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8 February 2016

Sentencing Advisory Council
3/333 Queen Street
Melbourne VIC 3000

By email: contact@sentencingcouncil.vic.gov.au

Dear Sir or Madam

LIBERTY VICTORIA SUBMISSION ON THE SENTENCING ADVISORY COUNCIL'S SENTENCING GUIDANCE REFERENCE

1. Liberty Victoria is grateful for the opportunity to make this submission to the Sentencing Advisory Council ("SAC") as part of the Sentencing Guidance Reference from the Attorney-General for the State of Victoria.

2. Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty Victoria is actively involved in the development of Australia's laws and systems of government. Further information may be found at www.libertyvictoria.org.au.

3. The members and office holders of Liberty Victoria include persons from all walks of life, including legal practitioners who appear in criminal proceedings for the prosecution and the defence.

4. As an organisation Liberty Victoria is deeply concerned about the gradual erosion of judicial discretion in sentencing and the move towards mandatory and/or more prescriptive models of sentencing. Part of that concern stems from the need for the

legislature to carefully protect the separation of powers so that a strong and independent judiciary is able to ensure that justice is done in the individual case.

The Terms of Reference

5. As noted in the SAC discussion paper, the Attorney-General has requested SAC to advise him on the most effective legislative mechanism to provide sentencing guidance to the courts in a way that:

    (1) Promotes consistency of approach in sentencing offenders; and

    (2) Promotes public confidence in the criminal justice system.[1]

6. Liberty Victoria takes issue with what must be inferred as the foundation for the reference, which is that the Victorian criminal justice system has failed to promote consistency in sentencing, and therefore the public has lost confidence in it.

7. The reforms potentially contemplated by the reference are too important for its foundation to rest on an incorrect premise that there is unacceptable inconsistency in sentencing. The dogmatic assertion from some in the media and the legislature that there are significant problems and therefore the system requires wide-ranging reform should be rejected.

8. As noted in the discussion paper, there are many mechanisms in Victoria that are designed to ensure consistency in sentencing offenders. These include:

    (1) The maximum penalty for a criminal offence as set by Parliament, which provides an important yardstick;[2]

    (2) Appeals against sentence by both the accused and the Crown, which includes appeals from the Magistrates' Court to the County Court and to the Supreme Court on a question of law, and from the County Court and the Supreme Court to the Court of Appeal;[3]

[1] Emphasis added.
[2] *Markarian v The Queen* (2005) 228 CLR 357, 372 [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *DPP (Cth) v Walters* [2015] VSCA 303, [33] (Maxwell P, Redlich, Tate, and Priest JJA); *DPP v Aydin and Kirsch* [2005] VSCA 86, [12] (Callaway JA).
[3] Parts 6.1, 6.2 and 6.3 of the *Criminal Procedure Act 2009* (Vic).

(3) The Court of Appeal can find that current sentencing practices are inadequate, and that judicial officers are no longer bound by them pursuant to s.5(2)(b) of the *Sentencing Act 1991.* Examples of such judgments include:

   (i) *Winch v The Queen*[4] concerning "glassing" offences;

   (ii) *Hogarth v The Queen*[5] concerning "confrontational aggravated burglary", extended to "'intimate relationship aggravated burglary" in *Anderson v The Queen*;[6] and

   (iii) *Harrison & Rigogiannis v The Queen*[7] concerning negligently causing serious injury by driving.

   Liberty Victoria understands that the Court of Appeal is presently considering the adequacy of current sentencing practices in incest cases. For the Court to fulfill this function, it obviously requires the assistance of the Crown to bring before it a proper analysis of current sentencing practices.

(4) The Court of Appeal regularly provides authority and guidance for sentencing courts at the level of sentencing principle. For example, in *DPP v Meyers*[8] the Court of Appeal observed of family violence offending:

> Violence of this kind is alarmingly widespread, and extremely harmful. The statistics about the incidence of women being killed or seriously injured by vengeful former partners are truly shocking. Although the cases under consideration do not fall into that worst category, they are symptomatic of what can fairly be described as an epidemic of domestic violence.
>
> General deterrence is, accordingly, a sentencing principle of great importance in cases such as these.

