practices. If, however, a sentencing guideline were not considered binding under those (or any alternative) requirements for consideration by a court when sentencing, the guideline would most likely not have any legal effect. As a result, current sentencing practices would not be affected, unless a courts’ consideration of current sentencing practices was also expressly amended.

5.31 For example, the Sentencing Act 1991 (Vic) could be amended to require a court to have regard to current sentencing practices, except where those practices are inconsistent with a sentencing guideline. This would be similar to the new requirement that a court, when sentencing an offender for a standard sentence offence, must only have regard to current sentencing practices that involve a standard sentence (thereby removing from the court’s consideration current sentencing practices before the commencement of the standard sentence scheme).224

5.32 A more binding approach to the application of a sentencing guideline would clarify the relevance of pre-guideline sentencing practices and might improve the predictability of sentencing outcomes and consistency in the sentencing process, without prescribing sentencing outcomes.

5.33 This is consistent with the recommendation of a leading international scholar on sentencing guidelines, Professor Julian Roberts, who has argued that:

> two critical elements are needed for guidelines to be effective: first, they need to be sufficiently detailed and prescriptive to actually provide guidance for courts at sentencing … The second requirement for an effective scheme of guidance is judicial compliance with the guidelines … A guidelines scheme needs to be accompanied by a statutory requirement for sentencers to follow the guidelines – or provide reasons why this is not desirable.225

5.34 Professor Julian Roberts noted that the experience in some jurisdictions in the United States that have sentencing guidelines (and not simply sentencing grids or matrices) ‘has demonstrated that when guidelines are purely advisory rather than presumptively binding on courts, sentencing practices generally remain unaffected’.226

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224. Sentencing Act 1991 (Vic) ss 5B(2)(a)–(b), as inserted by Sentencing Amendment (Sentencing Standards) Act 2017 (Vic) s 19 (not yet in operation).


The particular language requiring a court to apply, or permitting a court to depart from, a sentencing guideline will have a direct bearing on what a sentencing guideline can achieve, particularly in terms of changing current sentencing practices.

**Constitutional issues**

Constitutional risks may arise irrespective of whether legislation requires courts to ‘follow’, ‘have regard to’ or ‘sentence in a manner consistent with’ a sentencing guideline produced by the sentencing guidelines council. A court applying a sentencing guideline created by the sentencing guidelines council might be seen to be impermissibly acting at the dictation of the government. This risk would be further heightened if a sentencing guideline was both binding and numerically prescriptive but made no reference to the principles that justify those outcomes. In other words, a sentencing guideline would be more likely to be constitutionally permissible if it linked sentencing ranges to those factors that led to the imposition of sentences within that range.

For example, a sentencing guideline on drug trafficking might establish starting points and category ranges. The sentencing guideline would need to sufficiently detail considerations around culpability (such as the offender’s role, whether as a courier or a ring-leader of a trafficking operation) to ensure that the principles relating to proportionality (for example, appropriately reflecting an offender’s complicity in a larger offending operation) were taken into account. The factors for consideration, specified in the sentencing guideline, should evidence the relevant underlying principles.

A sentencing guideline in the form of a mere sentencing grid, with starting points and category ranges determined according to a single factor (such as the quantity of drugs trafficked) or a limited set of considerations (such as overall offence seriousness and prior offending) would most likely be impermissible. However, a sentencing guideline in a form similar to that of an offence-based guideline produced by the Sentencing Council for England and Wales, which comprehensively articulates the factors that must be considered by the court to determine a starting point and sentencing range (see Appendix 2), would most likely be permissible.

The Sentencing Advisory Council has formed the preliminary view that the following elements may minimise the constitutional risks of a sentencing guideline produced by the sentencing guidelines council in Victoria:

- sentencing guidelines should contain sufficient detail about the kinds of case 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 a particular sentence being imposed);
- sentencing guidelines that contain 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;
- the court, in applying the sentencing guideline, should retain discretion to reach a sentencing decision that:
  - takes into account all the relevant features of the offending and the offender;
  - is just and proportionate in all the circumstances of the case; and
- the court must retain the discretion to depart from a sentencing guideline.

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227. Such limited considerations might form a sentencing ‘grid’ or sentencing ‘matrix’ as used in some United States jurisdictions, such as Minnesota.
The Sentencing Advisory Council further considers that it would minimise constitutional risks if the specific elements of a sentencing guideline were provided for in the governing legislation.

Aside from these fundamental elements, the Sentencing Advisory Council does not put forward a proposal for the effect of a sentencing guideline. Instead, the Sentencing Advisory Council seeks stakeholders’ views on the appropriate effect of a sentencing guideline in Victoria.

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?

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?

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?

Retrospectivity of sentencing guidelines in Victoria

This section discusses whether a sentencing guideline should operate prospectively or retrospectively.

The Sentencing Advisory Council seeks stakeholders’ views on whether, if a sentencing guideline comes into effect after an offender has committed an offence but before that offender has been sentenced, the offender should be sentenced according to the guideline, sentencing practices at the time of the offending or a combination of both.

This section outlines the current Australian law on retrospectivity of sentencing law, both at first instance and following a successful appeal, and discusses the approach to retrospectivity in the guidelines council jurisdictions (England and Wales, Scotland and New Zealand).

Retrospectivity of sentencing guidelines at first instance

In Australia, criminal laws are generally prohibited from operating retrospectively. The High Court has held that all convicted persons are entitled to be sentenced ‘in conformity with the requirements of the law as it then stood’. Among other things, this has been interpreted to mean that a person cannot be prosecuted for behaviour that was not criminal – or receive a sentence higher than the applicable maximum penalty – at the time of the offending.

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5.46 Other than the prohibition on sentences exceeding the applicable maximum penalty at the date of the offence, however, there is scope in some jurisdictions for courts to sentence an offender according to sentencing practices at the date of sentence, rather than at the date of the offence. For example, historical child sex abuse offences are usually sentenced according to current sentencing practices (not the standards at the time of the offending), in order to reflect a contemporary understanding of the seriousness of that type of offending.\(^{231}\)

5.47 The competing reasons for and against taking past sentencing standards into account have been explained by the Northern Territory Court of Criminal Appeal:

On one view, the discretion of a sentencing court should not be fettered to the application of sentencing standards of years past which have subsequently been recognised as inadequate and which, if applied to current circumstances, will result in inconsistent sentences and will fail to achieve the current objects of sentencing … On the other hand … to apply a newly created standard to offences that occurred before the decision announcing such a new standard was delivered ‘amounts to a retrospective change in the approach to sentencing’ and produces the result that an offender sentenced after the change is treated more harshly than an offender sentenced before the change notwithstanding that their offences were both committed at about the same time. Equality of treatment of offenders is an important consideration.\(^{232}\)

5.48 On the one hand, sentencing practices should reflect contemporary community views of the seriousness of an offence. On the other hand, offenders have a right to equal justice if they have committed an offence under a different sentencing standard.\(^{233}\) These propositions are in the balance when considering the application of a sentencing guideline.

