Sentencing guidance reference

Submission to the Sentencing Advisory Council

12 February 2016

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# About Victoria Legal Aid

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

As the largest criminal defence practice in the State, VLA provides duty lawyer services, advice and representation to eligible persons charged with a criminal offence through our in-house criminal legal practice. VLA also funds eligible criminal law services provided by private practitioners, delivers community legal education and provides a free telephone advice service. In 2014-2015 VLA assisted 48,364 clients with a criminal law problem,[[1]](#footnote-1) many of whom are socially and economically isolated, have a disability or mental illness and/or are from culturally and linguistically diverse backgrounds.

Given our significant presence in both summary and indictable jurisdictions, VLA is in a unique position to comment on the questions raised by the Sentencing Guidance Reference. VLA has also been directly involved in two cases of particular relevance to this Reference – *DPP v Walters (a pseudonym)*[[2]](#footnote-2) and *Boulton v The Queen*.[[3]](#footnote-3)

VLA’s submission is consistent with its duty to ensure legal aid is provided in a manner that dispels fear and distrust.[[4]](#footnote-4) Pursuant to VLA’s Strategy 2015-2018, VLA is committed to encouraging a fair and transparent justice system and to using evidence and its experience to improve legal service delivery.[[5]](#footnote-5)

# Executive summary

VLA’s submission prioritises the need for evidence-based decision making. If a new legislative mechanism is to be adopted, there must be a demonstrated need for it: there must be a problem to be fixed, and the solution must be fit for purpose.

The Terms of Reference seek guidance on the most effective legislative mechanism to provide sentencing guidance to courts, in a way that promotes consistency of approach in sentencing and promotes public confidence in the criminal justice system. There is, however, a lack of evidence of a systematic and unjustified disparity in sentencing approach in respect of particular offences or offence categories. Further, the evidence to date suggests that when informed, public views of appropriate sentencing outcomes are roughly consistent with the outcomes imposed. The threshold question – whether there is a demonstrated need for a new form of legislative guidance – is not made out. To the extent an evidence base does not exist, the focus should be on obtaining that evidence, rather than legislating in a vacuum.

There is also an absence of evidence that mandatory sentencing and other discretion-limiting schemes canvassed in the Consultation Paper are *capable* of improving informed public confidence and consistency in sentencing approach. To the contrary, evidence suggests that many of these schemes are counterproductive. For example, mandatory and standard non-parole period (SNPP) schemes fail to eliminate inconsistency by displacing discretion to prosecutors. They offend principles of individualised justice, proportionality and parsimony, which may reduce public confidence. They also have other disadvantages: they do not work in deterring crime; result in significant economic cost; and have a disproportionate impact on disadvantaged offenders.

VLA's practice experience is that judicial discretion in sentencing is central to the administration of

justice. Consistency in sentencing approach cannot be properly or appropriately facilitated by treating unlike cases alike. Courts must also retain the capacity to treat different cases differently.[[6]](#footnote-6)

Of the mechanisms set out in the Consultation Paper, guideline judgments are likely to be most effective in providing sentencing guidance to courts in a way that promotes consistency of approach and public confidence in sentencing. By structuring rather than restricting discretion, guideline judgments allow for the individual circumstances of a case to be taken into account, while also promoting consistency, transparency and therefore public confidence. Guidelines can better take into account community views (through the role of the Sentencing Advisory Council), can allow for incremental development of the law, can respond to changing circumstances, and are consistent with the existing appellate process.[[7]](#footnote-7) Guidelines can also avoid many of the weaknesses of mandatory legislative regimes.[[8]](#footnote-8)

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

# Is there a problem to be fixed?

The imposition of a new sentencing guidance scheme should be predicated on: (a) whether there is a problem to be fixed; and (b) whether the proposed scheme is capable of effectively addressing the problem.

## Is there evidence of inconsistency of approach in sentencing offenders?

Empirical evidence of systematic, unjustifiable disparity in sentencing *approach* is currently lacking in respect of particular offences or offence categories.[[9]](#footnote-9)

Determining whether there is unjustifiable inconsistency of approach requires empirical data and evaluation (which the SAC is well positioned to provide) and proper consultation. It should not occur in haste or absent evidence simply to fill a perceived gap left by the failure of the baseline scheme.

*Boulton v The Queen*,[[10]](#footnote-10) Victoria’s first guideline judgment, provides a good example of the importance of evidence-based decision making. In that case, the qualitative and quantitative data, monitoring and analysis produced by the Sentencing Advisory Council (SAC), and the considered submissions of key institutional parties, provided a sound basis for identifying and addressing an unjustifiable disparity in approach in the use of a particular sanction type, namely community correction orders (CCOs).

## Is there evidence of a lack of public confidence in the criminal justice system?

The concept of “public confidence” is inherently ambiguous and subject to wide and varied interpretation.[[11]](#footnote-11) To be used to justify more restrictive sentencing regimes, a perceived lack of confidence reflected in the tabloid media cannot be sufficient. There must be actual and informed lack of confidence.