(5) The Court of Appeal may give a guideline judgment, with the first Victorian guideline judgment of *Boulton v The Queen*[9] concerning the operation and effect of the community correction order ("CCO") regime. Notably, pursuant to s.6AA of the *Sentencing Act 1991* (Vic), guideline judgments can consider general matters, a particular court or class of court, a particular offence or class

[4] (2010) 27 VR 658.
[5] (2012) 37 VR 658.
[6] [2014] VSCA 255.
[7] [2015] VSCA 349.
[8] [2014] VSCA 314, [45]-[46] (Maxwell P, Redlich and Osborn JJA).
[9] [2014] VSCA 342.

of offence, a particular penalty or class of penalty, or a particular class of offender. Relevantly to this reference, pursuant to s.6AE of the *Sentencing Act 1991* such guideline judgments must have regard to the need to promote consistency of approach in sentencing offenders and the need to promote public confidence in the criminal justice system; and

(6) The work of the SAC in providing a statistical basis for understanding current sentencing practices, which provides a sentencing yardstick for judicial officers.[10]

9. Accordingly, the Victorian criminal justice system has significant mechanisms to promote consistency in sentencing. There is no evidence provided in support of the reference that indicates that the system is failing to provide proper consistency, whether internally or by reference to other domestic or international criminal justice systems.

What is Consistency?

10. The reference raises the necessary question; what does consistency mean in the context of sentencing? While like cases should be treated alike, every case has its own unique set of circumstances.

11. In *Hasan v The Queen*,[11] the Court of Appeal (Maxwell P, Redlich and Harper JJA) held:[12]

> The first task of the sentencing judge when seeking to ascertain an appropriate sentence in a particular case is to assess the objective gravity of the particular offence. The maximum sentence prescribed by Parliament will give a definitive answer to the question where the most serious example of the offence in question stands in the catalogue of criminal behaviours. An examination of comparable cases will then assist the judge to make an objective assessment of the range of sentences applicable in cases where the gravity of the offence is of a similar nature to the particular offence for which the offender is to be sentenced; but the limitations of this exercise must be borne in mind.
>
> Tables or graphs showing average or mean sentences across the full spectrum from the statutory maximum to nothing, while important, will also be of limited use because they cannot of themselves identify the appropriate range for an

[10] Although there are limitations to the utility of sentencing statistics; *Hili v The Queen* (2010) 242 CLR 520, 535 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Russell v The Queen* (2011) 212 A Crim R 57, 59 [4] (Buchanan JA), 66 [42] (Neave JA), 70 [6] (Kaye AJA).
[11] (2010) 31 VR 28.
[12] Ibid, 38-39 [44]-[46] (emphasis added).

> offence of the particular gravity of that for which the particular offender is to be punished. Indeed, their limitations are conveyed by the description given to them by the Sentencing Advisory Council of Victoria as ‘snapshots’.
>
> The tables, therefore, have a part to play; but they must be used with their limitations in mind. As to the limitations in using comparable cases, this Court said in *Hudson v The Queen*:
>
>> To undertake and utilise a comparative analysis, whether at first instance or on appeal, in an attempt to identify a sentence in a “like” case that is a fair comparison, is calculated to introduce a level of mathematical precision inimical to the instinctive synthesis. Where the parity principle is not enlivened, recourse to other cases is not undertaken to strike some equality with another particular sentence. *Consistency is to be achieved by the application of the appropriate range and not from the application of single instances of “like” cases. The adoption of a sentence selected by an earlier court, even if the case is very similar, would be to sacrifice the proper exercise of judicial discretion in pursuit of consistency of sentencing.* Following an appropriate study of comparable cases, together with the application of the relevant sentencing principles, the judge will be in a position to identify the boundaries marking the range within which the particular sentence must fall. Up to this point, the exercise will have been a largely objective one, but with an element of the subjective introduced by the process of instinctive synthesis without which the case for which, and the offender upon whom, the sentence is to be imposed cannot be assessed. Beyond the point at which the boundaries are identified, however, the judge must exercise his or her discretion in deciding where within the range the particular sentence should fall.

