A Sentencing Guidelines Council for Victoria
Report
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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Sentencing Advisory Council
2018
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Preface

A perennial struggle within the criminal law is how to balance the need for equality, transparency and consistency with the need for individualised justice when deciding how people found guilty of crimes should be punished.

On the one hand, it is a fundamental principle of the rule of law that like cases be treated alike, that justice be dispensed equally. The legitimacy of the law, especially the criminal law, is largely dependent on it being perceived as fair. This requires not only that decisions are fair in and of themselves, but also that the process by which those decisions are made is perceived as fair; Justice must not just be done; it must be seen to be done. This means that decisions must not appear arbitrary, nor can they appear to treat people differently without good reason.

On the other hand, the unique circumstances of every case, and of every offender, mean that discretion is essential to the process of sentencing. Judges and magistrates are required to take into account the culpability of the offender; the harm the offender has caused to any victims and to the broader community; the particular circumstances of the offender's life and prior history; and a number of distinct (and often competing) objectives of punishment. Judges and magistrates must then determine both the type and the level of punishment that is most proportionate to the offending and that accords with numerous legislative schemes and broader principles of the common law.

Sentencing is a complex and unenviable task.

In Australia, the approach to sentencing known as instinctive synthesis involves courts simultaneously balancing all the relevant considerations in a case to reach an appropriate outcome. This approach preserves the court’s discretion to impose a just and proportionate sentence that takes into account all the circumstances of the case.

The intent of sentencing guidelines is not to remove that discretion, but rather to structure its exercise in a way that is transparent and understandable without unnecessarily tying the court’s hands. Indeed, recent research in the United Kingdom suggests that sentencing guidelines have improved not only the consistency in how courts sentence offenders, but also the individualisation of those sentences.

Sentencing guidelines aim to guide — not supplant — judicial decision-making. This is in stark contrast to proposals for mandatory sentencing, which curtail judicial discretion and inevitably lead to injustice.

Further, the process for the development of sentencing guidelines aims to engage the broader community in the informed consideration of sentencing policy, allowing greater reflection of community standards in sentencing practices, and greater public confidence in the sentencing process.

A sentencing guidelines council for Victoria represents one of the most significant changes to sentencing in Australia in recent memory. It also represents a unique opportunity to better achieve the necessary balance between consistency, transparency and discretion in sentencing, in a way not seen before in any Australian jurisdiction.
Contributors

Authors
Paul McGorrery, Helen Rechter and Donald Ritchie

Data analyst
Zsombor Bathy

Sentencing Advisory Council

Chair
Arie Freiberg AM

Deputy-Chair
Lisa Ward

Council Directors
Carmel Arthur
Hugh de Kretser
Fiona Dowsley
Helen Fatouros
David Grace QC
John Griffin PSM
Sherril Handley
Brendan Kissane QC
Shane Patton
Barbara Rozenes
Geoff Wilkinson OAM

Chief Executive Officer
Cynthia Marwood

Acknowledgments
The Council thanks all those who made submissions in relation to this reference, and all those who attended meetings, the judicial symposium, the legal stakeholder forum and the community discussion panel. The Council especially thanks those community members who shared with us their experiences as victims of crime. The Council is also particularly grateful to the Right Honourable Lord Justice Treacy and Professor Julian Roberts, for their invaluable participation in the Council’s consultation events, and their helpful advice throughout this reference.
Glossary of key terms

**Accused**  A person who is charged with a criminal offence.

**Executive**  The arm of government that implements the law. Distinguished from the legislature and the judiciary, 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.

**Guidelines council**  The proposed Victorian sentencing guidelines council.

**Guidelines council jurisdiction**  A jurisdiction that has a sentencing guidelines council.

**Guideline judgment**  In Victoria, a decision made by the Court of Appeal under Part 2AA of the Sentencing Act 1991 (Vic). A guideline judgment provides broad sentencing guidance beyond the facts of a particular case, and can apply generally to a particular court or class of court, to an offence or a penalty or to a particular class of offender.

**Higher courts**  In this report, the County Court of Victoria and the Supreme Court of Victoria.

**Instinctive synthesis**  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.

**Judiciary**  The arm of government comprising the system of courts that interpret and apply the law. Distinguished from the legislature and the executive, the judiciary in Victoria comprises all the judicial officers appointed to the various Victorian courts.

**Legislature**  The arm of government with the authority to make laws. Distinguished from the executive and the judiciary, the legislature in Victoria is the Parliament of Victoria.

**Offender**  A person who has been found guilty of a criminal offence.

**Sentencing guideline**  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.

**Separation of powers**  The distribution of state power between three arms of government: the legislature, the judiciary and the executive.


Case citations

In this report, case citations are provided for Commonwealth Law Reports (CLR) and Victorian Reports (VR) for relevant cases. However, medium neutral citations are provided (where available) for all other cases in order to promote broader accessibility to the original source materials.
Executive summary and recommendations

On 25 May 2017, the Victorian Government announced that it would introduce legislation in 2018 to establish a sentencing guidelines council, a body with a diverse membership of stakeholders that could develop and issue sentencing guidelines for use by the courts. In July 2017, the Attorney-General asked the Sentencing Advisory Council (the Council) to conduct broad consultation and advise him on the most suitable model for the sentencing guidelines council in Victoria, with particular reference to the features of sentencing guidelines councils in the United Kingdom. The Council was required to provide its advice by 29 March 2018. This report constitutes that advice.

Between July and October 2017, the Council conducted preliminary research and consultation, meeting with stakeholders from a number of key criminal justice organisations. In November 2017, the Council published A Sentencing Guidelines Council for Victoria: Issues Paper (the issues paper) to form the basis of formal consultation. For some of the issues discussed in that paper, the Council offered a proposal for stakeholders to comment on, and for other issues, the Council invited stakeholder views without making a proposal. The Council made a call for submissions on matters raised in the issues paper, and also published an online survey covering six key issues.

Following publication of the issues paper, the Council received and published expert legal advice about the constitutional validity of certain features of the proposed guidelines council (Appendix 2). The Council asked stakeholders to provide their responses to the questions in the issues paper in light of that constitutional advice.

The Council also conducted a series of consultation events in late November 2017, including a judicial symposium, a discussion forum with legal stakeholders and an open community discussion panel. At each of these events, the Right Honourable Lord Justice Treacy and Professor Julian Roberts, both members of the Sentencing Council for England and Wales, shared their experiences about the introduction and operation of sentencing guidelines in the United Kingdom.

This report makes 22 recommendations about the most appropriate features of the sentencing guidelines council in Victoria, as well as the sentencing guidelines it creates. This report does not address the threshold question of whether a sentencing guidelines council should be introduced in Victoria. The Council was not asked to provide such advice, and the government has already committed to the introduction of the sentencing guidelines council.

Some of the recommendations in this report relate to issues that were not discussed in the issues paper, as those issues emerged during consultation. In addition, there has been a substantial change in the recommended composition of the guidelines council. The Council notes that stakeholders’ responses to other questions (such as the binding nature of sentencing guidelines) may have been informed by, and premised on, the composition proposed in the issues paper. For these reasons, and given the significance of the reforms to sentencing law that are proposed, the Council suggests that it will be essential for the government to conduct further consultation on any draft legislation that implements the Council’s recommendations.
Constraints on the features of the sentencing guidelines council

Since the Council published its issues paper, there have been two key developments that place constraints around the permissible or possible features of the sentencing guidelines council in Victoria. The first was the constitutional advice received by the Council, which is discussed in detail in Chapter 2 (and reproduced in Appendix 2). The second was the Supreme Court of Victoria’s submission.

Constitutional advice

In brief, the constitutional advice received by the Council concluded that:

• sitting judicial officers could permissibly be members of a sentencing guidelines council that created binding sentencing guidelines, so long as those functions were performed consistently with essential judicial attributes such as independence, openness, impartiality and fairness;
• both models for approving sentencing guidelines discussed in the issues paper (the council-approval model and the court-approval model) could be crafted in a way that would be constitutionally permissible, though the risks associated with the council-approval model would be more easily mitigated; and
• it would be possible to craft sentencing guidelines in a manner that would allow them to be applied in cases involving both state and Commonwealth offences.

The constitutional advice is therefore supportive of the ability of the guidelines council to withstand constitutional challenge. After considering the constitutional advice, the Council has formed the view that the council-approval model is preferable to the court-approval model. The constitutional risks associated with the council-approval model are more easily mitigated than the risks associated with the court-approval model, and the High Court has expressed some reservations about the capacity of courts to issue general guidance outside a guideline judgment.1 So long as a lawful alternative exists, it seems unnecessary to expand the court’s role in giving guidance for the resolution of future cases if doing so could be said to interfere with the institutional integrity of the court.

Supreme Court submission

The Supreme Court of Victoria’s submission indicates that, even if judicial participation in the sentencing guidelines council were constitutionally permissible, the court is of the firm view that any such participation would be inappropriate. Judicial officers cannot be required to take on extra-judicial roles (such as membership on the guidelines council) without their consent. The Supreme Court’s view – that it would be inappropriate for judges to sit on the guidelines council – has therefore necessitated a change to the proposed composition of the guidelines council.

The Council maintains its view that a sentencing guidelines council with a majority of members who are sitting judicial officers would likely provide the best policy outcome. However, the Council also acknowledges that it cannot make recommendations that are incapable of implementation. As a result, the Council recommends that the guidelines council consist exclusively of non-judicial members, some of whom would be retired judicial officers.

1. Director of Public Prosecutions v Dalgliesh (A Pseudonym) [2017] HCA 41 (11 October 2017) [69] (‘[i]t might be said that [the guideline judgment legislation] deals exhaustively with the circumstances in which, and the extent to which, a court may go beyond the characteristic judicial function of quelling the particular controversy before it in order to give quasi-legislative guidance for the resolution of future cases’).
Purposes of the sentencing guidelines council

In the issues paper, the Council proposed that the legislated purposes of the guidelines council should be to produce sentencing guidelines that promote consistency of approach in sentencing and promote public confidence in the criminal justice system. These purposes mirror the existing purposes of guideline judgments in the Sentencing Act 1991 (Vic).

Most stakeholders were supportive of these purposes, though some also proposed additional purposes. Some stakeholders suggested that promoting transparency in the sentencing process should be a legislated purpose of the guidelines council. This is also a purpose in each of the three guidelines council jurisdictions examined. Further, in the absence of sitting judicial officers, the Council considers that it is important to emphasise the preservation of judicial discretion. It was also suggested, and the Council agrees, that the guidelines council should aim to promote public confidence in sentencing specifically, not in the criminal justice system as a whole.

Recommendation 1: Purposes of the sentencing guidelines council

The purposes of the sentencing guidelines council should be:

- to promote consistency and transparency of approach in sentencing while preserving judicial discretion; and
- to promote public confidence in sentencing.

Functions of the sentencing guidelines council

The Council proposed various functions for the guidelines council in the issues paper, in particular, that it would develop and issue sentencing guidelines for use by the judiciary, conduct broad consultation in developing those guidelines, and perform related functions such as publishing and publicising sentencing guidelines.

The Council’s recommendation remains relatively unchanged from that proposal, though with two additional guideline-related functions: first, that the guidelines council be expressly given the function of revising existing sentencing guidelines, and second, that the guidelines council should also monitor the effect of the guidelines that it produces.

Recommendation 2: Functions of the sentencing guidelines council

The functions of the sentencing guidelines council should be to:

- develop, issue, monitor and revise sentencing guidelines;
- consult with the general community, the courts, government departments and other interested persons or bodies when developing or revising sentencing guidelines; and
- perform related functions, such as publishing and publicising sentencing guidelines.
Composition of the sentencing guidelines council

The Council remains of the view, expressed in the issues paper, that the most appropriate composition of the sentencing guidelines council in Victoria would be one that includes a majority of sitting judicial officers. However, in light of the Supreme Court’s view that judicial membership of the guidelines council would be inappropriate, the Council recommends an alternative composition. Although this composition no longer includes sitting judicial officers, it allows for a broader range of views and experiences to be included than the composition proposed in the issues paper. The recommended composition includes members from three broad categories:

- up to seven community members, including two non-specialist members, similar to those on the Adult Parole Board of Victoria, and a number of other persons with knowledge or expertise relevant to the work of the guidelines council;
- up to four retired judicial officers, preferably recently retired, representing the various court jurisdictions in Victoria; and
- three persons with experience in policing, prosecution and defence.

Recommendation 3: Composition of the sentencing guidelines council

The sentencing guidelines council should have a minimum of 11 and a maximum of 14 members, comprising the following:

- up to four retired judicial officers:
  - preferably each with recent experience as a judicial officer of one or more of the different court jurisdictions in Victoria (Supreme Court, County Court, Magistrates’ Court, Children’s Court); and
  - preferably at least one recently retired judge of the Supreme Court;
- up to seven community members, including:
  - two non-specialist community members;
  - a person with expertise representing the interests of victims of crime;
  - a person with expertise in criminal justice issues affecting Aboriginal and Torres Strait Islander persons; and
  - three persons with expertise in one or more of the following:
    - criminal justice issues affecting:
      - children and young people;
      - female offenders;
      - offenders from culturally and linguistically diverse (CALD) communities; and/or
      - offenders with issues relating to disability, substance abuse and/or impaired mental functioning;
    - offender rehabilitation, management and supervision;
    - academic study in the area of criminal law, criminology and/or sentencing;
    - statistical analysis; and/or
    - the operation of the criminal justice system;
- a person with experience in policing;
- a person with expertise as a prosecution lawyer; and
- a person with expertise as a defence lawyer.
Appointment to the sentencing guidelines council

As the Council does not recommend a sentencing guidelines council that includes sitting judicial officers, the appointment process proposed in the issues paper is no longer appropriate. Instead, the Council recommends that all members of the guidelines council, and the position of Chair, be nominated by the Attorney-General and then formally appointed by the Governor in Council. The same process should apply to the two non-specialist community members, with an additional requirement of a merits-based application process similar to that used to appoint community members of the Adult Parole Board.

Recommendation 4: Appointment of members and Chair

Appointment of members

All members should be appointed by the Governor in Council on the recommendation of the Attorney-General.

The two non-specialist community members should be appointed by the Governor in Council on the recommendation of the Attorney-General, following an application process.

Appointment of Chair

A member of the sentencing guidelines council should be appointed Chair by the Governor in Council on the recommendation of the Attorney-General.

Development of sentencing guidelines

In the issues paper, the Council asked stakeholders about the appropriate processes by which a sentencing guideline should come into effect, including which body should make the decision to initiate the development of a sentencing guideline, the level of consultation required, which body should have the power to approve a sentencing guideline and when it should come into effect.

Initiation

In relation to the initiation of a sentencing guideline, the Council proposed in the issues paper that the guidelines council itself should have control over the process of developing a sentencing guideline. This was intended to protect the independence of the guidelines council, and to acknowledge the specialist knowledge that the guidelines council – both its members and secretariat – would have to inform itself of which sentencing guidelines would be most appropriate. The Council also proposed that the Attorney-General be expressly empowered to request the development of a sentencing guideline, so long as the guidelines council was not required to comply with that request.

The Council's recommendation remains substantially the same as the proposal, except to also require the guidelines council to give reasons to the Attorney-General if it refuses a request for the development of a particular sentencing guideline.

Recommendation 5: Initiation of a sentencing guideline

The process of developing a sentencing guideline should 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 such a request; and
  - if the sentencing guidelines council does not comply with such a request, it should provide reasons to the Attorney-General.
Consultation

The Council considers that, with or without sitting judicial officers, the most important task for the guidelines council before a sentencing guideline is finalised will be extensive consultation. In the issues paper, the Council proposed that the guidelines council be required to publish draft sentencing guidelines and then consult with courts, the general community, government departments and any other interested persons or bodies, before finalising a sentencing guideline for commencement. Stakeholders almost unanimously supported the importance of this broad consultation.

Many stakeholders also supported the suggestion made in the issues paper that the guidelines council be required to publish, alongside each sentencing guideline, draft and final impact assessments that would describe, in general terms, the intended effect of the guideline on sentencing practices (for example, whether it was intended to increase or decrease the severity of sentences for certain types of offences or offenders). Here, the Council draws a distinction between a sentencing impact assessment, which would describe the intended effect on sentencing practices (and no more), and a resource impact assessment, which would also detail the possible resourcing implications of any intended change in sentencing practices. Most stakeholders considered the latter to be an improper function for the guidelines council, and more properly carried out by government. The Council agrees, and therefore recommends that the guidelines council publish sentencing impact assessments, but not resource impact assessments, alongside each draft and final guideline.

It is anticipated that the guidelines council would, in appropriate circumstances, convene reference groups of individuals with specialist expertise in a particular area (such as the sentencing of children and young people) when developing particular sentencing guidelines, although the Council has not raised this to the level of a formal recommendation.

Recommendation 6: Consultation on a sentencing guideline

The sentencing guidelines council should be expressly required, in developing a sentencing guideline:

- to publish:
  - a draft sentencing guideline; and
  - an accompanying sentencing impact assessment that should describe, in general terms, any intended change in sentencing practice as a result of the guideline; and
- to consult with:
  - the courts;
  - the general community;
  - government departments; and
  - any other interested persons or bodies.

Finalisation, commencement and notice

In the issues paper, the Council did not make a proposal about which of the two approval models used in other sentencing guideline jurisdictions would be more appropriate in Victoria, and instead sought stakeholders’ views on both. In England and Wales, the Sentencing Council approves and finalises guidelines itself, and specifies a date on which the guidelines come into operation (council-approval model). In Scotland, the courts have final approval of guidelines (court-approval model).

Stakeholders were evenly divided in their support for each of these models. Having considered stakeholders’ views, the Council recommends the council-approval model, both because the constitutional advice suggested that the risks can more easily be ameliorated under that model (particularly in the absence of sitting judicial officers) and because the approval process is far more straightforward if the guidelines council has the authority to cause the sentencing guidelines it creates to come into effect.
The Council also recommends that the guidelines council should have the authority to set a date on which each sentencing guideline comes into effect, allowing the judiciary, the legal profession and the wider community an opportunity to familiarise themselves with the guideline before it comes into operation. The guidelines council should also be required to publish all draft and final guidelines (and sentencing impact assessments) on its website.

**Recommendation 7: Finalisation of a sentencing guideline**

A sentencing guideline should be considered finalised when approved by the sentencing guidelines council, without need for approval by any other body.

**Recommendation 8: Commencement of a sentencing guideline**

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

**Recommendation 9: Notice requirements for sentencing guidelines**

The *Sentencing Act 1991* (Vic) should require the sentencing guidelines council to publish and publicise all draft and final sentencing guidelines and sentencing impact assessments on its website.

**Form and content of sentencing guidelines**

In England and Wales, the Sentencing Council can develop two distinct forms of guidelines. The first is what has been referred to as an *offence-based guideline*. This is a sentencing guideline that outlines a staged decision-making process for the sentencing of a particular offence (or category of offences). Such guidelines include sentencing ranges, both for the offence as a whole and for narrower categories within that range. These ranges are determined and supported by a number of factors relevant to the culpability of the offender and the harm caused. After the courts have identified the appropriate sentencing range, they then use the prescribed starting point to determine the appropriate sentence by taking into account both the mitigating and the aggravating factors of the case. These category ranges then operate as a guide, but they by no means confine the courts. There may be, for example, so many mitigating factors (and so few aggravating factors) that a sentence below the sentencing range is the most appropriate in the circumstances of the case.

The second form of guideline in England and Wales is a *principle-based guideline*. This is a sentencing guideline that is not directed at appropriate sentencing ranges and starting points for a specific offence, but instead addresses an issue relevant to the sentencing exercise in general, such as the extent to which a plea of guilty might operate as a mitigating factor, or the effect an offender’s intoxication should have on the sentence imposed.

In the issues paper, the Council proposed that the guidelines council in Victoria be given the authority to develop both offence-based guidelines and principle-based guidelines. For consistency of language, the Council adapted the language in the *Sentencing Act 1991* (Vic) that currently specifies the permissible content of a guideline judgment from the Court of Appeal.

In general, stakeholders supported permitting the guidelines council to develop both offence-based guidelines and principle-based guidelines. This is particularly so given that the model in England and Wales seems to afford a balance of, on the one hand, transparency in the sentencing process in a way that offers helpful guidance to the judiciary and, on the other hand, considerable discretion for courts to continue to impose just punishments in the circumstances of each case.
The Council therefore recommends that the guidelines council be permitted to develop sentencing guidelines resembling those published in England and Wales. Unlike the proposed form and content in the issues paper; however, the recommended form and content of a sentencing guideline is designed to reflect the key features of sentencing guidelines in England and Wales, rather than the content of guideline judgments in Victoria.

**Recommendation 10: Form and content of a sentencing guideline**

The sentencing guidelines council should be expressly permitted to develop:

- **Offence-based guidelines**, which may provide:
  - a staged approach to sentencing a particular offence;
  - starting points and sentencing ranges for a particular offence, based on a non-exhaustive list of factors related to harm and culpability;
  - a non-exhaustive list of mitigating and aggravating factors that a court may take into account in increasing or decreasing the sentence for a particular offence;
  - a non-exhaustive list of permissible reasons to depart from the sentencing guideline; and/or
  - any other matter that the court should take into account, consistent with the provisions of the **Sentencing Act 1991 (Vic)**.

- **Principle-based guidelines**, which may provide guidance on:
  - sentencing principles generally;
  - sentencing principles related to a particular court, class of court, penalty, class of penalty or class of offender; and/or
  - any other matter that the court should take into account, consistent with the provisions of the **Sentencing Act 1991 (Vic)**.

**Sentencing guidelines and child offenders**

In Victoria, the sentencing of child offenders is significantly different from the sentencing of adult offenders. The Council is of the view that sentencing guidelines developed under the **Sentencing Act 1991 (Vic)** for application to adult offenders should not apply to the sentencing of child offenders. Instead, the guidelines council would need to, and should be given the authority to, develop distinct sentencing guidelines specifically for application to child offenders.

The bulk of sentencing proceedings involving offenders aged under 18 years at the time of the offence are heard in the Children's Court, but there are also certain circumstances in which children are sentenced in the higher courts, particularly for serious offences. The Council is of the view that adult sentencing guidelines should not apply in that instance either, and that the only guidelines that should apply in the sentencing of child offenders are those specifically developed for application to children.

**Recommendation 11: Sentencing guidelines for child offenders**

Offence-based guidelines issued by the sentencing guidelines council for adult offenders under the **Sentencing Act 1991 (Vic)** should not apply to the sentencing of children who were under 18 at the time of the commission of the offence, regardless of which court is sentencing them.

The **Children, Youth and Families Act 2005 (Vic)** should be amended to include similar reforms as recommended for the **Sentencing Act 1991 (Vic)** to allow the sentencing guidelines council to develop sentencing guidelines specifically for application when sentencing children.
Application of sentencing guidelines

In the issues paper, the Council sought stakeholder views about the mechanics of sentencing guidelines and how they should operate in practice. This included questions about the extent to which sentencing guidelines should be binding, their effect on common law precedent, instinctive synthesis and current sentencing practices, and their relationship with other sentencing orders and schemes, such as aggregate sentences and standard sentences.

Whether sentencing guidelines should be binding

Perhaps the most important question the Council considered was whether sentencing guidelines should be binding on courts, or merely advisory. The Council recommends that sentencing guidelines be binding, as this will ensure that guidelines are capable of:

- affecting sentencing practices where an issue has been identified;
- reducing (rather than increasing) disparity in the approach Victorian courts take to the sentencing exercise; and
- promoting public confidence in, and encouraging community engagement with, sentencing in Victoria.

A further reason the Council recommends that sentencing guidelines be binding is that courts would still retain the discretion to depart from a guideline where doing so would be in the interests of justice (and the court provides reasons).

Recommendation 12: Application of sentencing guidelines

The Sentencing Act 1991 (Vic) should specify that courts must follow any relevant sentencing guideline, unless the court is satisfied that it would be contrary to the interests of justice to do so and the court explains its reasoning.

Failure to comply

If there were a suggestion that a court failed to follow a sentencing guideline in a way that was not in the interests of justice, or that the court failed to comply with any procedural requirement (including the requirement to give reasons), the appropriate course of action should be for the prosecution or the offender to appeal. Out of an abundance of caution, the Council recommends amending section 103 of the Sentencing Act 1991 (Vic) to make it clear that a failure to comply with a procedural requirement in a sentencing guideline does not invalidate a sentence imposed by the court.

Recommendation 13: Failure to comply or give reasons

Section 103 of the Sentencing Act 1991 (Vic) should be amended to include that the failure of a court to comply with any procedural requirement contained in any relevant sentencing guideline in sentencing an offender does not invalidate any sentence imposed by the court.
Effect on common law

The relationship between sentencing guidelines and related common law precedents is a key issue. Stakeholders generally favoured the ability of guidelines to overrule existing common law, especially where there is inconsistency between the two. Concerns were raised, however, that sentencing guidelines might unintentionally displace valuable common law precedents that are consistent with a guideline (and likely more nuanced). The Council acknowledges and agrees with this concern.

While it was proposed in the issues paper that sentencing guidelines would overrule all inconsistent and consistent common law precedents, the Council recommends that a guideline would only overrule consistent common law precedents if it unambiguously expressed an intention to do so. Further, it is anticipated that such statements would be made sparingly, and only if the guidelines council considered it necessary and appropriate, and was satisfied that there would be no unintended consequences.

Recommendation 14: Effect on common law precedents

The Sentencing Act 1991 (Vic) should expressly state that, where there is an inconsistency between the common law and a sentencing guideline, or where a sentencing guideline expressly states an intention to overrule a common law principle, the sentencing guideline takes precedence over the common law, including a guideline judgment.

Effect on consideration of current sentencing practices

The Council asked stakeholders whether sentencing guidelines should also affect courts’ required consideration of current sentencing practices. This requirement currently allows accused persons and the community to reasonably anticipate the sentence in any given case by reference to past sentences imposed in similar cases (with more recent cases given higher priority).

The Council expressed the view in the issues paper that, in order to achieve their policy objectives, sentencing guidelines would need to be capable of addressing any systemic issues with sentencing practices. This would be similar to the power frequently exercised by the Court of Appeal when it calls for a change to sentencing practices for certain offences (such as incitement to murder; injury by glassing, negligently causing serious injury by driving, aggravated burglary and incest). Such pronouncements by the Court of Appeal, however, have an incremental, rather than immediate, effect.

The Council is of the view that after commencement, an offence-based guideline would, in effect, become the current sentencing practices to which courts must turn. Further, post-guideline sentencing practices would only be a discretionary consideration for courts, one that they would only need to take into account if they considered it appropriate to do so. It would be inappropriate, and contrary to the objectives of sentencing guidelines, if an entire line of jurisprudence could emerge that would then diminish the authority of guidelines as the primary source of guidance.

Recommendation 15: Effect on consideration of current sentencing practices

The Sentencing Act 1991 (Vic) should expressly state that despite section 5(2)(b), where a relevant offence-based guideline applies, the only sentencing practices to which a court may have regard are those sentences imposed in accordance with that guideline.
Effect on instinctive synthesis

The staged approach utilised in offence-based guidelines in England and Wales, and recommended for similar guidelines in Victoria, represents a significant departure from the current approach known as instinctive synthesis. Instinctive synthesis describes an approach to sentencing by which the court identifies all the factors relevant to the sentence, discusses their significance and then makes a value judgment as to the appropriate sentence, both on the individual charges and in the case as a whole.

The application of sentencing guidelines would instead require courts to apply a staged approach when sentencing individual offences, at least at the charge level. This would include considering the specified factors relating to harm and culpability (and any other relevant factors) in order to identify the category range and starting point, and then taking any aggravating and mitigating factors into account to determine the final sentence for the offence.

Given the incompatibility between offence-based guidelines and the instinctive synthesis approach, which is firmly embedded in the common law, the Council recommends that the Sentencing Act 1991 (Vic) be amended to expressly state that courts should not apply instinctive synthesis when determining the sentence for an offence to which an offence-based guideline applies. This will not, however, affect the application of instinctive synthesis to sentencing offences to which no sentencing guideline applies, or the application of broader principles (such as totality) for which no sentencing guideline has been developed.

Recommendation 16: Effect on instinctive synthesis

The Sentencing Act 1991 (Vic) should expressly state that when a court is sentencing an offence to which a relevant offence-based guideline applies, the common law approach to sentencing known as instinctive synthesis does not apply for the purpose of determining the sentence for that offence.

Sentencing guidelines and aggregate sentences

Following consultation, the Council considered the potential incompatibility of sentencing guidelines with the imposition of aggregate sentences. Currently, courts may (and often do) impose a single sentence of imprisonment or a fine for multiple offences. It would not be possible for courts to be seen to have followed a sentencing guideline if the sentence for the relevant offence was obscured within an aggregate sentence. Aggregate sentences are, however, considered a useful sentencing tool that assists with court efficiency.

The Council is therefore of the view that, in order to balance the transparency of sentencing guidelines with the efficiency afforded by aggregate sentences, offences to which a guideline applies should be permitted within an aggregate sentence. The court would still be under an obligation to state the sentence imposed on any relevant guideline offences, but would not need to state the extent to which the sentences are concurrent or cumulative upon one another.

Recommendation 17: Including guideline offences in an aggregate sentence

The Sentencing Act 1991 (Vic) should expressly provide that if:

- a court is sentencing two or more offences in a single case;
- the court has decided to impose an aggregate sentence; and
- at least one of the offences included in the aggregate sentence is an offence to which a relevant offence-based guideline applies;

the court must apply any relevant offence-based guideline and announce the sentence imposed on those offences before imposing an aggregate sentence.
Applying sentencing guidelines in a case with state and Commonwealth offences

Cases involving both state and Commonwealth offences require the application of both state and Commonwealth laws. State laws do not apply if they are inconsistent with Commonwealth law. The Council sought constitutional advice on this issue, and was advised that it would be possible for a state court sentencing both Commonwealth and state offences in a single case to lawfully apply an offence-based guideline.

It would, however, be necessary to compartmentalise the effect of the sentencing guideline. The offence-based guideline could only be used to determine the appropriate sentence for the relevant state offence, and could not apply to the sentencing of any Commonwealth offences, or to the sentencing of the case as a whole. The Council therefore recommends specifying in legislation that, in these mixed cases, offence-based guidelines would only apply at the charge level to fixing a sentence on relevant state offences.

Recommendation 18: Sentencing Commonwealth and state offences

The *Sentencing Act 1991* (Vic) should expressly provide that when a court sentences two or more offences in a single case and:

- at least one is a state offence to which a relevant offence-based guideline applies; and
- at least one is a Commonwealth offence;

the court must only apply the offence-based guideline when determining the appropriate sentence for the relevant state offence.

Retrospectivity of sentencing guidelines

The Council considered the extent to which sentencing guidelines should be capable of operating retrospectively, in particular, whether:

- guidelines should apply to all relevant offences sentenced after commencement of those guidelines, regardless of when the offence was committed;
- guidelines would apply during resentencing following a successful sentence appeal; and
- the issuing or revising of a guideline could, on its own, constitute a permissible ground of appeal against a previously imposed sentence.

The Council recommends that sentencing guidelines should operate retrospectively and apply to all offences sentenced after commencement of those guidelines. This promotes equal justice, helps to ensure that sentencing standards reflect contemporary community expectations and is consistent with the approach already taken when other changes are made to sentencing practices.

Further, the Council received unanimous feedback from stakeholders that a sentencing guideline should not apply during the resentencing of an offender (whether by virtue of a successful sentence appeal or a breach of the original sentence) if the guideline came into effect after the initial sentence was imposed. Stakeholders also considered that the issuing or revision of a sentencing guideline should be expressly prohibited from constituting a permissible ground of appeal.
Recommendation 19: Retrospectivity of sentencing guidelines

A sentencing guideline should apply to any relevant offence sentenced after commencement of that guideline, irrespective of when the offence was committed.

If a relevant sentencing guideline commences after a sentence has been imposed, that sentencing guideline should not apply during any resentencing.

The Sentencing Act 1991 (Vic) should expressly prohibit the commencement of a relevant sentencing guideline from constituting a permissible ground on which either party could appeal a sentence that was imposed prior to the commencement of that sentencing guideline.

Submissions about sentencing ranges

In 2008, the Victorian Court of Appeal determined that prosecutors were obligated, if requested by the court, or if necessary to prevent the court falling into appealable error, to make submissions about the appropriate sentencing range in a case. In 2014, the High Court deemed that practice wrong in principle, classifying submissions about sentencing ranges as statements of opinion, not submissions of law. In the absence of legislative intervention, the prosecution was prohibited from making submissions about sentencing ranges.

The Council is of the view that, in order for sentencing guidelines to operate most effectively in Victoria, both parties should be permitted to make submissions about the appropriate category ranges and starting points set out in an offence-based guideline, so long as those submissions are premised on the non-exhaustive list of factors and principles in any applicable guidelines. It is arguable that, even without legislative amendments, those submissions (premised on specified factors and principles) would constitute submissions of law, rather than statements of opinion.

For the avoidance of doubt, however, the Council recommends that legislation specifically empower the parties to make submissions about sentencing ranges, levels or starting points as set out in relevant guidelines, and that any rule of law or practice to the contrary does not apply. This is consistent with legislation in Queensland, which now permits parties to make sentencing submissions about appropriate ranges, as well as recent reforms to Victoria’s guideline judgment provisions, which permit the parties to make submissions about sentencing ranges, so long as those ranges are set out in a guideline judgment.