There have been few Australian studies that have examined public perceptions in sentencing. Each of those studies have found that when the community is informed, there is substantial support for the sentencing outcome imposed. For example, a study conducted by the SAC using 3 years of “Virtual You Be The Judge” data found that most users imposed sentences that were roughly consistent with that imposed by the judicial official.[[12]](#footnote-12) A Tasmanian Jury Sentencing Study determined that “the more information people have about an offender and their offence, the more likely they are to agree with sentence imposed by the court.”[[13]](#footnote-13) In that study, more than half of the jurors surveyed would have imposed a more lenient sentence, with 90% of jurors rating the sentence imposed by the judge as (at least) “appropriate”.[[14]](#footnote-14)

Of the offences considered in the Tasmanian Jury Study, jurors were least satisfied with sentences imposed for sex and drug offences.[[15]](#footnote-15) If the jury study currently underway in Victoria arrives at similar findings, it may provide some evidence of a lack of public confidence in specific offence categories.[[16]](#footnote-16)

Public perceptions of sentencing severity may differ depending on the type of sexual or drug offence. Although the numbers were too small to be statistically significant, further analysis of the Tasmanian jury data suggests that sexual offences may not be treated homogenously: jurors were more likely to suggest a more severe sentence for an offence involving child sexual assault; and more likely to suggest a more lenient sentence where the offence involved consensual sex with an under-age teenager.[[17]](#footnote-17) Further research is required to test these preliminary findings and to ensure their relevance to the Victorian context.

As a matter of objective offence seriousness, specific sex offences have been rated by members of the Victorian community as being particularly serious. According to the SAC 2012 study on community attitudes to offence seriousness, sexual penetration of a child under 12 was rated equally to murder (with each receiving a seriousness rating of 10).[[18]](#footnote-18) This study, when compared with the sentence distribution, maximum penalty *and* case detail for each of these offences, may provide some basis to suggest there is a disparity between current sentences for sexual penetration of a child under 12 and community views. However, if research of this nature is undertaken, account should be taken of possible statistical deficiencies,[[19]](#footnote-19) and to a potential “perception gap” between responses to abstract questions and those based on exposure to an individual case.[[20]](#footnote-20)

The studies to date suggest there is a gap between the views of informed and uninformed members of the community, with “informed members of the public overwhelmingly approv[ing] of the sentences given by our judges”.[[21]](#footnote-21) There may also be a gap in opinion depending on the type of offence involved, however this requires further research and evaluation. While harsher sentencing will not necessarily lead to greater public confidence in criminal justice processes,[[22]](#footnote-22) it is clear that more meaningful engagement and understanding of the criminal justice system are critical to improving public confidence. More needs to be done to “‘deal the public in’ in the debate about sentencing and punishment” [[23]](#footnote-23) (see further, pages 15-17 below). As with other key institutions, VLA has an educative role to play. VLA also has a role in challenging uninformed public perceptions as part of our legislative mandate to “dispel fear and distrust”.[[24]](#footnote-24)

## Is there concern regarding the current sentencing practices for the offence, or a subcategory of the offence?

The Court of Appeal has expressed concern with current sentencing practices[[25]](#footnote-25) in respect of a number of offences, including recklessly causing serious injury by glassing, ‘confrontational’ aggravated burglary and sexual penetration of a child under 10.[[26]](#footnote-26)

For example, in *DPP v CPD*,[[27]](#footnote-27) the Court of Appeal held that the sentencing statistics for the offence of sexual penetration of a child under 10 “appear difficult to reconcile” with the maximum penalty of 25 years set for the offence – which “reflects the community’s abhorrence of sexual crimes against children.”[[28]](#footnote-28)

The Court of Appeal is well placed to comment on the adequacy of current sentencing practices, to determine the extent to which courts should be constrained by current sentencing practices, and to provide guidance as to the type of sentence appropriate in the circumstances. Intermediate appellate courts can appropriately interfere to uplift current sentencing practices where, for example, there is a shift in community expectations, there are expressions of disquiet; where the objective seriousness of particular conduct has been wrongly categorised, or where evidence suggests the offence has become more prevalent.[[29]](#footnote-29) Unlike mandatory sentencing, Court of Appeal engagement enables the complexity of sentencing practices to be taken into account and modified over time.

The prosecution, by virtue of its statutory functions, also plays an important role in this space. Together with the Court, the prosecution operates as “the custodian of sentencing standards in this State… If current sentencing practices need to change, that is the place to start.”[[30]](#footnote-30)

Further consideration should be given to the extent to which Court of Appeal guidance has affected sentencing distribution (with regard to be had to both quantitative and qualitative characteristics). If there is compelling evidence to suggest that, despite Court of Appeal engagement, the system has not sufficiently self-corrected, consideration should be given to greater use of guideline judgment provisions, rather than prescriptive legislative sentencing mechanisms that cannot adequately address concerns of consistency or public confidence (see further, pages 6-11 below).