5.49 In Victoria, courts are required to take current sentencing practices into account,\(^{234}\) but may also take account of sentencing practices at the time of the offending in order to promote equal justice.\(^{235}\) This is also the approach taken in the Australian Capital Territory, where courts are required by legislation to consider current sentencing practices, but are also permitted to take into account past sentencing practices.\(^{236}\)

5.50 In other jurisdictions, if they are not required by legislation to consider current sentencing practices, courts are bound by precedent to take past sentencing practices into account.\(^{237}\) Most jurisdictions tend to take past sentencing practices into account in sentencing, while acknowledging that the legislature has the authority to expressly legislate for new sentencing standards and practices to apply retrospectively.

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231. See for example, the South Australian legislation: *Criminal Law (Sentencing) Act 1988* (SA) s 29D. The Royal Commission into Institutional Responses to Child Sexual Abuse recently recommended that this approach be adopted for this type of offence by all states and territories: Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII–X and Appendices* (2017) 322 (Recommendation 76).


233. In this regard, the Sentencing Advisory Council also notes the potential applicability of sections 27(2) and (3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Those provisions prohibit a greater penalty being imposed ‘than the penalty that applied to the offence when it was committed’, but permit a reduced sentence to be imposed if ‘a penalty for an offence is reduced after a person committed the offence’.


237. See for example, the following cases in Tasmania, the Northern Territory, New South Wales and Queensland, all of which permit courts to consider past sentencing practices: Director of Public Prosecutions v *Harrington* [2017] TASSC 4 (17 March 2017) [16]; Director of Public Prosecutions v *M* [2005] TASSC 14 (23 March 2005) [26]; *Green v The Queen* [2006] NTCCA 22 (23 October 2006) [45]; *Crump v The Queen* [2016] NSWCCA 2 (5 February 2016) [69]; MPB v *The Queen* [2013] NSWCCA 213 (19 September 2013); *R v MJR* [2002] NSWCCA 129 (12 April 2002) [26]; *R v Share* (1993) 66 A Crim R 37, 42; *R v Wruck* [2014] QCA 39 (7 March 2014).
5.51 If sentencing guidelines are to have the capacity to apply retrospectively in Victoria, the legislation will need to express this intention unambiguously.

**Retrospectivity of sentencing guidelines in guidelines council jurisdictions**

5.52 In England and Wales, most sentencing guidelines apply to all offenders sentenced after the date on which the guideline comes into operation.\(^{238}\) Recently, however, the Sentencing Council for England and Wales published a sentencing guideline – on the reduction in sentence for a guilty plea – that applies from the date of the defendant’s *first hearing* (the defendant’s first court appearance), being the stage in that jurisdiction at which the defendant pleads guilty or not guilty to the charges.\(^{239}\) In any event, all sentencing guidelines in England and Wales have the potential to apply retrospectively to offences committed prior to the commencement date, even if the guideline might increase the sentence imposed.

5.53 A similar approach was proposed in New Zealand. The legislation specified that sentencing courts should have taken into account any applicable sentencing guideline, regardless of whether the guideline was in force at the time the offence was committed.\(^{240}\) This provision was adopted on advice from the Crown Law Office that retrospectivity of sentencing tariffs was consistent with the approach in other similar jurisdictions – including England and Wales, Canada and the United States – and was constitutional on the basis that the sentencing guidelines would have benefited as many offenders as they would have disadvantaged, and that the sentencing judge could have still departed from guidelines in the interests of justice.\(^{241}\)

5.54 No sentencing guideline has yet been published in Scotland, and as the legislation is silent on the issue, it is not yet clear whether those guidelines might have retrospective effect.

**Practical effects of applying sentencing guidelines**

5.55 If a sentencing guideline is not retrospective (and only applies to relevant offending committed after the commencement of the sentencing guideline), then courts may be tasked with sentencing cases that have multiple charges of the same offence, where some of the offences fall to be sentenced under a guideline and some do not.

5.56 This issue would be avoided if a sentencing guideline were to operate retrospectively, applying to relevant offences sentenced after the commencement of the guideline.

**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?

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240. Sentencing Amendment Act 2007 (NZ) s 5.

Retrospectivity of sentencing guidelines on appeal

5.57 A further issue about the possible retrospectivity of sentencing guidelines relates to resentencing following a successful sentence appeal. If a sentencing guideline is issued between the date on which an offender is first sentenced and the date on which an offender is resentenced following a successful sentence appeal, should the guideline apply to that resentencing exercise?

5.58 In the High Court case of *Radenkovic v The Queen*,242 the prosecution successfully appealed the leniency of an offender’s sentence, resulting in the need for resentencing. During his time in prison, the offender had earned remissions (sentence discounts) under legislation that had been repealed by the time his original sentence was quashed. The question before the High Court was whether, when resentencing, the offender should be sentenced according to the new legislation,243 or the legislation in effect at the time of his original sentencing hearing.244 The court held that the latter was preferable:

[He] had an entitlement when he was sentenced by the sentencing judge to a sentence imposed in conformity with the requirements of the law as it then stood. He should not be denied that entitlement simply because the sentencing judge made a mistake, whether that mistake resulted in a sentence that was too harsh or too lenient.245

5.59 The High Court indicated that the critical issue was not that the previous legislation entitled the offender to a lesser sentence, but that it entitled him to a different sentence. This finding indicates that, were the circumstances reversed and had the previous legislation resulted in a harsher sentence, the court would still have sentenced the offender according to the original legislation.246

5.60 In Victoria, there has been a longstanding principle that, when resentencing, the law at the date of first sentence should apply.247 This reflects the position espoused in *Radenkovic v The Queen*. Recently, the Court of Appeal intimated that it is possible that the *Criminal Procedure Act 2009* (Vic) might have overturned this common law principle, so that the law at the date of resentence should apply.248 The Court of Appeal, however, expressed doubts that such a submission would succeed.249

5.61 A subsidiary issue is whether it should be possible for the prosecution or the accused to appeal a past sentence based solely on the commencement of a new sentencing guideline. That is, if a sentencing guideline commences while an offender is serving a lengthy sentence, should they be able to appeal for a lighter sentence on the grounds that there is now evidence that their sentence was manifestly excessive? Or alternatively, should the prosecution be able to appeal for a heavier sentence?