12. Judicial officers need to consider the impact of the offence on the victim or victims, give due weight to denunciation, deterrence and community protection, and consider an offender’s moral culpability and prospects of rehabilitation often in the context of issues of mental illness, intellectual disability or acquired brain injury, family trauma and/or separation, histories of traumatic physical and/or mental abuse, drug use, exceptional family hardship, delay and extra-curial punishment. In relating those matters to the facts of the case and in giving them due weight, a judicial officer will often have to consider contested expert evidence and voluminous other materials. The judicial officer is also required to consider current sentencing practices in properly comparative cases, which itself is a significant undertaking requiring a careful analysis of the factual basis of such matters and an assessment of the relevant similarities and differences to the given case.

13. Those who call for greater consistency in sentencing should take pause to consider just how difficult a task it is for a judicial officer to sentence a person and give due weight to counterbalancing sentencing considerations. There is always a different combination of

circumstances that need to be weighed differently in the intuitive synthesis in order to ensure that justice is, as far as possible, done for the State, the victim and the offender.

14. As the High Court of Australia held in *Hili v The Queen* ("*Hili*"):[13]

> Consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes.[14]

15. Nevertheless, in *Hili* the High Court emphasised that in seeking consistency in sentencing, "…sentencing judges must have regard to what has been done in other cases."[15] Past sentences can provide a yardstick against which a sentence (or proposed sentence) can be examined, although this must be done through attempting to discern and articulate *unifying principles* rather than merely relying upon raw empirical data.[16]

16. In attempting to identify those unifying principles, the task for judicial officers has become even more complex over recent years due to the rapid succession of amendments to the *Sentencing Act 1991* and related Acts, including the introduction of serious offender and continuing criminal enterprise provisions, staged abolition of suspended sentences through the *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013*, and the introduction of mandatory and prescriptive sentencing mechanisms through the *Crimes Amendment (Gross Violence Offences) Act 2013, Sentencing Amendment (Emergency Workers) Act 2014, Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014* and the *Sentencing Amendment (Baseline Sentences) Act 2014*.

17. It is difficult to think of any other area of law that has received such extensive reform over such a relatively short period.

18. These reforms have greatly magnified the potential for error in the sentencing process. Such reforms have often been enacted in haste with bipartisan support, seemingly as part of a desire by both major political parties to appear "tough on crime". The legislature has

[13] (2010) 242 CLR 520, 535 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[14] Ibid, 535 [48].
[15] Ibid, 536 [53].
[16] Ibid, 537 [54]-[55].

failed to heed the warnings of those who practice at the coalface of the criminal justice system that such reforms were flawed and would be counter-productive. Those warnings have come from people who have dedicated their professional lives to try and assist others through the criminal justice system, including accused persons and complainants, offenders and victims.

<u>Is there a Problem with Public Confidence?</u>

19. As noted in the SAC consultation paper, the research demonstrates that when informed of the facts relevant to sentencing, members of the public do not generally consider that the sentences imposed upon offenders by judicial officers are too lenient.[17]

20. Why then, is a lack of public confidence in the criminal justice system an issue? Liberty Victoria considers that over the previous decade there has been a significant increase in sensationalised reporting coupled with a failure by the legislature to defend the judiciary in the public arena.