Recommendation 20: Submissions about ranges and starting points

The Sentencing Act 1991 (Vic) should be amended to provide that the prosecution and the defence may make submissions to a court on the appropriate level or range of sentences, or starting points, if those levels, ranges or starting points have been set out in an offence-based guideline.

Legislation should provide that, to the extent necessary to provide for the above, any rule of law or practice to the contrary does not apply.

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Standard sentences

Legislation introducing standard sentences has recently commenced. Standard sentences are legislative guideposts intended to represent the appropriate sentence in the middle of the range for an offence, taking into account only objective factors relating to the seriousness of the offending (without taking into account factors related to the offender, such as prior convictions or a plea of guilty). Standard sentences therefore represent a more limited form of sentencing guidance than the comprehensive guidance that can be provided through an offence-based guideline.

The Council considers that it would be unworkable to apply both a standard sentence and a sentencing guideline when sentencing a standard sentence offence. The standard sentence provisions expressly preserve instinctive synthesis, while a sentencing guideline would take precedence over instinctive synthesis. Further, an offence-based guideline would comprehensively consider factors related to both the offending and the offender. In order to best achieve the policy objectives of improving transparency and public confidence in sentencing (including through extensive community input into the development of sentencing guidelines), the Council is of the view that sentencing guidelines should take priority where an offence-based guideline has been developed for a standard sentence offence.

Recommendation 21: Amending application of standard sentence provisions

Section 5A of the *Sentencing Act 1991* (Vic) should be amended to provide that the provisions relating to the standard sentence scheme do not apply when sentencing a standard sentence offence to which a relevant offence-based guideline applies.

Guideline judgments

There is a potential inconsistency in allowing the Court of Appeal and the guidelines council to create guidance addressing the same issues (and to an extent, to utilise the same consultation processes before providing that guidance). The Council, however, recommends that the guideline judgment powers be retained for three key reasons. First, removing the guideline judgment provisions would have little practical effect on the Court of Appeal's ability to provide sentencing guidance, as it does through ordinary case precedent. Second, it is anticipated that the relationship between the guidelines council and the Court of Appeal would be one of open communication and dialogue, involving ongoing consultation, which would substantially limit the potential for any inconsistency between the two. Third, it has been argued that the preservation of guideline judgment provisions is important to attaining judicial support for the introduction of sentencing guidelines.

Recommendation 22: Retention of guideline judgment provisions

The existing guideline judgment provisions of the *Sentencing Act 1991* (Vic) should be retained.
1. Project background, scope and approach

Structure of this report

1.1 This report is divided into seven chapters. This chapter sets out the background and scope of the project and discusses the Sentencing Advisory Council’s (the Council’s) approach to the project, including consultation. In addition:

- Chapter 2 examines the key constitutional issues for the sentencing guidelines council in Victoria, and presents conclusions to those issues based on expert advice received by the Council;
- Chapter 3 presents recommendations in relation to the purposes and functions of the guidelines council;
- Chapter 4 presents recommendations in relation to the composition of, and appointment of members to, the guidelines council;
- Chapter 5 presents recommendations in relation to the development of sentencing guidelines, including initiation, necessary consultation and finalisation;
- Chapter 6 presents recommendations in relation to the permissible content of sentencing guidelines; and
- Chapter 7 presents recommendations in relation to the manner in which courts should apply sentencing guidelines.

Background to the project

1.2 In June 2016, the Council published Sentencing Guidance in Victoria: Report.4 The aim of that report was to advise 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 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). Legislation implementing those recommendations came into effect on 1 February 2018.5

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The Council also discussed the possibility of a sentencing guidelines council in Victoria as an ‘aspirational model’ for sentencing guidance and provided a broad outline of the possible features of such a body. Sentencing guidelines councils are bodies, separate from the legislature and the judiciary, that publish sentencing guidelines. These 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, though the New Zealand Sentencing Council was never established, and the legislation has since been repealed.

The Council suggested that, after its recommended reforms to the guideline judgment provisions had been implemented and evaluated, further consideration could be given to the introduction of a sentencing guidelines council.

The Council formed this view on the basis that 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.

Because a sentencing guidelines council was outside the scope of the terms of reference for that project, the Council made no recommendations in relation to a particular model. However, the Council cautioned that there were 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.

Announcement of sentencing guidelines council

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. While legislation providing for a sentencing council was passed in New Zealand, the New Zealand Sentencing 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: see [1.13].
8. Statutes Repeal Act 2017 (NZ) s 3(1).
10. Ibid 198, 217.
Request for advice

1.9 On 12 July 2017, the Attorney-General wrote to the Council requesting advice on establishing a sentencing guidelines council in Victoria. The Council was asked to develop an issues paper that would elaborate on the ‘aspirational model’ for sentencing guidance described in Chapter 8 of *Sentencing Guidance in Victoria: Report*.

1.10 The request specifically asked the Council to examine and evaluate the Sentencing Council for England and Wales and the Scottish Sentencing Council as models, and explore which model, or which features of these models, would be most suitable for Victoria, including:

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

1.11 The request asked that the Council provide its advice to the Attorney-General by 29 March 2018.

Scope of the Council’s advice

1.12 In accordance with the request for advice, the Council has examined the various features of the Sentencing Council for England and Wales and the Scottish Sentencing Council. The Council has also examined features of the enacted (but never established) New Zealand Sentencing Council.

1.13 While many other jurisdictions have councils, or similar bodies, that create sentencing guidelines, the Council’s analysis focused on those guidelines council jurisdictions that produce sentencing guidelines that structure, rather than replace, judicial discretion. For example, the Council did not consider the features of the United States Sentencing Commission, which develops grid-like sentencing guidelines for application in the federal jurisdiction of the United States.

1.14 The Council’s examination has been guided by the government’s stated policy objectives: improving transparency of, and public confidence in, sentencing.
Excluded matters

1.15 Two key issues are not canvassed in this report. First, the Council has not examined the threshold issue of the appropriateness or desirability of a sentencing guidelines council in Victoria, as the government has committed to introducing such a body and has not requested such advice. The exclusion of the threshold question from the Council’s review was outlined in the issues paper, but a number of stakeholders nonetheless expressed opposition to the introduction of the sentencing guidelines council in Victoria.\footnote{Submission 2 (Anonymous); Submission 8 (J. Bartle); Submission 23 (Liberty Victoria).}

1.16 Second, given the potential for conflict of interest, the Council did not seek 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 Council will make a separate submission to the Attorney-General on that issue.

Further matters

1.17 Given the timeframe of the reference, the Council has confined its advice to the matters raised in the request for advice, and closely related issues. However, the breadth of the changes to sentencing law required by the creation of the guidelines council, and the application of sentencing guidelines in Victoria, means that it has not been possible for the Council to address all consequential issues.

1.18 It will, for example, be necessary for the Department of Justice and Regulation to comprehensively review the Sentencing Act 1991 (Vic), the Children, Youth and Families Act 2005 (Vic) and other related legislation, such as the Criminal Procedure Act 2009 (Vic), to ensure that the Council’s recommendations can be effectively implemented.

1.19 Further, the Council emphasises that it will be essential for government to consult with courts and other key stakeholders on the draft version of any legislation that seeks to implement the Council’s recommendations.

Approach to the project

1.20 The Council conducted preliminary research and consultation with 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. A list of these consultations is provided in Appendix 1.

Issues paper

1.22 In the issues paper, the Council set out proposals for some of the features of the sentencing guidelines council in Victoria. These proposals were based on the Council’s initial consultation and research into the characteristics of international sentencing guidelines councils, and were intended to provide a starting point for discussion. For other features, the Council did not provide a preliminary proposal.

1.23 Throughout this report, the Council has extensively referred to material in the issues paper.

Submissions and online survey responses

1.24 Through the issues paper, the Council made a public call for submissions, the deadline for which was 22 December 2018.

1.25 To facilitate broader community consultation, the Council also published an online survey seeking responses to six key questions from the issues paper. These questions focused on the composition and functions of the guidelines council, the process for development of a sentencing guideline (including initiation and consultation), the form and content of a guideline and how binding a guideline should be on sentencing courts.

1.26 The Council received 28 submissions, including survey responses, from a range of different individuals and organisations. The submissions are listed in Appendix 1.

Consultation events

1.27 In November 2017, the Council held three key consultation events:
   • a judicial symposium (with representation from all court jurisdictions in Victoria);
   • a legal stakeholders discussion forum; and
   • a community discussion panel.

1.28 Each of the events featured presentations by the Right Honourable Lord Justice Treacy, Chair of the Sentencing Council for England and Wales, and Professor Julian Roberts, member of the Sentencing Council for England and Wales. Both Lord Justice Treacy and Professor Roberts have been members of the Sentencing Council for England and Wales since 2010. Both generously shared their extensive experience and knowledge about topics such as:
   • the history of sentencing guidelines in England and Wales;
   • the processes for the development and revision of sentencing guidelines (including the comprehensive consultation process); and
   • the cooperative relationship between the Sentencing Council for England and Wales and key stakeholders, including the judiciary, the legal profession and the broader community.
Human rights considerations

1.29 In developing its advice, the Council has had regard to the rights contained in the Charter of Human Rights and Responsibilities Act 2006 (Vic).

1.30 The Charter requires public authorities (including public servants) to act compatibly with human rights, and to consider human rights when developing policies, making laws, delivering services and making decisions. In certain circumstances, some rights may be limited; however, this must be reasonable and necessary (taking into account such factors as the nature of the right and the purpose of the limitation).

1.31 There may be human rights implications in relation to the recommended elements of the sentencing guidelines council in Victoria, including 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.

2. Constitutional issues

Overview

2.1 This chapter discusses a number of constitutional issues relating to the establishment of the sentencing guidelines council in Victoria. These issues are discussed throughout this report in more detail as they arise in relation to specific features of the guidelines council.

2.2 In *Sentencing Guidance in Victoria: Report*, the Council acknowledged that sentencing guidelines councils in the United Kingdom had not encountered any constitutional issues. However, certain features of the Australian legal system – in particular, the federated system of government, the *Australian Constitution* and the doctrine of separation of powers – necessitated specific attention to possible constitutional concerns in the Australian context.20

The doctrine of separation of powers in Australia

2.3 The doctrine of separation of powers broadly refers to the distribution of state power between three arms of government: the legislature, the executive and the judiciary. The separation of powers is one of the cornerstones of Australian democracy, designed to ensure that ‘power does not become too concentrated in any one arm of government and that the different branches of government can provide a check on one another’.21

2.4 In turn, judicial independence is one of the key tenets of that separation of powers, lying ‘at the heart of our democracy’.22 Judges must ‘be, and be seen to be, independent’.23 The High Court has previously described the importance of judicial independence:

> The ultimate responsibility of deciding upon the limits of the respective powers of the governments were placed in the federal judicature … [U]pon the judicature rest[s] the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised and upon that the whole system was constructed.24

2.5 In Australia, the separation of powers is mandated by the *Australian Constitution*. Chapters I, II and III of the *Constitution* respectively confer the legislative power on the Commonwealth Parliament, the executive power of the Commonwealth on the Queen (exercisable by the Governor-General) and the judicial power of the Commonwealth on the High Court of Australia and other Commonwealth courts.25

2.6 That separation of powers, however, does not directly apply to the judiciary, executive or legislature of the states.26

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25. *Australian Constitution* chs I–III.
Separation of powers and the states: the *Kable* principle

2.7 In 1996, in the case of *Kable v Director of Public Prosecutions*, the High Court found that, in certain circumstances, state courts are subject to the doctrine of separation of powers in the *Australian Constitution* and must therefore have their independence protected. The court reached this conclusion on the basis that state courts oversee legal proceedings involving the application of Commonwealth legislation and are therefore vested with federal jurisdiction. Because of this, it would be contrary to the *Australian Constitution* for a state legislature 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 Commonwealth judicial power.

2.8 This has become known as the *Kable* principle and has been summarised by the High Court as follows:

> Because 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.

2.9 The *Kable* principle requires that, when vested with federal jurisdiction, state courts must only exercise powers — and further, must appear to be only exercising powers — consistent with the essential and defining characteristics of a court of law. This includes, for example, maintaining the reality and appearance of independence and impartiality and the fairness of the court’s processes. State legislation cannot confer on a court vested with federal jurisdiction a function that is repugnant to the institutional integrity of that court.

2.10 The constitutional issues relating to the establishment of the sentencing guidelines council in Victoria revolve around the *Kable* principle and whether the nature of the sentencing guidelines council or the sentencing guidelines it creates would interfere with the institutional integrity of Victorian courts.

Constitutional advice

2.11 In order to address a number of these constitutional issues, the Council sought expert legal advice about:

- the appropriateness of sitting judicial officers being members of the guidelines council;
- how sentencing guidelines can permissibly be finalised and approved;
- the form, content and characterisation of sentencing guidelines;
- whether Victorian courts could be required to follow sentencing guidelines; and
- the application of sentencing guidelines where a court is sentencing both state and Commonwealth offences in a single case.

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29. 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; *Momcilovic 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.
2. Constitutional issues

2.12 In the request for advice, the Council set out a range of features it considered essential to achieve the objectives announced by the government. These included that:

• the membership of the guidelines council would include both judicial and non-judicial members;

• the process for creating a sentencing guideline would involve extensive community consultation;

• the sentencing guidelines could resemble those in England and Wales; and

• the sentencing guidelines could affect sentencing practices in Victoria.

2.13 The Council also set out a range of features that it considered desirable, including that:

• the purposes of the guidelines council would be to promote consistency in courts’ approach to sentencing and public confidence in the criminal justice system;

• the functions of the guidelines council would be limited to the creation of sentencing guidelines and associated necessary functions, including consultation, publication and publicising of those guidelines;

• the guidelines council would be required to publish draft sentencing guidelines as part of the process of consultation;

• the guidelines council would consist of a majority of judicial members in addition to legal and community members with knowledge and expertise in criminal justice;

• the guidelines council would not be required to provide advice to, or receive direction from, the judiciary, the legislature or the executive; and

• the Attorney-General would be able to request that the guidelines council create a sentencing guideline, but the guidelines council would be able to decline that request.

Can sitting judicial officers be members of the guidelines council?

2.14 The first question was whether sitting judicial officers, acting in a personal capacity rather than as a member of a court, could be members of the guidelines council in Victoria. The advice concluded that they could, so long as certain criteria were satisfied, including that:

• any functions that the officer would perform would be independent of any instruction, advice or wish of the legislature or executive, other than a law or instrument made under a law;

• the functions would not be exercised on ‘political grounds’ nor involve providing a purely advisory opinion on a question of law to the executive; and

• the functions would be performed consistently with essential judicial attributes such as openness, impartiality and fairness.32

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32. Ibid 19 (constitutional advice [50]).
In determining that it was permissible for sitting judicial officers to be members of the guidelines council, the advice emphasised the importance of the guidelines council’s independence from the executive. That independence was so critical to the validity of the guidelines council, the advice concluded, that a number of features proposed by the Council in the issues paper should be implemented to bolster that perception of independence, including:

- ensuring that if the Attorney-General could request the development of a guideline, the guidelines council would have the power to refuse the request;
- ensuring that the guidelines council would not be subject to direction from the courts, executive or legislature; and
- limiting the guidelines council’s functions to avoid the appearance of that body providing advice to the executive.\(^{33}\)

### How may sentencing guidelines be finalised and approved?

In the request for advice, the Council described three possible models for approval of sentencing guidelines:

- a council-approval model (involving the guidelines council promulgating sentencing guidelines itself);
- a court-approval model (involving the Victorian Court of Appeal promulgating sentencing guidelines submitted to it by the guidelines council); and
- a legislative-approval model (involving the legislature promulgating sentencing guidelines after parliamentary scrutiny).

The Council noted in its request for advice that the legislative-approval model was not preferable and should only be considered if the other two models were not permissible. The advice considered both the court-approval model and the council-approval model to be permissible, and also specifically recommended against the legislative-approval model because it would risk enmeshing the guidelines council in the political process and undermine its independence.\(^{34}\)

### Council-approval model

The constitutional advice described two possible risks with the council-approval model. The first risk is a direct result of judicial membership of the guidelines council. If sitting judicial officers were included in the composition of the guidelines council, this could be seen as asking judicial officers to perform a legislative function, which would be incompatible with their role as judicial members (even acting in their personal capacity). The advice suggested that this concern could be addressed by ensuring that:

- the guidelines council would be established to be independent of the executive and legislature;
- the guidelines council’s functions would be confined to preparing sentencing guidelines and incidental functions; and
- the process for making a sentencing guideline would be open and fair; in the sense that the guidelines council would provide an opportunity for interested persons to make submissions but would not be bound to follow those submissions.\(^{35}\)

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33. Ibid 21 (constitutional advice [53]).
34. Ibid 25 (constitutional advice [66]).
35. Ibid 1, 21–23, 24, 27 (constitutional advice [2], [53]-[59], [61], [71]).
2.19 The second risk of the council-approval model is the potential for a sentencing guideline to be seen as the executive impermissibly interfering in matters more properly left to the courts. The advice suggested, however, that this concern could also be addressed, by ensuring that:

- sentencing guidelines would provide as comprehensively as possible the factors that go into setting starting points and sentencing ranges (where these are specified in a guideline);
- sentencing courts would retain the discretion to reach a sentencing decision that takes account of all relevant factors, and is just and proportionate in all the circumstances of the case; and
- sentencing courts would retain the discretion to depart from a guideline in appropriate circumstances.\(^{36}\)

2.20 This second risk applies whether or not the membership of the guidelines council includes sitting judicial members.

**Court-approval model**

2.21 In contrast, the constitutional advice identified one primary risk with the court-approval model: requiring the Court of Appeal to approve a sentencing guideline before it becomes law could constitute an improper non-judicial function. This would be on the basis that:

- the approval process might be contrary to the essential characteristics of a court, particularly as the function would be exercised by the Court of Appeal itself, not by judges in a personal capacity;
- the criteria by which the Court of Appeal would determine whether to approve, reject or modify a sentencing guideline may not give the court sufficient discretion; and
- the Court of Appeal might, by this process, be seen as *making* rather than *applying* the law.\(^{38}\)

2.22 The constitutional advice concluded that “[i]n theory, the approval function could be made to resemble the ordinary court processes; however, the usual judicial procedures would seem to be unwieldy and unsuited to the approval process.”\(^{39}\)

2.23 Given that the constitutional risks associated with the council-approval model can be more easily mitigated than the risks associated with the court-approval model, the Council has reached the view that the council-approval model is more appropriate.\(^{40}\)

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36. Ibid 26–29 (constitutional advice [69]–[77]).
37. For example, the court’s approval process might not involve a hearing in open court with arguments from interested parties, and if it did, it is not clear who would bring that cause of action, who the interested parties would be and whether anyone would oppose each guideline.
38. Hanks and Hill (2017), above n 31, 24 (constitutional advice [62]).
39. Ibid 25 (constitutional advice [63]).
40. See [5.46] (Recommendation 7).
Character of a sentencing guideline

2.24 Another issue on which the Council sought constitutional advice was the proper characterisation of a finalised sentencing guideline, in particular, whether it would be legislative in character, and whether that characterisation would affect the permissibility of judicial officers participating as members of the guidelines council.

2.25 The advice observed that characterisation of sentencing guidelines as ‘legislative’ or otherwise ‘does not, of itself, have any bearing on constitutional validity’ or ‘determine whether sitting judges can validly be involved in performing the function of making a sentencing guideline.’ Courts already exercise particular types of legislative power, such as making court rules, creating rights and applying particular policy considerations when developing the common law.

2.26 The constitutional advice concluded that making a sentencing guideline would not be responsive to public opinion, which would be at odds with judicial power, and that the process would not be prohibitive of judicial involvement because any submissions to the guidelines council would not be binding on judges on the guidelines council.

Application of sentencing guidelines

2.27 The Council also sought constitutional advice on whether there would be any constitutional restrictions around the ability of sentencing guidelines to structure the manner in which courts exercised their discretion.

2.28 In its request for advice, the Council described two essential characteristics of sentencing guidelines in Victoria relevant to this question: first, they would be capable of resembling the comprehensive guidelines of the sort produced in England and Wales (thus including numerical guidance) and second, they could affect sentencing practices in Victoria where systemic issues were identified.

2.29 The constitutional advice indicated that a binding sentencing guideline capable of affecting sentencing practices that included numerical guidance would likely be valid, so long as:

- the guidelines council was established to be independent of the other branches of government;
- the sentencing guideline explained as fully as possible the factors that go into setting the numerical guidance;
- the court retained the discretion to reach a sentencing decision that took account of all relevant factors, and was just and proportionate in all the circumstances of the case; and
- the court retained a genuine discretion to depart from a guideline in appropriate circumstances.

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41. Hanks and Hill (2017), above n 31, 22 (constitutional advice [55]).
42. Ibid 22 (constitutional advice [55.2]). See for example, Attorney-General (Cth) v Alinta Ltd (2008) 233 CLR 542, 553 (‘matters of policy may enter permissibly (and necessarily) into the exercise of judicial power’); Thomas v Mowbray (2007) 233 CLR 307, 350 (‘Courts are now inevitably involved on a day-to-day basis in the consideration of what might be called “policy”, to a degree which was never seen when earlier habits of thought respecting Ch III were formed’).
43. Hanks and Hill (2017), above n 31, 22–23 (constitutional advice [57]).
44. Ibid 26–29 (constitutional advice [68]–[77]).
Application of sentencing guidelines in the exercise of federal jurisdiction

2.30 During preliminary consultation, the question arose of whether a sentencing guideline could be validly applied by a court when sentencing an offender for a state offence in a case that also contained a Commonwealth offence. When a court is sentencing both state and Commonwealth offences in a single case, it is exercising jurisdiction as a federal court. Therefore, while the court must apply both state and Commonwealth law in sentencing the various offences, it cannot apply any state law that is inconsistent or incompatible with Commonwealth law.

2.31 For example, an offender might be convicted of a Victorian child sexual offence and also in the same case be convicted of Commonwealth offences, such as using a carriage service to groom or procure a child. The issue is whether the application of a sentencing guideline in sentencing the state offence would be inconsistent or incompatible with Commonwealth law. The constitutional advice indicated that a sentencing guideline could be validly applied in those circumstances, in a way that would not offend the institutional integrity of the court, because it would not dictate the manner in which the Commonwealth offences (or the case as a whole) were to be sentenced.45

Constitutional issues in the absence of sitting judicial officers

2.32 The request for constitutional advice was premised on the presence of sitting judicial officers in the membership of the guidelines council. Given that the Council no longer recommends that sitting judicial members participate as members of the guidelines council (see [4.19]–[4.23]), many of the constitutional issues fall away.

2.33 In the absence of sitting judicial officers, the key remaining constitutional issue is the validity of sentencing guidelines themselves. The constitutional advice noted:

   The issue here is whether a prescriptive guideline might be seen as impermissibly dictating to a court how to exercise its jurisdiction. Speaking generally, a State law will be invalid if it would require a State court to act as the instrument of the executive. Thus a function will be invalid if the State court is essentially directed or required to implement a political decision or government policy without following ordinary judicial processes. Similarly, as a general proposition, legislation that purports to direct the courts as to the manner and exercise of their jurisdiction will be invalid.46

2.34 This issue not only persists in the absence of judicial officers; arguably, it is slightly heightened by their absence. Sentencing guidelines developed without oversight from sitting judicial officers could be perceived as an impermissible interference with judicial discretion.

2.35 That said, the Council is of the view that this risk is adequately addressed by a number of factors. As explained in the constitutional advice, a sentencing guideline would be less likely to be seen as directing a court as to the exercise of their jurisdiction if:

   • the sentencing guideline explained as fully as possible the factors that would go into setting the starting point and the offence range;
   • the court retained the discretion to reach a sentencing decision that took into account all relevant factors and that was just and appropriate in all the circumstances of the case; and
   • the court retained a real discretion to depart from a guideline in appropriate circumstances.47

45. Ibid 30–32 (constitutional advice [80]–[84]).
46. Ibid 26 (constitutional advice [69]).
47. Ibid 28–29 (constitutional advice [74]).
2.36 Many of the Council’s recommendations directly address this risk by ensuring the preservation of judicial discretion. The Council has, for example, recommended that the preservation of judicial discretion be an express legislative purpose of the guidelines council (Recommendation 1), that courts should be permitted to depart from guidelines where doing so would be in the interests of justice (Recommendation 12), that the guidelines council should be required to consult with courts as a key stakeholder in developing guidelines (Recommendation 6) and that any list of factors in a guideline supporting numerical guidance, or list of permissible reasons to depart from a guideline, is non-exhaustive, so that courts can respond to circumstances not foreseen by a guideline (Recommendation 10).

2.37 With the above features in place, the Council is of the view that the conclusion in the constitutional advice – that ‘there will be very good arguments that a sentencing guideline is valid, and does not impermissibly purport to dictate the outcome of the sentencing court’s jurisdiction’ – will still apply, even in the absence of judicial members on the guidelines council.

Potential for increased functions

2.38 Without sitting judicial members, the guidelines council could permissibly perform broader functions than would have otherwise been possible. For example, subject to the need for the guidelines council to be independent of the executive, there would be no bar to the guidelines council providing advice to government, preparing sentencing impact assessments or monitoring the effect of sentencing guidelines.\footnote{48. Ibid 29 (constitutional advice [76]).} \footnote{49. On sentencing impact assessments, see [5.29]–[5.31].}
3. Purposes and functions of the sentencing guidelines council

Overview

3.1 This chapter discusses and makes recommendations about the purposes and functions of the sentencing guidelines council in Victoria.

Purposes

3.2 In its media release of 25 May 2017, the government announced that the policy objectives of the proposed guidelines council would be ‘to engage with the community and provide guidance to the courts on sentencing for specific crimes’. These policy objectives provided the starting point for the Council’s consideration of the appropriate purposes and functions of a Victorian sentencing guidelines council.

3.3 As discussed in the issues paper, the purposes of guidelines councils in England and Wales, Scotland and New Zealand are broadly similar. The Sentencing Council for England and Wales was established ‘to promote greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary’. Legislation requires that the Sentencing Council, in carrying out its duties, have regard to the ‘need to promote consistency in sentencing’ and ‘public confidence in the criminal justice system’. Similarly, the Scottish Sentencing Council was established to ‘help ensure greater consistency, fairness and transparency in sentencing and thereby increase public confidence in the integrity of the Scottish criminal justice system’. The legislative objectives of the Scottish Sentencing Council 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.

3.4 Consistency, transparency and public education were also to be legislative purposes of the New Zealand Sentencing Council.

3.5 Some of these guidelines councils also have (or had) additional purposes, such as assisting in the development of policy in relation to sentencing or facilitating the provision of reliable information to enable penal resources to be effectively managed.

3.7 In the issues paper, the Council proposed that the purposes of the guidelines council in Victoria should be to produce sentencing guidelines that promote consistency of approach in sentencing and public confidence in the criminal justice system.
3.8 These proposed purposes mirror the considerations that the Victorian Court of Appeal must currently take into account when giving or reviewing a guideline judgment.  

3.9 The proposed purposes in the issues paper were, in part, premised on the constitutional constraints placed on bodies with a membership that included sitting judicial officers. Any purposes that could be perceived as constituting advice to government, for example, were intentionally avoided. However, given that the Council recommends a membership that would not include sitting judicial officers, this concern falls away.

Stakeholders’ views

3.10 Most stakeholders agreed with the proposed purposes of the guidelines council. WorkSafe Victoria agreed that these purposes are both necessary and appropriate. There were also a number of suggestions for additional purposes, including promoting transparency in sentencing, preserving judicial discretion, promoting consistency in sentencing outcomes and engaging in public and judicial education. These are discussed in turn.

3.11 Victoria Police, the Victims of Crime Commissioner, the Victorian Bar and another stakeholder suggested expanding the purposes of the guidelines council to include the promotion of transparency in sentencing, the last-named suggesting that:

Encouraging transparency would seem to sit comfortably with a staged sentencing approach, particularly when compared with the instinctive synthesis approach currently applied, and would also assist in improving public comprehension of the process.

3.12 The preservation of judicial discretion was highlighted as a priority by a number of stakeholders. One submission in particular recommended that the retention of judicial discretion is so critical that it should be a legislative purpose of the guidelines council:

The inclusion of this purpose would … go some way to reassuring the judiciary that their discretion will be respected and to ensuring that the [guidelines] council is constitutionally valid.

3.13 One stakeholder suggested that the guidelines council should not only aim to promote consistency in approach to sentencing but should also strive for some level of consistency in sentencing outcomes. The basis for this assertion was that consistency in outcomes does not necessarily amount to numerical equivalence, but instead focuses more on the type of punishment imposed.

60. Sentencing Act 1991 (Vic) s 6AE.
61. Sentencing Advisory Council (2017), above n 51, 14 (issues paper [2.18]–[2.19]).
62. Submission 17 (WorkSafe Victoria); Submission 18 (Anonymous); Submission 22 (Victoria Legal Aid); Submission 23 (Liberty Victoria); Submission 24 (Law Institute of Victoria); Submission 26 (Chief Magistrate of the Magistrates’ Court of Victoria); Submission 27 (Victoria Police); Submission 28 (Victorian Bar). The Office of Public Prosecutions also indicated that it was ‘generally content’ with the proposals in the issues paper that it did not specifically address in its submission; however, to the extent that any such proposals were inconsistent with the constitutional advice, the Office of Public Prosecutions preferred that advice: Submission 13 (Office of Public Prosecutions).
63. Submission 17 (WorkSafe Victoria).
64. Submission 12 (Victims of Crime Commissioner); Submission 18 (Anonymous); Submission 27 (Victorian Bar).
65. Submission 18 (Anonymous).
66. Submission 6 (Anonymous); Submission 8 (J. Bartle); Submission 9 (Youthlaw); Submission 10 (Jesuit Social Services); Submission 16 (Anonymous); Submission 18 (Anonymous); Submission 22 (Victoria Legal Aid); Submission 23 (Liberty Victoria); Submission 28 (Victorian Bar).
68. Submission 15 (J. Awad); see also R v Pham (2015) 256 CLR 550.
3.14 In relation to the proposal in the issues paper that one of the purposes of the guidelines council should be to promote public confidence in the criminal justice system, one stakeholder suggested that it might be unrealistic to expect the guidelines council to promote public confidence in the entire criminal justice system.\(^69\) Sentencing is only one aspect of the criminal justice system – it also includes, for example, policing and management of correctional facilities. Because of this, that stakeholder suggested that the guidelines council ‘should seek to foster confidence in relation to its own processes, as well as in the sentencing process as a whole, but [expectations] beyond that may prove unrealistic’.\(^70\)

3.15 The Law Institute of Victoria submitted that the best way to address any public confidence issues is through education. It proposed that the guidelines council should also provide public and judicial education about the legislative purposes of sentencing.\(^71\) Victoria Police similarly suggested that the guidelines council should promote greater community awareness and understanding of sentencing practices.\(^72\) Neither submission discussed the potential overlap between those purposes and the functions of the Council.\(^73\)

3.16 Both the Victims of Crime Commissioner and another stakeholder\(^74\) cautioned against following the approach taken in the United Kingdom of attempting to reduce the prison population,\(^75\) or the approach in New Zealand of facilitating the provision of reliable information to government to ‘enable penal resources to be effectively managed’.\(^76\) Resourcing matters are, according to both submissions, more properly a matter for government.

The Council’s view

3.17 The Council agrees that it would be appropriate for the guidelines council in Victoria to have as one of its purposes the promotion of transparency in the sentencing process. There are not only additional levels of consultation and community engagement in the development of sentencing guidelines that are not present in the development of a guideline judgment, but one of the key aims of sentencing guidelines is to illuminate the decision-making process of sentencing courts. This purpose would also be consistent with section 1(d)(v) of the Sentencing Act 1991 (Vic), which provides that one of the purposes of that Act is ‘to prevent crime and promote respect for the law by … promoting public understanding of sentencing practices and procedures’.

3.18 The Council further agrees that the preservation of judicial discretion is of such importance in the introduction of sentencing guidelines that it should feature in the legislated purposes of the guidelines council. The Council is cautious to guard against any perception that sentencing guidelines would improperly fetter courts’ discretion to impose individualised and just sentences. Indeed, the experience in England and Wales is that sentencing guidelines have in fact increased the individualisation of sentences.\(^77\)

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69. Submission 18 (Anonymous).
70. Submission 18 (Anonymous).
71. Submission 24 (Law Institute of Victoria).
72. Submission 27 (Victoria Police).
73. Sentencing Act 1991 (Vic) s 108C(1) (the Sentencing Advisory Council’s functions include providing statistical information on sentencing, and on other sentencing matters, to members of the judiciary and other interested persons).
74. Submission 12 (Victims of Crime Commissioner); Submission 18 (Anonymous).
76. Sentencing Council Act 2007 (NZ) s 8 (repealed).
3.19 Given the importance of courts retaining the discretion to impose just and individualised sentences, the Council does not consider that the guidelines council should have ‘consistency of sentencing outcomes’ as a legislated purpose. While it is true that encouraging consistency in approach may increase consistency in sentencing outcomes, this is not an appropriate aim of the process. As the Supreme Court submitted, ‘[n]ot even the most detailed, and well considered guidelines can encompass the scope of human experience’.78

3.20 The Council agrees that promoting confidence in the entire criminal justice system is an overbroad objective for the guidelines council. Instead, the Council recommends that the guidelines council aim to promote public confidence in sentencing specifically, and not in the criminal justice system generally. While encouraging public confidence in sentencing may in turn improve public confidence in the criminal justice system, it would be unreasonable to task the guidelines council with achieving such a broad objective.