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246. To an extent, this approach has been legislated in South Australia. If an offender, after sentence, cooperates with law enforcement and applies to be resentenced, ‘the court must apply the law that was applicable in relation to the relevant sentence at the time that sentence was imposed’ *Criminal Law (Sentencing) Act 1988* (SA) s 29E(5a). Note, however, that section 29DA, which permits the Director of Public Prosecutions to apply for the offender to be resentenced if they fail to cooperate in accordance with an undertaking, is silent about what sentencing standards should apply to that resentencing exercise.
248. *Younger v The Queen* [2017] VSCA 199 (11 August 2017) [52]-[54] (this is on the basis that the legislation no longer described resentencing as a ‘substitution’ of the original sentence).
249. *Younger v The Queen* [2017] VSCA 199 (11 August 2017) [57].
5.62 The principle of finality, which provides that cases should not be reopened except in very narrowly defined circumstances, would suggest not. Scotland has legislated to prohibit a revised guideline from qualifying as a ground of appeal. The Sentencing Advisory Council is of the preliminary view that a legislative provision should expressly prohibit appeals from either party on the ground that the original sentence has been rendered manifestly excessive or inadequate by the commencement of a new sentencing guideline.

5.63 Similarly, the Court of Appeal (Criminal Division) in England and Wales has specifically held that the commencement of a guideline after an offender has been sentenced is not, in and of itself, sufficient evidence that the sentence imposed was unfair or disproportionate. Noting the frequency with which sentencing laws and practices change, the court said that:

[i]f changes in sentencing practice were generally regarded as retrospective in operation, not only would the courts be deluged with the need to re-sentence those whose cases have long been closed, but also great injustice would be likely to be done as between offenders. That would be because it would be a matter of accident whose sentences had or had not by the time of adjustment been served and thus become incapable of alteration.

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5.64 The Sentencing Advisory Council is of the preliminary view that this approach would be appropriate in Victoria, and (to avoid doubt) that it should be legislated to expressly prohibit appeals from either party on the ground that the original sentence has been rendered manifestly excessive or inadequate by the issue of a new sentencing guideline.

Proposal

5.65 It is proposed that sentencing guidelines issued before a successful sentence appeal (but after the original sentence) would not apply during resentencing. It is also proposed 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.

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?

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


251. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 6(6).

252. R v Bookie and Others (2012) EWCA Crim 838 (3 April 2012) [13], citing R v Graham [1999] 2 Cr App R(S) 312, 315. Notably, the court in that case used the term ‘retrospective’ as meaning a guideline that applies to offenders sentenced before the guideline came into operation (and not to refer to offenders who committed the offence before, but were sentenced after, the guideline came into operation).
Effect of sentencing guidelines on common law precedent

5.66 The question arises about how a sentencing guideline should affect the common law and decisions of the Court of Appeal, which has the final decision on the interpretation of sentencing law at a state level. The Sentencing Advisory Council seeks stakeholders’ views on the extent to which a sentencing guideline should overrule common law precedent.

5.67 There are two ways that a sentencing guideline might affect a common law precedent. First, it could overturn statements of principle. For example, in 2007 the Court of Appeal delivered a judgment specifying six means by which an offender’s mental impairment could be relevant to the sentencing exercise (as a mitigating factor).253 If the sentencing guidelines council were to publish a definitive guideline on how mental impairment is to be treated when sentencing, such a guideline could be consistent or inconsistent with that 2007 judgment. In those circumstances, the issue would then be whether the sentencing guideline would effectively replace the Court of Appeal’s jurisprudence on the issue, or whether the two would exist in parallel, so that the common law principles would continue as authority in Victoria alongside the guideline.

5.68 The second manner in which a sentencing guideline might affect common law precedent is its potential to overturn pre-guideline sentencing practices. For example, until the Court of Appeal’s decision in Kalala v The Queen,254 the sentencing range for the offence of incitement to murder was between four and a half and eight years’ imprisonment.255 If the sentencing guidelines council were to publish a sentencing guideline that allocated sentencing ranges and starting points to that offence, a question arises about whether that guideline would ‘wipe the slate clean’ so that pre-guideline sentencing practices would no longer be a relevant (or appropriate) consideration, or whether the two would co-exist, so that courts would be required to consider both pre-guideline sentencing practices and a relevant sentencing guideline.

5.69 In England and Wales, sentencing guidelines have been found to overturn both past numerical sentencing practices and statements of principle. For example, in R v Tata Steel UK Ltd256 an organisation sentenced for health and safety offences appealed its sentence on the grounds that it had been fined in a manner disproportionate to fines for similar offences in the past. The Court of Appeal (Criminal Division) dismissed the appeal, concluding that:

[the resultant fine was out of proportion to penalties imposed in the past but the Guideline had ‘marked a new dawn’. The calculation of the fine was heavily dependent upon turnover and organisations potentially affected by the Guideline ‘had better wake up to this fact’]257

5.70 Similarly, in R v Healy and Others,258 a number of offenders had appealed their sentence for cultivating cannabis after the sentencing judge refused to apply the relevant guideline because he disagreed with it, and instead preferred and applied the previously applicable guideline judgment. The Court of Appeal (Criminal Division) concluded that the sentencing judge’s approach was incorrect, and that the previous guideline judgment was no longer good law.

256. R v Tata Steel UK Ltd [2017] EWCA Crim 704 (7 June 2017).
257. R v Tata Steel UK Ltd [2017] EWCA Crim 704 (7 June 2017) [34] (emphasis added).
5.71 The court highlighted that a sentencing guideline is more informed by public debate than a guideline judgment, there is a great deal of flexibility built into the guidelines and, most importantly, the statutory obligation to ‘follow’ the guideline means that it is unlawful to refuse to sentence according to the guideline because the judicial officer ‘happens to take a different view about where the general level ought to be’.259

5.72 The court concluded that parliament had prescribed a duty for courts to follow sentencing guidelines and therefore a court can apply a guideline how it sees fit (including by identifying a starting point outside the offence range), but it cannot ignore a sentencing guideline altogether.260 The Court of Appeal concluded that:

it was simply not open to the judge to announce that he preferred the earlier and limited analysis of the level of sentencing which had been given in [the guideline judgment] to the definitive guidelines published by the Sentencing Council. One of the principal purposes of the Sentencing Council and of the guidelines that it creates is to avoid the necessity for repeated reference back in Crown Courts, Magistrates’ Courts or here to previous decisions whether they are single instances or, for that matter, previously delivered guideline judgments.261

5.73 In England and Wales, therefore, sentencing guidelines overrule the common law. Subsequent judicial decisions may interpret and apply the guidelines and create a new line of precedent,262 but past common law precedents purporting to address the same sentencing practices covered in a guideline – both numerical guidance and statements of principle – are no longer applicable.

**Proposal**

5.74 It is proposed that sentencing guidelines produced by the sentencing guidelines council in Victoria should overrule existing common law precedents (both consistent and inconsistent, and both principled and numerical) and that, for certainty, the legislation would expressly state that if a relevant sentencing guideline has been published, past common law purporting to address the same issue(s) would no longer apply.