21. As the Court of Appeal observed in *R v WCB*:[18]

> **Public misconceptions that courts are too lenient in sentencing**
>
> There is a widely held perception within the community that sentences generally imposed are too lenient.
>
> The Department of Justice in 2007-2008 conducted a survey inter alia to measure public perception as to the appropriateness of sentences handed down in criminal cases. In both years approximately two thirds of those surveyed considered sentences handed down were too lenient, while only one fifth thought sentences were about right. The Sentencing Advisory Council has actively sought to inform the community about the realities of sentencing and correct the misconception that courts do not impose sufficiently severe sentences. A research paper released by the Council in 2006 has drawn attention to the public misconception that courts are in general too lenient. It restated that misconception again in a further examination of the question in 2008.
>
> In 2008 the Council summarised overseas and Australian research which shows that a combination of the public underestimating the severity of sentencing and over-

[17] Austin Lovegrove, 'Public Opinion, Sentencing and Lenience; an Empirical Study involving Judges Consulting the Community' (2007) Criminal Law Review 769; Karen Gelb "More Myths and Misconceptions" (Research Paper, Sentencing Advisory Council 2008); Kate Warner et al, "Public judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study" (Research Paper, Trends & Issues in crime and criminal justice, Australian Institute of Criminology, February 2011). See *R v WCB* (2010) 29 VR 483, 490 [23] (Warren CJ and Redlich JA).

[18] (2010) 29 VR 483, 490-1 [20]-[25] (Warren CJ and Redlich JA).

estimating the severity of offending, builds a grossly inaccurate picture that has had serious implications for levels of public confidence in the criminal justice system.

The 2006 paper found that in 'the abstract the public thinks sentences are too lenient', and that people have 'very little accurate knowledge of crime and the criminal justice system', such that the mass media is 'the primary source of information' on those subjects. Selective publicity creates an unwarranted loss of confidence in the administration of criminal justice. Worse still, such publicity undermines the principle of deterrence. It creates the risk that offending will increase, because of the false perception that offenders will not be punished. None of this is intended to suggest that there should not be public discussion in the media about individual cases. The public have a right to criticise and hear the criticism of others through the media. That is a legitimate and important function of the media. But it should be informed and balanced discussion

An informed public does not demand longer sentences

The 2006 Sentencing Advisory Council paper found that when people are given more information, 'their levels of punitiveness drops dramatically' and that despite the apparent punitiveness, 'public sentencing preferences are similar to those expressed by the judiciary'. This is not a phenomena peculiar to Victoria. The paper further noted that when provided with the information of the kind provided to the judge in court, the public come to a view very similar to the judge's, as to what sentence is appropriate.

The appellant referred to the particular academic research conducted in 2007, and which was relied upon in the Council paper of 2008, as demonstrating that the 'informed' community does not demand lengthy sentences. The research provides an empirical foundation for the view that an informed and objective public does not consider sentences imposed by judges in particular cases to be too lenient. In The Age article to which we have referred, the results of research by Melbourne University criminologist Dr Austin Lovegrove were said to show that the Victorian public is 'more compassionate than calls for zero tolerance and complaints over "lenient sentencing" suggest' and that public attitudes 'softened when mitigating factors where understood'. An editorial in The Age the following day suggested that the gulf between the views of those on the street and those on the bench may be much narrower than is suggested by those who call for tougher sentences. The editorial emphasised the importance of knowledge of all the relevant facts, 'not only those seized on by the punitively minded'.

22. The legislature should be willing to lead the debate and assist the public to understand the importance of an independent and strong judiciary, and indeed the importance of competing sentencing considerations including the rehabilitation of offenders. As French CJ observed in *Hogan v Hinch*,[19] "[r]ehabilitation, if it can be achieved, is likely to be

[19] (2011) 243 CLR 506.

the most durable guarantor of community protection and is clearly in the public interest."[20]

23. Instead, the legislature had been drawn into a public discourse and a model of criminal law making that has become inherently reactive and sensationalised. That is notwithstanding that Victoria has had traditionally, and proudly, had one of the lowest rates of incarceration and recidivism in Australia.