3.21 The Council also agrees that gathering and providing information about correctional resources is a matter for government and would not be an appropriate purpose for the guidelines council.

Recommendation 1: Purposes of the sentencing guidelines council

The purposes of the sentencing guidelines council should be:

• to promote consistency and transparency of approach in sentencing while preserving judicial discretion; and

• to promote public confidence in sentencing.

Functions

3.22 The guidelines councils in England and Wales, Scotland and New Zealand each have (or had) as their primary function the development of sentencing guidelines.79

3.23 In addition to this primary function, these guidelines councils also have additional or secondary functions.80 For example, the Sentencing Council for England and Wales must also publish resource assessments in respect of each draft and definitive guideline,81 monitor the operation and effect of sentencing guidelines,82 and promote awareness of matters related to sentencing more generally.83 The Scottish Sentencing Council must publish information about sentences imposed by courts,84 and may also publish information about sentencing matters, provide advice or guidance of a general nature about sentencing matters and conduct research into sentencing matters.85 The New Zealand Sentencing Council would also have been required to provide a statement of the guidelines' likely effect on the prison population, and to ‘collate information on sentencing practice and adherence to and departures from sentencing guidelines and provide this information to the judiciary’.86

78. Submission 11 (Supreme Court of Victoria).
79. Coroners and Justice Act 2009 (UK) s 120; Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 3; Sentencing Council Act 2007 (NZ) s 9(1)(a) (repealed).
80. See Sentencing Advisory Council (2017), above n 51, 23 (issues paper [3.41]–[3.44]).
81. Coroners and Justice Act 2009 (UK) s 127.
82. Coroners and Justice Act 2009 (UK) s 128.
83. Coroners and Justice Act 2009 (UK) s 129.
84. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 10(3).
85. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 11.
86. Sentencing Council Act 2007 (NZ) s 9(1) (repealed).
3. Purposes and functions of the sentencing guidelines council

3.24 In the issues paper, the Council proposed that the functions of the guidelines council in Victoria should only be those directly related to the development of sentencing guidelines, including:

• developing and issuing sentencing guidelines for use by the judiciary when sentencing;
• consulting with the general community, the courts, government departments and other interested persons or bodies when developing and issuing sentencing guidelines; and
• performing related functions, such as publishing and publicising sentencing guidelines.87

3.25 One of the reasons that the Council proposed restricting the functions of the guidelines council in Victoria was to ensure that the guidelines council could include sitting judicial members in a way that was constitutionally permissible.88 This was not, however, the only reason. It is also important that the guidelines council be, and be seen to be, independent of the executive and the legislature. Further, as a number of stakeholders noted in their submissions, the function of providing advice to government on matters relating to sentencing is already carried out by the Sentencing Advisory Council.89

3.26 That said, the Council makes no comment about the potential overlap between the functions of the Sentencing Advisory Council and the guidelines council. In accordance with the Attorney-General’s request for advice, that issue will be addressed in a separate advice to government.

Stakeholders’ views

3.27 Almost all stakeholders who commented on the functions proposed in the issues paper – including the Victims of Crime Commissioner, the Chief Magistrate, Victoria Police, the Victorian Bar and the Law Institute of Victoria – expressly or impliedly supported the proposed functions.90 Only one stakeholder opposed the proposed functions, on the basis that they did not accord with the spirit of the separation of powers.91

3.28 Two submissions also suggested that either the guidelines council itself or the Sentencing Advisory Council should be responsible for monitoring the operation, effect and application of sentencing guidelines.92

The Council’s view

3.29 Building on the proposal in the issues paper, the Council believes that the guidelines council should also be given the function of revising the guidelines it creates. This could be necessary if, for example, the legislature amends the legislation on which a sentencing guideline is based. The sexual offences guideline prepared by the Sentencing Council for England and Wales, for example, was amended in December 2017 to provide interim guidance about sentencing modern slavery offences pending the production of a full guideline in the wake of the Modern Slavery Act 2015 (UK).93

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87. Sentencing Advisory Council (2017), above n 51, 24 (issues paper [3.47]).
88. Ibid (issues paper [3.45]–[3.46]); Hanks and Hill (2017), above n 31, 8 (constitutional advice [22]); Momcilovic v The Queen (2011) 245 CLR 1, 95; Wakin v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1, 18–19.
89. Submission 8 (J. Bartle); Submission 18 (Anonymous).
90. Submission 3 (T. McKay); Submission 4 (Anonymous); Submission 6 (Anonymous); Submission 12 (Victims of Crime Commissioner); Submission 13 (Office of Public Prosecutions) (approval is implied; see above n 62); Submission 18 (Anonymous); Submission 24 (Law Institute of Victoria); Submission 26 (Chief Magistrate of the Magistrates’ Court of Victoria); Submission 27 (Victoria Police); Submission 28 (Victorian Bar).
91. Submission 8 (J. Bartle).
92. Submission 12 (Victims of Crime Commissioner); Submission 18 (Anonymous).
93. Sentencing Council for England and Wales, Sexual Offences: Definitive Guideline (2013) 99 (the guideline provides that “[s]entencers seeking to rely on this guideline when sentencing offenders under the [Modern Slavery Act] may … need to adjust the starting point and ranges bearing in mind the increased statutory maximum”).
3.30 Similarly, the guidelines council might consider it necessary to revise a sentencing guideline in light of new research or policy developments. For example, researchers in England and Wales recently suggested that courts might benefit from more clarity about how, and in what circumstances, intoxication should (or should not) act as an aggravating factor in sentencing.\textsuperscript{94} If after consideration the Sentencing Council for England and Wales agreed with the proposition, it could revise the relevant guideline.\textsuperscript{95}

3.31 The Council further agrees that the guidelines council should be required to monitor the effect of sentencing guidelines. Given that there will be no sitting judicial members on the guidelines council, there is no longer a constitutional impediment to the guidelines council itself carrying out that task.

3.32 This monitoring function is supported by the recommendation that the guidelines council publish sentencing impact assessments alongside all draft and final guidelines.\textsuperscript{96} Post-implementation monitoring of sentencing guidelines against the sentencing impact assessment will assist the guidelines council in identifying whether there may be gaps in the operation of the guidelines or if the guidelines are having any unintended effects.

### Recommendation 2: Functions of the sentencing guidelines council

The functions of the sentencing guidelines council should be to:
- develop, issue, monitor and revise sentencing guidelines;
- consult with the general community, the courts, government departments and other interested persons or bodies when developing or revising sentencing guidelines; and
- perform related functions, such as publishing and publicising sentencing guidelines.


\textsuperscript{96} See [5.29]–[5.31] (Recommendation 6).
4. Composition of and appointment to the sentencing guidelines council

Overview

4.1 This chapter discusses the recommended composition (membership) of the sentencing guidelines council in Victoria, and the process by which the members and Chair should be appointed.

Composition

4.2 The appropriate composition of the guidelines council was one of the key questions on which the Council sought stakeholder feedback. It is a key element that will likely influence the perceived credibility of the guidelines council. Each of the guidelines councils in the guidelines council jurisdictions examined includes a combination of judicial and non-judicial members.

4.3 The Sentencing Council for England and Wales has a judicial majority (eight of the 14 members are judicial officers), while in Scotland there is equal representation of judicial and non-judicial members (six of the 12 members are judicial officers). The New Zealand Sentencing Council would similarly have had equal representation of judicial and non-judicial members (five of the 10 members were to be judicial officers).

4.4 In England and Wales, the non-judicial members have experience in one or more of a range of areas related to the criminal justice system: 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.

4.5 In Scotland, the non-judicial members must include a prosecutor, a practicing advocate (a barrister), a practicing solicitor, a police constable, a person with knowledge of the issues faced by victims of crime and one other person not otherwise qualified for appointment as a judicial or legal member. In New Zealand, the expertise of the five legal and community members was not defined in legislation.

4.6 In the issues paper, the Council proposed that the guidelines council in Victoria should have 13 members, including seven sitting judicial members with designated representation from each of the court jurisdictions, and six non-judicial members who would have expertise, knowledge or skills relevant to sentencing and criminal justice. It was also proposed that one of the two Supreme Court members would be appointed to act as Chair.

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98. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) sch 1 cls 1(2)–(3).
99. Sentencing Council Act 2007 (NZ) s 10(1) (repealed) (note that one of the members would have been the chairperson of the Parole Board, a position generally held by a judicial officer).
101. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) sch 1 cls 1(4)–(5).
103. In the proposal in the issues paper, the Council did not specify what skills, knowledge or expertise the appropriate members might have: Sentencing Advisory Council (2017), above n 51, 20 (issues paper [3.28]).
104. Ibid.
4.7 The reasons for the inclusion of sitting judicial members, and a judicial majority, on the guidelines council were that:

- judicial officers are the acknowledged subject matter experts in sentencing practice and the interpretation and application of sentencing law;
- judicial officers, especially in the higher courts, are already tasked with ‘establishing standards of sentencing or by indicating an appropriate sentence range or a category of seriousness of an offence’;\(^\text{105}\)
- judicial officers will ultimately be responsible for the application of sentencing guidelines when sentencing offenders; and
- a judicial majority would bolster the perception that the guidelines council is independent of government.\(^\text{106}\)

4.8 The Council was also of the view that a judicial majority would help the guidelines council to gain and maintain the confidence of the broader judiciary.\(^\text{107}\)

4.9 The Council also considered that the benefits of a majority membership of sitting judicial members outweighed the concern raised during preliminary consultation that a judicial majority could silence the voice of non-judicial members. That view was commented on by Professor Julian Roberts, who has been a non-judicial member of the Sentencing Council for England and Wales since 2010, who told a public consultation forum that there is no ‘divide’ on the Sentencing Council between the judicial and non-judicial members, and that all decisions are made collegially and by consensus. Professor Roberts further observed that the judicial members do not speak with one voice, but instead each brings their own unique knowledge and expertise to the work of the guidelines council, just as each of the non-judicial members do.\(^\text{108}\)

**Supreme Court’s view**

4.10 In its submission to the Council, the Supreme Court advised that the ‘firm position of the Court is that it would not be appropriate’ for sitting Supreme Court judges to be members of the guidelines council.\(^\text{109}\) The Supreme Court stated that:

> Being a member of a Sentencing Guidelines Council is considered to be outside the appropriate functions of a member of the Court. It does not sit comfortably with the role of the judiciary and the judges of the Court have made it clear that they would not be prepared to sit on such a body while continuing to serve on the bench.

> This position is consistent with the long held view of the Supreme Court of Victoria that it is not appropriate for serving judges to sit on Royal Commissions or Boards of Inquiry. However, it is not only based on that position.

> Whatever shape the proposal ultimately takes, the functions of the Council will not be akin to a charge book committee providing a resource for judges about the application of existing law. The guidelines are to be given a form of legislative effect.

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105. *Nguyen v The Queen* [2016] VSCA 198 (11 August 2016) [103].

106. Sentencing Advisory Council (2017), above n 51, 18, 19 (issues paper [3.15], [3.24]).


108. Community Discussion Panel (22 November 2017). The same was also said of the Sentencing Council’s predecessor, the Sentencing Advisory Panel, which did not experience ‘dissent in the final output of the Panel’s deliberations … [T]he Chairman of the Panel would make an attempt to reach an outcome that was acceptable to all’: Samuel Mason, ‘Sentencing Guidelines for Canada: A Re-Evaluation’ (2017) 22(3) Canadian Criminal Law Review 275, 285.

109. Submission 11 (Supreme Court of Victoria).
Guidelines of the nature given as examples from England and Wales make judgments about how the law should be applied at a category level by setting out sentencing ranges. Judges of the Court are not comfortable with performing that function extra-judicially whilst performing the judicial sentencing function.

The Court is conscious of the fact that much of the issues paper is premised upon serving members of the Court forming part of the Council. While the composition of the Council is a matter for Government and the Parliament, the position of the Court should be respected. In these circumstances, even if it is constitutionally permissible to do so, the Council’s composition should not require a serving member of the court to participate, nor require the Chief Justice to nominate such a person.

To the extent that SAC’s proposal is informed by a concern to include judicial sentencing expertise on the Council, the Court indicates that there is no objection, in principle, to retired judges, especially those recently retired, serving as members of such a body.

4.11 As discussed further below, this submission makes it untenable for the Council to recommend a composition similar to that proposed in the issues paper.

Other stakeholders’ views

4.12 Most stakeholders commenting on the issue supported the composition proposed in the issues paper, including that there be both judicial membership and a judicial majority.

4.13 Four further stakeholders indicated general support but also stated that consideration should be given to a non-judicial majority. One of those stakeholders suggested that a judicial majority could risk creating a perception that the guidelines council is merely a mechanism for the judiciary to ‘maintain their control over the sentencing process’. This view was echoed by the Victims of Crime Commissioner, who said that a judicial majority would simply result in ‘judicial officers providing sentencing guidance to other judicial officers’.

4.14 These submissions opposing a judicial majority on the guidelines council accord with the opinion of a number of sentencing experts. Professor Andrew Ashworth, for example, has argued that a judicial majority is ‘defensible only as a means of reassuring an apprehensive judiciary and magistracy’. Similarly, Warren Young and Andrea King have argued that a judicial majority ‘reinforces the perception that the approach to sentencing is solely or primarily for judges to determine’ and contributes to the impression that the guidelines council is a ‘creature of the judiciary’. In contrast, having an equal membership or a majority of non-judicial members gives ‘at least the appearance that the [guidelines council] has a significant “community voice”’.

4.15 The Victims of Crime Commissioner commented that the composition proposed in the issues paper was ‘legal heavy’, at the expense of community membership, and that in addition to representation for victims of crime, the membership should also include an ordinary member of the community.
Stakeholders also suggested a number of specific office-holders and individuals with particular experience and skills that could or should be included in the guidelines council’s membership, including:

- the Director of Public Prosecutions (or his or her nominated representative);\(^{119}\)
- a representative of Victoria Legal Aid;\(^{120}\)
- a representative from community legal centres;\(^{121}\)
- a representative of Victoria Police;\(^{122}\)
- a representative of Corrections Victoria;\(^{123}\)
- a representative of victims of crime;\(^{124}\)
- a human rights expert (who might be, for example, a representative of the Victorian Equal Opportunities and Human Rights Commission);\(^{125}\)
- a representative of the Law Institute of Victoria;\(^{126}\)
- a representative of the Koori Court;\(^{127}\)
- a representative of the media;\(^{128}\)
- a person to represent the experience of women in the criminal justice system;\(^{129}\)
- a representative of the Aboriginal and Torres Strait Islander community (who might be, for example, a representative from the Victorian Aboriginal Legal Service);\(^{130}\)
- a psychologist, social worker or other person with experience in supporting victims of crime and/or understanding the pathology of offenders;\(^{131}\)
- a representative from the legislature;\(^{132}\)
- representation for both victims and offenders who have a lived experience of the criminal justice system;\(^{133}\) and
- representation by agencies or legal representatives with experience working with vulnerable groups, especially children and young people, people with an acquired brain injury or cognitive impairment, people with substance abuse issues, and people with mental health issues.\(^{134}\)

The Victims of Crime Commissioner further suggested that the Chair of the guidelines council ‘should be a senior judicial officer and retired judicial officers should be eligible to hold the position.’\(^ {135}\)

\(^{119}\) Submission 13 (Office of Public Prosecutions) (it is ‘essential that the person responsible for prosecuting the State’s most serious crimes has a permanent voice on the council’); Submission 12 (Victims of Crime Commissioner); Submission 25 (C. Kelly).

\(^{120}\) Submission 12 (Victims of Crime Commissioner); Submission 22 (Victoria Legal Aid); Submission 24 (Law Institute of Victoria).

\(^{121}\) Submission 24 (Law Institute of Victoria).

\(^{122}\) Submission 12 (Victims of Crime Commissioner).

\(^{123}\) Submission 12 (Victims of Crime Commissioner).

\(^{124}\) Submission 12 (Victims of Crime Commissioner); Submission 25 (C. Kelly); Submission 27 (Victoria Police); Submission 28 (Victorian Bar).

\(^{125}\) Submission 3 (T. McKay); Submission 5 (Victorian Aboriginal Legal Service).

\(^{126}\) Submission 3 (T. McKay).

\(^{127}\) Submission 5 (Victorian Aboriginal Legal Service); Submission 9 (Youthlaw); Submission 10 (Jesuit Social Services); Submission 22 (Victoria Legal Aid).

\(^{128}\) Submission 28 (Victorian Bar).

\(^{129}\) Submission 28 (Victorian Bar).

\(^{130}\) Submission 5 (Victorian Aboriginal Legal Service); Submission 9 (Youthlaw); Submission 22 (Victoria Legal Aid); Submission 28 (Victorian Bar).

\(^{131}\) Submission 6 (Anonymous); Submission 7 (Anonymous); Submission 12 (Victims of Crime Commissioner).

\(^{132}\) Submission 7 (Anonymous).

\(^{133}\) Submission 9 (Youthlaw).

\(^{134}\) Submission 9 (Youthlaw); Submission 10 (Jesuit Social Services); Submission 22 (Victoria Legal Aid); Submission 24 (Law Institute of Victoria); Submission 27 (Victoria Police); Submission 28 (Victorian Bar).

\(^{135}\) Submission 12 (Victims of Crime Commissioner).
4. Composition of and appointment to the sentencing guidelines council

4.18 The Victorian Aboriginal Legal Service submitted that, because Aboriginal and Torres Strait Islander people are overrepresented in the criminal justice system, sentencing guidelines created by the proposed guidelines council will affect Aboriginal and Torres Strait Islander families and communities more than any other group in Victoria.\(^{136}\) The Victorian Aboriginal Legal Service further submitted that mandatory Aboriginal representation be included by way of an Aboriginal Co-Chair and mandatory positions on the guidelines council for Aboriginal people.\(^{137}\) This point was also made by Jesuit Social Services and Victoria Legal Aid.\(^{138}\)

The Council’s view

4.19 In both the issues paper and its request for constitutional advice, the Council described judicial membership as an essential feature of the guidelines council in Victoria. For the reasons given at [4.7]–[4.8], the Council remains of the view that a guidelines council with sitting judicial members would be the most effective model for developing sentencing guidelines in Victoria and achieving the government’s intended policy objectives.\(^{139}\)

4.20 The Council, however, considers that this model is no longer viable. A sitting judicial officer cannot be required by law to perform an extra-judicial function without his or her consent.\(^{140}\) In light of the Supreme Court’s submission that it would be inappropriate for sitting members of the court to participate in the guidelines council, the Council cannot recommend a composition that is premised on the participation of judges from the Supreme Court, or indeed judicial officers from any other Victorian court, given the Supreme Court’s authority.

4.21 It would also be unworkable for the Council to recommend that the guidelines council include sitting judicial officers generally (without specifying their jurisdiction) on the basis that judicial officers from courts other than the Supreme Court may still wish to be involved.\(^{141}\)

4.22 The Sentencing Advisory Council cannot therefore recommend a model that includes sitting judicial officers on the basis that it would be incapable of implementation.

4.23 In the circumstances, the Council considers that the most effective composition for the guidelines council in Victoria is one that includes recently retired judicial officers,\(^{142}\) substantial community representation and individuals with expertise and experience in the operation of the criminal justice system. To ensure a balance between practicable workability and a diversity of views, the Council recommends that the guidelines council be constituted by 14 members.

4.24 There are a number of advantages to an amended composition that does not include sitting judicial officers. It respects the position of the Supreme Court as to the appropriateness of serving judicial officers forming part of the guidelines council. It also overcomes many of the constitutional concerns around the role that sitting judicial officers can perform, as discussed in the issues paper and in the constitutional advice.

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136. Submission 5 (Victorian Aboriginal Legal Service).
137. Submission 5 (Victorian Aboriginal Legal Service).
138. Submission 10 (Jesuit Social Services); Submission 22 (Victoria Legal Aid).
139. On this point, the Council agrees with the submission of the Victorian Bar that, in garnering community confidence in sentence, ‘it is of at least equally vital importance that the judiciary and users of the criminal justice system have confidence in the guidelines of the SGC and its independence’: Submission 28 (Victorian Bar).
141. See for example, Submission 26 (Chief Magistrate of the Magistrates’ Court of Victoria) supporting the composition proposed in the issues paper, and suggesting that the Chief Magistrate should be a required member of the guidelines council.
142. The Supreme Court has indicated it has no objection in principle to the participation of retired judges, especially those recently retired: Submission 11 (Supreme Court of Victoria).
For example, there is no longer a risk of constitutional incompatibility in requiring the guidelines council to prepare a sentencing impact assessment alongside each draft guideline.\textsuperscript{143}

4.25 Further, the amended composition provides an opportunity for broader community representation, and so may have the effect of affirming the guidelines council’s capacity to effect change to sentencing practices that reflect community expectations and standards, helping to fulfil a key purpose of promoting community confidence in sentencing.

\textbf{Retired judicial officers}

4.26 The Council is of the view that, in the absence of sitting judicial officers, substantial and comprehensive judicial input into the work of the guidelines council could still be achieved through other measures.

4.27 One such measure is for the guidelines council to include up to four retired judicial officers, preferably each with recent experience in one or more of the four different Victorian jurisdictions (Supreme Court, County Court, Magistrates’ Court and Children’s Court). At least one of the retired judicial officers should be a recently retired Supreme Court judge.

4.28 In considering recommendations for the appointment of retired judicial officers, the Council suggests that the Attorney-General may wish to give preference to a judicial officer who has also had experience sitting on a Koori Court, including the County Koori Court, the Koori Court Division of the Magistrates’ Court or the Children’s Koori Court.

4.29 The Council acknowledges that there may be challenges to obtaining the participation of willing and available retired judicial officers, but a judicial presence on the guidelines council is important to provide sentencing expertise, to ensure identification of potential unintended consequences and to act as a bridge to the judiciary for the purposes of ongoing consultation.

\textbf{Non-specialist community members}

4.30 In addition to retired judicial officers and specialist community members with experience in the criminal justice system, the Council’s recommended composition affords the opportunity to include non-specialist community members, as suggested by a number of stakeholders.\textsuperscript{144}

4.31 These community members would have a similar skill set, and be appointed in a similar way, to the community members appointed to the Adult Parole Board.\textsuperscript{145} On the Adult Parole Board, community members come from a diverse range of experiences and backgrounds, including mental health service provision, public administration, journalism, and as members of other decision-making boards and tribunals in hospitals, education and child protection.\textsuperscript{146}

\textbf{Specialist community members}

4.32 In addition to non-specialist community members, there are also a number of people who would represent community interests and be capable of bringing with them a wealth of experience in the operation of the criminal justice system. Some of these, in the Council’s view, are essential and should be required members. Others, while not required, are still highly desirable.

4.33 First, the Council considers it essential that there be a member on the guidelines council with expertise representing the interests of victims of crime.

\textsuperscript{143} This could have had the appearance of judicial officers giving advice to government: see discussion at [2.38]; see also, Sentencing Advisory Council (2017), above n 51, 24, 30 (issues paper [3.45]–[3.46], [4.31]).

\textsuperscript{144} Submission 12 (Victims of Crime Commissioner); Submission 15 (J. Awad).

\textsuperscript{145} 
Corrections Act 1986 (Vic) s 61(2)(d) (“[t]he Board consists of … one or more persons appointed by the Governor in Council”).

\textsuperscript{146} Adult Parole Board of Victoria, Annual Report 2016–17 (2017) 14.
4. Composition of and appointment to the sentencing guidelines council

4.34 Second, the Council agrees with the Victorian Aboriginal Legal Service that it is essential that the guidelines council include a member with expertise in criminal justice issues affecting Indigenous persons.\(^{147}\) Aboriginal and Torres Strait Islander people are currently the most incarcerated people in the world.\(^{148}\)

4.35 It is not possible, however, to compose the guidelines council with a membership that fully represents all possible stakeholders and interests. One submission proposed limiting the number of members on the guidelines council to seven, viewing 14 members as 'unwieldy and unworkable'.\(^{149}\) The Council agrees that too many members might create operational and decisional obstacles for the guidelines council, but considers a maximum of 14 members to be a manageable number, one that strikes a balance between practical workability and the desire for diverse representation.

4.36 To allow the guidelines council the capacity to include a diverse range of views and experience in its membership, the Council further recommends that there be up to three additional community members who have knowledge and experience relevant to the work of the guidelines council. This would include persons with expertise in any one or more of the following:

- criminal justice issues affecting children and young people, female offenders, offenders from culturally and linguistically diverse (CALD) communities, and/or offenders with issues relating to disability, substance abuse or ‘impaired mental functioning’;\(^{150}\)
- offender rehabilitation, management and supervision;
- academic study in the area of criminal law, criminology and/or sentencing;
- statistical analysis; or
- the operation of the criminal justice system.

4.37 That final category, expertise in ‘the operation of the criminal justice system’, is intended to future-proof the guidelines council and allow for the appointment of members who are specialists in emerging or unanticipated fields of expertise related to the criminal justice system.

**People with expertise in the criminal justice system**

4.38 It is important that those involved in the day-to-day operations of the criminal justice system are also involved in the guidelines council. The Council has therefore recommended that three required members of the guidelines council include a person with expertise as a prosecution lawyer, a person with expertise as a defence lawyer, and a person with expertise in policing.

4.39 Structuring the required expertise in this way would not preclude office-holders, such as the Director of Public Prosecutions, from membership on the guidelines council. It does, though, serve to emphasise that members would not be representing their respective organisations, but instead would be acting in their personal capacity, bringing their own expertise, knowledge and skills to the work of the guidelines council.

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\(^{148}\) Thalia Anthony and Eileen Baldry, ‘FactCheck Q&A: Are Indigenous Australians the Most Incarcerated People on Earth?’ (theconversation.com, 6 June 2017) The Conversation <https://theconversation.com/factcheck-qanda-are-indigenous-australians-the-most-incarcerated-people-on-earth-78528> at 26 February 2018. See also Sentencing Advisory Council (2016), above n 147, 13, finding that between 2006 and 2016, Indigenous prisoners experienced much higher percentage growth (up 147%) than non-Indigenous prisoners (up 62%).

\(^{149}\) Submission 3 (T. McKay).

\(^{150}\) The term ‘impaired mental functioning’ is defined in section 10A of the Sentencing Act 1991 (Vic) to include a mental illness within the meaning of the Mental Health Act 1986 (Vic), an intellectual disability within the meaning of the Disability Act 2006 (Vic), an acquired brain injury, an autism spectrum disorder and a neurological impairment, including but not limited to dementia.
Recommendation 3: Composition of the sentencing guidelines council

The sentencing guidelines council should have a minimum of 11 and a maximum of 14 members, comprising the following:

- **up to four retired judicial officers:**
  - preferably each with recent experience as a judicial officer of one or more of the different court jurisdictions in Victoria (Supreme Court, County Court, Magistrates’ Court, Children’s Court); and
  - preferably at least one recently retired judge of the Supreme Court;
- **up to seven community members, including:**
  - two non-specialist community members;
  - a person with expertise representing the interests of victims of crime;
  - a person with expertise in criminal justice issues affecting Aboriginal and Torres Strait Islander persons; and
  - three persons with expertise in one or more of the following:
    - criminal justice issues affecting:
      - children and young people;
      - female offenders;
      - offenders from culturally and linguistically diverse (CALD) communities; and/or
      - offenders with issues relating to disability, substance abuse and/or impaired mental functioning;
    - offender rehabilitation, management and supervision;
    - academic study in the area of criminal law, criminology and/or sentencing;
    - statistical analysis; and/or
    - the operation of the criminal justice system;
  - a person with experience in policing;
  - a person with expertise as a prosecution lawyer; and
  - a person with expertise as a defence lawyer.

Appointment of members and Chair

4.40  In England and Wales, judicial members of the Sentencing Council 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 to legal and community members, who are appointed by the Lord Chancellor with agreement of the Lord Chief Justice.151 In Scotland, judicial and legal members are appointed by the Lord Justice General (the equivalent of Victoria’s Chief Justice) after consultation with the Scottish Ministers (members of the executive), and community members are appointed by the Scottish Ministers after consultation with the Lord Justice General.152

4.41  In addition, organisations such as guidelines councils often have a chairperson. The Chair of the Sentencing Advisory Council, for example, convenes meetings of the Board of Directors as necessary for the efficient conduct of its affairs, and presides over any meeting where he or she is present.153 Legislation in other guidelines council jurisdictions also specifies that a certain member is the chairperson of those guidelines councils; in each of those jurisdictions, the chairperson is (or would have been) a senior judicial member.

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152.  Criminal Justice and Licensing (Scotland) Act 2010 (Scot) sch 1 cl 2.
4. Composition of and appointment to the sentencing guidelines council

4.42 The Chair of the Sentencing Council for England and Wales is a judicial member appointed by the Lord Chief Justice with agreement from the Lord Chancellor.\(^{154}\) The Chair of the Scottish Sentencing Council is the Lord Justice Clerk (a senior judicial officer in the equivalent of Victoria’s Supreme Court) by right of office.\(^{155}\) In New Zealand, the Chief Justice would have been required to appoint one of the judicial members as Chair of the Sentencing Council.\(^{156}\)

4.43 As a matter of law, the members and Chair of the guidelines council in Victoria would be appointed by the Governor in Council.\(^{157}\) It would be desirable, however, for the legislation to specify the basis on which such appointments were made.

4.44 In the issues paper, the Council proposed that nominations of judicial members would be made by respective heads of jurisdiction, nominations of non-judicial members would be made by the Attorney-General, and the Chief Justice of the Supreme Court would nominate a member from the Supreme Court as Chair. These proposals are no longer relevant in the absence of judicial members, and in light of the Supreme Court’s further position that even with judicial members, the Chief Justice should not be required to nominate judicial officers.\(^{158}\)

Stakeholders’ views

4.45 Both Liberty Victoria and the Law Institute of Victoria raised concerns that the nomination of members by the Attorney-General without involvement by the wider community could result in a politicised appointment process.\(^{159}\) Liberty Victoria recommended that safeguards be put in place, though it did not specify what those might be, and the Law Institute of Victoria recommended that the legal and community members be endorsed and recommended by appropriate professional bodies and then appointed by the legislature.

4.46 The Victorian Bar proposed that all recommendations for non-judicial appointments should follow an advertisement and selection process.\(^{160}\) Similarly, another stakeholder agreed that a merits-based application process could improve the diversity of non-judicial members, and further suggested that it might be appropriate for those members to be shortlisted by the Sentencing Advisory Council before being nominated or appointed by the Attorney-General.\(^{161}\)

4.47 The Victims of Crime Commissioner further suggested that the Chair of the guidelines council ‘should be a senior judicial officer’ and that ‘retired judicial officers should be eligible to hold the position’.\(^{162}\) Further, both the Victorian Aboriginal Legal Service and Jesuit Social Services submitted that an Indigenous member should serve as Co-Chair.\(^{163}\)

The Council’s view

4.48 The Council notes the concern that the membership of the guidelines council should not become a politicised issue, but does not consider it necessary to introduce an additional process such as endorsement by relevant professional bodies. The Attorney-General is already empowered to make recommendations for appointments to bodies such as the Adult Parole Board;

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\(^{154}\) Coroners and Justice Act 2009 (UK) sch 15 cl 2.
\(^{155}\) Criminal Justice and Licensing (Scotland) Act 2010 (Scot) sch 1 cl 1(2).
\(^{156}\) Sentencing Council Act 2007 (NZ) s 10(2) (repealed).
\(^{157}\) Constitution Act 1975 (Vic) s 88.
\(^{158}\) Submission 11 (Supreme Court of Victoria).
\(^{159}\) Submission 23 (Liberty Victoria); Submission 24 (Law Institute of Victoria).
\(^{160}\) Submission 28 (Victorian Bar).
\(^{161}\) Submission 15 (J. Awad).
\(^{162}\) Submission 12 (Victims of Crime Commissioner).
\(^{163}\) Submission 5 (Victorian Aboriginal Legal Service); Submission 10 (Jesuit Social Services).
this would not be a novel power. It would also undermine the independence of the guidelines council to permit the legislature exclusive control over appointment of its members. The Council therefore recommends that all members, including retired judicial officers, be appointed by the Governor in Council on the recommendation of the Attorney-General.

4.49 The Council does agree, however, with the suggestion by stakeholders that the non-specialist community members should be appointed following a merits-based application process. A similar process is used by the Adult Parole Board for community members.\(^{164}\) Non-specialist community members should be invited to apply by public advertisement, which would describe the role and responsibilities of the position. Successful applicants would then, like other members, be appointed by the Governor in Council on the recommendation of the Attorney-General.

**Appointment of Chair**

4.50 The Chairs of guidelines councils in Scotland and England and Wales are senior judicial members. However, both of these bodies have sitting judicial members. There is no consistent rule or convention as to who should be Chair of a body that has only retired judicial members, none of whom is actively sitting. On the Adult Parole Board, which has both sitting and retired judicial members, a sitting or retired judicial officer from the Supreme or County Court is required to be appointed as Chair.\(^{165}\) In contrast, one past Chair of the Victorian Law Reform Commission was not a sitting or retired judicial officer.\(^{166}\)

4.51 The Council therefore considers that any member of the guidelines council should be eligible to be appointed as Chair. That person should be similarly appointed by the Governor in Council on the recommendation of the Attorney-General.