**QUESTION 13: Effect of a sentencing guideline on common law precedents**

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

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

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260. See for example, R v O’Brien [2012] EWCA Crim 518 (1 March 2012) (the court quashed a sentence imposed by a judge who did not think that the definitive guidelines in relation to statutory fraud applied).
262. See for example, R v Hall and Others [2010] EWCA 2753 (creating guidance about the proper application of the definitive guideline on sexual offences published by the Sentencing Guidelines Council).
Effect of sentencing guidelines on guideline judgments

5.75 From 1982, the Court of Appeal of England and Wales gave guideline judgments without any statutory basis. In 1998, in recognition of the limitations on the court to consult on the development of guideline judgments, the Sentencing Advisory Panel was established to draft and consult on guidelines that the Court of Appeal could then choose to deliver. Between 2000 and 2003, the Sentencing Advisory Panel delivered advice to the Court of Appeal on 12 occasions, in all but one of those occasions resulting in the court delivering a guideline judgment.

5.76 In 2003, this process was removed from the courts in recognition that more comprehensive guidance could be delivered outside the bounds of particular appeals. The Sentencing Guidelines Council was established to deliver guidelines based on the research and consultation prepared by the Sentencing Advisory Panel, which continued in operation.

5.77 The Court of Appeal of England and Wales also resumed delivering guideline judgments on its own initiative under the 2003 reforms. These guideline judgments essentially operate as interim guidance while sentencing guidelines are prepared or if guidelines are on topics that the sentencing guidelines council has not proposed to address. As of 2010, 15 guideline judgments had been delivered.

5.78 Guideline judgments (as well as the sentencing guidelines prepared by the former Sentencing Guidelines Council) continue to operate until they are replaced by sentencing guidelines from the current Sentencing Council.

5.79 Professor Julian Roberts has stated that the retention of guideline judgment powers is one of the reasons for a high level of support for the work of the Sentencing Council for England and Wales among the senior judiciary in England and Wales.

5.80 In Scotland, under the Criminal Procedure (Scotland) Act 1995 (Scot), the High Court of Justiciary may ‘pronounce an opinion on the sentence or other disposal or order which is appropriate in any similar case’, and Scottish courts ‘shall have regard to any relevant opinion’ pronounced in such a way. These pronounced opinions are known as guideline judgments. The Sheriff Appeal Court may also pronounce opinions.

5.81 Any such pronouncements trigger the power of the High Court of Justiciary or the Sheriff Appeal Court to require the Scottish Sentencing Council to prepare sentencing guidelines. Similarly, absent a requirement to prepare guidelines, it is intended that the Scottish Sentencing Council play a key role in publishing those opinions.


268. Roberts (2012), above n 42, 343.

269. Criminal Procedure (Scotland) Act 1995 (Scot) ss 118(7), 189(7).

270. Criminal Procedure (Scotland) Act 1995 (Scot) s 197.

271. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) ss 9(1)–(5).
5.82 In New Zealand, the Court of Appeal has given ‘tariff guidance’ (that is, broad numerical guidance) since the late 1970s, without a statutory basis, and subsequently has developed a comprehensive jurisprudence around guideline judgments, aimed at providing ‘integrated sentencing guidance’. The Sentencing Council Act 2007 (NZ) did not propose that this function should be limited after the commencement of the sentencing guidelines council.

Guideline judgments in Victoria

5.83 In Victoria, the Court of Appeal may give a guideline judgment after an application by a party to a sentence appeal, or on the initiative of the Court of Appeal itself. Such a judgment can be given in a case even when it is not necessary for the purposes of determining the appeal.

5.84 In considering whether a guideline judgment is needed, and if so how it should be structured, the Court of Appeal must have regard to the need to:

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

5.85 A guideline judgment may set out:

- the criteria to be applied in selecting among various sentencing alternatives;
- the weight to be given to the various purposes for which a sentence may be imposed;
- the criteria by which a sentencing court is to determine the gravity of an offence;
- the criteria that a sentencing court may use to reduce the sentence for an offence;
- the weight to be given to relevant criteria; or
- any other matter consistent with the principles contained in the Sentencing Act 1991 (Vic).

5.86 If the Court of Appeal decides to give a guideline judgment, it must notify the Sentencing Advisory Council and seek its views. The court must also afford the Director of Public Prosecutions and a lawyer representing Victoria Legal Aid the opportunity to appear and to make submissions.

5.87 The guidance provided by a guideline judgment is in addition to all the guiding principles under the Sentencing Act 1991 (Vic) that are required to be taken into account by a sentencing court, and such guidance does not limit or take away from those requirements.

5.88 Although they commenced in 2004, the guideline judgment provisions have been enlivened only once. In 2014, the Court of Appeal gave a guideline judgment in the case of Boulton v The Queen.

5.89 In its 2016 Sentencing Guidance in Victoria: Report, the Sentencing Advisory Council recommended changes to the powers available to the Court of Appeal in giving a guideline judgment. Those changes were aimed at encouraging the use of guideline judgments as the preferred means of sentencing guidance in Victoria.

272. See for example, R v AM [2010] 2 NZLR 750.
273. The Sentencing Council Act 2007 (NZ) was repealed by the Statutes Repeal Act 2017 (NZ) s 3(1).
274. Sentencing Act 1991 (Vic) pt 2AA.
276. Sentencing Act 1991 (Vic) s 6AC.
278. Sentencing Act 1991 (Vic) s 6AG.
5.90 The Sentencing Amendment (Sentencing Standards) Act 2017 (Vic), which has been passed but has not yet commenced, reforms the guideline judgment provisions to provide that:

- the Attorney-General may request that the Court of Appeal consider giving a guideline judgment in the absence of an appeal, where he or she considers that a guideline is needed to address a broad or systemic sentencing issue and that making the application is in the public interest;
- the Court of Appeal is to allow the Sentencing Advisory Council time to conduct research and statistical analysis and consultation (including community consultation); and
- guideline judgments may include guidance as to the appropriate level or range of sentences for a particular offence or class of offence.

5.91 In light of the constitutional issues around the operation of the sentencing guidelines council in Victoria, and the necessity for judicial and other support for that body, it may be prudent for the Court of Appeal to retain the power to give a guideline judgment.

5.92 Further, the retention of the power to give a guideline judgment recognises the important relationship between the Court of Appeal and the sentencing guidelines council to provide sentencing guidance in Victoria. For example, the Court of Appeal could issue guidance on the appropriate interpretation of a sentencing guideline, in a manner similar to the arrangements in England and Wales.

