Victorian Council for Civil Liberties Inc
Reg No: A0026497L

GPO Box 3161
Melbourne, VIC 3001
t 03 9670 6422
info@libertyvictoria.org.au

libertyvictoria.org.au

4 June 2017

Sentencing Amendment (Sentencing Standards) Bill 2017

1. If enacted the Sentencing Amendment (Sentencing Standards) Bill 2017 would repeal the baseline sentencing regime in the *Sentencing Act 1991* (Vic) and introduce a new "standard sentence" regime for twelve criminal offences.

2. Liberty Victoria agrees that the baseline sentencing regime should be repealed, but opposes the introduction of a standard sentence scheme.

3. We explained some of the history of the baseline sentencing regime and called for its repeal in our comprehensive submission to the Sentencing Advisory Council ('SAC') Reference on Sentencing Guidance, which can be found here.

4. Despite almost uniform criticism from the legal profession (including judicial officers, prosecutors and defence lawyers), the baseline sentencing regime was enacted through the *Sentencing Amendment (Baseline Sentences) Act 2014* with bipartisan support.

   The baseline regime was found to be incurably defective in *DPP v Walters*.[1] 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". That was because the legislation did

[1] [2015] VSCA 303.

not provide any mechanism for the achievement of the intended future median sentence. 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. Further, the Court of Appeal observed that the Baseline Sentences Act was plainly contemplated to create a two-stage sentencing methodology in practice. 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".

The Court of Appeal observed:[2]

> 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.

5. In contrast, the proposed standard sentencing scheme is unlikely to be found to be incurably defective. The Bill attempts to address some of the above criticisms from the Court of Appeal and is modelled on the New South Wales model of standard non-parole periods, except it applies to head sentences. In short:

    (i) The Bill applies to twelve offences;

    (ii) It sets a "standard sentence" for those offences, which is an offence where the objective (not subjective) circumstances place it in the middle of the range of seriousness for the given offence;

    (iii) The sentencing judge must have regard to the standard sentence and give reasons for sentencing above or below the standard sentence;

    (iv) It is expressly stated that the standard sentence regime does not interfere with the intuitive synthesis approach to sentencing; and

[2] Ibid, [73].

(v) The Bill sets mandatory minimum non-parole periods as a percentage of the head sentence for standard sentence offences, unless it is in the interests of justice to not impose the mandatory minimum. For example, if the total effective sentence for a standard sentence is less than 20 years' imprisonment the non-parole period must be at least 60% of the total effective sentence unless that is not in the interests of justice.

6. While the Bill will most probably be found to be functional legislation, that does not mean that it is necessary or desirable. As we said in our submission to the SAC:

> 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 judicial task and results in cases such as *Muldrock v The Queen*[3] ("*Muldrock*"), 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. 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.

While the Bill is expressed in a manner that does not bind judges, and purports to preserve the "intuitive synthesis", there is a real issue as to whether it will result in two-stage sentencing in practice. For example, a judge may be inclined to take the standard sentence for culpable driving causing death of 8 years' imprisonment as a starting point, and then add and subtract to the standard sentence based on matters in aggravation and mitigation. That is impermissible, and results (as occurred in the the case of *Muldrock*) in a failure to give due weight to the personal circumstances of an accused and matters in mitigation. It leads to an artificial compression in sentencing towards the standard sentence.

7. Further, the Bill creates a worrying precedent. The standard sentence mechanism can easily be ratcheted up over time to cover more offences, and to make exceptions more difficult to satisfy. For example, the "interests of justice" exception with regard to standard non-parole periods could easily become a "compelling reasons" or "exceptional

[3] (2011) 244 CLR 120.

circumstances" test. The Bill marks a further erosion in the separation of powers which sees more prescriptive legislation seeking to bind the judicial arm of government.

A standard sentence regime is particularly prone to the law and order auction. It is easy to foresee future Governments and/or Oppositions committing to increase the standard sentences as part of a "tough on crime" media campaign. The Bill creates a sentencing mechanism that is particularly vulnerable to that kind of electioneering.

8. This all raises the question, why is the Bill needed? As noted in the SAC consultation paper for the sentencing guidance reference, the research clearly demonstrates that when informed of the facts relevant to sentencing, members of the public do not generally consider that the sentences imposed by judicial officers are too lenient. The limited exception to that is in relation to some sexual offences against children.[4]

As the Court of Appeal observed in *R v WCB*:[5]

> **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-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

[4] See 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).

[5] (2010) 29 VR 483, 490-1 [20]-[25] (Warren CJ and Redlich JA).

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 were 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'.

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

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

    (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) 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*[6] concerning "glassing" offences;

(ii) *Hogarth v The Queen*[7] concerning "confrontational aggravated burglary", extended to "'intimate relationship aggravated burglary" in *Anderson v The Queen*;[8]

(iii) *Harrison & Rigogiannis v The Queen*[9] concerning negligently causing serious injury by driving;

(iv) *Nguyen v The Queen*[10] for cultivation of a narcotic plant; and

(v) *DPP v Dalgliesh*[11] for incest offences.

(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*[12] 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*[13] concerning the operation and effect of the community correction order ('CCO') regime. Notably, pursuant to s 6AA of the *Sentencing Act 1991*, guideline judgments can consider general matters, a particular court or class of court, a particular offence or class of offence, a particular penalty or class of penalty, or a particular class

[6] (2010) 27 VR 658.
[7] (2012) 37 VR 658.
[8] (2013) 230 A Crim R 38.
[9] (2015) 74 MVR 58.
[10] [2016] VSCA 198.
[11] [2016] VSCA 148.
[12] (2014) 44 VR 486.
[13] (2014) 46 VR 308.

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.

(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. In its report on sentencing guidance, the SAC's primary recommendation was for the greater use of guideline judgments rather than the introduction of a standard sentence scheme. Liberty Victoria supports the greater use of guideline judgments.

11. To that end, Liberty Victoria supports the proposal in the Bill to enable the Attorney-General to commence proceedings for a guideline judgment. However, it remains unclear why the Government has not sought to make more use of guideline judgments before embarking down the path of seeking to introduce a standard sentence regime.

12. Utilising guideline judgments rather than introducing a standard sentence regime would preserve judicial independence and the separation of powers while providing an additional mechanism for ensuring that sentencing practices are commensurate with community expectations.