4.52 As discussed above, both the Victorian Aboriginal Legal Service and Jesuit Social Services suggested that an Indigenous member should serve as Co-Chair, along with mandatory positions on the guidelines council for Aboriginal and Torres Strait Islander peoples.\(^{167}\) While acknowledging the important motivations of that proposal, it is not possible to create a guidelines council with a membership that fully represents all possible stakeholders and interests. Further, the Council considers that the role of the Chair should be to represent the interests of all possible stakeholders involved in the work of the guidelines council, not any particular group.

**Recommendation 4: Appointment of members and Chair**

**Appointment of members**

All members should be appointed by the Governor in Council on the recommendation of the Attorney-General.

The two non-specialist community members should be appointed by the Governor in Council on the recommendation of the Attorney-General, following an application process.

**Appointment of Chair**

A member of the sentencing guidelines council should be appointed Chair by the Governor in Council on the recommendation of the Attorney-General.

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164. Correspondence with Adult Parole Board representative, 23 January 2018.
165. Corrections Act 1986 (Vic) ss 61A(1), 61(2)(a)–(b), 61(2)(d).
167. Submission 5 (Victorian Aboriginal Legal Service); Submission 10 (Jesuit Social Services).
5. Development of sentencing guidelines

Overview

5.1 This chapter discusses and makes recommendations on the process for the development of sentencing guidelines by the guidelines council. Specifically, it makes recommendations in relation to:

• the process for initiating the development of a sentencing guideline;
• the required consultation that the guidelines council should conduct;
• how sentencing guidelines should be finalised and when they should commence; and
• any notice requirements for the issuing of sentencing guidelines.

5.2 The recommendations for a number of these elements have been guided by the constitutional advice received by the Council. In particular, the recommendation that a sentencing guideline be finalised by the guidelines council itself, and not by the Court of Appeal, was guided in large part by the constitutional advice.

Initiation

5.3 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. The Court of Appeal of England and Wales (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. In both circumstances, the Sentencing Council is not required to comply with the request.

5.4 Similarly, in New Zealand, the legislative framework permitted 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, so long as reasons were provided for any such request. The Sentencing Council would then have been required to consider the request and the reasons for it, but was not required by the legislation to comply with it.

5.5 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, and if it decides not to comply, it must provide the Scottish Ministers with reasons.

169. Coroners and Justice Act 2009 (UK) s 124(5).
170. Coroners and Justice Act 2009 (UK) ss 124(2)–(4).
172. Sentencing Council Act 2007 (NZ) s 24(2) (repealed).
173. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 7(1).
174. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) ss 7(2)–(3).
5.6 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 Sentencing Council must then, in complying with that request, have regard to the court’s reasons for making that request.

Stakeholders’ views

5.7 In the issues paper, the Council proposed that the guidelines council in Victoria should be able to make its own decision whether to initiate the development of a sentencing guideline, and that the Attorney-General should be able to make a non-binding formal request for the development of a sentencing guideline.

5.8 Almost all stakeholders were in favour of the proposed initiation process, including the importance of not requiring the guidelines council to comply with any request from the Attorney-General. Some stakeholders did, however, suggest that the guidelines council should be required to provide the Attorney-General with reasons for refusing to develop or revise a particular guideline.

5.9 It was also suggested that the guidelines council should establish its own criteria for determining which principles or offences would be addressed in order to promote transparency in the guidelines council’s work, and to help prioritise work.

5.10 Three stakeholders further suggested that courts should be expressly permitted to request the development of specific sentencing guidelines (as is the case in Scotland). Another stakeholder suggested that there should be an open invitation to make submissions to the guidelines council throughout the year.

5.11 The Victorian Bar emphasised that the guidelines council should:

be able to receive informal correspondence and submissions made directly to [the guidelines council] from interested organisations, such as the Bar, on the need for the creation of certain guidelines. This would further promote and encourage the involvement of legal and community members in the sentencing process, and in the Bar’s case, provide a vehicle for barristers to highlight sentencing principles or standards where, from their experience, more comprehensive guidance from the [guidelines council] is desirable.

175. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) ss 8(1), 8A(1).
176. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) ss 8(3), 8A(3).
177. Sentencing Advisory Council (2017), above n 51, 27 (issues paper [4.15]).
178. Submission 4 (Anonymous); Submission 6 (Anonymous); Submission 12 (Victims of Crime Commissioner); Submission 13 (Office of Public Prosecutions) (approval is implied; see above n 62); Submission 15 (J. Awad); Submission 16 (Anonymous); Submission 18 (Anonymous); Submission 22 (Victoria Legal Aid); Submission 25 (C. Kelly); Submission 26 (Chief Magistrate of the Magistrates’ Court of Victoria); Submission 27 (Victoria Police); Submission 28 (Victorian Bar). One stakeholder suggested that the balance of membership of the guidelines council would hopefully insulate it from media and political pressures: Submission 4 (Anonymous).
179. Submission 16 (Anonymous); Submission 18 (Anonymous).
180. Submission 18 (Anonymous).
181. Submission 15 (J. Awad); Submission 16 (Anonymous); Submission 23 (Liberty Victoria).
182. Submission 3 (T. McKay).
183. Submission 28 (Victorian Bar).
5. Development of sentencing guidelines

The Council's view

5.12 The Council remains of the view expressed in the issues paper, and in accordance with the submissions of stakeholders, that the guidelines council should decide itself when to initiate the development or revision of a sentencing guideline, and that the Attorney-General should be formally empowered to make a request for the development or revision of a sentencing guideline.

5.13 The Council further agrees with the view put forward by some stakeholders that the guidelines council should be required to provide reasons to the Attorney-General if it refuses to develop or revise a sentencing guideline in accordance with such a request. The Attorney-General is the conduit of the views of both the community and the legislature, and should reasonably expect reasons to be given if the guidelines council were to refuse a request to develop or revise a guideline.

5.14 The Council does not, however, agree that courts should be permitted to extra-judicially request the development of a sentencing guideline. As the issues paper observed, making such a request could be perceived as the court carrying out a non-judicial function. Further, it would be an unnecessary constitutional risk to permit courts to make an extra-judicial request for the development or revision of a sentencing guideline; they already make comments in the course of judgments about principles or offences that would benefit from sentencing guidance.184

5.15 In addition, in relation to the proposal that the guidelines council accept suggestions for the development or revision of a guideline on a rolling basis throughout the year, it is expected that the guidelines council would consider, on a continuing and informal basis, all such correspondence from interested stakeholders. For example, WorkSafe Victoria has suggested that there is a need for guidance in relation to occupational health and safety (OHS) breach offences, stating:

The lack of consistency in the approach to sentencing for OHS breaches and a lack of public confidence in the sentencing of OHS offenders are frequently noted concerns by WorkSafe’s internal and external stakeholders, victims and their families as well as the Victorian community generally.185

Recommendation 5: Initiation of a sentencing guideline

The process of developing a sentencing guideline should 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 such a request; and
  - if the sentencing guidelines council does not comply with such a request, it should provide reasons to the Attorney-General.

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184. See for example, *Director of Public Prosecutions v Rapid Roller Co Pty Ltd* [2011] VSCA 17 (2 February 2011) [15].
185. Submission 17 (WorkSafe Victoria).
Consultation

5.16 In the issues paper, the Council described broad consultation as one of the most critical features of an effective guidelines council.\textsuperscript{186} The Council proposed that the guidelines council be required to publish draft guidelines and to consult broadly with the general community, courts, government departments and any other interested persons or bodies.\textsuperscript{187}

5.17 The Council also sought feedback about whether the guidelines council should prepare and publish an impact or resource assessment alongside each draft and final sentencing guideline, and whether the guidelines council should be expressly required to consult with any particular individuals or organisations.\textsuperscript{188}

Stakeholders’ views

5.18 Most stakeholders agreed with the proposed consultation requirements;\textsuperscript{189} some stakeholders particularly emphasised the importance of:

- broad community consultation in the development of sentencing guidelines;\textsuperscript{190}
- publishing draft guidelines for consultation purposes;\textsuperscript{191} and
- consulting specifically with certain vulnerable groups, such as members of the Victorian Aboriginal and Torres Strait Islander community.\textsuperscript{192}

5.19 One stakeholder commented that ‘the wider the consulting the better the outcome for everyone’.\textsuperscript{193} However, a number of stakeholders – including Victoria Police, the Victorian Bar and the Victims of Crime Commissioner – expressly opposed any requirement that the guidelines council consult with a parliamentary committee, on the basis that such a requirement would threaten the independence of the guidelines council.\textsuperscript{194}

\textsuperscript{186}. Sentencing Advisory Council (2017), above n 51, 28 (issues paper [4.17]–[4.18]).
\textsuperscript{187}. Ibid 31 (issues paper [4.36]–[4.37]).
\textsuperscript{188}. Ibid (issues paper [4.38]).
\textsuperscript{189}. Submission 4 (Anonymous); Submission 7 (Anonymous); Submission 9 (Youthlaw); Submission 10 (Jesuit Social Services); Submission 12 (Victims of Crime Commissioner); Submission 13 (Office of Public Prosecutions) (approval is implied; see above n 62); Submission 16 (Anonymous); Submission 18 (Anonymous); Submission 20 (R. Caruana); Submission 22 (Victoria Legal Aid); Submission 23 (Liberty Victoria); Submission 24 (Law Institute of Victoria); Submission 25 (C. Kelly); Submission 26 (Chief Magistrate of the Magistrates’ Court of Victoria); Submission 27 (Victoria Police); Submission 28 (Victorian Bar).
\textsuperscript{190}. Submission 7 (Anonymous); Submission 9 (Youthlaw); Submission 10 (Jesuit Social Services) (describing broad consultation as ‘indispensable’); Submission 12 ( Victims of Crime Commissioner) (describing wide consultation as ‘absolutely critical’); Submission 16 (Anonymous); Submission 20 (R. Caruana) (noting that ‘the sentencing guidelines council should consult with organisations and victims of crime that know what goes on in the system’); Submission 22 (Victoria Legal Aid) (describing community consultation as ‘vital’); Submission 28 (Victorian Bar) (also describing broad-based community engagement as ‘vital’).
\textsuperscript{191}. Submission 1 (D. Blum); Submission 25 (C. Kelly).
\textsuperscript{192}. Submission 5 (Victorian Aboriginal Legal Service); Submission 6 (Anonymous) (suggesting that social workers and mental health care providers be consulted); Submission 9 (Youthlaw); Submission 10 (Jesuit Social Services).
\textsuperscript{193}. Submission 7 (Anonymous).
\textsuperscript{194}. Submission 3 (T. McKay); Submission 12 (Victims of Crime Commissioner); Submission 27 (Victoria Police); Submission 28 (Victorian Bar).
5. Development of sentencing guidelines

Impact assessments

5.20 There was a variety of views in relation to whether the guidelines council should be required to publish a resource impact assessment alongside draft and final guidelines. Some stakeholders were strongly in favour of such a requirement. The Victorian Bar commented that this ‘would enable interested stakeholders to obtain further insight into how the guideline, once released, may affect the mechanics of the criminal justice system’. The Victims of Crime Commissioner, on the other hand, was opposed to any such requirement, commenting that resourcing should be a separate concern for government, not courts or the guidelines council.

5.21 One stakeholder noted that there is an important distinction between resource impact assessments and sentencing impact assessments – the former is more concerned with resourcing issues while the latter indicates the intended effect the guideline should have on sentencing practices – stating:

I appreciate that the [guidelines] council preparing a resource assessment which includes predicting the effect on corrections resources and prison populations looks suspiciously like the provision of advice to the government and [so] poses a constitutional risk. However, I would encourage the [Sentencing Advisory Council] to consider whether the [guidelines] council could prepare impact assessments, rather than resource assessments, for the purpose of measuring the expected and actual effect of the guidelines. Such an assessment would be of significant value to the body monitoring the effect of the guidelines. Experience in England and Wales demonstrates that an initial impact assessment can play an important role in evaluating changes to sentencing practice following the introduction of a guideline.

5.22 A sentencing impact assessment might, for example, identify that the draft guideline is intended to increase, or simply codify, existing sentencing practices for a particular category of offences. It might also be possible to use sentencing impact assessments as a measure of whether a sentencing guideline is having an unintended effect on disadvantaged groups.

5.23 Both Youthlaw and Jesuit Social Services, for example, noted the over-representation of Indigenous offenders in the Victorian criminal justice system, and recommended a racial equity tool be published alongside all proposed guidelines. A racial equity impact assessment is a document produced by policymakers that intentionally considers the ‘racial effects of changes in sentencing and related policies’. These stakeholders suggested that such a tool could help to avoid any unanticipated adverse consequences on offenders from particular racial groups (or perhaps even from other groups, such as offenders with an acquired brain injury).

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195. Submission 10 (Jesuit Social Services) (describing this requirement as ‘critical’); Submission 16 (Anonymous) (describing this requirement as ‘essential’); Submission 28 (Victorian Bar).

196. Submission 28 (Victorian Bar).

197. Submission 12 (Victims of Crime Commissioner).

198. Submission 18 (Anonymous).

199. Submission 9 (Youthlaw); Submission 10 (Jesuit Social Services).


201. Submission 9 (Youthlaw); Submission 10 (Jesuit Social Services).
The Council’s view

5.24 The capacity for sentencing guidelines to promote public confidence in sentencing is likely, in large part, to be determined by the adequacy and breadth of the consultation conducted during the development of sentencing guidelines.

5.25 The Council acknowledges that, on the one hand, a substantial number of submissions expressed serious concerns about sentencing standards in Victoria for particular offences.202 On the other hand, one stakeholder commented that they have become ‘increasingly concerned at the politicization of sentencing outcomes and resulting increasing prison population’, which they believe is ‘creating negative outcomes for both individuals and society as a whole’.203

5.26 To encourage community confidence in sentencing guidelines, every opportunity should be available for the guidelines council to hear a similar diversity of opinions and for all interested persons and organisations to contribute their views.

5.27 Similarly, and especially in the absence of sitting judicial officers on the guidelines council, there will also need to be extensive consultation with the courts to foster judicial confidence in sentencing guidelines. Judicial officers are the acknowledged subject matter experts in sentencing law and practice and will ultimately be responsible for the application of sentencing guidelines. The Sentencing Council for England and Wales, for example, ‘test drives’ draft sentencing guidelines with the judiciary to identify any matter that could lead to confusion, misinterpretation or unintended consequences.204

5.28 The Council is of the view that legislation should require the guidelines council to publish draft sentencing guidelines, and to then consult broadly with the general community, courts, relevant government departments and any and all other interested persons or bodies.

Sentencing impact assessments

5.29 Considering stakeholders’ views on the value of impact assessments – both for the guideline development process and to assist with the process of monitoring the effect of guidelines – the Council is of the view that the guidelines council should also produce and publish sentencing impact assessments alongside each draft and final sentencing guideline. As discussed above, a sentencing impact assessment would describe, in general terms, the intended effect of the guideline on sentencing practices (for example, if it was intended to increase, decrease or codify existing sentencing practices). A sentencing impact assessment would then provide a benchmark for future monitoring of the effect the guideline had on sentencing practices.

5.30 The Council does not recommend that the guidelines council be expressly required, for each sentencing guideline, to develop and publish a racial equity impact assessment. However, the guidelines council should consider whether each sentencing impact assessment would benefit from an equity impact assessment. This need not be limited to the effect that a guideline might have on particular demographic groups but could, in appropriate circumstances, also extend to other groups, such as female offenders or offenders with acquired brain injuries, for whom interaction with the criminal justice system may raise particular issues.

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202. Submission 1 (D. Blum); Submission 2 (Anonymous); Submission 3 (T. McKay); Submission 12 (Victims of Crime Commissioner); Submission 14 (C. Verbunt); Submission 20 (R. Caruana); Submission 25 (C. Kelly).
5.31 The Council also agrees that resourcing of the criminal justice system is not a relevant consideration in the development of sentencing guidelines; it is instead more properly a matter for government. Unlike a resource impact assessment, a sentencing impact assessment should not seek to quantify intended outcomes in terms of numbers or prison beds, nor seek to make projections. In practice, a sentencing impact assessment may become an input for Corrections Victoria to consider when it makes resource projections, but that would not be its primary purpose, nor would it be a function of the guidelines council.

Reference groups

5.32 A further issue arose after publication of the issues paper as to whether the guidelines council should be able to convene reference groups. Even with the diverse composition recommended by the Council (Recommendation 3), it is not possible for any one body to represent the views and experiences of all interested persons.

5.33 The guidelines council could, for example, develop a principle-based guideline relating to the treatment of impaired mental functioning as a mitigating factor in sentencing. In so doing, that guideline would benefit from the views of psychologists, psychiatrists, neurologists, social workers and many others. In order to provide a mechanism by which such views and expert knowledge can be available in developing that guideline, the guidelines council could form a reference group (or groups). There are reference groups on many specialised issues throughout Victoria, such as the mental health workforce, the water industry and disability.

5.34 Although the Council does not recommend expressly empowering the guidelines council to convene reference groups, that power should be considered implicit in the legislative authority to engage in consultation and perform all necessary activities to support that consultation. For example, Victoria Legal Aid noted that if the guidelines council were to develop sentencing guidelines specifically for application to child offenders, further thought would need to be given to how the views of those with knowledge and expertise relevant to sentencing children would be taken into account. In those circumstances, the guidelines council may wish to convene a reference group (or groups) of individuals with that expertise or knowledge.

Recommendation 6: Consultation on a sentencing guideline

The sentencing guidelines council should be expressly required, in developing a sentencing guideline:

• to publish:
  – a draft sentencing guideline; and
  – an accompanying sentencing impact assessment that should describe, in general terms, any intended change in sentencing practice as a result of the guideline; and
• to consult with:
  – the courts;
  – the general community;
  – government departments; and
  – any other interested persons or bodies.

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208. Submission 22 (Victoria Legal Aid).
Finalisation and approval

5.35 As discussed in the issues paper, the guidelines councils in the United Kingdom differ in the manner in which a sentencing guideline is finalised. In England and Wales, the Sentencing Council itself issues the definitive sentencing guideline and declares the date on which that guideline is to commence. This approval process was described in the issues paper as the council-approval model.

5.36 In contrast, in Scotland, where no sentencing guideline has yet been finalised, the Sentencing Council will be required to present the sentencing guideline to the Scottish High Court of Justiciary (equivalent to Victoria’s Court of Appeal) for approval. The court may then reject the guideline, or approve it with or without modification, and state the date on which it commences. This approval process was described in the issues paper as the court-approval model.

5.37 In the issues paper, the Council did not offer a proposal about whether the council-approval model or court-approval model would be more appropriate in Victoria, and instead sought stakeholders’ views on the appropriate process for the finalisation of a sentencing guideline in Victoria.

Stakeholders’ views

5.38 There was an even mix of support for both approval models.

5.39 A number of stakeholders – including the Office of Public Prosecutions, Victoria Legal Aid, Victoria Police and the Victims of Crime Commissioner – supported the council-approval model, though most stated that their support was premised on there being a judicial majority on the guidelines council. A number of stakeholders who supported this model noted that it was more in accordance with the constitutional advice, and that it would reinforce the notion of the guidelines council as an independent body.

5.40 In contrast, just as many stakeholders – including Liberty Victoria, the Law Institute of Victoria and the Chief Magistrate – supported the alternative court-approval model, on the basis that this would permit the judiciary to retain a measure of control over sentencing guidelines and reduce the risk of any encroachment on judicial discretion.

209. Sentencing Advisory Council (2017), above n 51, 32 (issues paper [4.40]–[4.43]).
210. Coroners and Justice Act 2009 (UK) s 120(8).
211. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 5.
212. Sentencing Advisory Council (2017), above n 51, 33 (issues paper [4.47]–[4.50]).
213. Submission 12 (Victims of Crime Commissioner); Submission 13 (Office of Public Prosecutions); Submission 18 (Anonymous); Submission 22 (Victoria Legal Aid); Submission 27 (Victoria Police).
214. Submission 12 (Victims of Crime Commissioner); Submission 22 (Victoria Legal Aid); Submission 27 (Victoria Police).
215. Submission 18 (Anonymous); Submission 22 (Victoria Legal Aid).
216. Submission 9 (Youthlaw); Submission 15 (J. Awad); Submission 23 (Liberty Victoria); Submission 24 (Law Institute of Victoria); Submission 26 (Chief Magistrate of the Magistrates’ Court of Victoria) (supporting the court-approval model if sentencing guidelines were binding, and the council-approval model if they were not).
The Council’s view

5.41 The Council is of the view that the council-approval model is the more appropriate. To a large extent, this view is informed by the constitutional advice, which suggested that the risks associated with this model could be more easily ameliorated than the risks associated with the court-approval model. To a lesser extent, this is also the simpler option. There would be a significant amount of extra work required if after developing a sentencing guideline (with consultation from stakeholders) the guidelines council was also then required to bring that guideline to the Court of Appeal for some form of proceedings in which parties might present arguments over the appropriateness (or not) of that guideline.

5.42 In relation to the constitutional risks, the advice noted that the council-approval model described in the issues paper raised two discrete risks. The first was that the development of sentencing guidelines as quasi-legislative instruments might be too far outside the traditional and proper role of judicial officers, even acting in their personal capacity. This risk, however, is eliminated in the absence of sitting judicial officers.

5.43 The second risk with the council-approval model – a risk that persists despite the absence of sitting judicial officers – is that a sentencing guideline might be seen as an impermissible interference with judicial discretion. A law will be deemed invalid if it requires a state court to act as an instrument of the executive, or purports to direct courts about the manner and exercise of their jurisdiction. The constitutional advice concluded that this risk could be ‘sufficiently addressed’ by ensuring that:

- the sentencing guidelines attempt to set out as comprehensively as possible the factors that go into setting the starting point and the sentencing range;
- sentencing courts retain the discretion to reach a sentencing decision that takes account of all relevant factors, and is just and proportionate in all the circumstances of the case; and
- courts retain a real discretion to depart from a sentencing guideline in appropriate circumstances.

5.44 In contrast, the main risk with the court-approval model is the possibility that it would be improper for the Court of Appeal to be involved in approving a sentencing guideline, on the basis that:

- the approval process might be contrary to the essential characteristics of a court;
- the criteria by which the Court of Appeal would determine whether to approve, reject or modify a sentencing guideline might not give the court sufficient discretion; and
- the Court of Appeal could therefore end up making, rather than applying, the law.

5.45 The constitutional advice, however, was less optimistic that appropriate measures could be put in place to ameliorate the risks associated with a court-approval model – unlike the measures available to reduce the risk associated with the council-approval model – concluding that:

In theory, the approval function could be made to resemble the ordinary court processes; however, the usual judicial procedures would seem to be unwieldy and unsuited to the approval process.

217. Hanks and Hill (2017), above n 31, 24 (constitutional advice [61]).
219. Hanks and Hill (2017), above n 31, 28–29 (constitutional advice [61.2], [74]–[76]).
220. Ibid 24–25 (constitutional advice [62]).
221. Ibid 25 (constitutional advice [63]).
5.46 As a result, the Council is of the view that the appropriate approval model for sentencing guidelines in Victoria is the council-approval model, particularly one bolstered by the preservation of judicial discretion. The Council is mindful that utilising the council-approval model, and not including sitting judicial officers in the composition of the guidelines council, reduces the ability of the judiciary to contribute directly to the appropriate content of a sentencing guideline. For this reason, extensive consultation with the judiciary in the preparation of, and deliberation on, sentencing guidelines will be critical. The judiciary will be the primary user of sentencing guidelines, and they have an invaluable amount of knowledge and experience in sentencing. Their input should therefore carry considerable weight in the guideline development process.

**Recommendation 7: Finalisation of a sentencing guideline**

A sentencing guideline should be considered finalised when approved by the sentencing guidelines council, without need for approval by any other body.

**Commencement**

5.47 The Council sought views about whether sentencing guidelines should come into effect immediately upon publication, or on a future date determined by whichever body approves the guidelines.

5.48 Each of the stakeholders who commented on this issue suggested that guidelines should come into effect on a future date specified by whichever body approves the guidelines.\(^{222}\) The advantage of this approach is that it gives the judiciary, lawyers and the wider community an opportunity to familiarise themselves with the finalised guidelines before they take effect.

5.49 The Council agrees with this approach, and is of the view that there should be a period between the publication of a sentencing guideline and its commencement date, within which the guidelines council would undertake the necessary publicity and education for criminal justice stakeholders and the broader community.

5.50 This approach accords with the approach taken in England and Wales, where sentencing guidelines tend to commence between 35 and 132 days from the publication date.\(^{223}\) The length of this period should be determined by the guidelines council according to the particular needs of each sentencing guideline. However, the Council suggests that approximately three months might be appropriate for most sentencing guidelines.

**Recommendation 8: Commencement of a sentencing guideline**

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

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222. Submission 12 (Victims of Crime Commissioner); Submission 13 (Office of Public Prosecutions); Submission 18 (Anonymous); Submission 22 (Victoria Legal Aid); Submission 27 (Victoria Police); Submission 28 (Victorian Bar).

223. Sentencing Advisory Council (2017), above n 51, 32 (issues paper [4.44]).
5. Development of sentencing guidelines

**Notice**

5.51 In the issues paper, the Council proposed that the guidelines council in Victoria should be required to publish all draft and final sentencing guidelines on its website (downloadable free of charge), and that it should publicise the issuance of draft and final guidelines by sending a copy to the heads of each court jurisdiction and the Judicial College of Victoria, emailing a copy to individual judges, members of the legal profession and interested stakeholders and issuing a media release.224

**Stakeholders’ views**

5.52 Almost all stakeholders commenting on this issue supported the proposal in the issues paper:225 The Chief Magistrate considered it sufficient that the guidelines council publish and publicise all draft and final guidelines,226 and Victoria Police cautioned against permitting the notice requirements becoming unnecessarily onerous.227 In terms of whether sentencing guidelines should be published in the Government Gazette, only the Victorian Bar suggested that this be given consideration.228

5.53 The Victims of Crime Commissioner noted the importance of – and possible avenues for ensuring – proper notice of draft and final guidelines:

The sentencing guidelines council should ensure that draft guidelines are widely advertised, in order to ensure that as many people as possible are made aware of the existence of the draft guideline. The draft and final guidelines should be posted on the sentencing guidelines council’s website, along with the sentencing advisory council’s website … advertisements can be made in the main Victorian newspapers … any social media accounts [of the sentencing guidelines council] … [and] draft guidelines could be posted on other stakeholder websites, such as the Victims Support Agency, Victoria Police, this Office, the Bar Council and the Victorian Law Institute.229

5.54 Another stakeholder also suggested that notification that a guideline is being prepared or has been published should be advertised through television media as well as on websites, and that there should be an email listing where individuals can register to receive updates relating to sentencing guidelines.230

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224. Ibid 35 (issues paper [4.57]).
225. Submission 13 (Office of Public Prosecutions) (approval is implied; see above n 62); Submission 18 (Anonymous); Submission 22 (Victoria Legal Aid); Submission 24 (Law Institute of Victoria); Submission 27 (Victoria Police); Submission 28 (Victorian Bar).
226. Submission 26 (Chief Magistrate of the Magistrates’ Court of Victoria).
227. Submission 27 (Victoria Police).
228. Submission 28 (Victorian Bar).
230. Submission 16 (Anonymous).
The Council’s view

5.55 Given the general support for the notice requirements proposed in the issues paper, the Council is of the view that the guidelines council should not be required to give formal notice via the Government Gazette. Further, the Council agrees that it is unnecessary to impose overly prescriptive or stringent notice requirements on the guidelines council, and the guidelines council should determine the most efficient and effective way to publicise, and to educate stakeholders about, draft, final and revised guidelines.

5.56 The Council therefore recommends simply that there be a requirement for the guidelines council to publish and publicise all sentencing guidelines on its website. The specific details should be at the guidelines council’s discretion.

Recommendation 9: Notice requirements for sentencing guidelines

The Sentencing Act 1991 (Vic) should require the sentencing guidelines council to publish and publicise all draft and final sentencing guidelines and sentencing impact assessments on its website.
6. Form and content of sentencing guidelines

Overview

6.1 This chapter discusses and makes recommendations on the permissible features of sentencing guidelines in Victoria. In particular, it considers the extent to which the guidelines council should be able to develop offence-based guidelines and principle-based guidelines, and whether the guidelines council should be permitted to develop sentencing guidelines for both the adult and the children’s jurisdictions.

6.2 In the issues paper, the Council proposed that the guidelines council should be able to prepare sentencing guidelines similar to those produced in England and Wales (both offence-based guidelines and principle-based guidelines), and suggested that the permissible content could be partly premised on the matters that the Victorian Court of Appeal may address in a guideline judgment.\footnote{Sentencing Advisory Council (2017), above n 51, 43 (issues paper [4.103]).} Offence-based guidelines would provide starting points and sentencing ranges and explain the principles on which any numerical guidance is based, while principle-based guidelines would include statements of general sentencing principles, such as how an offender’s guilty plea is to be taken into account in any given case.

Features of offence-based guidelines

6.3 In England and Wales, offence-based guidelines address particular offences or categories of offences, and have three overarching features: a staged decision-making process, numerical guidance and principled guidance.

6.4 The staged sentencing process specifies the order and manner in which courts should take certain considerations into account during the sentencing exercise. For example, the offence-based guideline for the offence of rape in England and Wales\footnote{Sentencing Council for England and Wales (2013), above n 93, 9–12. An excerpt from this guideline was extracted as an example in Sentencing Advisory Council (2017), above n 51, 66–70 (issues paper Appendix 2).} details nine steps that should be followed in sentencing that offence:

1. **Offence category.** The court determines the levels of harm and culpability by reference to a non-exhaustive table of factors (for example, a significant degree of planning and violence would indicate a high level of culpability).

2. **Category range and starting point.** Having determined the levels of harm and culpability, the court then determines the corresponding starting points and category ranges. Once the appropriate category range and starting point have been determined, the court makes further adjustments to account for relevant aggravating or mitigating factors set out in non-exhaustive lists in the sentencing guideline.

3. **Factors that indicate a reduction.** The court considers whether the offender should receive a discounted sentence as a result of offering, or giving, assistance to the prosecution or police.
4. **Reduction for guilty pleas.** The court determines whether the offender should receive a discount for a guilty plea in accordance with the principle-based guideline relating to guilty plea discounts.

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 whether to make ancillary orders, such as compensation orders or forensic sample orders.

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 certain periods of time spent on bail.\(^{233}\)

6.5 In Australia, a staged sentencing process is generally considered to be the alternative to the traditional approach to sentencing known as **instinctive synthesis**.\(^{234}\) Despite indicating a preference for instinctive synthesis over staged sentencing, the High Court has acknowledged that legislation may expressly permit approaches to sentencing other than instinctive synthesis,\(^{235}\) so long as any numerical guidance is supported by underlying principles and does not simply exist in an unexplained vacuum.\(^{236}\) The approach known as instinctive synthesis and its relationship with the introduction of sentencing guidelines are discussed in more detail at [7.44]–[7.48].

6.6 In addition to creating a staged sentencing process, the legislation in England and Wales permits sentencing guidelines to include the following, noting that this incorporates both numerical and principled guidance:

- a description of the 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 foreseeable) and any other factors relevant to the seriousness of the offence;
- the appropriate range of sentences for the offence generally;
- the appropriate range of sentences for each identified category of that offence, if a guideline describes different categories;
- starting points, within either the broad offence range or the narrow category ranges;
- any additional aggravating or mitigating factors that the court should take into account; and
- criteria and guidance for determining the weight to be given to aggravating factors and mitigating factors.\(^{237}\)

\(^{233}\) Criminal Justice Act 2003 (UK) s 240A: this provision specifies that if an offender is granted bail and while on bail is subject to either a curfew condition or an electronic monitoring condition, the court is required to follow a five-step process to determine what portion of that period (usually half) must be counted as time served.

\(^{234}\) Markarian v The Queen (2005) 228 CLR 357, 377; Muldrock v The Queen (2011) 244 CLR 120, 132.

\(^{235}\) Muldrock v The Queen (2011) 244 CLR 120.

\(^{236}\) Wong v The Queen (2001) 207 CLR 584, 613–615.

\(^{237}\) Coroners and Justice Act 2009 (UK) s 121.
6.7 An example of how a sentencing guideline might intertwine numerical and principled guidance is contained in the sentencing guideline for the offence of rape, which addresses how courts should take previous good character or exemplary conduct into account, providing:

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.238

6.8 The provision of similar principled guidance would be critical to both the functionality and the legality of numerical guidance in Victoria. Providing courts with numerical guidance in the absence of supporting factors and principles would likely be futile; there would be no indication about how or why that guidance has been developed, and the court’s fact-finding role in those circumstances would be undermined.

6.9 In contrast, when applying sentencing guidelines in which numerical guidance is supported by a non-exhaustive list of factors and principles, courts are still performing their essential function of determining the presence or absence of factors relating to harm, culpability, aggravation and mitigation, as well as the weight to be attributed to those factors. In those circumstances, and particularly with their ability to identify and consider factors and principles not described in a sentencing guideline, courts retain the discretion necessary to perform the sentencing exercise.

Features of principle-based guidelines

6.10 In addition to issuing offence-based guidelines, the Sentencing Council for England and Wales has also published a number of principle-based guidelines that provide statements of general sentencing principles.