**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?
# Appendix 1: comparison of UK sentencing councils

<table>
<thead>
<tr>
<th>Sentencing Council for England and Wales</th>
<th>Scottish Sentencing Council</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Aims/objectives</strong></td>
<td></td>
</tr>
<tr>
<td>Promote greater transparency and</td>
<td>· Promote consistency in</td>
</tr>
<tr>
<td>consistency in sentencing, while</td>
<td>sentencing;</td>
</tr>
<tr>
<td>maintaining the independence of the</td>
<td>· Assist the development of</td>
</tr>
<tr>
<td>judiciary.</td>
<td>sentencing policy; and</td>
</tr>
<tr>
<td></td>
<td>· Promote greater awareness</td>
</tr>
<tr>
<td></td>
<td>and understanding of</td>
</tr>
<tr>
<td></td>
<td>sentencing.</td>
</tr>
<tr>
<td><strong>Functions</strong></td>
<td></td>
</tr>
<tr>
<td>· Develop sentencing guidelines and</td>
<td>· Prepare sentencing</td>
</tr>
<tr>
<td>monitor their use;</td>
<td>guidelines for the courts;</td>
</tr>
<tr>
<td>· Assess the impact of guidelines on</td>
<td>· Publish guideline</td>
</tr>
<tr>
<td>sentencing practice;</td>
<td>judgments issued by the</td>
</tr>
<tr>
<td>· Consider the impact of policy and</td>
<td>courts;</td>
</tr>
<tr>
<td>legislative proposals relating to</td>
<td>· Publish information about</td>
</tr>
<tr>
<td>sentencing, when requested by the</td>
<td>sentences handed down by the</td>
</tr>
<tr>
<td>government; and</td>
<td>courts;</td>
</tr>
<tr>
<td>· Promote awareness among the</td>
<td>· Conduct research and</td>
</tr>
<tr>
<td>public regarding sentencing, and</td>
<td>provide general advice or</td>
</tr>
<tr>
<td>publishing information regarding</td>
<td>guidance.</td>
</tr>
<tr>
<td>sentencing practice.</td>
<td></td>
</tr>
<tr>
<td>· Prepare sentencing guidelines for</td>
<td></td>
</tr>
<tr>
<td>the courts;</td>
<td></td>
</tr>
<tr>
<td>· Publish guideline judgments issued</td>
<td></td>
</tr>
<tr>
<td>by the courts;</td>
<td></td>
</tr>
<tr>
<td>· Publish information about sentences</td>
<td></td>
</tr>
<tr>
<td>handed down by the courts; and</td>
<td></td>
</tr>
<tr>
<td>· Conduct research and provide</td>
<td></td>
</tr>
<tr>
<td>general advice or guidance.</td>
<td></td>
</tr>
<tr>
<td><strong>Judicial majority?</strong></td>
<td>No (six judicial, six non-judicial)</td>
</tr>
<tr>
<td>Yes (eight judicial, six non-judicial)</td>
<td></td>
</tr>
<tr>
<td><strong>Equivalent to Attorney-General</strong></td>
<td></td>
</tr>
<tr>
<td>(VIC)</td>
<td>Lord Advocate</td>
</tr>
<tr>
<td>Lord Chancellor</td>
<td></td>
</tr>
<tr>
<td><strong>Equivalent to Chief Justice</strong></td>
<td>Lord Justice General</td>
</tr>
<tr>
<td>(VIC)</td>
<td></td>
</tr>
<tr>
<td>Lord Chief Justice</td>
<td></td>
</tr>
<tr>
<td><strong>Appointment of members</strong></td>
<td></td>
</tr>
<tr>
<td>· Judicial members appointed by the</td>
<td>· Judicial and legal members</td>
</tr>
<tr>
<td>Lord Chief Justice with agreement</td>
<td>appointed by Lord Justice</td>
</tr>
<tr>
<td>from the Lord Chancellor; and</td>
<td>General after consulting</td>
</tr>
<tr>
<td>· Non-judicial members appointed by</td>
<td>with Scottish Ministers;</td>
</tr>
<tr>
<td>the Lord Chancellor with agreement</td>
<td>and</td>
</tr>
<tr>
<td>of the Lord Chief Justice.</td>
<td>· Lay members appointed by</td>
</tr>
<tr>
<td></td>
<td>Scottish Ministers after</td>
</tr>
<tr>
<td></td>
<td>consulting the Lord Justice</td>
</tr>
<tr>
<td></td>
<td>General.</td>
</tr>
<tr>
<td><strong>Chair</strong></td>
<td></td>
</tr>
<tr>
<td>A judicial member, appointed by the</td>
<td>Lord Justice Clerk, by virtue</td>
</tr>
<tr>
<td>Lord Chief Justice with agreement of</td>
<td>of the office.</td>
</tr>
<tr>
<td>the Lord Chancellor.</td>
<td></td>
</tr>
</tbody>
</table>
### Sentencing Council for England and Wales

**Composition – judicial members**
- Eight judicial members, including at least:
  - one Circuit judge;
  - one District judge (Magistrates’ Courts); and
  - one lay justice.

**Composition – non-judicial members**
- Six non-judicial members with experience in:
  - criminal defence;
  - criminal prosecution (including the Director of Public Prosecutions);
  - policing;
  - sentencing policy and the administration of justice;
  - the promotion of the welfare of victims of crime;
  - academic study or research relating to criminal law or criminology;
  - the use of statistics; or
  - the rehabilitation of offenders.

**Initiation of guideline development**
- Development of guidelines can be initiated:
  - by own-motion initiation by the council;
  - at the request of the Lord Chancellor; or
  - at the request of the Court of Appeal (Criminal Division).
- Must consider all requests, but not required to comply.

**Required consultation**
- Must consult with the Lord Chancellor (and such persons as the Lord Chancellor directs) and the Justice Select Committee of the House of Commons (parliament).

### Scottish Sentencing Council

**Composition – judicial members**
- Six judicial members:
  - the Lord Justice Clerk;
  - a judge of the Outer House of the Court of Session or the High Court of Justiciary;
  - a sheriff;
  - two people holding the office of summary sheriff or justice of the peace; and
  - one other person holding any of the offices above.

**Composition – non-judicial members**
- Three legal members:
  - a prosecutor;
  - an advocate practising in Scotland (other than a prosecutor); and
  - a solicitor practising in Scotland (other than a prosecutor).

- Three lay members:
  - a constable;
  - a person appearing to the Scottish Ministers to have knowledge of the issues faced by victims of crime; and
  - a person who is not qualified for appointment as a judicial or legal member.

**Initiation of guideline development**
- Development of guidelines can be initiated:
  - by own-motion initiation by the Sentencing Council;
  - at the request of the Scottish Ministers;
  - at the request of the High Court of Justiciary; or
  - at the request of the Sheriff Appeal Court.
- Must consider requests from Scottish Ministers, but must comply with requests from courts.