24. Tragically history demonstrates that there will always be cases that shock the public conscience, such as the horrific murders of Jill Meagher and Masa Vukotic. Given the sanctity of human life, for the most serious offences against the person no term of imprisonment, no matter how lengthy, could ever be regarded as sufficient to remedy the harm done to those victims and their families and friends. In that context the call for longer and harsher punishment will be perpetual, as no legislative response can ultimately be regarded as sufficient.

25. The media will always be able to find a case where an offender has received a sentence that seems inadequate or light. There will always be a statistical outlier. What does not get reported are the plethora of other cases where offenders have received proper (or even stern or harsh) punishments, or the above cases where the Court of Appeal has called for an increase in sentences.

Baseline Sentencing and *DPP v Walters*

26. It is in the above context that, despite the almost uniform criticism by legal practitioners and the judiciary, the *Sentencing Amendment (Baseline Sentences) Act 2014* ("the *Baseline Sentences Act*") was enacted with bipartisan support.

27. The criticism from the legal profession towards the *Baseline Sentences Act* focussed on the fact that it constituted another example of the whittling away of judicial sentencing discretion and appeared to require a form of two-stage sentencing in breach of the judgment of the High Court of Australia in *Markarian v The Queen.*[21] Further, it was submitted that it would significantly increase complexity, delay and cost by requiring criminal lawyers and judicial officers to effectively fulfil a role as sentencing

[20] Ibid, 537 [32].
[21] (2005) 228 CLR 357.

statisticians on plea hearings. The reform was characterised by a disregard for the duty of the judicial officer to do justice in an individual case, and statements of fundamental sentencing principle such as in *Hili*.[22]

28. In *DPP v Walters* ("*Walters*"),[23] the Court of Appeal observed that the *Baseline Sentences Act* was without precedent in Australian sentencing law.[24]

29. By a strong majority (Maxwell P, Redlich, Tate, and Priest JJA, with Whelan JA in dissent), the Court held that the legislation was "incurably defective".[25] That was because the legislation did not provide any mechanism for the achievement of the intended future median.[26] Further, the Act erroneously conflated the idea of a median sentence with a sentence of mid-range seriousness. It was held that there was no way to properly overcome those defects without the judiciary exceeding the limits of its interpretive power in order to try to "fill a gap" in the legislation.[27]

30. Further, the Court of Appeal observed that the *Baseline Sentences Act* was plainly contemplated to create a two-stage sentencing methodology in practice.[28] That was notwithstanding the claim in the Explanatory Memorandum that "[t]he baseline sentence is not a starting point for sentencing judges nor does it require two-stage sentencing".

31. However, the practical reality was that under the baseline sentencing regime, the sentencing judge would have to consider the median sentence at the outset (which was mistakenly contemplated by the legislature as being an offence of mid-range seriousness), and then, having considered the circumstances of the given case, provide reasons for sentencing above or below the median sentence. As noted by the Court of Appeal, such an approach would have overthrown fundamental principles of sentencing law.[29]

32. The Court of Appeal observed:[30]

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[22] See for example the submission of the Criminal Bar Association, November 2011, https://www.sentencingcouncil.vic.gov.au/projects/completed-projects/baseline-sentences/public-submissions. That submission was endorsed by Liberty Victoria.
[23] [2015] VSCA 303.
[24] Ibid, [10].
[25] Ibid, [10].
[26] Ibid, [11].
[27] Ibid, [69].
[28] Ibid, [49], [67].
[29] Ibid, [65].
[30] Ibid, [73].

> It is a tenet of sentencing law that the sentence imposed in a particular case reflects the judge's evaluation of the full range of factors bearing on the nature and circumstances of the offending and the personal circumstances and past history of the offender. The mere fact that two offenders received the same sentence for the same offence provides little or no information as to whether the cases are in any way comparable.