6.11 Two of the principle-based guidelines in England and Wales (on guilty plea discounts and totality) were expressly required by legislation.239 The Sentencing Council has also produced principle-based guidelines on when to impose community and custodial sentences,240 how to sentence children and young people,241 a revised version of the sentencing guideline relating to guilty plea discounts,242 and factors to take into account in sentencing offences that occur in the context of domestic abuse.243

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239. Coroners and Justice Act 2009 (UK) s 120(3); Sentencing Guidelines Council, Reduction in Sentence for a Guilty Plea: Definitive Guideline (2007) (this guideline was already in place when the legislation came into effect); Sentencing Council for England and Wales, Offences Taken into Consideration and Totality: Definitive Guideline (2012).
Sentencing guidelines in Victoria

6.12 As described in the issues paper, many of the stages outlined in the offence-based guidelines in England and Wales already represent similar considerations made by a court when sentencing in Victoria, and further, they are applied in a similar order.244

6.13 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).245 Then, while there is no standard discount for an offender who undertakes to assist authorities, courts in Victoria take this into account in sentencing (step 3).246 Courts are also required to consider whether the offender pleaded guilty, and if so, at what stage of the proceedings (step 4).247 Courts are required to comply with statutory schemes, such as the serious offender or standard sentence provisions in the Sentencing Act 1991 (Vic) (step 5).248 Courts are also required to ensure that, when there are multiple offences (or where the offender is already serving a sentence), the total sentence is ‘just and proportionate’, and in all the circumstances ‘is not excessive’ (step 6).249 Courts regularly make ancillary orders such as forensic sample orders,250 sex offender registration orders251 and compensation and restitution orders (step 7).252 There are multiple requirements in Victoria for sentencing courts to give reasons for certain decisions, such as reasons for imposing an aggregate or indefinite sentence (step 8).253 Further, courts in Victoria are required to declare any pre-sentence detention to be deducted from a sentence of imprisonment (step 9).254

6.14 In effect, even with offence-based guidelines similar to those issued in England and Wales, the only feature that courts in Victoria would not already be familiar with (or be required to comply with) would be engaging in the first two steps separately: assessing culpability and harm in order to determine the category range and starting point, and then taking aggravating and mitigating circumstances into account to determine the final sentence.

6.15 For a number of reasons, it is important to note that there is a distinction between charge-level steps in an offence-based guideline and case-level steps. Charge-level steps are those directed at sentencing the specific offence to which the sentencing guideline applies (these would, for example, be steps 1 and 2 in the rape guideline in England and Wales). Case-level steps, on the other hand, are those relevant to determining the total effective sentence (final outcome) in a case.

6.16 If there is only one offence being sentenced in a case, there is no real difference; the court would progress through all nine steps consecutively. If, on the other hand, there are multiple offences being sentenced in a single case, it becomes necessary to determine when (or even whether) the case-level steps should be engaged in. This is particularly relevant in a case with a mix of offences that are and are not covered by a relevant guideline (see [7.49]), and especially in a case with a mix of state and Commonwealth offences (see [7.66]–[7.70]).

244. Sentencing Advisory Council (2017), above n 51, 37–38 (issues paper [4.69]–[4.71]).
247. Sentencing Act 1991 (Vic) ss 5(2)(e), 6AAA.
248. Director of Public Prosecutions (NSW) v McDonald [2015] NSWCA 7 (13 February 2015).
250. See for example, Crimes Act 1958 (Vic) s 464ZF.
251. Sex Offenders Registration Act 2004 (Vic) s 11.
252. Sentencing Act 1991 (Vic) ss 84, 85B.
253. See for example, Sentencing Act 1991 (Vic) s 9(3) (reasons for imposing an aggregate sentence), s 18G (reasons for indefinite sentence), s 85 (reasons for granting or refusing an application for a compensation order).
Legislative restriction on the permissible contents of sentencing guidelines

6.17 Sentencing guidelines in Victoria, as in other guidelines council jurisdictions, would be bound by the substantive law set by the legislature. In developing a guideline, the guidelines council would therefore need to ensure that it was consistent with all the relevant provisions of the Sentencing Act 1991 (Vic).

6.18 Courts in Victoria are, for example, currently required to take into account numerous factors when sentencing an offender, including:

- the five purposes for which a sentence may be imposed;\(^{255}\)
- the maximum penalty for the offence;
- the standard sentence (where applicable) 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 victim’s personal circumstances;
- any injury, loss or damage resulting directly from the offence;
- whether, and when, the offender pleaded guilty;
- the offender’s previous character; and
- any other aggravating or mitigating factors.\(^{256}\)

6.19 These required considerations raise two questions. First, to what extent would courts still be required to expressly turn their mind to these considerations (if the sentencing guideline has already accounted for them)? Second, to what extent do these required considerations constrain the permissible content of sentencing guidelines?

6.20 As to the first question, the Council notes that even with sentencing guidelines in place, the courts would still be required to follow any legislative requirements. The application of a sentencing guideline should ideally assist a court in the identification of relevant factors as required by section 5 of the Sentencing Act 1991 (Vic). Judges and magistrates, however, would still need to satisfy themselves that they have taken all relevant factors into account.

6.21 As to the second issue, sentencing guidelines would, as a general rule, be subordinate to primary legislation. Sentencing guidelines would therefore need to operate within the confines of that legislation; a guideline could not, for example, require courts to ignore the maximum penalty for an offence as a required consideration.

6.22 That said, the legislature can specify circumstances in which one requirement should take priority over another. For example, although courts are required to take current sentencing practices into account, the newly enacted standard sentence legislation limits this requirement. If the court is sentencing a standard sentence offence, it must only take into account how that offence has been sentenced after the commencement of the standard sentence provisions (as previous sentencing practices are no longer relevant).\(^{257}\)

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\(^{255}\) Sentencing Act 1991 (Vic) s 5(1) (punishment, deterrence, rehabilitation, denunciation and protection of the community). See also Veen v The Queen (No 2) (1988) 164 CLR 465, 476.

\(^{256}\) Sentencing Act 1991 (Vic) s 5(2). There are also a number of factors that courts may (but are not required to) take into account, but they are not relevant here: Sentencing Advisory Council (2017), above n 51, 40 (issues paper [4.82]).

\(^{257}\) Sentencing Act 1991 (Vic) s 5B(2)(b).
6.23 There are a number of other sentencing schemes in Victoria that the guidelines council would need to take into account when developing sentencing guidelines, such as the serious offender provisions, the continuing criminal enterprise offender provisions, statutory minimum sentences, prohibitions on the use of non-custodial sentences in certain circumstances, and presumptions around cumulation and concurrency.

6.24 These schemes would most likely make the development of certain sentencing guidelines complex, but they are not necessarily incompatible. The Sentencing Council for England and Wales, for example, regularly issues guidelines that accommodate existing sentencing schemes, such as the dangerous offender provisions that require life sentences of imprisonment in certain circumstances, and the provisions requiring mandatory minimum sentences for offenders convicted on three separate occasions of dealing in a particular class of drugs, or for burglary of a dwelling.

6.25 The same would be true in Victoria; a sentencing guideline could not, for example, include non-custodial sentences in the sentencing range for the offences of rape or murder because courts must impose a custodial order for those offences.

6.26 In contrast (as discussed at [7.112]–[7.118]) the standard sentence provisions that came into effect on 1 February 2018 are incompatible with the simultaneous application of a sentencing guideline involving a staged sentencing process to the same offence.

**Constitutional issues**

6.27 The constitutional advice received by the Council confirmed that the creation of sentencing guidelines that are numerically prescriptive and that provide for a staged sentencing process may be constitutionally permissible so long as:

- the guidelines attempt to set out as comprehensively as possible the factors that go into setting the starting point and the sentencing range;
- sentencing courts retain the discretion to reach a sentencing decision that takes account of all relevant factors, and is just and proportionate in all the circumstances of the case; and
- courts retain a real discretion to depart from a guideline in appropriate circumstances.

258. See for example, Sentencing Advisory Council (2017), above n 51, 40 (issues paper [4.87]).
259. Sentencing Act 1991 (Vic) pt 2A.
260. Sentencing Act 1991 (Vic) pt 2B.
261. Sentencing Act 1991 (Vic) ss 9B, 9C, 10, 10AA, 10AB, 10AC, 10AD.
263. See for example, Sentencing Act 1991 (Vic) ss 16(1A), (3B)–(3C).
269. The High Court has previously confirmed that setting numerical standards is within the power of state parliaments and courts: see discussion at [7.46].
270. Hanks and Hill (2017), above n 31, 28–29 (constitutional advice [74]–[76]).
6.28 As discussed at [6.8], numerical guidance without explanation of the principles underpinning those numbers is likely to be found invalid. 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.271 Therefore a sentencing guideline in the form of a mere sentencing grid would not be permissible. The Supreme Court agreed and, citing High Court authorities, opposed any suggestion that the sentencing exercise could be the subject of ‘mathematisation’.272

6.29 That said, there are a number of circumstances in which Victorian courts already consider numerical standards during the sentencing exercise. For example, a recent decision saw the Court of Appeal reduce an offender’s non-parole period from eight years to seven years on the basis that non-parole periods of 75% are typically reserved for the ‘worst category of case’.273 Therefore, the non-parole period imposed in the case (80% of the total effective sentence) was ‘most unusual’ and ‘inadequately explained’.274

6.30 In another recent case, the Court of Appeal resented an offender to a higher total effective sentence because the offender’s assistance to authorities did not justify ‘a discount anywhere near the order of fifty per cent – let alone two thirds’.275 The court clarified that a 50% discount for assisting authorities should not be seen as ‘standard’, and that the discount should not be ‘approached in a mechanical or mathematical way’.276

6.31 In both cases, the court appears to have accepted that there are general numerical boundaries that – when adequately supported by the presence of certain facts and the applicability of certain principles – are useful guides in determining appropriate outcomes during the sentencing exercise.

Stakeholders’ views

6.32 There was considerable support for the guidelines council being permitted to develop offence-based guidelines similar to those in England and Wales – including from Victoria Legal Aid, the Victorian Bar, Victoria Police, the Victims of Crime Commissioner and the Chief Magistrate.277 One stakeholder commented that:

[In relation to offence-based guidelines, the narrative guidelines advocated in the [issues paper] and applied in England and Wales appear to be the best model for Victoria. The structure offers great flexibility and allows for the provision of detailed guidance where appropriate.]278

271. See for example, Wong v The Queen (2001) 207 CLR 584.
272. Submission 11 (Supreme Court of Victoria), citing Wong v The Queen (2001) 207 CLR 584, 611–612; Markarian v The Queen (2005) 228 CLR 357, 378; Director of Public Prosecutions v Dalgleish (A Pseudonym) [2017] HCA 41 (11 October 2017) [4].
274. Middleton and Others v The Queen [2018] VSCA 23 (15 February 2018) [104].
275. Director of Public Prosecutions v Cooper [2018] VSCA 21 (12 February 2018) [43], citing R v Johnston [2008] VSCA 133 (29 July 2008) [20] (‘recognizing that the quantification of informer discount involves a degree of arbitrariness which adherents to the shibboleth of intuitive synthesis may prefer to avoid, in the circumstances of the case I would set the discount at 50%’).
277. Submission 3 (T. McKay); Submission 4 (Anonymous); Submission 6 (Anonymous); Submission 12 (Victims of Crime Commissioner); Submission 13 (Office of Public Prosecutions) (approval is implied; see above n 62); Submission 16 (Anonymous); Submission 18 (Anonymous); Submission 22 (Victoria Legal Aid); Submission 25 (C. Kelly); Submission 26 (Chief Magistrate of the Magistrates’ Court of Victoria); Submission 27 (Victoria Police); Submission 28 (Victorian Bar).
278. Submission 18 (Anonymous).
6.33 The Victims of Crime Commissioner further commented that:

the nine steps contained in the example sentencing guideline contained within the Issues Paper essentially codify the considerations that judicial officers in Victoria are currently required to consider.

However, by outlining the nine steps in a formal sentencing guideline, it becomes an unambiguous and transparent process.279

6.34 The Law Institute of Victoria, on the other hand, opposed the introduction of offence-based guidelines similar to those in England and Wales on the basis that they would interfere with instinctive synthesis and add to court delays:

The LIV holds concerns over the prospect of the [sentencing guidelines council] issuing a guideline that is structured in a form similar to that of an offence-based guideline produced by the Sentencing Council for England and Wales. Those guidelines adopt a staged process of decision-making, and the LIV submits that such a form is capable of compromising judicial discretion … by providing a rigid decision-making process that reduces the ability of judicial officers to synthesise the relevant factors in a manner that is responsive to the individual circumstances of the person convicted. Additionally, requiring every judicial officer in Victoria to apply this process of rigid decision-making is likely to be impractical and contribute to court delays.280

6.35 In relation to principle-based guidelines, most stakeholders expressly or impliedly supported their introduction.281 One commented that ‘principle-based sentencing guidelines for guilty pleas and young offenders would be essential’.282 Another commented that the proposed topics in the issues paper that could be addressed in a principle-based guideline were ‘comprehensive and [would] provide the [guidelines] council with sufficient flexibility to address a range of sentencing principles’.283

6.36 In contrast, Liberty Victoria opposed the introduction of principle-based guidelines, commenting that:

the development of sentencing principles and the formation of sentencing guidelines should be done by those who have the real-life experience of sentencing offenders ….

It is not by accident that the rules and principles forged, over time, in that context have a unique and long-standing status as the common law. It is reflective of our collective recognition that ‘the concrete reality of the courtroom’, with its limitless variation and messy complexities, is an ideal setting for developing fair; workable guidelines for the imposition of sentences.284

279. Submission 12 (Victims of Crime Commissioner).
280. Submission 24 (Law Institute of Victoria).
281. Submission 3 (T. McKay); Submission 4 (Anonymous); Submission 6 (Anonymous); Submission 13 (Office of Public Prosecutions) (approval is implied; see above n 62); Submission 16 (Anonymous); Submission 18 (Anonymous); Submission 22 (Victoria Legal Aid); Submission 26 (Chief Magistrate of the Magistrates’ Court of Victoria); Submission 27 (Victoria Police); Submission 28 (Victorian Bar).
282. Submission 16 (Anonymous).
283. Submission 18 (Anonymous).
284. Submission 23 (Liberty Victoria).
6. Form and content of sentencing guidelines

The Council’s view

6.37 In the issues paper, the Council proposed that the guidelines council should have discretion to determine the form and content of a particular sentencing guideline according to the needs of the issue or offence concerned. The constitutional advice confirmed that the guidelines council would be able to prepare valid offence-based guidelines and principle-based guidelines, consistent with the Sentencing Act 1991 (Vic), in a form similar to guidelines produced by the Sentencing Council for England and Wales, so long as legislation expressly gave them the power to do so.

6.38 The Council is of the view that, even if the guidelines council does not necessarily develop sentencing guidelines that include each of the permissible features specified in legislation, the legislation should still set broad outer bounds of what is permissible. This would ensure that the guidelines council would have the power to tailor guidelines to the particular issue or offence concerned, and what the appropriate features of each guideline would be.

6.39 The Council therefore recommends that legislation should expressly provide that the guidelines council be able to develop comprehensive offence-based guidelines, involving a staged decision-making process, and including sentencing ranges and starting points, so long as any guidance about the appropriate type or level of punishment is supported by a comprehensive and non-exhaustive list of considerations for courts to take into account.

6.40 The Council further recommends that the guidelines council be permitted to develop principle-based guidelines. These would be necessary for the guidelines council to address systemic issues that arise from judicial consideration of particular principles (for example, the discount for a guilty plea).

6.41 The Council does not agree that such guidelines would ignore or sweep away precedents carefully established by courts over decades. Researching and understanding those precedents would be a prerequisite to developing a draft principle-based guideline, and the judiciary would be a primary stakeholder during consultation, both before and after the publication of the draft sentencing guideline.

Recommendation 10: Form and content of a sentencing guideline

The sentencing guidelines council should be expressly permitted to develop:

- **Offence-based guidelines**, which may provide:
  - a staged approach to sentencing a particular offence;
  - starting points and sentencing ranges for a particular offence, based on a non-exhaustive list of factors related to harm and culpability;
  - a non-exhaustive list of mitigating and aggravating factors that a court may take into account in increasing or decreasing the sentence for a particular offence;
  - a non-exhaustive list of permissible reasons to depart from the sentencing guideline; and/or
  - any other matter that the court should take into account, consistent with the provisions of the Sentencing Act 1991 (Vic).

- **Principle-based guidelines**, which may provide guidance on:
  - sentencing principles generally;
  - sentencing principles related to a particular court, class of court, penalty, class of penalty or class of offender; and/or
  - any other matter that the court should take into account, consistent with the provisions of the Sentencing Act 1991 (Vic).
Sentencing guidelines for children

6.42 In Victoria, children sentenced in the Children’s Court are not sentenced under the Sentencing Act 1991 (Vic). Instead, they are sentenced in accordance with the Children, Youth and Families Act 2005 (Vic), which provides for different purposes of sentencing and different sentencing orders for children.

6.43 There are also certain circumstances in which offenders who were under 18 years at the time of the offence are sentenced in the higher courts. The offences of murder, attempted murder, manslaughter, child homicide, arson causing death and culpable driving causing death must be heard in the Supreme or County Court. In addition, in exceptional circumstances (or if the child objects to the matter being heard summarily), the Children’s Court can also exclude a matter involving any other indictable offence from its jurisdiction and refer it to the higher courts. Further, legislative amendments that are scheduled to come into effect on 1 June 2018 will require transfer to the higher courts ‘if the Court considers that the sentencing options available to it under [the Children, Youth and Families Act 2005 (Vic)] are inadequate to respond to the child’s offending’.

6.44 The higher courts may sentence a child under either the Children, Youth and Families Act 2005 (Vic) (with some sentencing restrictions) or the Sentencing Act 1991 (Vic) – the offender is both a child for the purposes of the Children, Youth and Families Act 2005 (Vic) and a young offender for the purposes of the Sentencing Act 1991 (Vic).

6.45 Under the common law, even if a child is sentenced in the higher courts under the provisions of the Sentencing Act 1991 (Vic), the courts’ consideration of such things as the purposes of sentencing under that Act reflects the unique and particular needs of child offenders. For example, even though a child may be outside the jurisdiction of the Children’s Court, a child sentenced in an adult court is still often ‘entitled to benefit from the mitigatory effects of youthfulness under general sentencing principles’.

6.46 Sentencing guidelines developed for adult offenders are therefore likely to be inappropriate for sentencing child offenders, even if those child offenders fall to be sentenced under the Sentencing Act 1991 (Vic) in the higher courts.

6.47 It is therefore necessary to consider whether sentencing guidelines should only apply to offenders who were over 18 years at the time of the commission of their offence, or whether the guidelines council should be able to develop specific guidelines for application to children who were under 18 years at that time.

6.48 Although the Council did not expressly seek stakeholders’ views on this question, the issues paper did imply that the guidelines council would be empowered to create guidelines for application to the sentencing of children. The Council noted that ‘representation from the Children’s Court is desirable [on the guidelines council] 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’.

285. Children, Youth and Families Act 2005 (Vic) s 516(1)(b). The Children’s Court can, however, conduct committal proceedings in respect of these excluded offences: Children, Youth and Families Act 2005 (Vic) s 516(1)(c).


289. Sentencing Act 1991 (Vic) s 3 (definition of a young offender as a person under the age of 21 at the time of sentencing).


291. Sentencing Advisory Council (2017), above n 51, 18 (issues paper [3.18]).
Stakeholders’ views

6.49 A number of submissions expressly raised the particular needs of children and young people in the sentencing process, calling for the composition of the guidelines council to include representation by agencies with experience of working with children and young people, or judicial representation from the Children’s Court. One submission expressed the view that:

Children’s needs are very different to those of adults and very careful attention is needed in developing guidelines as to how and what sentencing options should be available for them.

6.50 Victoria Legal Aid submitted that, as children and young people in the criminal justice system have very specific needs, it would support further consultation on the need for sentencing guidelines in the Children’s Court, and the inclusion of additional judicial and non-judicial members with knowledge and expertise relevant to sentencing children and young people.

The Council’s view

6.51 The Council acknowledges that sentencing child offenders (offenders who were under 18 at the time of the commission of the offence) is significantly different from sentencing adult offenders, irrespective of whether children are sentenced in the Children’s Court or the higher courts.

6.52 As a result of the different legislative and common law approach to sentencing children, sentencing guidelines developed for adult offenders pursuant to the provisions of the Sentencing Act 1991 (Vic) could not, and should not, apply to sentencing child offenders. Instead, it would be necessary to legislatively empower the guidelines council to develop sentencing guidelines for children. This would involve amendments to the Children, Youth and Families Act 2005 (Vic) that would incorporate and reflect the amendments to the Sentencing Act 1991 (Vic), as is the case with some other provisions.

6.53 This prohibition on adult guidelines being used to sentence child offenders would apply to children sentenced both in the Children’s Court (which sentences the bulk of child offenders in Victoria) and in the higher courts.

6.54 Regardless of which jurisdiction is sentencing the child offender, the Council is of the view that the sentencing of children and adult offenders is so fundamentally different that sentencing guidelines developed for the adult jurisdictions should not be applied to the sentencing of any child. If a child is being sentenced in the higher courts, the only applicable sentencing guidelines should be those specifically developed for application to a child.

6.55 The Council notes that courts sentencing children and young offenders would still be under the same obligation to follow relevant sentencing guidelines as other courts (Recommendation 12). The Council further notes that just as sentencing guidelines for adults must be consistent with the provisions of the Sentencing Act 1991 (Vic), any sentencing guidelines for children would need to be consistent with the provisions of the Children, Youth and Families Act 2005 (Vic).

292 Submission 9 (Youthlaw); Submission 10 (Jesuit Social Services); Submission 22 (Victoria Legal Aid).
293 Submission 7 (Anonymous); Submission 22 (Victoria Legal Aid).
294 Submission 3 (T. McKay).
295 Submission 22 (Victoria Legal Aid).
296 See for example, Children, Youth and Families Act 2005 (Vic) ss 411(5), 413(1), 417, 430Z(1).
6.56 In addition, the guidelines council may wish to give consideration, when developing sentencing guidelines for application to child offenders, to forming reference groups with expertise in matters relating to the sentencing of children. Further, if the guidelines council chooses to develop such guidelines on a regular basis, it may wish to form an ongoing (rather than ad hoc) reference group for that purpose.

**Recommendation 11: Sentencing guidelines for child offenders**

Offence-based guidelines issued by the sentencing guidelines council for adult offenders under the *Sentencing Act 1991* (Vic) should not apply to the sentencing of children who were under 18 at the time of the commission of the offence, regardless of which court is sentencing them.

The *Children, Youth and Families Act 2005* (Vic) should be amended to include similar reforms as recommended for the *Sentencing Act 1991* (Vic) to allow the sentencing guidelines council to develop sentencing guidelines specifically for application when sentencing children.
7. Application of sentencing guidelines

Overview

7.1 This chapter discusses and makes recommendations on:

• how sentencing guidelines should be applied in practice, including:
  – how binding guidelines should be on courts in Victoria and how being required to follow a guideline should affect:
    • the current requirement for courts to have regard to current sentencing practices;
    • the approach to sentencing known as instinctive synthesis; and
    • common law precedents relating to sentencing principles;
  – how the application of a guideline can be reconciled with the imposition of an aggregate sentence; and
  – how Commonwealth and state offences should be sentenced in a single case when the state offence is covered by a relevant guideline;

• the extent to which sentencing guidelines should operate retrospectively;

• whether the prosecution and defence should be permitted to make submissions about sentencing ranges within sentencing guidelines;

• the relationship between sentencing guidelines and the standard sentence provisions that came into effect on 1 February 2018; and

• whether the Court of Appeal’s guideline judgment powers should be retained when sentencing guidelines are introduced.

7.2 Some of these issues were raised in the issues paper while others emerged during consultation.

How binding should sentencing guidelines be in Victoria?

7.3 As discussed in the issues paper, guidelines council jurisdictions have taken three approaches to incorporating guidelines into the sentencing exercise. Courts are required to:

• have regard to relevant sentencing guidelines;

• follow relevant sentencing guidelines; or

• sentence in a manner consistent with relevant sentencing guidelines.

7.4 The manner in which sentencing guidelines have been applied in England and Wales suggests that there is actually relatively little difference between these three approaches. For example, prior to 2010, courts in England and Wales were only required to have regard to guidelines, which might be considered the least onerous of the three tests. Appellate courts nevertheless treated improper application of the guidelines as a successful ground for appeal, and they have continued to do so since the legislation was amended in 2010 to require courts to follow guidelines, which might be considered the strictest of the three tests.
7.5 The real question, and one that a number of stakeholders commented on, is whether sentencing guidelines should be merely advisory, such that courts are not required to adhere to them, or whether they should be binding. Each of the guidelines council jurisdictions examined in the issues paper – England and Wales, Scotland and New Zealand – opted for guidelines that are binding and that require courts to adhere to them.

7.6 Stakeholders raised two objections to sentencing guidelines having binding authority in Victoria. The first objection is based on concerns about the effect guidelines might have on the independence of courts’ decision-making processes, especially the courts’ ability to impose just and individual sentences. The Supreme Court, for example, submitted that:

> [s]entencing law is a combination of legislative frameworks and requirements and common law principles. Arriving at a sentence is an exercise of discretion within the legislative framework and in accordance with principle … [The] law rejects as wrong in principle an approach of adding and subtracting item by item from a starting figure.300

7.7 The second objection to the sentencing guidelines council developing binding guidelines is that a body that does not include sitting judicial officers might be criticised for not having persuasive authority to issue guidelines that bind the courts.

7.8 The Council acknowledges the legitimacy of these concerns. In relation to the first objection, however, overseas experience has demonstrated that well-developed sentencing guidelines do not constrain judicial discretion, but instead structure and preserve it. Recent research in England and Wales suggests that guidelines have not only preserved but also improved the individualisation of sentences.301

7.9 The second objection then relates to the perceived credibility of the sentencing guidelines (and the guidelines council itself), not their legal authority. There is no question that legislation can empower the guidelines council to create binding guidelines. Any perceived lack of credibility of the guidelines council can, in the Council’s view, be addressed through comprehensive consultation with all stakeholders, especially the judiciary (see [5.27]).

7.10 Although like cases should be treated alike, no two cases are ever entirely the same, highlighting the difficulty faced by courts when considering similar past cases. Because of the critical importance of individualised justice, one of the most important features of sentencing guidelines in Victoria will be the preservation of judicial discretion by:

- permitting courts to consider factors not specified in the guidelines;
- leaving the decision about which factors are present (and to an extent, how much weight to accord them) in the hands of the courts; and
- ensuring that courts can depart from guidelines where they consider it in the interests of justice to do so (see [7.21]).

7.11 In relation to the test for determining whether a departure from a sentencing guideline is permissible, in England and Wales courts are permitted to depart from a guideline when doing so would be in the interests of justice.302 In New Zealand, the same would have been true.303 In Scotland, courts need only state their reasons for not following a guideline, as there is no legislative test for permissible departures.304

300. Submission 11 (Supreme Court of Victoria).
301. Researchers recently found that the introduction of sentencing guidelines relating to assault and burglary in England and Wales was able to improve both consistency and individualisation of sentencing outcomes, with judicial officers less likely to ‘cluster’ their sentences around popular numerical biases such as one year, or even numbers: Roberts, Pina-Sanchez and Marder (2018), above n 77.
302. Coroners and Justice Act 2009 (UK) s 125(1).
304. Criminal Justice and Licensing (Scotland) Act 2010 (Scot) s 6.
7. Application of sentencing guidelines

7.12 In the issues paper, the Council asked stakeholders to consider the extent to which sentencing guidelines should be binding on Victorian courts, and also whether the interests of justice test was appropriate, or whether perhaps a more stringent test – such as exceptional circumstances or substantial and compelling reasons – was preferable.

Stakeholders’ views

7.13 Feedback from most stakeholders supported sentencing guidelines being binding on sentencing courts.\(^{305}\) There were a number of reasons for this. The Office of Public Prosecutions considered it ‘essential that the effect of the guidelines be certain’, and suggested that requiring courts to follow guidelines ‘would provide the most certainty’.\(^{306}\) Similarly, Victoria Legal Aid submitted that:

> binding guidelines will ultimately lead to a greater long-term cultural shift, as the binding nature of the guidelines will oblige courts and the profession to engage with (rather than disregard) the guidelines … We also believe that this position will lead to greater consistency and public confidence in the sentencing process.\(^{307}\)

7.14 Another stakeholder commented that:

> [g]iven the court’s preference for broad judicial discretion and the use of instinctive synthesis, merely requiring the court to ‘have regard to’ the guidelines will have limited impact … the court is unlikely to follow such an approach unless specifically required to do so. In an advisory form, the guidelines will simply be an academic exercise. They must be binding on the court to have any chance of being effective.\(^{308}\)

7.15 A number of stakeholders did, however, express the contrary view, that sentencing guidelines in Victoria should not be binding.\(^{309}\)

7.16 In relation to the circumstances in which courts should be able to depart from relevant sentencing guidelines, there was substantial support for courts being able to depart from guidelines where doing so would be ‘in the interests of justice’,\(^{310}\) so long as the court explains the reasons for the departure.\(^{311}\) The Office of Public Prosecutions submitted that:

> [a] court should be permitted to depart from a guideline when doing so would be ‘in the interests of justice’. We consider that this is an appropriate test for departing from a guideline. However, we respectfully submit that the judge or magistrate should have to provide reasons as to why departing from the guideline is in the interests of justice.\(^{312}\)

\(^{305}\). Submission 3 (T. McKay); Submission 4 (Anonymous); Submission 6 (Anonymous); Submission 10 (Jesuit Social Services); Submission 12 (Victims of Crime Commissioner); Submission 13 (Office of Public Prosecutions); Submission 16 (Anonymous); Submission 18 (Anonymous); Submission 22 (Victoria Legal Aid); Submission 27 (Victoria Police).

\(^{306}\). Submission 13 (Office of Public Prosecutions).

\(^{307}\). Submission 22 (Victoria Legal Aid).

\(^{308}\). Submission 18 (Anonymous).

\(^{309}\). Submission 8 (J. Bartle); Submission 9 (Youthlaw); Submission 23 (Liberty Victoria); Submission 24 (Law Institute of Victoria); Submission 26 (Chief Magistrate of the Magistrates’ Court of Victoria); Submission 28 (Victorian Bar).

\(^{310}\). Submission 6 (Anonymous); Submission 13 (Office of Public Prosecutions); Submission 16 (Anonymous); Submission 18 (Anonymous); Submission 22 (Victoria Legal Aid).

\(^{311}\). Submission 16 (Anonymous); Submission 18 (Anonymous).

\(^{312}\). Submission 13 (Office of Public Prosecutions).
Another stakeholder commented that:
requiring the court to follow guidelines unless it is ‘contrary to the interests of justice’ to do so,
appears to be the safest approach in terms of preserving judicial discretion … [A]s Ashworth recognises, ‘so long as there is an “interests of justice” exception, can the constraint really be too great? Requiring the court to ‘follow’ the sentencing guidelines is consistent with the guidelines setting down a process to be worked through and the expectation that it will be adhered to.313

Two stakeholders supported a more stringent departure test, and suggested that courts only be permitted to depart from a relevant sentencing guideline if there are ‘substantial and compelling reasons’ or ‘exceptional circumstances’.314

The Council’s view

The Council is of the view that for sentencing guidelines to achieve their intended effect, they must be binding on courts. This is necessary for the following reasons:

• A key aim of sentencing guidelines is to increase consistency in sentencing. Guidelines that are merely advisory would most likely have the contrary effect, of increasing disparity in sentencing, because some judicial officers may apply relevant guidelines while others may not.

• It would not be possible to simultaneously apply the current approach of instinctive synthesis (see [7.44]–[7.48]) while also applying a relevant sentencing guideline. These two approaches cannot be used to sentence the same offence in a single case.

• It is intended that sentencing guidelines be capable of addressing identified issues with existing sentencing practices, as they occasionally have in other jurisdictions.315 Guidelines would need to be legally enforceable to address similar concerns in Victoria.316

• Sentencing guidelines are intended to increase community input into sentencing.317 It would be difficult to argue that such input would be worthwhile if the resulting guidelines were not then binding on the courts.

• Non-binding sentencing guidelines could render individual sentences more susceptible to legal challenge. If a court were required to only have regard to a relevant guideline, there would be greater scope for parties to argue that the court gave too much or too little regard to the guideline (for example, by arguing that the court gave insufficient weight to current sentencing practices, which would continue to be a required consideration if guidelines were non-binding).

The Council is further of the view that the simplest and clearest expression of the requirement for a court to apply sentencing guidelines should be used, and that legislation should therefore expressly require courts to follow any relevant guidelines.