**Required consultation**
- Must consult with the Scottish Ministers and the Lord Advocate.
<table>
<thead>
<tr>
<th><strong>Sentencing Council for England and Wales</strong></th>
<th><strong>Scottish Sentencing Council</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Community consultation</strong></td>
<td>Yes. Must publish draft guidelines unless ‘urgent’.</td>
</tr>
<tr>
<td></td>
<td>In practice, minimum of six weeks community and stakeholder consultation on a draft guideline in most circumstances.</td>
</tr>
<tr>
<td><strong>Guideline approval</strong></td>
<td>No judicial approval required; published as a definitive guideline by the Sentencing Council with a stated commencement date (usually around three months after publication).</td>
</tr>
<tr>
<td></td>
<td>Must be approved by the High Court of Justiciary, which may (in whole or in part) approve, modify or reject the guideline. Reasons must be provided for rejection or modification.</td>
</tr>
<tr>
<td></td>
<td>If approved, the Scottish Council must publish, as soon as possible, the guideline and the date on which they take effect.</td>
</tr>
<tr>
<td><strong>Retrospective or prospective application</strong></td>
<td>Retrospective. Guidelines usually apply to offenders sentenced after the commencement date, including offenders sentenced for offences committed before that date.</td>
</tr>
<tr>
<td></td>
<td>Unknown. Guidelines take effect on such date (or dates) as the High Court of Justiciary may determine. No definitive guidelines published to date.</td>
</tr>
<tr>
<td><strong>Guidelines published</strong></td>
<td>Since 2004, 27 definitive guidelines have been issued (including some revised guidelines).</td>
</tr>
<tr>
<td></td>
<td>One draft guideline for consultation.</td>
</tr>
<tr>
<td><strong>Governing legislation</strong></td>
<td>Coroners and Justice Act 2009 (UK)</td>
</tr>
<tr>
<td></td>
<td>Criminal Justice and Licensing (Scotland) Act 2010 (Scot)</td>
</tr>
<tr>
<td><strong>Application of guideline in sentencing</strong></td>
<td>Every court must:</td>
</tr>
<tr>
<td></td>
<td>a. in sentencing an offender, follow any sentencing guideline that is relevant to the offender’s case; and</td>
</tr>
<tr>
<td></td>
<td>b. in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines that are relevant to the exercise of the function unless the court is satisfied that it would be contrary to the interests of justice to do so.</td>
</tr>
<tr>
<td></td>
<td>A court (whether at first instance or on appeal) must:</td>
</tr>
<tr>
<td></td>
<td>a. in sentencing an offender in respect of an offence, have regard to any sentencing guidelines that are applicable in relation to the case; and</td>
</tr>
<tr>
<td></td>
<td>b. in carrying out any other function relating to the sentencing of offenders, have regard to any sentencing guidelines applicable to the carrying out of the function.</td>
</tr>
<tr>
<td></td>
<td>If the court decides not to follow the guidelines, or to depart from them, it must state the reasons for its decision.</td>
</tr>
</tbody>
</table>
Appendix 2: Sentencing Council for England and Wales – definitive guideline on rape

Applicability of guideline

In accordance with section 125 of the Coroners and Justice Act 2009, the Sentencing Council issues this definitive guideline. It applies to all offenders aged 18 and older, who are sentenced on or after 1 April 2014.

Section 125(1) of the Coroners and Justice Act 2009 provides that when sentencing offences committed on or after 6 April 2010:

“Every court –

(a) must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender’s case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so.”

This guideline applies only to offenders aged 18 and older. General principles to be considered in the sentencing of youths are in the Sentencing Guidelines Council’s definitive guideline, Overarching Principles – Sentencing Youths.

Structure, ranges and starting points

For the purposes of section 125(3)–(4) of the Coroners and Justice Act 2009, the guideline specifies offence ranges — the range of sentences appropriate for each type of offence. Within each offence, the Council has specified different categories which reflect varying degrees of seriousness. The offence range is split into category ranges — sentences appropriate for each level of seriousness. The Council has also identified a starting point within each category.

Starting points define the position within a category range from which to start calculating the provisional sentence. Starting points apply to all offences within the corresponding category and are applicable to all offenders, in all cases.

Once the starting point is established, the court should consider further aggravating and mitigating factors and previous convictions so as to adjust the sentence within the range. Starting points and ranges apply to all offenders, whether they have pleaded guilty or been convicted after trial. Credit for a guilty plea is taken into consideration only at step four in the decision making process, after the appropriate sentence has been identified.

Information on ancillary orders is set out at Annex A on page 153. Information on historic offences is set out at Annexes B and C on pages 155 and 157.

Information on community orders and fine bands is set out at Annex D on page 160.
Rape
Sexual Offences Act 2003 (section 1)

Triable only on Indictment
Maximum: Life Imprisonment

Offence range: 4 – 19 years’ custody

This is a serious specified offence for the purposes of sections 224 and 225(2) (life sentence for serious offences) of the Criminal Justice Act 2003.

For offences committed on or after 3 December 2012, this is an offence listed in Part 1 of Schedule 15B for the purposes of sections 224A (life sentence for second listed offence) of the Criminal Justice Act 2003.

For convictions on or after 3 December 2012 (irrespective of the date of commission of the offence), this is a specified offence for the purposes of section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003.

Effective from 1 April 2014
STEP ONE
Determining the offence category

The court should determine which categories of harm and culpability the offence falls into by reference only to the tables below.

Offences may be of such severity, for example involving a campaign of rape, that sentences of 20 years and above may be appropriate.

<table>
<thead>
<tr>
<th>Harm</th>
<th>Culpability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Category 1</td>
<td>The extreme nature of one or more category 2 factors or the extreme impact caused by a combination of category 2 factors may elevate to category 1</td>
</tr>
<tr>
<td>Category 2</td>
<td>• Severe psychological or physical harm • Pregnancy or stillbirth as a consequence of offence • Additional degradation/humiliation • Abortion • Prolonged detention/sustained confinement • Violence or threats of violence (beyond that which is inherent in the offence) • Forced/uninvited entry into victim’s home • Victim is particularly vulnerable due to personal circumstances*</td>
</tr>
<tr>
<td>Category 3</td>
<td>Factor(s) in categories 1 and 2 not present</td>
</tr>
</tbody>
</table>

* for children under 13 please refer to the guideline on page 27

STEP TWO
Starting point and category range

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range on the next page. The starting point applies to all offenders irrespective of plea or previous convictions. Having determined the starting point, step two allows further adjustment for aggravating or mitigating features set out on the next page.

A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out on the next page.