33. Liberty Victoria submits the *Baseline Sentences Act* and its amendments to the *Sentencing Act 1991* should be immediately repealed. The Act was worse than flawed, it was fundamentally disingenuous. It was, despite protestations, an attempt to introduce a system of two-tiered sentencing intended to diminish the discretion of the judiciary.

34. Further, for the reasons that follow the mandatory minimum non-parole periods that have been ushered in over the past few years should also be repealed, whether expressed as a minimum percentage of the total effective sentence (such as the baseline amendments) or as a minimum period (as with the gross-violence and emergency worker amendments).

Alternative Models

35. The SAC discussion paper considers other sentencing models that could be introduced in the name of greater consistency and public confidence.

36. Liberty Victoria repeats that the need for such reform has not been demonstrated, and opposes any model that would fetter the discretion of judicial officers to do justice in the individual case.

37. As noted above, when the public is fully informed of relevant sentencing facts, the research confirms that sentencing standards of judicial officers are not out of step with the community.[31]

Mandatory Sentencing

38. The problem with mandatory sentencing is that it removes the discretion from the sentencing judge to impose a sentence that is appropriate having regard to the circumstances of the particular instance of the offence. It is contrary to the fundamental

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[31] "Public judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study", http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi407.html.

sentencing principle that the punishment should be proportionate to the seriousness of the offence having regard to the circumstances of the offender.

39. The central problem caused by mandatory sentences was eloquently described by Mildren J in *Trenerry v Bradley*:[32]

> Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.

40. Liberty Victoria shares the Law Council of Australia's concerns that mandatory sentencing regimes:[33]

    (1) Undermine the fundamental principles underpinning the independence of the judiciary and the rule of law;

    (2) Are inconsistent with Australia's international obligations, particularly Australia's obligations with respect to the prohibition against arbitrary detention as contained in Article 9 of the International Covenant on Civil and Political Rights (ICCPR); and the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR;

    (3) Increases economic costs to the community through higher incarceration rates;

    (4) Disproportionately affect vulnerable groups within the community, including Indigenous Australians and persons with a mental illness or intellectual disability.

    (5) Potentially result in unjust, harsh and disproportionate sentences where the punishment does not fit the crime;

    (6) Fails to deter crime;

    (7) Increases the likelihood of recidivism because prisoners are placed in a learning environment for crime whereby inhibiting rehabilitation prospects;

[32] (1997) 6 NTLR 175, 187.
[33] Law Council of Australia, Policy Discussion Paper on Mandatory Sentencing, May 2014.

(8) Wrongly undermines the community's confidence in the judiciary and the criminal justice system as a whole; and

(9) Displaces discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and thereby fails to eliminate inconsistency in sentencing.

41. Such concerns have been echoed by the Law Institute of Victoria's comprehensive submission on mandatory sentencing dated 30 June 2011, which noted *inter alia*:

> The overwhelming evidence from Australia and overseas… demonstrates that mandatory sentencing does not reduce crime through deterrence nor incapacitation, and may lead to increased crime rates in the long run, as imprisonment has been shown to have a criminogenic effect.

42. To that end, Liberty Victoria respectfully adopts the criticisms of mandatory sentencing from former NSW Director of Public Prosecutions Nicholas Cowdery AM QC.[34]

43. In addition, when faced with a mandatory minimum periods of imprisonment (whether with regard to the head sentence or non-parole period), accused persons are much less likely to plead guilty to offences. Accordingly, mandatory sentencing reforms are bound to see an increase in contested committals and trials which places further pressure on a Court system that is already strained and suffering from serious delays. Those delays also have a huge impact on complainants and their families and friends.

44. Further, under such regimes it will fall upon prosecutors and informants to determine whether to proceed on offences that attract a mandatory minimum term. Mandatory sentencing reforms transfer the burden of decision-making from the judiciary to the executive, where there is less transparency and greater room for arbitrary and inconsistent decision-making without recourse to judicial review or consideration by an appellate court.