314. Submission 10 (Jesuit Social Services); Submission 12 (Victims of Crime Commissioner).
315. See for example, Sentencing Council for England and Wales, Consultation Stage Resource Assessment: Terrorism Offences (2017) 2 (‘for some of the offences, Council intends either to increase sentences, or for some of the very low volume offences, to set sentencing practice at a sufficiently high level to reflect the seriousness of the offence’).
316. There have been a number of Victorian judgments in recent years identifying a need to increase sentencing for certain offence categories: see for example, Director of Public Prosecutions v Dolgleish (A Pseudonym) [2017] HCA 41 (11 October 2017); Director of Public Prosecutions v Dolgleish (A Pseudonym) [2016] VSCA 148 (29 June 2016) (sentencing for incest offences); Shrestha v The Queen [2017] VSCA 364 (11 December 2017) (sentencing for digital rape); Kalalo v The Queen [2017] VSCA 223 (30 August 2017) (sentencing for incitement to murder).
7.21 It is fundamental that courts should retain discretion to impose a just and proportionate sentence according to the circumstances of each case. The most appropriate way of achieving this, in the Council’s view, is by permitting courts to depart from a relevant sentencing guideline where doing so would be in the interests of justice, so long as courts explain their reasons for departure.

7.22 The Council is of the view that binding sentencing guidelines are not just the preferred option: it would be preferable to have no guidelines at all rather than non-binding guidelines. Non-binding guidelines would likely make sentencing more complex than it already is, and could have the opposite effect to the intended policy objectives by increasing inconsistency, decreasing transparency and threatening public confidence in sentencing.

**Recommendation 12: Application of sentencing guidelines**

The *Sentencing Act 1991* (Vic) should specify that courts must follow any relevant sentencing guideline, unless the court is satisfied that it would be contrary to the interests of justice to do so and the court explains its reasoning.

**Effect of a court failing to follow a sentencing guideline or give reasons**

7.23 Section 103 of the *Sentencing Act 1991* (Vic) currently provides that sentences are not automatically invalidated if a court has failed to comply with a procedural requirement. Instead, the appropriate course of action in those circumstances is for the party to appeal the sentence in order to have the sentence reviewed in light of that alleged failure.

7.24 The Council is of the view that, for clarity and the avoidance of doubt, the *Sentencing Act 1991* (Vic) should be amended to expressly provide that the failure of a court to comply with any procedural requirement imposed by a relevant sentencing guideline in sentencing an offender does not invalidate any sentence imposed by that court. As with any other failure to comply with a procedural requirement, the appropriate recourse should be through the appeal process.

**Recommendation 13: Failure to comply or give reasons**

Section 103 of the *Sentencing Act 1991* (Vic) should be amended to include that the failure of a court to comply with any procedural requirement contained in any relevant sentencing guideline in sentencing an offender does not invalidate any sentence imposed by the court.
Effect on common law precedents

7.25 In the issues paper, the Council asked stakeholders whether sentencing guidelines issued by the guidelines council in Victoria should overrule existing common law precedents, and if so, whether legislation should expressly provide that the common law does not apply in the event of inconsistency between the two. It was proposed that guidelines would overrule common law precedents, both consistent and inconsistent.\(^{318}\)

Stakeholders’ views

7.26 Most stakeholders – including Victoria Legal Aid, the Chief Magistrate, Victoria Police, the Victims of Crime Commissioner and Jesuit Social Services – supported the ability of sentencing guidelines to overrule common law precedents, on the basis that guidelines would not have the intended effect or achieve any useful purpose if they did not have that authority.\(^{319}\)

7.27 One stakeholder proposed that sentencing guidelines should take priority where there is inconsistency between the common law, but that they should not unintentionally overrule carefully developed common law if the two are consistent:

> It seems unlikely that the intention is to deprive the courts of the benefit of years of informative common law, much of which will likely be drawn upon by the [sentencing guidelines] council itself when formulating the guidelines … Existing common law and sentencing guidelines can sit alongside each other, as in England and Wales, with the common law operating within a structure provided by the guidelines. All that needs to be addressed is which takes priority where there is conflict between the two.\(^{320}\)

7.28 Four stakeholders – including the Law Institute of Victoria, the Victorian Bar and Liberty Victoria – did not support guidelines having the ability to overrule common law precedents.\(^{321}\)

The Council’s view

7.29 Given that the Council has recommended that sentencing guidelines should be binding in Victoria and provide a clear and transparent mechanism for both offence-based guidelines and principle-based guidelines,\(^{322}\) it is essential that guidelines have the ability to overrule inconsistent common law (including guideline judgments).

7.30 For example, the guidelines council might publish a sentencing guideline about how an offender’s mental impairment is to be taken into account in sentencing. If there is any inconsistency between that guideline and existing case law on the issue (that is, Verdins\(^{323}\) and subsequent authorities), then the guideline would need to take precedence. This is necessary not only because it prevents confusion about the relationship between the two, but also because it acknowledges the legal status of guidelines as having more authority than common law precedents.

7.31 The Council notes the concern that sentencing guidelines might unintentionally interfere with carefully developed common law precedents, and agrees that it would be inappropriate to simply ‘wipe the slate clean’ regardless of the guidelines council’s intention to preserve or overrule those precedents.

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318. Sentencing Advisory Council (2017), above n 51, 59 (issues paper [5.74]).
319. Submission 10 (Jesuit Social Services); Submission 12 (Victims of Crime Commissioner); Submission 13 (Office of Public Prosecutions) (approval is implied; see above n 62); Submission 18 (Anonymous); Submission 22 (Victoria Legal Aid); Submission 26 (Chief Magistrate of the Magistrates’ Court of Victoria); Submission 27 (Victoria Police).
320. Submission 18 (Anonymous).
321. Submission 8 (J. Bartle); Submission 23 (Liberty Victoria); Submission 24 (Law Institute of Victoria); Submission 28 (Victorian Bar).
7.32 The Council is therefore of the view that the default position should be the preservation of consistent common law precedents, but that the guidelines council should have discretion to expressly state an intention to overrule consistent common law. The guidelines council may, for example, wish to simplify a complex set of common law precedents and codify them.

7.33 There is a significant advantage to sentencing guidance being contained exclusively within a transparent and clearly written sentencing guideline, allowing community members to see codified legal principles that are otherwise contained within numerous judicial decisions. That said, nuances may be lost in a guideline that were otherwise accounted for in the common law. The guidelines council should therefore only overrule a common law principle if it is satisfied that doing so is necessary and appropriate, and would have no unintended consequences.

7.34 Courts would still have a considerable role in developing common law precedents relating to the interpretation of sentencing guidelines, particularly for issues not addressed in a relevant guideline. For example, in the recent English case of *R v Ajayi and Another*, which involved offenders charged with drug-related offences, the Court of Appeal (Criminal Division) noted that since the publication of the definitive guideline relating to drug offences, a phenomenon had emerged known as *cuckooing* (or *running county lines*). Cuckooing involves:

- retail drug dealers from large metropolitan centres who travel to a smaller provincial community to sell drugs and who set themselves up in premises locally from which they will operate. Very frequently, they will latch onto a local dealer and take over his network, or onto a local user, and take over his address as a base for operations …

The practice of cuckooing is commonly achieved by exploiting local drug users … by paying them in drugs, or by building up drug debt, or by the use of threats and/or violence to coerce.

7.35 Because of the unique nature of this form of drug offending, the Court of Appeal encouraged future courts, when following a relevant guideline, to sentence in a manner that reflects a particularly high level of culpability for the persons responsible for establishing the cuckooing operation, and if the evidence warrants it, ‘to mitigate the position of a vulnerable recruit who has clearly been exploited’.

7.36 The common law relating to sentencing would therefore be preserved in a number of ways. First, a sentencing guideline would only interfere with established common law if there were either inconsistency between the two or an express statement to that effect in a guideline. Second, it is anticipated that the guidelines council would exercise considerable caution before displacing consistent common law precedents. Third, after each guideline commences, courts would be responsible for developing case law about its application and interpretation, such as by supplementing a guideline’s non-exhaustive lists of relevant factors to take into account, or permissible reasons to depart.

**Recommendation 14: Effect on common law precedents**

The *Sentencing Act 1991* (Vic) should expressly state that, where there is an inconsistency between the common law and a sentencing guideline, or where a sentencing guideline expressly states an intention to overrule a common law principle, the sentencing guideline takes precedence over the common law, including a guideline judgment.

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Consideration of current sentencing practices

7.37 Section 5(2)(b) of the Sentencing Act 1991 (Vic) currently requires courts in Victoria to take current sentencing practices into account when sentencing an offender. Current sentencing practices have been described as the approach ‘currently adopted by sentencing judges when sentencing for the particular offence’. The aim of requiring courts to look at recent sentencing patterns for a particular offence is to achieve a level of consistency in the application of relevant legal principles. The High Court recently clarified that while current sentencing practices are an important factor to take into consideration, they are just one factor among many.

7.38 In the issues paper, the Council expressed the view that current sentencing practices prior to the commencement of a sentencing guideline should no longer be relevant. The guideline would effectively become the new standard by which any relevant offences would be sentenced, though not prohibiting courts from taking into account post-guideline sentencing practices. As Professor Roberts has pointed out, this is necessary in order for guidelines to be capable of having any effect on sentencing practices and addressing any systemic issues identified with those practices for particular offences.

7.39 On the one hand, a number of stakeholders – including Victoria Police, the Victorian Bar and the Victims of Crime Commissioner – supported this approach. Victoria Police commented that ensuring guidelines overrule current sentencing practices ‘is critical to the guidelines council achieving its proposed purposes’.

7.40 Liberty Victoria, on the other hand, stated that sentencing guidelines ‘should be devised and used to clarify and consolidate, rather than alter, the common law or current sentencing practices’.

7.41 The Council remains of the view expressed in the issues paper that sentencing practices prior to the commencement of a relevant offence-based guideline should no longer be relevant. To that end, the Council recommends that section 5(2)(b) of the Sentencing Act 1991 (Vic) be amended to specify that where a relevant offence-based guideline applies, the only sentencing practices to which a court may have regard are those sentences imposed in accordance with the relevant guideline.

7.42 The Council has intentionally made the consideration of post-guideline sentencing practices discretionary for sentencing courts, not required. An offence-based guideline is intended to become the measure of current sentencing practices; parties in the case should only bring similar cases sentenced under a sentencing guideline to the court’s attention if this would assist the court in determining how to apply the guideline. Even then, the court should have discretion to decide whether those cases would be of assistance or not.

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329. Director of Public Prosecutions v CPD (2009) 22 VR 533, 552.
331. Director of Public Prosecutions v Dalgleish (A Pseudonym) [2017] HCA 41 (11 October 2017).
332. Sentencing Advisory Council (2017), above n 51, 51–52 (issues paper [5.29]–[5.35]).
334. Submission 3 (T. McKay); Submission 6 (Anonymous); Submission 12 (Victims of Crime Commissioner); Submission 18 (Anonymous); Submission 27 (Victoria Police); Submission 28 (Victorian Bar).
335. Submission 27 (Victoria Police).
336. Submission 23 (Liberty Victoria).
7. Application of sentencing guidelines

7.43 This treatment of current sentencing practices would be relatively consistent with the new standard sentence provisions of the Sentencing Act 1991 (Vic), which provide that a court must only have regard to current sentencing practices for a standard sentence offence that has been imposed since the standard sentence provisions came into force. (In effect, this prohibits courts from considering sentencing practices in place prior to the operation of the standard sentence provisions.337) However, while the standard sentence provisions preserve instinctive synthesis and retain some sentencing practices (post-commencement) as a required consideration, instinctive synthesis would not be relevant in the application of a sentencing guideline, and post-guideline sentencing practices would only be relevant if a court considered them to be of assistance.

Recommendation 15: Effect on consideration of current sentencing practices

The Sentencing Act 1991 (Vic) should expressly state that despite section 5(2)(b), where a relevant offence-based guideline applies, the only sentencing practices to which a court may have regard are those sentences imposed in accordance with that guideline.

Effect of sentencing guidelines on instinctive synthesis

7.44 Victorian courts currently sentence offenders using an approach termed instinctive synthesis (or intuitive synthesis). This approach is often contrasted with an alternative approach called two-tier (or two-stage) sentencing. McHugh J has described the two approaches as follows:

By two-tier sentencing, I mean the method of sentencing by which a judge first determines a sentence by reference to the ‘objective circumstances’ of the case. This is the first tier of the process. The judge then increases or reduces this hypothetical sentence incrementally or decrementally by reference to other factors, usually, but not always, personal to the accused. This is the second tier.

By instinctive synthesis, I mean the method of sentencing 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 what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.338

7.45 Sentencing guidelines represent a significant departure from instinctive synthesis, moving instead towards a staged approach to sentencing. In 2005, the High Court was asked to consider whether staged sentencing was appropriate in Australian jurisdictions, or whether only instinctive synthesis was permissible.339 The New South Wales Court of Criminal Appeal had sentenced an offender by first determining a starting point by reference to a single factor relevant to the objective seriousness of the offending (the quantity of the drug being trafficked), and then adjusting the sentence to eight years’ imprisonment by reference to aggravating and mitigating factors. The appellant argued that this approach was inappropriate and that by applying this two-staged approach, the court had inappropriately anchored the sentencing exercise.

337. Sentencing Act 1991 (Vic) s 5B(2)(b).
338. Markarian v The Queen (2005) 228 CLR 357, 377–378 (emphasis added). The term instinctive synthesis was first used in R v Williscroft and Others (1975) VR 292, 300 (ultimately every sentence imposed represents the sentencing judge’s instinctive synthesis of all the various aspects involved in the punitive process).
7.46 The majority of the High Court agreed, and held that the sentencing court had given too much weight to a single factor relating to the offending, which had artificially resulted in an excessive starting point. The majority rejected an approach whereby courts would ‘add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison’. They did not, however, rule out the possibility that there might be cases in which ‘indulgence in arithmetical deduction by sentencing judges’ would be acceptable. Therefore, while there was a clear preference for instinctive synthesis, the court did not expressly prohibit alternative approaches. Further, a majority of the High Court has since confirmed that approaches to sentencing offenders other than instinctive synthesis are permissible if clearly expressed in legislation.

7.47 The Law Institute of Victoria and Liberty Victoria opposed sentencing guidelines having any effect on the operation of instinctive synthesis in Victoria. Another stakeholder, however, commented that staged sentencing is more likely to encourage transparency and public understanding than the current approach of instinctive synthesis.

7.48 The Council is of the view that, to avoid doubt, the Sentencing Act 1991 (Vic) should be amended to unambiguously provide that the common law approach to sentencing known as instinctive synthesis would not apply when sentencing a charge of an offence to which a relevant offence-based guideline applies. Instinctive synthesis is incapable of being applied to an offence if a binding offence-based guideline that establishes a staged approach to sentencing applies to that same offence. Instinctive synthesis may be considered to maximise judicial discretion at the expense of transparency; sentencing guidelines may be considered to maximise transparency while structuring, but preserving, judicial discretion.

**Recommendation 16: Effect on instinctive synthesis**

The Sentencing Act 1991 (Vic) should expressly state that when a court is sentencing an offence to which a relevant offence-based guideline applies, the common law approach to sentencing known as instinctive synthesis does not apply for the purpose of determining the sentence for that offence.

7.49 This will not, however, affect the application of instinctive synthesis to sentencing offences to which no sentencing guideline applies, or the application of broader principles (such as totality) for which no sentencing guideline has been developed.

7.50 The application of an offence-based guideline, in a case involving both guideline and non-guideline offences, would be confined to the sentencing of offences covered by a relevant guideline. Courts would still need to apply instinctive synthesis in determining the appropriate sentence for any non-guideline offences (see Case Study 1).

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342. *Muldrock v The Queen* (2011) 244 CLR 120. See also the concurring judgment of McHugh J in *Markarian v The Queen* (2005) 228 CLR 357, 392 (‘whatever has been said or written by judges about that [sentencing] task must take second place to the requirements of legislation as part of the written law’).
343. Submission 23 (Liberty Victoria); Submission 24 (Law Institute of Victoria).
344. Submission 18 (Anonymous).
Case Study 1: Hypothetical case with guideline and non-guideline offences

The offender drives at night to his ex-partner’s residence, armed with a baseball bat, with the intention of assaulting her new boyfriend. The offender enters the premises and assaults the victim. The offender pleads guilty in the County Court to one charge of aggravated burglary and one charge of assault.

Victoria’s sentencing guidelines council has issued a relevant offence-based guideline for burglary offences, including category ranges, starting points and mitigating and aggravating factors. The guidelines council has not yet published an offence-based guideline for assault offences.

The court identifies the appropriate sentence for the aggravated burglary charge using the charge-based steps of the relevant sentencing guideline, and identifies the appropriate sentence for the assault charge using instinctive synthesis (informed by current sentencing practices). The court does this in either order.

After the court has identified the appropriate sentences for each charge, it then takes into account case-level considerations, such as the applicable guilty plea discount and the extent to which there should be concurrency and/or cumulation between the two charges. The court then fixes a total effective sentence and non-parole period.

Sentencing guidelines and aggregate sentences

7.51 One of the issues that emerged during consultation was how to reconcile the application of sentencing guidelines with the imposition of aggregate sentences.

7.52 When sentencing an offender for two or more offences founded on the same facts, or part of a series of offences of the same character, the court can usually sentence the offender to an aggregate sentence of imprisonment or an aggregate fine, representing a single penalty for multiple offences. There are some circumstances in which courts may not impose an aggregate sentence, such as when the offender is a serious offender.

7.53 When imposing an aggregate sentence, the court is not required to identify the sentences that would have been imposed for each charge. However, for an aggregate sentence of imprisonment, the court must announce its reasons for imposing an aggregate sentence.

7.54 Aggregate sentences of imprisonment are common in Victoria. Between 2011 and 2016, 84% of all offences sentenced to imprisonment in the Magistrates’ Court were part of an aggregate sentence (131,394 of 156,413), and 9% of all offences sentenced to imprisonment in the higher courts were part of an aggregate sentence (2,164 of 23,601).

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345. Sentencing Act 1991 (Vic) ss 9(1), 51(1). As at 1 June 2018, courts sentencing young offenders to detention under the Sentencing Act 1991 (Vic) or Children, Youth and Families Act 2005 (Vic) will also be able to impose an aggregate sentence of detention in respect of two or more offences that are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character: Sentencing Act 1991 (Vic) s 32A (not yet in operation), Children, Youth and Families Act 2005 (Vic) s 362B (not yet in operation), inserted by Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017 (Vic) s 7, 8.

346. Sentencing Act 1991 (Vic) s 9(1A) (a court must not impose an aggregate sentence of imprisonment if the offender is a ‘serious offender’, if at least one of the offences was committed while the offender was on parole and another offence was committed at another time, or if at least one offence is a standard sentence offence), s 51(1A) (a court must not impose an aggregate fine if at least one of the offences is a standard sentence offence).


7.55 Courts may also impose a single community correction order for multiple offences. In those circumstances, courts are not required to announce the sentences that would have been imposed for each separate offence.\textsuperscript{350} Similarly, a drug treatment order may be made in respect of one or more offences, though there is no requirement for the offences to be founded on the same or similar facts and circumstances.\textsuperscript{351} These orders are not, however, defined as aggregate sentences in the \textit{Sentencing Act 1991} (Vic).

7.56 The application of an offence-based guideline initially appears incompatible with the imposition of an aggregate sentence. As discussed in the issues paper, one of the circumstances in which courts in England and Wales have failed to follow a sentencing guideline (as required by legislation) is when there is a lack of transparency about how the court applied the guideline.\textsuperscript{352} Even though the outcome might be appropriate, this lack of clarity renders the outcome \textit{prima facie} inappropriate (such as failing to explain why an offender has not been given the allocated reduction for a guilty plea).\textsuperscript{353} Imposing an aggregate sentence for multiple charges that include one or more guideline offences would remove the transparency afforded by guidelines.

7.57 Because this issue emerged after the Council had already published its issues paper, it is not a question that all stakeholders have had an opportunity to consider or comment on.

7.58 The Council is of the view that, in order for sentencing guidelines to be effective, sentences imposed on individual charges must be visible: to the public, to the offender and to any appellate courts as evidence that the sentencing court has followed the guideline. The Council also acknowledges, however, that the majority of imprisonment sentences in Victoria are currently aggregate sentences; therefore, any substantial change to this practice would further burden an already strained system.

7.59 In order to balance these competing considerations – the workload of the courts and the need for visible application of sentencing guidelines – the Council recommends that Victorian courts be permitted to include guideline offences in an aggregate sentence. However, when doing so, courts should still be required to state the sentences imposed on those guideline offences. This is described in Case Study 2.

7.60 The court could still impose an aggregate sentence but would need to demonstrate that the sentence for the relevant offences was determined by reference to the relevant guideline. The court would not, however, need to indicate the levels of cumulation or concurrency between the charges.

\textsuperscript{350} \textit{Sentencing Act 1991} (Vic) s 40.
\textsuperscript{351} \textit{Sentencing Act 1991} (Vic) s 18ZA(1).
\textsuperscript{352} Sentencing Advisory Council (2017), above n 51, 52 (issues paper [5.17]).
\textsuperscript{353} \textit{R} v \textit{Thomas} [2016] EWCA Crim 2223 (21 December 2016).
Case Study 2: Hypothetical case involving an aggregate sentence

The offender breaks into two houses at night while the occupants (who are unknown to the offender) are at home sleeping. During the break-ins, the offender steals electronics. The offender pleads guilty in the County Court to two charges of aggravated burglary and four charges of theft.

Victoria’s sentencing guidelines council has issued a relevant offence-based guideline for burglary offences (including category ranges, starting points and mitigating and aggravating factors). The guidelines council has not yet published an offence-based guideline for theft.

Because the offending takes place in a single evening and the offences are of a similar character, the judge forms the view that it is appropriate to impose an aggregate sentence on all six charges.

First, the judge follows the aggravated burglary guideline to determine the appropriate penalties for those two offences (for example, three years’ imprisonment for each offence). Second, the judge determines the aggregate sentence of imprisonment for all six charges (for example, five years’ imprisonment). Third, when announcing the sentence in court, the judge needs to state that each charge of aggravated burglary has received three years’ imprisonment, and that an aggregate sentence of five years’ imprisonment has been imposed on all six offences.

7.61 While the Council is of the view that this process would not, in itself, constitute two-stage sentencing, it acknowledges that it could be perceived as such. This concern would, however, be addressed through the implementation of Recommendation 16 (see [7.44]–[7.50]), such that the common law approach known as instinctive synthesis would not apply when sentencing an offence to which a relevant offence-based guideline applies, therefore permitting two-stage sentencing in the application of sentencing guidelines.

Recommendation 17: Including guideline offences in an aggregate sentence

The Sentencing Act 1991 (Vic) should expressly provide that if:

- a court is sentencing two or more offences in a single case;
- the court has decided to impose an aggregate sentence; and
- at least one of the offences included in the aggregate sentence is an offence to which a relevant offence-based guideline applies;

the court must apply any relevant offence-based guideline and announce the sentence imposed on those offences before imposing an aggregate sentence.

7.62 The Council notes that there is a risk that this approach could lead to an increase in aggregate sentences, particularly if they are viewed as a means of avoiding the full application of any relevant guidelines. According to current law, however, this should not occur: courts must not impose an aggregate sentence of imprisonment on multiple offences unless they are ‘founded on the same facts, or form, or are part of, a series of offences of the same or a similar character’.354 Further, when courts impose an aggregate sentence of imprisonment, they must give reasons for doing so.355

7.63 The Council suggests that consideration should be given to conducting a review – perhaps in two to three years’ time – of the use of aggregate sentences in Victoria, with particular attention to the inclusion of guideline offences in aggregate sentences.

Sentencing Commonwealth and state offences

7.64 A further issue that emerged during consultation was how to reconcile the application of a staged sentencing process in an offence-based guideline with the application of Commonwealth law in cases with both state and Commonwealth offences.

7.65 In 2016–17, approximately 1% of cases sentenced in Victoria included both state and Commonwealth offences in a single case: 831 of 86,050 cases in the Magistrates’ Court (1%) and 74 of 1,670 cases in the higher courts (4%) (Figure 1).

Figure 1: Cases with at least one state offence and at least one Commonwealth offence, Magistrates’ Court and higher courts, 2016–17

7.66 In the cases involving both Commonwealth and state offences, courts must apply a hybrid of state and Commonwealth law in sentencing the offender, though the court is first and foremost a federal court in that process. Any state law that would be inconsistent with the proper application of Commonwealth law in the case is therefore not ‘picked up’ and applied. Establishing whether any particular state law has that effect is no easy task, and this can make the sentencing exercise very complex. The Court of Appeal, for example, recently commented that there is ‘extraordinary complexity’ and ‘extraordinary difficulties’ in sentencing for multiple offences on a joint Commonwealth–state indictment. In that case, the court cited R v Carroll, which described the Commonwealth and state sentencing regimes as a ‘legislative jungle in which any court sentencing a federal offender must now spend a considerable time’.

7.67 In its submission, the Supreme Court asked the Council to consider how the introduction of sentencing guidelines would affect the sentencing exercise in cases involving both state and Commonwealth offences.

357. Section 79 of the Judiciary Act 1903 (Cth) permits state sentencing laws to be applied in cases with both state and Commonwealth offences where the Australian Constitution does not ‘otherwise provide’.
358. Director of Public Prosecutions (Vic) and Director of Public Prosecutions (Cth) v Swingler [2017] VSCA 305 (24 October 2017) [35], [75].
359. Director of Public Prosecutions (Vic) and Director of Public Prosecutions (Cth) v Swingler [2017] VSCA 305 (24 October 2017) [75]; R v Carroll (1991) 2 VR 509, 514.
360. Submission 11 (Supreme Court of Victoria).
7.68 The Council sought constitutional advice about whether a sentencing guideline developed by the guidelines council in Victoria could be validly applied when a Victorian court is exercising federal jurisdiction in a case involving both state and Commonwealth offences. The relevant question, the advice noted, is whether the guideline would direct the manner and outcome of the exercise of the court’s jurisdiction. The advice concluded that guidelines would not have this effect and that the court could lawfully apply a guideline to the relevant state offences. This would be on the basis that:

- the sentencing of the state offence would be compartmentalised in a way that would only affect the sentencing of the individual charge and not the case as a whole (or the sentencing of the Commonwealth offences);
- the guideline would outline the comprehensive and non-exhaustive list of factors that would go into setting the starting point and sentencing range;
- the court would still retain discretion to reach a sentencing decision for that charge that took into account all the relevant factors and was just and proportionate in the circumstances; and
- the court would still retain a real discretion to depart from the guideline in appropriate circumstances.

7.69 Accordingly, there should be no bar to sentencing guidelines being applied in a case involving both state and Commonwealth offences so long as the guideline does not attempt to dictate how the court should sentence Commonwealth offences, or the case as a whole, and the court retains discretion (an essential characteristic of a court).

7.70 The Council recommends that, for clarity, legislation should specify that a court should only apply the relevant offence-based guideline to the extent of determining the sentence for the state offence when sentencing an offender in a case involving at least one state offence to which an offence-based sentencing guideline applies and at least one Commonwealth offence.

7.71 If there are further case-level steps in the relevant sentencing guideline, they would not apply; neither would any principle-based guidelines. Instead, the court would still determine the final sentence in the case and the individual sentence for the Commonwealth offences by reference to Commonwealth sentencing principles.

Recommendation 18: Sentencing Commonwealth and state offences

The Sentencing Act 1991 (Vic) should expressly provide that when a court sentences two or more offences in a single case and:

- at least one is a state offence to which a relevant offence-based guideline applies; and
- at least one is a Commonwealth offence;

the court must only apply the offence-based guideline when determining the appropriate sentence for the relevant state offence.

361. Hanks and Hill (2017), above n 31, 30–32 (constitutional advice [80]–[84]).
Should sentencing guidelines operate retrospectively?

7.72 In the issues paper, the Council discussed the laws relating to retrospectivity of sentencing practices and principles and sought stakeholder feedback about the extent to which sentencing guidelines should operate retrospectively in Victoria. There are three ways in which sentencing guidelines might conceivably operate retrospectively:

1. Sentencing guidelines might apply to first instance sentencing decisions for offences sentenced after (but committed before) the commencement of a relevant guideline.

2. Sentencing guidelines might apply to resentencing following a successful appeal (by the prosecution or the accused) of a first instance sentencing decision made before a relevant guideline came into effect.

3. The promulgation of a relevant sentencing guideline might be used as the basis on which a previously imposed sentence might be appealed.

Retrospectivity (at first instance)

7.73 In relation to the first form of potential retrospectivity, the Council considered whether sentencing guidelines should apply to all offences sentenced after a relevant guideline comes into effect (retrospective), or to all offences committed after a relevant sentencing guideline comes into effect (prospective).

7.74 It could be argued that if guidelines were to operate retrospectively, this would give rise to potential injustice because it would subject offenders to sentencing standards different from those they might have reasonably anticipated at the time of the offence. On this point, however, Australian courts have held that, in terms of penalties, the only expectation an offender can have is that they will not receive a sentence more severe than the maximum penalty applicable at the time of the offence. Indeed, for certain offences, several jurisdictions have specified that sentencing practices at the time of the offence are irrelevant.

7.75 Further, there is a strong argument that an offender who chose not to admit their offending at a time when sentencing practices might have resulted in a less severe sentence should not benefit from the concealment of their offending. The Court of Appeal in R v Whyte, for example, held that while accused persons may be entitled to have delay between offending and sentence taken into account as a mitigating factor:

[w]here … the delay cannot be sheeted home to the prosecution or the system, but can be fairly attributed to the accused, such as absconding from bail, fleeing the jurisdiction or otherwise avoiding being brought to justice, delay must necessarily become of less significance, even to the point of giving less credit for rehabilitation established during that period.

363. Sentencing Advisory Council (2017), above n 51, 53–57 (issues paper [5.42]–[5.65]).
364. See for example, Green v The Queen (2006) NTCCA 22 (23 October 2006).
365. See for example, Criminal Law (Sentencing) Act 1988 (SA) s 29D (for offences involving paedophilia).
7.76 Allowing guidelines to operate retrospectively and to apply to all offences sentenced after their commencement is consistent with other mechanisms by which sentencing practices are altered. For example, in June 2016 the Court of Appeal held that sentencing practices for incest offences in Victoria were manifestly inadequate and should be uplifted. This had an immediate effect on all subsequent sentencing hearings, not just those dealing with offending that took place after the Court of Appeal’s decision.

7.77 A retrospective approach is also consistent with each of the guidelines council jurisdictions that address the issue; guidelines apply to all offences sentenced after their commencement, irrespective of when the offence was committed. This is the case in England and Wales and would have been the case in New Zealand. The Scottish legislation is silent on the issue.

Retrospectivity (when resentencing)

7.78 In the issues paper, the Council also asked stakeholders whether sentencing guidelines that came into effect between a sentence at first instance and a successful sentence appeal should be applicable in the resentencing of an offender. The High Court has previously held that the only applicable law in resentencing is the law that was applicable at the time of the first sentence:

The convicted person 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.

7.79 In effect, the court concluded that the sentence was intended to be finalised at the original sentencing hearing, and judicial error should not lead to a later outcome that is different from the one that should have otherwise been imposed but for the error. Presumably, that logic extends to the introduction of fresh evidence by either party; it should not affect the law that is applicable in resentencing the offender. The Victorian Court of Appeal has also endorsed this position, finding that the law at the date of first sentence applies during resentencing following a successful sentence appeal.

369. See for example, Calazzo (A Pseudonym) v The Queen [2017] VSCA 242 (11 September 2017) (the Court of Appeal finding that the uplift required for incest sentences applied despite the entirety of the offending taking place before the Court of Appeal’s decision in Director of Public Prosecutions v Dalgliesh (A Pseudonym) [2016] VSCA 148 (29 June 2016).
371. Sentencing Act 2002 (NZ) s 6A (repealed) (‘[a] sentencing guideline applies to the sentencing of an offender … or after the date on which the guideline comes into force, whether or not the guideline was in force when the offence was committed’).
372. Sentencing Advisory Council (2017), above n 51, 56 (issues paper [5.57]–[5.60]).
7.80 It is also possible for an offender to fall to be resentenced in circumstances other than a successful sentence appeal, in particular, if they breach their original sentencing order. This may happen, for example, following a breach of a drug treatment order,\(^{375}\) a community correction order,\(^{376}\) a fine instalment order,\(^{377}\) a conversion order,\(^{378}\) a justice plan condition,\(^{379}\) a residential treatment order,\(^{380}\) or an adjourned undertaking,\(^{381}\) and the court decides that in the circumstances it is appropriate to cancel the sentencing order and resentence the offender for the original offence(s).