Effective from 1 April 2014
## Appendix 2: Sentencing Council for England and Wales – definitive guideline on rape

<table>
<thead>
<tr>
<th>Category 1</th>
<th>Starting point</th>
<th>Category range</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>15 years' custody</td>
<td>13 – 19 years' custody</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Category 2</th>
<th>Starting point</th>
<th>Category range</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>10 years' custody</td>
<td>7 – 13 years' custody</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Category 3</th>
<th>Starting point</th>
<th>Category range</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>7 years' custody</td>
<td>4 – 9 years' custody</td>
</tr>
</tbody>
</table>

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In particular, relevant recent convictions are likely to result in an upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

### Aggravating factors

#### Statutory aggravating factors

- Previous convictions, having regard (a) to the nature of the offence to which the conviction relates and its relevance to the current offence; and (b) to the time that has elapsed since the conviction
- Offence committed whilst on bail

#### Other aggravating factors

- Specific targeting of a particularly vulnerable victim
- Extradition (where not taken into account at step one)
- Blackmail or other threats made (where not taken into account at step one)
- Location of offence
- Timing of offence
- Use of weapon or other item to frighten or injure
- Victim compelled to leave their home (including victims of domestic violence)
- Failure to comply with current court orders
- Offence committed whilst on licence
- Exploiting contact arrangements with a child to commit an offence
- Presence of others, especially children
- Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

### Mitigating factors

- Attempts to dispossess or conceal evidence
- Commission of offence whilst under the influence of alcohol or drugs

- No previous convictions or no relevant/recent convictions
- Remorse
- Previous good character and/or exemplary conduct
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability, particularly where linked to the commission of the offence

*Previous good character/exemplary conduct is different from having no previous convictions. The more serious the offence, the less the weight which should normally be attributed to this factor. Where previous good character/exemplary conduct has been used to facilitate the offence, this mitigation should not normally be allowed and such conduct may constitute an aggravating factor.*

In the context of this offence, previous good character/exemplary conduct should not normally be given any significant weight and will not normally justify a reduction in what would otherwise be the appropriate sentence.

Effective from 1 April 2014.
### Sexual Offences: Definitive Guideline

#### STEP THREE

**Consider any factors which indicate a reduction, such as assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

#### STEP FOUR

**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

#### STEP FIVE

**Dangerousness**

The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to award a life sentence (section 224A or section 225(2)) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions, the national determinate sentence should be used as the basis for the setting of a minimum term.

#### STEP SIX

**Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour.

#### STEP SEVEN

**Ancillary orders**

The court must consider whether to make any ancillary orders. The court must also consider what other requirements or provisions may automatically apply. Further information is included at Annex A on page 153.

#### STEP EIGHT

**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

#### STEP NINE

**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

---

*Effective from 1 April 2014*
<table>
<thead>
<tr>
<th>Type of guideline</th>
<th>Topic covered</th>
<th>Publication date</th>
<th>Commencement date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principle</td>
<td>Reduction in sentence for a guilty plea</td>
<td>7 March 2017</td>
<td>1 June 2017</td>
</tr>
<tr>
<td>Principle</td>
<td>Sentencing children and young people</td>
<td>7 March 2017</td>
<td>1 June 2017</td>
</tr>
<tr>
<td>Principle</td>
<td>Community and custodial sentences</td>
<td>25 October 2016</td>
<td>1 February 2017</td>
</tr>
<tr>
<td>Offence</td>
<td>Dangerous dog offences</td>
<td>17 March 2016</td>
<td>1 July 2016</td>
</tr>
<tr>
<td>Offence</td>
<td>Robbery</td>
<td>28 January 2016</td>
<td>1 April 2016</td>
</tr>
<tr>
<td>Principle (revision)</td>
<td>Allocation (when cases should be heard in the Magistrates’ Court or Crown Court)</td>
<td>10 December 2015</td>
<td>1 March 2016</td>
</tr>
<tr>
<td>Offence</td>
<td>Health and safety offences, corporate manslaughter and food safety and hygiene offences</td>
<td>3 November 2015</td>
<td>1 February 2016</td>
</tr>
<tr>
<td>Offence</td>
<td>Theft</td>
<td>6 October 2015</td>
<td>1 February 2016</td>
</tr>
<tr>
<td>Offence</td>
<td>Fraud, bribery and money laundering offences</td>
<td>23 May 2014</td>
<td>1 October 2014</td>
</tr>
<tr>
<td>Offence</td>
<td>Environmental offences</td>
<td>26 February 2014</td>
<td>1 July 2014</td>
</tr>
<tr>
<td>Offence</td>
<td>Sexual offences</td>
<td>12 December 2013</td>
<td>1 April 2014</td>
</tr>
<tr>
<td>Principle</td>
<td>Offences taken into consideration and totality</td>
<td>6 March 2012</td>
<td>11 June 2012</td>
</tr>
<tr>
<td>Offence</td>
<td>Drug offences</td>
<td>24 January 2012</td>
<td>27 February 2012</td>
</tr>
<tr>
<td>Offence</td>
<td>Burglary</td>
<td>13 October 2011</td>
<td>16 January 2012</td>
</tr>
<tr>
<td>Offence</td>
<td>Assault</td>
<td>16 March 2011</td>
<td>13 June 2011</td>
</tr>
</tbody>
</table>
### Appendix 4: preliminary consultation

<table>
<thead>
<tr>
<th>Date</th>
<th>Meeting</th>
</tr>
</thead>
<tbody>
<tr>
<td>17 July 2017</td>
<td>Meeting with representatives of the Judicial College of Victoria</td>
</tr>
<tr>
<td>18 July 2017</td>
<td>Meeting with representatives of the Office of Public Prosecutions</td>
</tr>
<tr>
<td>17 August 2017</td>
<td>Meeting with the Chief Judge of the County Court of Victoria</td>
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<tr>
<td>21 August 2017</td>
<td>Meeting with representatives of WorkSafe Victoria</td>
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<td>23 August 2017</td>
<td>Meeting with representatives of Victoria Legal Aid</td>
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<tr>
<td>23 August 2017</td>
<td>Meeting with the Director of Public Prosecutions and the Solicitor for Public Prosecutions</td>
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<tr>
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<td>Meeting with the President of the Court of Appeal/Acting Chief Justice of the Supreme Court of Victoria</td>
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References