<u>NSW Standard Non-Parole Period</u>

45. Liberty Victoria strongly opposes the introduction of a NSW style standard non-parole period scheme. The problem with such a system is that it leads to a distortion of the

[34] www.justinian.com.au/storage/pdf/Cowdery_Mandatory_Sentencing.pdf.

judicial task and results in cases such as *Muldrock v The Queen* ("*Muldrock*"),[35] where judicial officers fail to give appropriate weight to matters in mitigation (in that case intellectual disability) because of giving too much weight to the standard period.

46. Further, as the High Court made plain in *Muldrock*, such a system still does not permit the Court to take a two-stage approach to sentencing, and the standard non-parole period only concerns a hypothetical case in the mid-range offence of objective seriousness, and says nothing about the personal circumstances of an individual offender.

Jury Sentencing

47. Liberty Victoria does not support the introduction of jury involvement in the sentencing process. Liberty endorses the concerns highlighted by the New South Wales Law Reform Commission in its 2007 Report where it found that there was little evidence to suggest that jury involvement in sentencing produces better, fairer or more reasoned or consistent sentencing outcomes. It is unlikely to lead to greater consistency in sentencing and there would be significant practical and procedural difficulties in implementing any such proposal.

USA Sentencing Matrix

48. Liberty Victoria strongly supports the preservation of judicial discretion in sentencing and opposes an American style grid system of sentencing on the basis that it is in effect a form of partial mandatory sentencing. The operation of a grid system is likely to have the effect of transferring discretion away from judges and towards prosecutors. It is likely to give prosecutors additional power in terms of what facts or matters they choose to allege. It is likely to increase the role and importance of a "plea bargaining" process above the judicial process, with reduced transparency and increased pressure on accused persons to plead guilty to certain offences to avoid facing a higher penalty range. It would also limit the role of the Court of Appeal in providing supervision and guidance in the sentencing process.

[35] (2011) 244 CLR 120.

Sentencing Council Guidelines

49. At present we have a criminal justice system that intends for individual judicial officers to be independent. These judges and magistrates are invested with the responsibility of fixing appropriate sentences in individual cases that accord with sentencing principles, in particular, in accordance with the "instinctive synthesis" approach upheld by *Markarian v The Queen*.[36]

50. As outlined above, there is no evidence to support the proposition that the sentencing outcomes this system produces are out of step with community expectations. Notwithstanding that public opinion polls regularly find the majority of respondents believe sentences to be too lenient in the abstract, studies also consistently show that most people have little accurate knowledge about the criminal justice system and when properly informed about the facts of a particular case, there is little or no discrepancy between informed public expectation and actual sentencing outcomes. The Tasmanian Jury Study found that 90% of jurors said the given sentence was appropriate and 52% of jurors would have imposed a more lenient sentence than the sentencing judge.

51. Liberty Victoria opposes the introduction of Sentencing Council guidelines on the basis that there is no evidentiary basis to suggest that such an approach to sentencing guidelines is necessary.

52. Pursuant to Part 2AA of the *Sentencing Act 1991* there is already a system for guideline judgments that must take into account consistency in sentencing and public confidence. That mechanism has been used once. It should be used more regularly before other more radical measures are contemplated.

53. Further, 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 difficult to imagine a more difficult task than sentencing an offender and weighing the competing sentencing considerations in the austere environment of a courtroom, often before the devastated families and friends of both the offender and the victim. To have an external body develop sentencing guidelines in the abstract, removed from the actual practice of hearing trials and pleas in mitigation, is too far removed from the concrete reality of the courtroom. Sentencing guidelines should be developed by those

[36] (2005) 228 CLR 357.

who have had to endure what it is to sentence an offender to prison and to hear from victims and their families.

54. Further, the criminal justice system works by having parties who, when issues of fact or law are in dispute, provide competing submissions. Where possible those submissions are made in public and recorded so there is transparency. That process is vitally important because it allows for judicial officers to assess the merit of such submissions in reasoning towards an outcome. It is also important that such a process occurs where possible in public so that people can witness the criminal justice system in operation. It is that process that should lead to the development of sentencing guidelines and principles, and not the consideration of such matters in the abstract.