### Retrospectivity (new guideline as grounds of appeal)

7.81 The third potential form of retrospectivity is the possibility that the accused or the prosecution could seek to appeal a previously imposed sentence on the basis that a sentencing guideline issued after the sentencing hearing renders that sentence manifestly excessive or inadequate. In the issues paper, the Council proposed that the principle of finality should operate to prohibit such appeals, as cases should not be reopened except in very narrowly defined circumstances.\(^{382}\)

7.82 This proposal is consistent with the approach taken in the guidelines council jurisdictions examined in the issues paper. Scottish legislation expressly prohibits past sentences from being relitigated when a sentencing guideline is revised.\(^{383}\) In England and Wales, despite the legislation not directly addressing this issue, the Court of Appeal (Criminal Division) has stated that:

> If 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.\(^{384}\)

7.83 In Australia, the High Court has repeatedly affirmed the importance of the principle of finality:

> A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances …

> The principal qualification to the general principle that controversies, once quelled, may not be reopened is provided by the appellate system. But even there, the importance of finality pervades the law.\(^{385}\)

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375. *Sentencing Act 1991* (Vic) ss 18ZN(1)(b)(i), 18ZP.
382. *Sentencing Advisory Council (2017)*, above n 51, 57 (issues paper [5.64]).
383. *Criminal Justice and Licensing (Scotland) Act 2010* (Scot) s 6(6) (‘[a] revision of the sentencing guidelines after an offender is sentenced in respect of an offence is not a ground for the referral of the case to the High Court of Justiciary’).
385. *D’Orto-Ekenaie v Victoria Legal Aid* (2005) 223 CLR 218, 223; *Plaintiff v Minister for Immigration and Citizenship* [2013] HCA 22 (26 April 2013) [10]; *Achurch v The Queen* (2014) 253 CLR 141, 152; *NH and Others v Director of Public Prosecutions* [2016] HCA 33 (31 August 2016) [70].
7.84 There are exceptions to the principle of finality. Fresh evidence that was unavailable to the sentencing court can support the reopening of the sentencing discretion. There are also rare circumstances in which a new legal principle can open up past sentences to appellate scrutiny. For example, in 2016 the United States Supreme Court held that its previous decision – prohibiting mandatory life imprisonment without the possibility of parole for offenders aged under 18 at the time of the offence – was to operate retrospectively, such that more than 2,000 offenders around the country needed to be resentenced in order to give them the possibility of parole.

7.85 These exceptions to the principle of finality are, however, properly confined to very narrow categories of circumstances.

Stakeholders’ views

7.86 In relation to the first form of retrospectivity, the majority of stakeholders considered that sentencing guidelines should apply to all offences sentenced after the guidelines come into effect, regardless of whether the offences were committed prior to the commencement of the guidelines. The Victims of Crime Commissioner commented that:

> [g]iven that some matters can take over two years to finalise, it would arguably be more unjust for an offender who pleads guilty early and is sentenced only months after the offending to be subject to the sentencing guideline, than one who committed their offence prior to the sentencing guideline, but delays finalisation of the matter.

7.87 The Office of Public Prosecutions submitted that if sentencing guidelines did not operate in this retrospective manner, courts ‘may be faced with multiple charges for the same offence, with some falling under the guideline, and others not falling under the guideline’.

7.88 One stakeholder acknowledged the arguments that might weigh against the retrospective operation of sentencing guidelines resulting in increased sentences for offenders, in particular, offenders’ right to equal justice. However, this stakeholder contended that, especially in the context of historical offending, such offenders ‘should forfeit the benefits of receiving a lower sentence’, noting that ‘[v]ictims need the offender to receive an equitable sentence to current crimes or else they feel that justice is not done and this feeds through to the community.’

386. See for example, the Victorian Court of Appeal’s decision to resentence an offender on the basis of fresh evidence that he had undiagnosed early onset dementia that had significantly contributed to the offending: Fedele v The Queen [2017] VSCA 363 (8 December 2017), citing R v Nguyen [2006] VSCA 184 (8 September 2006) [30]–[38].

387. In 2012, the United States Supreme Court held that mandatory life imprisonment without the possibility of parole for those aged under 18 years at the time of the offence violated the prohibition on cruel and unusual punishment in the Eighth Amendment to the United States Constitution: Miller v Alabama 567 US 460 (2012). Subsequently, the Supreme Court held that this principle should operate retroactively, such that all offenders in prison in the United States who were aged under 18 years at the time of the offence and serving a life sentence without the possibility of parole (approximately 2,300 prisoners) were entitled to be resentenced so that they would at some point be eligible for parole: Montgomery v Louisiana 136 S Ct 718 (2016).

388. Submission 12 (Victims of Crime Commissioner); Submission 13 (Office of Public Prosecutions); Submission 16 (Anonymous); Submission 18 (Anonymous); Submission 22 (Victoria Legal Aid); Submission 24 (Law Institute of Victoria); Submission 27 (Victoria Police); Submission 28 (Victorian Bar).


390. Submission 13 (Office of Public Prosecutions).

391. Submission 16 (Anonymous).
7.89 Another stakeholder commented that applying sentencing guidelines to all offences sentenced after the guidelines commence ‘is consistent with the Victorian approach of considering current sentencing practices’.\(^\text{392}\)

7.90 Victoria Legal Aid qualified its support for the retrospectivity of sentencing guidelines at first instance on the condition that courts be able to consider the time of the offender’s plea (that is, before the commencement of a guideline) as a permissible reason to depart from a guideline in appropriate circumstances.\(^\text{393}\) Similarly, the Victorian Bar submitted that although guidelines should apply to all relevant offences sentenced after the guidelines commence, ‘regard must still be had to prevailing sentencing practice at the time of the offending’.\(^\text{394}\)

7.91 There were also a number of stakeholders, including the Chief Magistrate and Liberty Victoria, who held a contrary view, and contended that guidelines should only operate prospectively.\(^\text{395}\) Liberty Victoria commented that:

Liberty Victoria has long opposed the retrospective application of the criminal law. Retrospective laws undermine clarity and certainty about the reach of the law, and the consequences likely to follow from certain conduct. Changes to the law must be managed to avoid unfair and arbitrary inequalities, and as far as possible, ensure that criminal conduct is punished according to the law as it stands when that conduct occurs.\(^\text{396}\)

7.92 As to the second and third potential forms of retrospectivity – whether guidelines should apply during resentencing after a successful sentence appeal, or whether the issuing of a guideline could permissibly constitute a ground of appeal – stakeholders who addressed these issues were unanimous in opposing both.\(^\text{397}\)

The Council’s view

7.93 The Council recommends that relevant sentencing guidelines should apply retrospectively to all offences being sentenced at first instance after a sentencing guideline comes into effect. Allowing changes to sentencing practices to take effect in all future sentencing hearings has a recognised history in Australian sentencing law; it promotes consistency and encourages sentencing standards to better reflect contemporary community expectations.

7.94 The Council disagrees, however, with the proposition that the entering of a guilty plea prior to the commencement of a sentencing guideline should constitute a permissible reason to depart from the relevant guideline. There may be extreme circumstances where it would be appropriate to depart from a guideline because it was not in effect at the time of the offending or the entering of a guilty plea,\(^\text{398}\) but these cases should be rare; in the majority of cases, this should not constitute a reason to depart from a guideline.

\(^{392}\) Submission 18 (Anonymous).

\(^{393}\) Submission 22 (Victoria Legal Aid).

\(^{394}\) Submission 28 (Victorian Bar).

\(^{395}\) Submission 8 (J. Bartle); Submission 23 (Liberty Victoria); Submission 26 (Chief Magistrate of the Magistrates’ Court of Victoria).

\(^{396}\) Submission 23 (Liberty Victoria).

\(^{397}\) Submission 8 (J. Bartle); Submission 12 (Victims of Crime Commissioner); Submission 18 (Anonymous); Submission 22 (Victoria Legal Aid); Submission 23 (Liberty Victoria); Submission 26 (Chief Magistrate of the Magistrates’ Court of Victoria); Submission 27 (Victoria Police); Submission 28 (Victorian Bar). The Victorian Bar suggested, however, that ‘the question as to whether parties should be able to raise a new guideline as a ground of appeal of a past sentence is most appropriately left to the Court of Appeal’.

\(^{398}\) For example, as the Victorian Bar submitted, equal justice may in certain cases require the court to consider past sentencing practices. Submission 28 (Victorian Bar).
7. Application of sentencing guidelines

7.95 The Council further agrees with stakeholders that sentencing guidelines should not apply to resentencing following either a successful sentence appeal or a breach of the original sentencing order. A sentencing error at first instance should not constitute a basis on which an offender could be subject to a different sentencing regime (regardless of whether it would result in a more lenient or a more severe sentence), nor should it appear at all possible that an offender might receive a more lenient sentence under a sentencing guideline following a breach of the original sentencing order; thereby potentially rewarding such a breach.

7.96 There is a risk that a sentencing hearing might occur soon before or after the commencement of a sentencing guideline. If a guideline were intended to alter sentencing practices, the difference of a few days could result in a notably different sentence being imposed. Despite this, however, the Council is of the view that this should not be seen as a reason to either delay or expedite a sentencing hearing. Courts have both expertise and autonomy in the timing and management of hearings. The justice system should not, however, await the commencement of a particular guideline, nor should court resources be stretched even further to accommodate a series of rushed sentencing hearings before a guideline comes into effect.

7.97 In addition, the Council is of the view that the issuing or revision of a sentencing guideline should not constitute a permissible ground of appeal, as this would be contrary to the principle of finality. If the issuing of a sentencing guideline becomes a regular feature of the Victorian criminal justice system, it would neither constitute fresh evidence nor exceptional circumstances. To avoid doubt, legislation should expressly clarify this in a manner similar to the Scottish legislation.

**Recommendation 19: Retrospectivity of sentencing guidelines**

A sentencing guideline should apply to any relevant offence sentenced after commencement of that guideline, irrespective of when the offence was committed.

If a relevant sentencing guideline commences after a sentence has been imposed, that sentencing guideline should not apply during any resentencing.

The *Sentencing Act 1991* (Vic) should expressly prohibit the commencement of a relevant sentencing guideline from constituting a permissible ground on which either party could appeal a sentence that was imposed prior to the commencement of that sentencing guideline.

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399. See for example, Victoria Legal Aid’s review of how resourcing pressures in the Magistrates’ Court are reaching ‘crisis point’: Law and Justice Foundation of New South Wales (on behalf of Victoria Legal Aid), *Evaluation of the Appropriateness and Sustainability of Victoria Legal Aid’s Summary Crime Program* (2017).
Prosecution and defence submissions

7.98 A further issue that arose during consultation was the effect that the High Court’s decision in Barbaro v The Queen\(^{400}\) may have on the ability of parties to make submissions about appropriate category ranges and starting points at a sentencing hearing involving a sentencing guideline. In that case, the High Court held that the prosecution is not permitted to make submissions to a sentencing judge on the ‘available sentencing range’.

7.99 The High Court’s decision in Barbaro overturned a 2008 decision by the Victorian Court of Appeal in R v MacNeil-Brown.\(^{401}\) In that case, the court held that the prosecution had a duty to assist the court in avoiding appealable error, and that duty extended to identifying for the court the range in which the prosecution would not envisage a sentence being appealable (at least by the prosecution). A range, the court said, refers to “the limits within which reasonable minds can differ on the appropriate sentence for a particular case.”\(^{402}\) That is, there is an upper and a lower limit of sentences that could be imposed in each case (a ceiling and a floor),\(^{403}\) and the ‘generous ambit’ between the two ‘marks the area of immunity from appellate interference’.\(^{404}\)

7.100 In Barbaro, the offenders had appealed their sentences on the basis that it was unfair for the sentencing judge to expressly refuse to receive any submissions from the prosecution about what it believed was the available sentencing range. The High Court made two important findings on appeal: first, that the offenders were not denied procedural fairness by the court refusing to hear prosecution submissions on the appropriate range; and second, that the practice of prosecutors submitting sentencing ranges in Victoria was inappropriate. Submissions about sentencing ranges, the court held, are more properly classified as statements of opinion, not submissions about the law.\(^{405}\) The court left no room for misinterpretation, stating that “[t]he practice to which MacNeil-Brown has given rise should cease. The practice is wrong in principle.”\(^{406}\)

7.101 Gageler J joined the majority in the outcome of the case, but disagreed with the majority’s view that sentencing range submissions were statements of opinion; instead, he considered them to be more properly classified as submissions of law.\(^{407}\)

403. The terms ceiling and floor are regularly used to describe the upper and lower limits of the sentencing range within which the sentence imposed would be immune from appeal; see for example, McI v The Queen (2000) 203 CLR 452; Nguyen v The Queen [2016] VSCA 198 (11 August 2016) [74]; Director of Public Prosecutions v Dalgleish (A Pseudonym) [2016] VSCA 148 (29 June 2016) [118].
405. Barbaro v The Queen (2014) 253 CLR 58, 64.
407. Gageler J stated “[MacNeil-Brown] was in my view correct to hold that the prosecution duty to assist a sentencing court to avoid appealable error requires the prosecutor to make a submission on sentencing range if the sentencing court requests such assistance or if the prosecutor perceives a significant risk that the sentencing court would make an appealable error in the absence of assistance”: Barbaro v The Queen (2014) 253 CLR 58, 80.
The Council’s view

7.102 The Council considers that submissions by both parties in relation to sentencing ranges would assist the court in its application of sentencing guidelines. The Right Honourable Lord Justice Treacy commented that one of the most positive outcomes of the introduction of sentencing guidelines in England and Wales has been to enable parties to make reasoned submissions about category ranges and starting points in each case, by reference to enumerated (and sometimes non-enumerated) factors in the relevant guideline, without needing to bring an ‘armload of similar cases’ to court with them.  

7.103 In order to clarify that the parties may permissibly make these submissions in Victoria, despite the High Court’s ruling in Barbaro, it will be necessary for legislation to expressly grant the parties that ability. Queensland recently enacted legislation that empowers any party to the proceedings (including prosecutors) to make submissions about sentencing ranges, overruling the application of Barbaro.  

7.104 The Sentencing Amendment (Sentencing Standards) Act 2017 (Vic) recently expanded the permissible content of a guideline judgment in Victoria to include ‘guidelines as to the appropriate level or range of sentences for a particular offence or class of offence’. The amended provisions also permit parties at a sentencing hearing to ‘make a submission to a court considering the sentence for an offence, on the level or range of sentences that could be imposed for it, if that level or range has been set out in a guideline judgment.’  

7.105 Further, for clarity, in order to address the incompatibility between these provisions and the High Court’s decision in Barbaro, the legislation also provides that those amendments ‘have effect despite any rule of law or practice to the contrary and any such rule is abolished’. This provision does not appear to overrule the principle established in Barbaro more broadly; it is confined to permitting the prosecution and the defence to make submissions about any sentencing ranges set out in a guideline judgment.  

7.106 In a similar fashion, and particularly because there has not been an opportunity to consult with stakeholders about whether the rule in Barbaro should be entirely overturned in Victoria, the Council recommends that parties should be able to make submissions about ranges and starting points in accordance with any relevant sentencing guidelines, but no further. Much like the amended guideline judgment provisions, this is a minimal approach to the reform, and the rule in Barbaro should otherwise be preserved.

Recommendation 20: Submissions about ranges and starting points

The Sentencing Act 1991 (Vic) should be amended to provide that the prosecution and the defence may make submissions to a court on the appropriate level or range of sentences, or starting points, if those levels, ranges or starting points have been set out in an offence-based guideline. Legislation should provide that, to the extent necessary to provide for the above, any rule of law or practice to the contrary does not apply.

408. Correspondence with the Right Honourable Lord Justice Treacy, Sentencing Council for England and Wales, 13 February 2018.
409. Penalties and Sentences Act 1992 (Qld) ss 15(1), 15(3) (the definition of a ‘sentencing submission’ includes ‘the sentence, or range of sentences, the party considers appropriate for the court to impose’).
412. Sentencing Act 1991 (Vic) s 6AC(3).
Standard sentence provisions

7.107 The Council has conducted a preliminary review of existing schemes of the Sentencing Act 1991 (Vic) to determine whether any are incompatible with the introduction of binding sentencing guidelines in Victoria. This review should not be considered exhaustive, and it will be necessary for the government to conduct a more thorough review when preparing any draft legislation.

7.108 The Council has, however, identified some consequential amendments that would be necessitated by the introduction of sentencing guidelines. For example, consideration should be given to amending the title of section 5 of the Sentencing Act 1991 (Vic). That provision is currently titled ‘Sentencing guidelines’, and it would be prudent to amend this language to avoid confusion between two references to sentencing guidelines in the same Act (perhaps, for example, to ‘sentencing principles’).

7.109 The Council has restricted its review only to schemes that are incompatible with the introduction of sentencing guidelines. The Council makes no recommendations about schemes that could still operate in conjunction with sentencing guidelines, even if such schemes would make the work of the guidelines council more complicated.

7.110 For example, the continuing criminal enterprise offenders scheme under part 2B of the Sentencing Act 1991 (Vic) provides that, when sentencing an offender for certain property or fraud offences, a court may impose a sentence that is twice as long as the available maximum term (or 25 years, whichever is the lesser), and must note on the record that the person is a continuing criminal enterprise offender.\textsuperscript{413} Despite this, the Council makes no recommendations about those provisions in this report because it is possible for them to operate alongside sentencing guidelines. The guidelines council could, for example, develop two guidelines for each relevant offence: one that courts should apply when sentencing the offence when the provisions do not apply and another for when they do.

7.112 In contrast, the Council considers that the recently introduced standard sentence provisions would be incompatible with offence-based guidelines.\textsuperscript{415} As the Supreme Court commented:

\begin{quote}
[C]onsideration needs to be given to how the proposed sentencing guideline scheme would sit with [the standard sentence] provisions …
\end{quote}

It is observed that within that scheme is a provision which states that the requirement to have regard to the standard sentence ‘is not intended to affect the approach to sentencing known as instinctive synthesis’. It is difficult to reconcile a sentencing guidelines regime of the kind given in examples in the issues paper; with the continuation of an instinctive synthesis approach, and a legislative indication that is unaffected.\textsuperscript{416}

\textsuperscript{413} Sentencing Act 1991 (Vic) pt 2B.
\textsuperscript{414} Sentencing Advisory Council (2016), above n 4, 251.
\textsuperscript{415} Sentencing Amendment (Sentencing Standards) Act 2017 (Vic). The legislation came into effect on 1 February 2018.
\textsuperscript{416} Submission 11 (Supreme Court of Victoria).
The Council agrees with the Supreme Court’s concerns in this regard. A standard sentence is a legislated numerical guidepost for certain serious offences, representing the middle of the range of offending, by reference only to objective factors affecting the relative seriousness of the offence, and without consideration of factors related to the offender (such as their guilty plea or prior offending history).\textsuperscript{417} The standard sentence is not, however, determinative of the sentence to be imposed and is not a starting point; instead it is one factor to be taken into account among all other relevant factors.\textsuperscript{418} The scheme is expressly not intended to affect the approach to sentencing known as instinctive synthesis.\textsuperscript{419}

As discussed at [7.48], the staged approach to sentencing in an offence-based guideline is incompatible with the simultaneous application of instinctive synthesis to the same offence. By extension, the standard sentence provisions also cannot apply to the same offences covered by relevant offence-based guidelines that require a staged approach to sentencing.

\textbf{The Council’s view}

The Council considers that it would be unworkable to apply both a standard sentence and an offence-based guideline when sentencing a standard sentence offence.

The standard sentence provisions expressly preserve instinctive synthesis, while a sentencing guideline will take precedence over instinctive synthesis. While the standard sentence provides guidance as just another factor to be taken into account, a guideline is intended to be a more comprehensive (though not exhaustive) form of guidance.

The Council is of the view that the improved transparency – and therefore public confidence in sentencing – that would attend sentencing guidelines makes them the preferred means of achieving the government’s stated policy objectives, such that they should take priority over the standard sentence provisions.

The Council therefore recommends that legislation specify that the standard sentence scheme should not apply to offences to which a relevant offence-based guideline applies. It is anticipated that the guidelines council would, however, accommodate the policy intent of the standard sentence provisions in creating guidelines for any standard sentence offences.

\textbf{Recommendation 21: Amending application of standard sentence provisions}

Section 5A of the \textit{Sentencing Act 1991 (Vic)} should be amended to provide that the provisions relating to the standard sentence scheme do not apply when sentencing a standard sentence offence to which a relevant offence-based guideline applies.

\begin{itemize}
\item \textsuperscript{417} Sentencing Act 1991 (Vic) s 5A(1)(b).
\item \textsuperscript{418} Sentencing Act 1991 (Vic) s 5B(2)(a).
\item \textsuperscript{419} Sentencing Act 1991 (Vic) s 5B(3)(b).
\end{itemize}
Retention of guideline judgment powers

7.119 Guideline judgments are a mechanism by which the Court of Appeal can provide sentencing guidance beyond the facts of a particular case, and establish guidelines to be taken into account by future courts in sentencing offenders (including, as at 1 February 2018, levels or ranges of sentences).\(^\text{420}\)

7.120 The Court of Appeal’s guidance can apply generally, to a particular court or class of court, to a particular offence or class of offence, to a particular penalty or class of penalty or to a particular class of offender;\(^\text{421}\) To date, the Court of Appeal has delivered only one guideline judgment since the provisions came into effect in 2004.\(^\text{422}\)

7.121 On 1 February 2018, new legislation came into effect that made a number of changes to the guideline judgment scheme in Victoria, including:

- expanding the permissible content of a guideline judgment to include guidelines about the appropriate level or range of sentences for a particular offence or class of offence;\(^\text{423}\)
- permitting the Attorney-General to apply for the Court of Appeal to give or review a guideline judgment in the absence of a particular case;\(^\text{424}\) and
- requiring the Court of Appeal to take into account the period reasonably required for the Sentencing Advisory Council to undertake research and statistical analysis, and to consult with relevant persons.\(^\text{425}\)

7.122 In the issues paper, the Council asked whether the Court of Appeal should retain its guideline judgments powers after the establishment of the guidelines council in Victoria.\(^\text{426}\) The reason the Council asked for stakeholders’ feedback on this issue was because of the potential conflict between guideline judgments and sentencing guidelines. Both attempt to provide guidance for sentencing courts about the appropriate sentencing process, the factors to be taken into account or the ranges to be applied. Given the potential overlap in authority and subject matter, it is necessary to determine, first, whether the guideline judgments should be retained at all, and second, if they are retained, which of the two should be given priority in the event of inconsistency.

7.123 In the other guidelines council jurisdictions examined in the issues paper, appellate courts had similar guideline judgment powers both before and after the establishment of guidelines councils.\(^\text{427}\) There was some suggestion that this could give rise to conflicts between court-delivered guideline judgments and council-developed sentencing guidelines.\(^\text{428}\) However, commentators have suggested that the retention of guideline judgment powers is one of the reasons that the judiciary in England and Wales supported the introduction of guidelines prepared by the Sentencing Council and its predecessors.\(^\text{429}\)

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\(^{421}\) Sentencing Act 1991 (Vic) ss 6AA(a)–(e).

\(^{422}\) Boulton v The Queen (2014) 46 VR 308. See further Sentencing Advisory Council (2016), above n 4, 36–37, 142.

\(^{423}\) Sentencing Act 1991 (Vic) s 6AC(1)(eb).

\(^{424}\) Sentencing Act 1991 (Vic) ss 6ABA.

\(^{425}\) Sentencing Act 1991 (Vic) s 6AD(2).

\(^{426}\) Sentencing Advisory Council (2017), above n 51, 61–62 (issues paper [5.83]–[5.92]).

\(^{427}\) Ibid 60–61 (issues paper [5.75]–[5.82]).


\(^{429}\) Roberts (2012), above n 107, 343.
7. Application of sentencing guidelines

7.124 Guideline judgments in England and Wales have also been used as a form of interim guidance. The Court of Appeal of England and Wales will prepare a guideline judgment, for example, in circumstances where there is an urgent need to address an emerging trend in offending. However, the Court of Appeal of England and Wales is not required to consult with external agencies. These interim guideline judgments are prepared with the understanding that they may be replaced with a sentencing guideline once the Sentencing Council has undertaken the full consultation process.

7.125 Utilising guideline judgments as a means of delivering interim guidance would not, however, be possible in Victoria without reforming the process by which the Court of Appeal seeks views on a guideline judgment. The recent amendments to the Sentencing Act 1991 (Vic) now require the Court of Appeal to take into consideration the time required for the Sentencing Advisory Council to engage in necessary consultation. It is therefore likely that the time required to engage in consultation and development of either a sentencing guideline or a guideline judgment in Victoria would be similar.

Stakeholders’ views

7.126 Most stakeholders supported the retention of the guideline judgment powers. The Law Institute of Victoria stated that this would ‘recognise the important relationship between the Court of Appeal and the guidelines council’, and the Victorian Bar submitted that ‘the ability to issue a guideline judgment is an important and necessary recognition of the court’s traditional role in providing assistance to sentencing courts in the application of the law’. Victoria Legal Aid gave three reasons for the retention of the Court of Appeal’s guideline judgment powers:

- guideline judgments are an extension of the court’s traditional role and powers to provide sentencing guidance to lower courts;
- the establishment of the guidelines council and the enhanced guideline judgment provisions might prompt the Court of Appeal to issue more guideline judgments; and
- the guidelines council may not have the resources or capacity to respond to all the issues that arise, and the Court of Appeal may be best placed to quickly respond through a guideline judgment.

7.128 Another stakeholder stated that:

[experience in England and Wales demonstrates that it is possible for sentencing guidelines and guideline judgments to operate alongside each other and for guideline judgments to be used to aid the interpretation of the guidelines.]

7.129 Further, Liberty Victoria indicated that it is ‘firmly of the view that the Court of Appeal’s guideline judgment powers should be retained’. This was on the basis that guideline judgments ‘have substantial untapped potential’ for the development of sentencing practices through the common law process, and that the guidelines council should not be established until the reforms to guideline judgments have had an opportunity to take effect.

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430. See for example, Ashworth (2014), above n 313, 26, citing R v Corran and Others [2005] EWCA Crim 192 (2 February 2005) (while awaiting the guidelines on sexual offences, courts needed some guidance on how to approach sentencing under the Sexual Offences Act, and the Court of Appeal supplied this).

431. Submission 8 (J. Bartle); Submission 18 (Anonymous); Submission 22 (Victoria Legal Aid); Submission 23 (Liberty Victoria);
Submission 24 (Law Institute of Victoria); Submission 27 (Victoria Police); Submission 28 (Victorian Bar).

432. Submission 24 (Law Institute of Victoria).

433. Submission 28 (Victorian Bar).

434. Submission 22 (Victoria Legal Aid).


436. Submission 23 (Liberty Victoria).

437. Submission 23 (Liberty Victoria).
A sentencing guidelines council for Victoria: Report

7.130 Victoria Police qualified its support for the retention of the guideline judgment powers, stating: this power should be limited to circumstances where sentencing guidelines have not yet been developed by the sentencing guidelines council, or where guidance on the appropriate interpretation of a guideline is required.  

7.131 In contrast, a number of stakeholders — including the Victims of Crime Commissioner, the Office of Public Prosecutions and the Chief Magistrate — recommended that the guideline judgment provisions be repealed. The Victims of Crime Commissioner commented that ‘[t]he difficulty with allowing the Court of Appeal to retain its power to give a guideline judgment is that it may well result in inconsistencies in application and principle.’ Similarly, the Office of Public Prosecutions suggested that ‘it would be difficult for the [guidelines] council and the Court of Appeal to produce consistent guidelines’.

The Council’s view

7.132 For a number of reasons, the Council recommends that the Court of Appeal should retain its guideline judgment powers.

7.133 First, removing the guideline judgment provisions would likely have little practical effect. The Court of Appeal has issued a single guideline judgment since commencement of the provisions in 2004, and the court already provides guidance that goes beyond the scope of the case at hand. Therefore, removing the guideline judgment provisions would likely have little effect on the court’s powers and would instead only affect the process required prior to issuing guidance.

7.134 Second, the Council considers that the risk of inconsistency between a sentencing guideline and a guideline judgment is low. It is anticipated that the relationship between the Court of Appeal and the guidelines council would be one of open dialogue and communication, involving ongoing consultation. The Court of Appeal would therefore be unlikely to issue a guideline judgment if it was aware that the guidelines council was developing a guideline on the same issue. In any event, even if there were inconsistency between a sentencing guideline and a guideline judgment, the legal status of guidelines would mean that the guideline would take priority.

7.135 Third, it has also been argued that retaining guideline judgment powers may better ensure judicial support for the introduction of sentencing guidelines.

Recommendation 22: Retention of guideline judgment provisions

The existing guideline judgment provisions of the Sentencing Act 1991 (Vic) should be retained.

438. Submission 27 (Victoria Police).
439. Submission 12 (Victims of Crime Commissioner); Submission 13 (Office of Public Prosecutions); Submission 26 (Chief Magistrate of the Magistrates’ Court of Victoria).
441. Submission 13 (Office of Public Prosecutions).
442. Boulton v The Queen (2014) 46 VR 308.
443. See for example, Kalala v The Queen [2017] VSCA 223 (30 August 2017) [3] (the Court of Appeal provided guidance on a number of principles that courts should apply in sentencing offenders for incitement to murder; especially in cases involving family violence).
444. When the Court of Appeal enlivens its guideline judgment powers, it is required to permit the Director of Public Prosecutions and Victoria Legal Aid an opportunity to appear before the court, and must also consider any views of the Sentencing Advisory Council: Sentencing Act 1991 (Vic) s 6AD.
445. Roberts (2012), above n 107, 343.
# Appendix 1: Consultation

## Meetings and events

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<thead>
<tr>
<th>Date</th>
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<tbody>
<tr>
<td>17 July 2017</td>
<td>Meeting with representatives of the Judicial College of Victoria</td>
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<tr>
<td>18 July 2017</td>
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<tr>
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<td>Meeting with the Chief Judge of the County Court of Victoria</td>
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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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<td>31 August 2017</td>
<td>Meeting with Chief Magistrate Lauritsen of the Magistrates’ Court of Victoria, Magistrate Rozencwaig and Magistrate Cameron</td>
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<td>20 November 2017</td>
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<td>Legal stakeholder forum</td>
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<td>22 November 2017</td>
<td>Community discussion panel</td>
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<tr>
<td>22 November 2017</td>
<td>Meeting with the Director of Public Prosecutions, the Solicitor for Public Prosecutions and representatives of the Office of Public Prosecutions</td>
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<tr>
<td>25 January 2018</td>
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## Submissions

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CONSTITUTIONAL VALIDITY OF PROPOSED SENTENCING GUIDELINES COUNCIL

MEMORANDUM OF ADVICE

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

Summary of advice

2. In summary, we advise as follows:

2.1 It should be possible to implement the essential features set out in paragraph 12 below, and the proposed features set out in paragraph 13 below, under either of the “Council-approval” model or the “Court-approval” model described in paragraphs 8-9 below.

2.2 The key aspects of the proposal that support those conclusions are:

(a) the Guidelines Council will be established to be independent of the executive and legislature, and its functions will be confined to preparing sentencing guidelines (and incidental functions);

(b) the process for making a sentencing guideline will be open and fair (in the sense that the Guidelines Council will provide an opportunity to interested persons to make submissions, but will not be bound to follow any of those submissions);

(c) although a sentencing guideline may contain numerical guidance, the guideline will attempt to set out as comprehensively as possible the factors that go into setting the starting point and the sentencing range;

(d) further, a sentencing court will retain the discretion to reach a sentencing decision that takes account of all relevant factors, and is just and proportionate in all the circumstances of the case;
in addition, the court will retain a real discretion to depart from a guideline in appropriate circumstances.

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

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

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

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

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

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

BACKGROUND

Proposal

4. On 25 May 2017, the Premier announced that the Government will move to create a Guidelines Council in Victoria. The proposed Guidelines Council would engage with the community and provide guidance to the courts on sentencing for specific crimes, and would be based on the sentencing councils now functioning in the United Kingdom. The Premier stated that the Government intended to introduce legislation to establish the Guidelines Council in 2018.
5. We are instructed that, in July 2017, the Attorney-General asked the Advisory Council to conduct consultation and then advise on the appropriate features of a Guidelines Council in Victoria by 29 March 2018. The Advisory Council was specifically asked to consider the features of the sentencing guidelines councils in England and Wales, and Scotland.

6. The Advisory Council had previously set out an “aspirational model” for a Guidelines Council in Ch 8 of the report Sentencing Guidance in Victoria (June 2016).

6.1 The Advisory Council stated that its preferred model was a “dialogue model”, based on the Scottish system. Under that model, sentencing guidelines would be prepared by an independent council, but those guidelines would not come into effect until they were approved by the Victorian Court of Appeal: p 215 (figure 9).

6.2 The Advisory Council set out some obstacles that would need to be overcome (such as the need for significant resources): paragraphs 8.78-8.81, and discussed the constitutional issues raised by that proposal: paragraphs 8.111-8.126.

6.3 The Advisory Council stated that a Guidelines Council could address some of the issues identified with the combined guideline judgments and standard sentence scheme reforms. However, that model represented a significant departure from the current sentencing framework and would require further development: paragraph 8.2.

Three models

7. In outline, there are three possible models for how sentencing guidelines might be given effect.

8. The first model (the Council-approval model) is that sentencing guidelines come into operation when they are issued by the Guidelines Council, without the need for approval by any other body. That is the model in England and Wales.

9. The second model (the Court-approval model) is that the sentencing guidelines only come into operation once they are approved by the lead court of the
jurisdiction (in Victoria, the Court of Appeal). The court has power to approve, modify or reject a proposed sentencing guideline. That is the model in Scotland.

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

11. We are instructed that the Attorney-General does not seek advice on the Legislative approval model.

**Essential features**

12. The Advisory Council considers that the following five features would be essential to achieving the objectives of a Guidelines Council:

12.1 the membership of the Guidelines Council would need to include non-judicial (that is, legal and community) members;

12.2 the Guidelines Council would need to include sitting judicial members, and preferably a judicial majority;

12.3 the process of creating sentencing guidelines would need to involve broad-based consultation with criminal justice stakeholders, the judiciary and the general community;

12.4 the Guidelines Council would need to be able to produce comprehensive sentencing guidelines in a form similar to a sentencing guideline produced by the Sentencing Council for England and Wales;

12.5 sentencing guidelines created by the Guidelines Council would need to be capable of having some legal effect (and could not be merely advisory), and must have the capacity to affect sentencing practices (including by changing the common law).