Bibliography


Case law

Victoria

Azzopardi v The Queen (2011) 35 VR 43
Boulton v The Queen (2014) 46 VR 308
Bradley v The Queen [2017] VSCA 69 (30 March 2017)
Curypko v The Queen [2014] VSCA 192 (29 August 2014)
Director of Public Prosecutions v Alesi [2017] VCC 768 (18 May 2017)
Director of Public Prosecutions v Rapid Roller Co Pty Ltd [2011] VSCA 17 (2 February 2011)
Kalala v The Queen [2017] VSCA 223 (30 August 2017)
Nguyen v The Queen [2016] VSCA 198 (11 August 2016)
Pilgrim v The Queen [2014] VSCA 191 (28 August 2014)
R v Jennings (1999) 1 VR 352
R v Verdins (2007) 16 VR 269
Russell v The Queen [2011] VSCA 147 (19 May 2011)
Stalio v The Queen [2012] VSCA 120 (12 June 2012)
Till v The Queen [2017] VSCA 224 (29 August 2017)
Younger v The Queen [2017] VSCA 199 (11 August 2017)

Other Australian jurisdictions

Assistant Commissioner Condon v Pompano (2013) 252 CLR 38
Attorney-General (NT) v Emmerson (2014) 253 CLR 393
Burrell v The Queen (2008) 238 CLR 218
Crump v The Queen [2016] NSWCCA 2 (5 February 2016)
D’Orta-Ekenaie v Victoria Legal Aid (2005) 223 CLR 1
Director of Public Prosecutions v Harington [2017] TASCCA 4 (17 March 2017)
Director of Public Prosecutions v M [2005] TASSC 14 (23 March 2005)
Green v The Queen [2006] NTCCA 22 (23 October 2006)
Grollo v Palmer (1995) 184 CLR 348
Hili v The Queen (2010) 242 CLR 520
House v The King (1936) 55 CLR 499
International Finance Trust Co Ltd v NSW Crime Commission (2009) 240 CLR 319
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51
Kirk v Industrial Court (NSW) (2010) 239 CLR 531
Lacey v Attorney-General (Qld) (2011) 242 CLR 573
Markarian v The Queen (2005) 228 CLR 357
Mill v The Queen (1988) 166 CLR 59
Momcilovic v The Queen (2011) 245 CLR 1
References

MPB v The Queen [2013] NSWCCA 213 (19 September 2013)
North Australian Aboriginal Legal Aid Service Inc v Bradley (2004) 218 CLR 146
R v Kench (2005) 152 A Crim R 294
R v Kidman (1915) 20 CLR 425
R v MJR [2002] NSWCCA 129 (5 February 2016)
R v Scheeren [2014] ACTSC 272 (16 October 2014)
R v Shore (1992) 66 A Crim R 37
Radenkovic v The Queen (1990) 170 CLR 623
RG Capital Radio Ltd v Australian Broadcasting Authority (2001) 113 FCR 185
Totani v South Australia (2010) 242 CLR 1
Tyne v Tasmania [2005] TASSC 19 (5 April 2005)
Veen v The Queen (No 2) (1988) 164 CLR 465
Wainohu v State of New South Wales (2011) 243 CLR 181
Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1
Wong v The Queen (2001) 207 CLR 584
Yardley v Betts (1979) 22 SASR 108

International

New Zealand
Hessell v The Queen [2010] 2 NZLR 298 (2 October 2009)
R v AM [2010] 2 NZLR 750 (31 March 2010)

United Kingdom
R v Anderson and Another [2016] EWCA Crim 1624 (5 October 2016)
R v AO [2016] EWCA Crim B4 (16 December 2016)
R v Aramah (1982) 4 Cr App R (S) 407
R v Barkauskas [2017] EWCA 1210 (8 August 2017)
R v Boakye and Others [2012] EWCA Crim 838 (3 April 2012)
R v Burke [2017] EWCA Crim 848 (7 June 2017)
R v Calvert and Another [2016] EWCA Crim 1519 (23 September 2016)
R v Clarke [2017] EWCA Crim 393 (6 April 2017)
R v Fountain [2017] EWCA Crim 967 (27 June 2017)
R v Gilmore [2017] EWCA Crim 509 (12 April 2017)
R v Graham [1999] 2 Cr App R(S) 312
R v Hall and Others [2010] EWCA 2753
R v Healy and Others [2012] EWCA Crim 1005 (9 May 2012)
R v Hill [2017] EWCA Crim 64 (3 February 2017)
R v Humphrey [2017] EWCA Crim 852 (8 June 2017)
R v Hutchinson [2017] EWCA Crim 1283 (4 July 2017)
R v Iglo [2017] EWCA Crim 1145 (7 July 2017)
R v Khan [2017] EWCA Crim 440 (6 April 2017)
R v Kudriasov [2016] EWCA Crim 1614 (19 October 2016)
R v Lal [2017] EWCA Crim 373 (22 February 2017)
R v Magee [2017] EWCA Crim 972 (29 June 2017)
R v Marsh and Stokes [2011] EWCA Crim 3190 (9 December 2011)
R v Morris [2017] EWCA Crim 966 (27 June 2017)
R v Peters and Others [2005] EWCA Crim 605 (10 March 2005)
R v Shahodat [2017] EWCA Crim 822 (27 June 2017)
R v Sienkiewicz [2016] EWCA Crim 2117 (9 November 2016)
R v Smith and Others [2011] EWCA Crim 66 (18 January 2011)
R v Stanislas [2016] EWCA Crim 1520 (20 September 2016)
R v Tata Steel UK Ltd [2017] EWCA Crim 704 (7 June 2017)
R v Thomas [2016] EWCA Crim 2223 (21 December 2016)
R v Valentas and Tabuns [2010] ECA Crim 200 (3 February 2010)
R v Williams [2011] EWCA Crim 2126 (2 September 2011)
Legislation

Victoria
Charter of Human Rights and Responsibilities Act 2006 (Vic)
Constitution Act 1975 (Vic)
Corrections Act 1986 (Vic)
Crimes Act 1958 (Vic)
Criminal Procedure Act 2009 (Vic)
Public Administration Act 2004 (Vic)
Sentencing (Amendment) Act 2003 (Vic)
Sentencing Act 1991 (Vic)
Sentencing Amendment (Sentencing Standards) Act 2017 (Vic)
Sex Offenders Registration Act 2004 (Vic)
Subordinate Legislation Act 1994 (Vic)
Subordinate Legislation (Legislative Instruments) Regulations 2011 (Vic)

Other Australian jurisdictions

Crimes (Sentencing) Act 2005 (ACT)
Probation and Parole Act 1983 (NSW)
Sentencing Act 1989 (NSW)
Criminal Law (Sentencing) Act 1988 (SA)

International

New Zealand
Parole Act 2002 (NZ)
Sentencing Act 2002 (NZ)
Sentencing Amendment Act 2007 (NZ)
Sentencing Council Act 2007 (NZ)
Statutes Repeal Act 2017 (NZ)

United Kingdom
Coroners and Justice Act 2009 (UK)
Criminal Justice Act 2003 (UK)
Criminal Justice and Licensing (Scotland) Act 2010 (Scot)
Power of Criminal Courts (Sentencing) Act 2000 (UK)

Quasi-legislative materials