55. Liberty Victoria is concerned that Sentencing Council bodies are far more susceptible to being politicised than the judiciary. Whether through issues of funding, appointment and/or replacement of key office holders, the legislature is much more easily able to exert political pressure on executive bodies. The strength of a robust criminal justice system is that the judiciary operates at arm's length from the legislature – that itself is a vital protection for the individual against the State.

Conclusion

56. It is submitted that the foundation of the reference is flawed – there is no evidentiary basis that there is unacceptable inconsistency in Victorian sentencing, or that members of the public, when fully informed of relevant facts, consider that judicial officers impose inadequate sentences.

57. When individual sentences are inadequate the Crown can appeal. If there is a systemic issue and it appears that sentences are not meeting the intention of Parliament, then Parliament can increase the maximum penalty or the Crown can seek to have the Court of Appeal declare that current sentencing practices are inadequate, or seek a guideline judgment, the express purpose of which is to ensure consistency in sentencing and to promote public confidence. The executive has a wide range of options to ensure that there is consistency in sentencing and to ensure there is public confidence in the Victorian criminal justice system.

58. In *Boulton v The Queen*[37] the Court of Appeal observed with regard to the guideline judgment on CCOs:[38]

> …imprisonment is often seriously detrimental for the prisoner, and hence for the community. The regimented institutional setting induces habits of dependency, which lead over time to institutionalisation and to behaviours which render the prisoner unfit for life in the outside world. Worse still, the forced cohabitation of convicted criminals operates as a catalyst for renewed criminal activity upon release. Self-evidently, such consequences are greatly to the community's disadvantage…
>
> The CCO option offers the court something which no term of imprisonment can offer, namely, the ability to impose a sentence which demands of the offender that he/she take personal responsibility for self-management and self-control and (depending on the conditions) that he/she pursue treatment and rehabilitation, refrain from undesirable activities and associations and/or avoid undesirable persons and places. The CCO also enables the offender to maintain the continuity of personal and family relationships, and to benefit from the support they provide….
>
> Overwhelmingly, however, the responsibility for communicating 'the message' about CCOs rests with government. As this Court said recently in DPP v Russell, courts have neither the expertise nor the resources to undertake the kind of systematic public communication on which the theory of general deterrence depends. That is properly a function of government, which is responsible for public safety and law enforcement.
>
> As noted earlier, the Attorney-General submitted that there should be greater utilisation of CCOs and that they were perfectly capable of serving the purposes of punishment and deterrence. But whether the CCO is utilised more widely, and whether it can be seen to serve the purpose of general deterrence, will to a very large degree depend upon there being an active and well-funded program of public communication. Otherwise, the use of the CCO may well attract the kinds of public criticisms which have characterised the increasingly punitive debate about sentencing in recent years.

59. What undermines public confidence in the criminal justice system is the enactment of rushed and fatally flawed legislation such as the *Baseline Sentences Act*. In that context, the legislature needs to accept a measure of responsibility for perpetuating a sense of crisis in the Victorian criminal justice system. Parliament should be proactive and take a lead in the public arena with regard to explaining the need for there to be a strong and independent judiciary, and to assist the public to understand that we all have a significant interest a criminal justice system that gives due weight to the rehabilitation of offenders.

[37] [2014] VSCA 342.

[38] Ibid, [108], [114] [127]-[128] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA) (citations ommited).

60. Thank you for the opportunity to make this submission. If the SAC has any questions with regard to this submission, or if we can provide any further information or assistance, please do not hesitate to contact George Georgiou SC, President of Liberty Victoria, or Michael Stanton, Vice-President of Liberty Victoria. This is a public submission and is not confidential.

Yours sincerely

George A Georgiou SC
President
Liberty Victoria