**Proposed features**

13. The Advisory Council also proposes (and will seek stakeholders’ views on) the following features of the Guidelines Council:
13.1 The purposes of the Guidelines Council would be to promote public confidence in the criminal justice system, and to promote consistency in courts’ approach to sentencing. Those are also the objectives of guideline judgments: see Sentencing Act 1991 (Vic) (the Sentencing Act), s 6AE(a)-(b).

13.2 The functions of the Guidelines Council would be limited to the following:

(a) the creation of sentencing guidelines;

(b) consultation relating to the creation of those guidelines; and

(c) any associated functions, such as publishing and publicising those guidelines.

13.3 The Guidelines Council would consist of a majority of judicial members (7 members), as well as legal and community members with knowledge and expertise in criminal justice (6 members), such as the Director of Public Prosecutions.

13.4 The Guidelines Council would not be required to provide advice to, or receive direction from, the judiciary, the legislature or the executive.

13.5 The Attorney-General would be able to request the Guidelines Council to create a sentencing guideline on a topic. The Guidelines Council would not be required to comply with such a request, but would possibly be required to provide reasons for a refusal. The Victorian Court of Appeal would not be able to make a formal request for the creation of a guideline, but could indicate in obiter dicta that a certain offence or category of offences would benefit from guidance.¹

13.6 The Guidelines Council would be required to publish draft sentencing guidelines as part of the process of consultation.

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


Guidelines Council: purposes, composition and functions

15. It is proposed that the Guidelines Council would be guided by two overarching purposes:

15.1 promoting consistency of approach in sentencing; and

15.2 promoting public confidence in the criminal justice system.²

16. The purposes of the Guidelines Council should reflect constitutional limitations arising from the fact that Council members will include sitting judicial officers. Consequently, the Guidelines Council could not conduct any activity that:

16.1 is an integral part of, or closely connected with, the functions of the legislature or the executive;

16.2 involves giving advice to the government; or

16.3 is at the behest or direction of the government.³

17. The proposed composition of the Guidelines Council is as follows:⁴

17.1 seven judicial members, comprising two justices of the Supreme Court (including at least one justice of the Court of Appeal); two judges of the County Court; the President or a magistrate of the Children’s Court; and two magistrates of the Magistrates’ Court;

17.2 six legal and community members who, in the opinion of the Attorney-General, would have expertise, knowledge or skills relevant to

² Draft Issues Paper, paragraph 2.20.
⁴ Draft Issues Paper, paragraph 3.28.
sentencing and criminal justice and the work of the Guidelines Council; and

17.3 one of the two Supreme Court justices would be the Chairperson.

18. It is not proposed that the heads of a court be appointed automatically as members; however, the heads of a relevant court may be appointed as members of the Guidelines Council.⁵

19. The judicial members of the Guidelines Council would be appointed by the Governor in Council, on the recommendation of the head of the relevant court. The head of the court would be required to consult with the Attorney-General before recommending the appointment of a judicial officer.⁶ The Chairperson of the Guidelines Council (the senior judicial member) would be appointed by the Governor in Council on the recommendation of the Chief Justice.⁷

20. As the members of the Guidelines Council will include sitting judicial officers, there will be constitutional limits on the types of functions that the Council can perform. The Guidelines Council cannot act as a mere instrument of government policy. Two key factors are the precise functions required of judicial members, and the independence of the Guidelines Council from government direction.⁸

21. The proposed functions of the Guidelines Council are as follows:

21.1 to develop and issue sentencing guidelines for use by the judiciary when sentencing;

21.2 to consult with the general community, the courts, government departments and other interested persons or bodies when developing and issuing sentencing guidelines; and

21.3 to perform related functions, such as publishing or publicising sentencing guidelines.⁹

⁶ Draft Issues Paper, paragraphs 3.33, 3.36.
⁹ Draft Issues Paper, paragraph 3.47.
22. There are constitutional limits on the functions that the Guidelines Council can perform. In particular, the Council cannot perform any function that:

22.1 is an integral part of, or closely connected with, the functions of the legislature or the executive;

22.2 involves the giving of advice to the government; or

22.3 is at the behest or direction of the government.\(^{10}\)

**Process for developing sentencing guidelines**

23. It is proposed that a sentencing guideline would be initiated on the Guideline Council’s own motion, or at the request of the Attorney-General (although the Council would not be required to comply with the Attorney-General’s request). The Guidelines Council would decide whether to initiate the development of a guideline by reference to the purposes of the Council.\(^{11}\)

24. The preliminary view is that, at a minimum, the required consultation is that the Guidelines Council: publish draft guidelines; and be required to consult with the general community, the courts, government departments, and other interested persons or bodies. The preliminary view is there should not be any facility by which the Guidelines Council could bypass consultation in order to publish an urgent sentencing guideline.\(^{12}\)

25. An important issue is how and when guidelines come into operation, particularly the choice between the Court-Approval and the Council-Approval models referred to in paragraphs 8-9 above.

25.1 The Advisory Council notes that there are constitutional risks associated with the Court-Approval model, including that:

(a) the approval process might be contrary to the essential characteristics of a court;

\(^{10}\) Draft Issues Paper, paragraph 3.45.

\(^{11}\) Draft Issues Paper, paragraphs 4.15-4.16.

\(^{12}\) Draft Issues Paper, paragraphs 4.36-4.37.
Appendix 2: Constitutional advice

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(b) the criteria by which the court would determine whether to approve, reject or modify a sentencing guideline might not give the court sufficient discretion; and

(c) the court could therefore end up “making”, rather than “applying”, the law.13

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

26. The Advisory Council does not give a preliminary view on whether it would be more appropriate for sentencing guidelines to be approved by the Guidelines Council or by the Court of Appeal. Both options carry unique risks.15

27. The preliminary view is that sentencing guidelines should come into effect on a date determined by whichever body approves the guidelines, rather than taking effect immediately on publication.16

Content of sentencing guidelines

28. It is proposed that the Guidelines Council would have power to prepare sentencing guidelines, consistent with the Sentencing Act,17 that set out:

28.1 the appropriate level or range of sentences for a particular offence or class of offence;

28.2 criteria to be applied in selecting from various sentencing alternatives;

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13 Draft Issues Paper, paragraph 4.43.
14 Draft Issues Paper, paragraph 4.44.
15 Draft Issues Paper, paragraphs 4.50-4.51.
16 Draft Issues Paper, paragraph 4.53.
17 The Sentencing Act sets out the purposes for which a sentence may be imposed: s 5(1); and a range of factors, such as the maximum penalty: s 5(2)(a); and the circumstances in which the court may take account of matters such as the totality of the offending that constitutes the course of conduct: s 5(2F). The Sentencing Act contains other provisions, such as serious offender provisions: Pt 2A, and continuing criminal enterprise provisions: Pt 2B.
28.3 the weight to be given to the various purposes specified in the Sentencing Act for which a sentence may be imposed;

28.4 the criteria by which a sentencing court is to determine the gravity of an offence;

28.5 the criteria that a sentencing court may use to reduce the sentence for an offence;

28.6 the weight to be given to relevant criteria;

28.7 any other matter consistent with the principles of the Sentencing Act; and/or

28.8 a non-exhaustive list of permissible reasons to depart from a sentencing guideline.\(^\text{18}\)

29. It is also proposed that the Guidelines Council could prepare offence-based guidelines, setting out the appropriate level or range of sentences for a particular offence or class of offence. An offence-based guideline would:

29.1 be structured in a form similar to an offence-based guideline produced by the Sentencing Council for England and Wales;

29.2 preserve judicial discretion; and

29.3 explain the principles on which the numerical guidance is based, such that any sentencing ranges are linked to factors that lead to the imposition of sentences within that range.\(^\text{19}\)

30. An offence-based guideline may create a staged decision-making process. For example, a sentencing guideline in England and Wales dealing with rape offences\(^\text{20}\) creates an 9-stage process, as follows:

30.1 **Offence category:** the court determines the offence category of harm and culpability into which the offence falls by reference to a table of factors.

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\(^\text{19}\) Draft Issues Paper, paragraph 4.108.

\(^\text{20}\) See draft Issues Paper, Appendix 2.
30.2 Starting point and category range: having determined the offence category, the court uses the corresponding starting points to reach a sentence within the category range. That step involves identifying the starting point, and adjusting for aggravating and mitigating features of the offending.

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

30.4 Reduction for guilty pleas: the court determines the appropriate reduction in sentence (where relevant) according to a separate guideline relating to guilty pleas.

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

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

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

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

30.9 Time spent on bail: the court must consider whether to give credit for time spent on bail.21

31. The Advisory Council considers that those nine steps (except for the specification of ranges and starting points at step 2) essentially codify a set of considerations already used by judicial officers in Victoria, and in the order in which most courts already apply those considerations.22

32. The Advisory Council considers that a sentencing guideline that is numerically prescriptive might be constitutionally permissible, provided that a court applying

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22 Draft Issues Paper, paragraph 4.72.
the guideline retains a discretion to reach an appropriate sentence that takes account of all the relevant circumstances of each individual case. A sentencing guideline would comprehensively articulate factors that must be considered by a court when determining a sentencing range and starting point.23

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

Applying sentencing guidelines

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

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

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

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

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

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25 Draft Issues Paper, paragraph 5.2.
dictation of the executive. A question is raised whether the following elements would minimise that constitutional risk:

35.1 sentencing guidelines should contain sufficient detail about the kinds of cases for which the guideline is appropriate (including the range of factors relevant to the offending and the offender that must be considered and that lead to the particular sentence being imposed);

35.2 sentencing guidelines that contain a reference to starting points or category ranges should link that numerical guidance to the factors for consideration by the court that suggest the use of that starting point, or the imposition of a sentence within those ranges;

35.3 a court, in applying a sentencing guideline, should retain the discretion to reach a sentencing decision that: takes into account all the relevant features of the offending and the offender; and is just and proportionate in all the circumstances of the case; and

35.4 a court must retain a discretion to depart from a sentencing guideline.

36. It is likely that a sentencing court would be found to have not followed a sentencing guideline (so as to amount to appellable error) in three circumstances:

36.1 a misapplication of the guideline (including applying the steps out of order, or applying a step incorrectly, in a way that affects the sentencing exercise and that is not in the interests of justice);

36.2 using a starting point outside the offence range, when it is not in the interests of justice to do so;

36.3 failing to explain how the court applied the sentencing guideline.

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26 Draft Issues Paper, paragraph 5.36.
27 Draft Issues Paper, paragraph 5.39.
28 Draft Issues Paper, paragraph 5.17.
37. A second issue is specifying the circumstances in which the court may legitimately depart from a guideline.

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

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

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

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

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

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

29 Draft Issues Paper, paragraph 5.22, referring to Coroners and Justice Act 2009 (UK), s 125(1).
31 Draft Issues Paper, paragraph 5.75.
32 Draft Issues Paper, paragraphs 5.42ff, in particular paragraph 5.51.
issuing of the new sentencing guideline.\textsuperscript{33} Further, if a sentencing guideline were issued after a person was sentenced, that guideline would not be applicable to the re-sentencing of that offender following a successful appeal.\textsuperscript{34}

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

**Example: England and Wales Theft Guideline**

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

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

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

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

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

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

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

\textsuperscript{33} Draft Issues Paper, paragraph 5.64.
\textsuperscript{34} Draft Issues Paper, paragraph 5.65.
\textsuperscript{35} Draft Issues Paper, paragraphs 5.92-5.93.
(b) category B (medium culpability) includes breach of some degree of trust or responsibility, and all other cases where characteristics for Categories A and C are not present;

(c) category C (lesser culpability) includes where an offender was involved in the offence through coercion, intimidation or exploitation, or where there is limited awareness or understanding of the offence.

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

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

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

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

(a) in the most serious case (category 1 harm, category A culpability), the starting point is 3 years 6 months’ custody, with a category range of 2 years 6 months’ to 6 years’ custody;

(b) in the least serious case (category 4 harm, category C culpability), the starting point is a “Band B fine”, with a category range of discharge to Band C fine.

43.2 The table refers to single offences. Where there are multiple offences, consecutive sentences may be appropriate (which is determined by a separate guideline relating to totality). If there are consecutive sentences, then an aggregate sentence in excess of 7 years may be appropriate: p 6.
If the offender is dependent or has a propensity to misuse drugs or alcohol, then a community order with drug rehabilitation requirement (under specific statutory provisions) may be a proper alternative to a short or moderate custodial sentence. If the offender suffers from a medical condition that is susceptible to treatment but does not warrant detention, then a community order with a mental health treatment requirement (under specific statutory provisions) may be a proper alternative to a short or moderate custodial sentence: p 6.

The court is then to consider further adjustment for any aggravating or mitigating factors. The Theft Guideline sets out a non-exhaustive list of aggravating and mitigating factors: p 7. There may be exceptional local circumstances that arise, which may lead a court to decide that prevalence should influence sentencing levels, by reference to harm caused to the community: p 7.

The remaining steps are described relatively briefly: p 8.

- **step 3** involves considering any factors, which indicate a reduction, such as assistance to the prosecution (in accordance with separate statutory provisions);
- **step 4** involves a reduction for any guilty plea (in accordance with a separate statutory provision and guideline);
- **step 5** is the totality principle (in accordance with a separate guideline);
- **step 6** involves considering confiscation, compensation and ancillary orders (in accordance with separate statutory provisions);
- **step 7** involves providing reasons (as required by statute);
- **step 8** involves considering whether to give credit for time spent on bail (in accordance with a separate statutory provision).

**ANALYSIS**

The proposal for a Guidelines Council raises constitutional issues at two stages:
first, the involvement of sitting judicial officers in the making of sentencing guidelines; and

secondly, the application by courts of a sentencing guideline when sentencing an offender.

The constitutional issue at each stage is whether the legislation will be consistent with the principle in *Kable v Director of Public Prosecutions (NSW)* (the *Kable principle*). Relevantly, the *Kable* principle prevents a State from conferring a function on a State court that “substantially impairs the court’s institutional integrity, and which is therefore incompatible with that court’s role as a repository of federal jurisdiction”.

Making a sentencing guideline

The first constitutional issue concerns the involvement of sitting judicial officers in the making of sentencing guidelines. It is proposed that the Sentencing Guidelines council would contain a majority of members who are sitting judicial officers: see paragraphs 12.2, 13.3 and 17 above.

Under each model, sitting judicial officers would participate in a body that makes sentencing guidelines.

Under the Court-approval model, the Court of Appeal would have an additional role of deciding whether to approve or reject (or approve with modifications) a sentencing guideline.

State judges exercising functions in a personal capacity

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

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

49. A State law that confers a function on State judges in their personal capacity is capable of infringing the *Kable* principle.  However, a function conferred on a judge in a personal capacity is less likely to undermine the integrity of the judge’s court as an institution, and to be invalid for that reason. That said, when the function is conferred on a State judge by reason of his or her judicial office (as in the proposal here), the fact that the function is conferred on the judge in a personal capacity will not determine whether there is incompatibility.  

50. The functions that can validly be conferred on federal judges in their personal capacity provide guidance on what functions can be conferred on State judges in their personal capacity. The following principles apply to functions conferred on federal judges acting in a personal capacity:  

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

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

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

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50.2 A function cannot be conferred on a federal judge that is to be exercised on “political grounds”; that is, grounds that are not prescribed by law. Accordingly, the fact that a function is performed pursuant to a detailed statutory framework can assist validity.

50.3 A federal judge cannot be given the function of providing a purely advisory opinion on a question of law to the executive.

50.4 Other relevant factors include: whether the judge is liable to removal by the Minister before the function is completed; whether the function has historically performed; and whether the function is to be performed consistently with essential judicial attributes of openness, impartiality and fairness.

Participating in making a sentencing guideline

51. Two key factors are:

51.1 the grounds, on which the Guidelines Council perform their functions; and

51.2 the independence the Council enjoys from the executive when performing those functions.

52. A sentencing guideline is closely related to the function that courts routinely perform; namely, determining the appropriate punishment for an offence.

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


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


52.1 It is true that a sentencing guideline makes that assessment at a general level, rather than by reference to the facts of a specific case. However, that is also true of the function already conferred of permitting the Court of Appeal to issue a guideline judgment under Pt 2AA of the Sentencing Act.

52.2 In our view, making a sentencing guideline would not involve an exercise on “political” grounds in the sense described in the cases. The policy judgments involved in developing such a guideline are of the same sort as those involved in sentencing an offender and developing common law sentencing principles.

53. The Guidelines Council will be independent from the executive government.

53.1 The Attorney-General will be able to request that the Guidelines Council develop a guideline, but the Council will have power to refuse the request: see paragraph 13.5 above.

53.2 The Guidelines Council will not be subject to direction from the courts, or the executive or the legislature: see paragraph 13.4 above.

53.3 The Guidelines Council’s functions will be circumscribed, to avoid the Council being in the position of providing (non-binding) advice to the executive: see paragraphs 21-22 above.

54. However, it is also necessary to consider the relationship between the judicial members of the Guidelines Council and the other members. There is no necessary objection to sitting judicial officers performing functions with non-judicial officers in multi-member bodies; for example, sitting judicial officers sit with non-judicial officers on the Adult Parole Board. However, there may be constitutional concerns if sitting judicial officers’ views on sentencing could be outvoted on the Guidelines Council. For that reason, it assists validity that there will be a majority of judicial members, and that the Chairperson will be the senior judicial member on the Guidelines Council.

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50 See Kotzmann [2008] VSC 356 at [48] (Judd J): “While a judge of the Supreme Court is the chairperson, he or she does not constitute the Board. Decisions are made collectively.”
55. We have been asked to consider the legal nature of a sentencing guideline; for example, whether it is properly characterised as “legislative” or “executive” or some other category. However, in our view, that characterisation does not, of itself, have any bearing on constitutional validity.

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

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

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

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

\(^{51}\) Cf draft Issues Paper, paragraph 1.33.

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

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

\(^{54}\) Wheeler (2015) at 317, discussing a State judge acting as an Electoral District Commissioner.
Appendix 2: Constitutional advice

It is true that the process for making sentencing guidelines is intended to bring in different perspectives from persons who are not judges, with the involvement of non-judicial members on the Guidelines Council, and the process of consultation. However, we consider that those processes are intended to assist in ascertaining prevailing community standards, which is a relevant factor in determining the appropriate sentence. Judges comprise a majority of members, and are not bound by any of the views expressed to the Guidelines Council in the consultation process.

A guideline is set in advance, and applies to sentencing an offence generally (or deals with a sentencing issue generally). The guideline is not intended to respond to community expectations about a particular offender.

The process of making a sentencing guideline is, of course, different from the usual process of making judicial decisions. However, a procedure that may be repugnant if required of a court “will not necessarily be unacceptable if required of an administrative body or tribunal”. That is particularly the case when a judge performs the function in a personal capacity as part of a multi-member body. In addition, the process for making sentencing guidelines will be both open and fair (in the sense that interested persons will have an opportunity to comment on a draft guideline). Those features promote validity.

For those reasons, we consider that the involvement of sitting judicial officers in making sentencing guidelines (as described in the draft Issues Paper) does not involve the conferral of an incompatible function on those judicial officers.

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

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

Council-approval compared to Court-approval

60. The next issue is the means by which a sentencing guideline is given effect: whether it comes into force without any further step (the Council-approval model); or whether it only comes into force when approved by the Court of Appeal (the Court-approval model).

61. Two possible concerns with the Council-approval model are that such a feature increases the possibility that the Guidelines Council is exercising a legislative function; and increases the possibility that a sentencing guideline would be analysed as an impermissible dictation of the courts by the executive branch. In our view, neither of those concerns needs be a barrier to adopting the Council-approval model.

61.1 In relation to the first concern, we consider that the characterisation of the sentencing guideline as “legislative” or otherwise is not significant, in itself, in determining constitutional validity: see paragraphs 55-57 above.

61.2 In relation to the second concern, we consider that the risk of a sentencing guideline being regarded as an impermissible dictation addressed to the courts can be sufficiently addressed through the content of the guideline. That issue is considered at paragraphs 69-77 below.

62. The constitutional concern with the Court-approval process is whether the Court of Appeal can validly perform the approval function. We agree with the Advisory Council that the proposal for Court-approval raises the following potential constitutional difficulties:

62.1 the approval process might be contrary to the essential characteristics of a court (particularly as the function would be exercised by the Court of Appeal itself, not by judges in a personal capacity);

62.2 the criteria by which the Court of Appeal would determine whether to approve, reject or modify a sentencing guideline may not give the Court sufficient discretion; and

62.3 the Court of Appeal could therefore end up “making”, rather than “applying”, the law.
See paragraph 25.1 above.

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

Summary of conclusions and drafting comment

64. The preceding discussion concerns the first three essential features of the Guidelines Council set out in paragraph 12.1-12.3 above, and all of the proposed features in paragraph 13 above.

65. We consider that it should be possible to maintain those essential features (and proposed features) under either the Council-approval model or the Court-approval model. Those two models raise different constitutional risks: we consider that the principal risk with the Council-approval model is that it could be taken to be an impermissible dictation of the judicial branch (discussed in paragraphs 69-77 below), whereas the Court-approval model has the countervailing constitutional risk that the approval function could be invalid.

66. We have not considered the Legislative-approval model in any detail. However, we would recommend against that model, because of the constitutional risk that a disallowable guideline could be seen as merely advisory, and that the Guidelines Council would be seen as becoming enmeshed with the political process.

67. We make one drafting comment: we recommend against a head of jurisdiction being required to consult with the Attorney-General before recommending to the Governor in Council a judicial member for appointment to the Guidelines Council: cf paragraph 19 above. We are not aware of any other legislation that requires a head of jurisdiction to consult a Minister on a recommendation by the
head of jurisdiction,\(^5\) and requiring a judge to consult with a Minister could be seen as affecting the independence of the recommendation.

**Applying a sentencing guideline**

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

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

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

See paragraphs 12.4-12.5 above.

69. The issue here is whether a prescriptive guideline might be seen as impermissibly dictating to a court how to exercise its jurisdiction. Speaking generally, a State law will be invalid if it would require a State court to act as the instrument of the executive.\(^5\) Thus a function will be invalid if the State court is essentially directed or required to implement a political decision or government policy without following ordinary judicial processes.\(^6\) Similarly, as a general

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\(^5\) One model is that judicial members are appointed by the Governor in Council on the recommendation of the relevant head of jurisdiction: see, for example, *Corrections Act 1986* (Vic), s 61(2)(a)-(c). An alternative model is that a judicial member is appointed by a Minister after consultation with the head of jurisdiction: see for example *Victorian Civil and Administrative Tribunal Act 1998* (Vic), ss 10(1) and 11(2).

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


\(^6\) *Emmerson* (2014) 253 CLR 393 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Cf *Kuczborski* (2014) 254 CLR 51, [140] (Crennan, Kiefel, Gageler and Keane JJ): the institutional integrity of a court is taken to be impaired by legislation that enlists the court in the implementation of the legislative or executive policies of the relevant State or Territory which requires the court to depart, to a significant degree, from the processes that characterise the exercise of judicial power.
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proposition, legislation that purports to direct the courts as to the manner and exercise of their jurisdiction will be invalid.61

70. We address two preliminary points.

71. First, those statements of general principle refer to the courts being independent of the “legislature” and the “executive”. The Guidelines Council will be established to be independent of the elected branches of government – it will not be subject to direction, and (as we understand it) its members will not include Ministers or departmental officers. However, the independence of the Guidelines Council is not a complete answer to a Kable argument that a sentencing guideline interferes with judicial discretion – the need for the sentencing court to retain its decisional independence requires that the court be free from influences external to proceedings in the court, “including, but not limited to, the influence of the executive government and its authorities”.62

72. Secondly, we note that Parliament has an undoubted power to alter sentencing principles, and can set mandatory minimum sentences and even a mandatory sentence.63 However, that does not suggest that Parliament can therefore delegate a power to a body such as the Guidelines Council to set minimum and mandatory penalties in any and all circumstances – sentencing guidelines issued by the Council are qualitatively different from laws enacted by the Parliament (even putting aside whether the guidelines are “legislative” in character or not). A court applying a mandatory sentence is simply applying the law, which is an essential part of the judicial function. By contrast, a sentencing guideline issued by a non-judicial body that purported to direct a court would be seen as interfering with the court’s ability to apply the law.

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63. See Magaming v The Queen (2013) 252 CLR 381, upholding the mandatory minimum sentences in ss 233C and 236B of the Migration Act 1958 (Cth). See also Palling v Corfield (1970) 123 CLR 52 at 58 (Barwick CJ): although mandatory sentences are undesirable, the court must obey a mandatory penalty “assuming its validity in other respects”. At common law, the two-stage sentencing process (setting an objective sentence, and then adjusting for personal factors) is considered to be wrong in principle: Wong v The Queen (2001) 207 CLR 584 at [76] (Gaudron, Gummow and Hayne JJ).
73. *South Australia v Totani*[^64] is an example of a State law constraining the function
given to a court.

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

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

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

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

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

[^64]: (2010) 242 CLR 1 (*Totani*).

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

[^66]: See the analysis of *Totani in Kuczborosi* (2014) 254 CLR 51 at [223]-[224] (Crennan,
Kiefel, Gageler and Keane JJ); see also [40] (French CJ): the court in *Totani* was treated
as a “rubber stamp”.
74.3 The court should retain a real discretion to depart from a guideline in appropriate circumstances.

75. Accordingly, we consider that any of the proposed requirements as to when the sentencing guidelines are to apply would be valid – that is, whether the sentencing court is required to “have regard to”, “follow”, or “sentence consistently” with those guidelines: see paragraph 34 above. The key requirement is the criterion used to determine whether the sentencing court can depart from a guideline. A criterion that the court must apply a guideline unless satisfied that doing so would be “contrary to the interests of justice” has a very good chance of being valid, because that criterion engages the overriding objective of the sentencing function and indeed the exercise of judicial power.67

76. If that position is implemented, then there will be very good arguments that a sentencing guideline is valid, and does not impermissibly purport to dictate the outcome of the sentencing court’s jurisdiction. That is so, whether the sentencing guideline is given effect under the Council-approval model or the Court-approval model. We note that the arguments for validity on this point are even stronger with the Court-approval model, because it can be argued that the guidelines only operate with the approval of the Court of Appeal, and so any confining of judicial discretion occurs consistently with the judicial hierarchy.

77. However, there is some tension between the core objectives of the proposal set out in paragraph 12.4-12.5 above and constitutional validity: on the one hand, validity is promoted by increasing the discretion left to the sentencing court; on the other hand, the whole purpose of the guidelines is to have legal effect and to change sentencing practices. It will be necessary to consider carefully the form of draft legislation.

Drafting comments

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

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

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

Application of sentencing guideline in the exercise of federal jurisdiction

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

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

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

(a) Federal criminal offences are generally prosecuted in the courts of the State or Territory where the offence occurred.

(b) If the federal and State offences form a single “matter”, the court will be exercising federal jurisdiction throughout the entire proceeding, including the prosecution of the State offences. The federal and State offences will form part of a

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68 See paragraph 39 above.

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

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


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

81.2 A State court would also be exercising federal jurisdiction if the offender being prosecuted for a State offence was a resident of another State,74 or if the prosecution of a State offence raised an issue under the Commonwealth Constitution.75

82. If a Victorian court is exercising federal jurisdiction, then Victorian laws that regulate the exercise of jurisdiction do not apply of their own force. Rather, those laws are applied as federal law by s 79 of the Judiciary Act.76 A State sentencing law (including a law providing for a sentencing guideline) would be a law regulating the exercise of jurisdiction, and would therefore only apply if picked up by s 79 of the Judiciary Act.

83. Section 79 of the Judiciary Act does not pick up a State law if the Constitution “otherwise provides”; relevantly here, if the State law (applied as federal law) would be contrary to constitutional limitations under Ch III of the Constitution that apply to Commonwealth laws. The relevant Ch III limitation is that a Commonwealth law cannot direct the courts as to the manner and the outcome of the exercise of those courts’ jurisdiction.77

84. The Ch III limit for Commonwealth laws is in substance very similar to the aspect of the Kable doctrine discussed in paragraphs 69-79 above. For the reasons given in those paragraphs, there are very good arguments that a sentencing guideline would not impermissibly dictate the manner and outcome of the sentencing court’s jurisdiction. Accordingly, a sentencing guideline could be validly applied

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

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

75 See Constitution, s 76(ii).

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

77 Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 37 (Brennan, Deane and Dawson JJ).
when sentencing an offender for a State offence or offences in the exercise of federal jurisdiction.\textsuperscript{78}

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

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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
Calazzo (A Pseudonym) v The Queen [2017] VSCA 242 (11 September 2017)
Director of Public Prosecutions v Arthur [2018] VSCA 37 (27 February 2018)
Director of Public Prosecutions v Cooper [2018] VSCA 21 (12 February 2018)
Director of Public Prosecutions v CPD (2009) 22 VR 533
Director of Public Prosecutions v Dalgliesh (A Pseudonym) [2016] VSCA 148 (29 June 2016)
Director of Public Prosecutions v Rapid Roller Co Pty Ltd [2011] VSCA 17 (2 February 2011)
Director of Public Prosecutions (Vic) and Director of Public Prosecutions (Cth) v Swingler [2017] VSCA 305 (24 October 2017)
Fedele v The Queen [2017] VSCA 363 (8 December 2017)
Gray v The Queen [2010] VSCA 312 (18 November 2010)
Kalala v The Queen [2017] VSCA 223 (30 August 2017)
 Middleton and Others v The Queen [2018] VSCA 23 (15 February 2018)
Nguyen v The Queen [2016] VSCA 198 (11 August 2016)
R v Carroll (1991) 2 VR 509
R v Jennings (1999) 1 VR 352
R v MacNeil-Brown (2008) 20 VR 677
R v Verdis (2007) 16 VR 269
R v Whyte (2004) 7 VR 397
R v Williscroft and Others (1975) VR 292
Shrestha v The Queen [2017] VSCA 364 (11 December 2017)
Stalio v The Queen (2012) 46 VR 426

Commonwealth

Achurch v The Queen (2014) 253 CLR 141
Assistant Commissioner Condon v Pompano (2013) 252 CLR 38
Attorney-General (Cth) v Alinta Ltd (2008) 233 CLR 542
Attorney-General (NT) v Emmerson (2014) 253 CLR 393
Australian Securities and Investments Commission v Edensor Nominees Pty Ltd (2001) 204 CLR 559
Barbaro v The Queen (2014) 253 CLR 58
Burrell v The Queen (2008) 238 CLR 218
Chu Keng Lim v Minister for Immigration (1992) 176 CLR 1
D’Orta-Ekenaik v Victoria Legal Aid (2005) 223 CLR 1
Director of Public Prosecutions v Dalgliesh (A Pseudonym) [2017] HCA 41 (11 October 2017)
Felton v Mulligan (1971) 124 CLR 367
Forge v Australian Securities and Investments Commission (2006) 228 CLR 45
Grollo v Palmer (1995) 184 CLR 348
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51
Kirk v Industrial Court (NSW) (2010) 239 CLR 531
Markarian v The Queen (2005) 228 CLR 357
McL v The Queen (2000) 203 CLR 452
Momcilovic v The Queen (2011) 245 CLR 1
Muldrock v The Queen (2011) 244 CLR 120
NH and Others v Director of Public Prosecutions [2016] HCA 33 (31 August 2016)
Norbis v Norbis (1986) 161 CLR 513
North Australian Aboriginal Legal Aid Service Inc v Bradley (2004) 218 CLR 146
Plaintiff S3/2013 v Minister for Immigration and Citizenship [2013] HCA 22 (26 April 2013)
Postiglione v The Queen (1997) 189 CLR 295
R v Kilic (2016) 259 CLR 256
R v Kirby and Others; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254
R v Pham (2015) 256 CLR 550
Radenkovic v The Queen (1990) 170 CLR 623
Thomas v Mowbray (2007) 233 CLR 307
Veen v The Queen (No 2) (1988) 164 CLR 465
Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1
Wong v The Queen (2001) 207 CLR 584

Northern Territory

Green v The Queen [2006] NTCCA 22 (23 October 2006)

International

United Kingdom

Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343
R v Ajayi and Another [2017] EWCA Crim 1011 (13 July 2017)
R v Bookye and Others [2012] EWCA Crim 838 (3 April 2012)
R v Smith and Others [2011] EWCA Crim 66 (18 January 2011)
R v Thomas [2016] EWCA Crim 2223 (21 December 2016)

United States

Miller v Alabama 567 US 460 (2012)
Montgomery v Louisiana 136 S Ct 718 (2016)
Legislation

Victoria

Charter of Human Rights and Responsibilities Act 2006 (Vic)
Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017 (Vic)
Children, Youth and Families Act 2005 (Vic)
Constitution Act 1975 (Vic)
Corrections Act 1986 (Vic)
Crimes Act 1958 (Vic)
Disability Act 2006 (Vic)
Mental Health Act 1986 (Vic)
Sentencing Act 1991 (Vic)
Sentencing Amendment (Sentencing Standards) Act 2017 (Vic)
Sex Offenders Registration Act 2004 (Vic)

Other Australian jurisdictions

Criminal Law (Sentencing) Act 1988 (SA)
Judiciary Act 1903 (Cth)
Penalties and Sentences Act 1992 (Qld)

International

New Zealand

Sentencing Act 2002 (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)