## Selection of offences subject to a new sentencing guidance scheme

The first step must be to ensure an evidence-base exists: is there a problem to be fixed in respect of the particular offence? Second, the offences targeted should be sufficiently prevalent and higher in objective offence seriousness. Depending on the sentencing scheme adopted, offences that span a wider degree of behaviour and objective seriousness should be excluded, given the potential for unfairness and unintended consequences.

# Mechanisms for sentencing guidance

## (a) Mandatory sentences

### Should mandatory sentences be introduced?

VLA's practice experience is that judicial discretion in sentencing is central to the administration of

justice. Every criminal case is different and requires a tailored response. In some cases lengthy terms of imprisonment are required; in others, the right outcome having regard to the offending and the offender, is a merciful one. Our practitioners are acutely aware of the difficulties faced when cases and offenders are placed into strict categories. VLA’s experience in assisting people charged with people smuggling provides an apt example.

In 2011-2012 VLA assisted or arranged legal representation for 66 people charged with the offence of aggravated people smuggling under the *Migration Act 1958* (Cth), an offence that attracts a mandatory minimum sentence of imprisonment of five years with a three-year non-parole period.

Most of those charged were poor, illiterate Indonesian fishermen who were either tricked or promised a paltry sum to transport passengers. Many were unaware they would be travelling to Australia or transporting a human cargo until they were already at sea and had no choice but to continue.

The removal of sentencing discretion resulted in the imposition of disproportionately lengthy imprisonment terms on ‘expendable boat crew members’ for low culpability offending.

In a practical sense, the consequence was an enormous backlog of trials, with the County Court listing super mentions in its ‘ceremonial Court’ in an attempt to expedite matters. Without an incentive to plead guilty, most proceeded to trial, with significant resourcing and delay implications for courts, legal services and custodial facilities.

In response to the backlog of prosecutions and pressure on the courts, and in recognition of the injustice of mandatory minimum provisions, in 2012 the Attorney-General issued a people smuggling Direction. That Direction precluded the Commonwealth Director of Public Prosecutions (CDPP) from charging first time, low culpability offenders with offences that carried mandatory minimum penalties, instead directing the CDPP to pursue an alternative charge (without a mandatory minimum).[[31]](#footnote-31)

The example above demonstrates how mandatory sentencing laws “conceived in the abstract” can often become “absurdities in practice” – with disproportionate impact on the disadvantaged.[[32]](#footnote-32)

Mandatory sentencing regimes are not supported by the rationale proposed, namely increased consistency and enhanced public confidence.

While mandatory sentences *appear* to produce consistency in sentencing approach, practice experience dictates that any consistency is largely superficial. Discretion is simply shifted to prosecutors and law enforcement agencies where there is reduced transparency and accountability, and where inconsistencies in approach are hidden (for example through the plea bargaining process). Juries, judges and practitioners find ways to circumvent the unfairness of mandatory sentencing.[[33]](#footnote-33)

Under the guise of enhancing consistency, mandatory schemes produce arbitrary and *unjustly* consistent outcomes, and in doing so, offend against other important principles of sentencing, including individualised justice, proportionality and parsimony. For consistency to be meaningful as a rationale for a new sentencing regime, it should require a *similar* approach to sentencing for *similar* behaviour. It should not require the *same* punishment to be imposed where offending behaviour and factors personal to the accused dramatically differ, simply because the case falls into a particular offence category.[[34]](#footnote-34)

The public outcry over the injustice of mandatory sentencing regimes (for example people smuggling, or mandatory schemes in operation in the Northern Territory or Western Australia), also challenges the assumption that mandatory sentencing will inevitably be effective in enhancing informed public confidence in the criminal justice system.[[35]](#footnote-35)

Consistency and public confidence aside, mandatory sentencing cannot be said to achieve its other stated aims. Mandatory schemes do not deter criminal offending either on a specific or a general basis,[[36]](#footnote-36) and do not protect the community because of the extent to which prison makes it more likely that a person will re-offend.[[37]](#footnote-37) There are also significant costs associated with mandatory sentencing. For example, matters may more likely proceed to trial and then appeal to avoid a mandatory penalty, resulting in protracted court processes which may impact negatively on victims, cause system-wide delay and be resource intensive for the defence, prosecution, courts and custodial facilities (which are already at or near capacity).[[38]](#footnote-38) The immediate and long-term costs of increased incarceration must also be taken into account. These are more likely to impact disproportionately on low culpability offenders and more marginalised members of society.

### Should there be exceptions if a mandatory scheme is introduced?

As outlined above, VLA does not support a mandatory sentencing scheme.

If a mandatory scheme is imposed, judicial discretion must be retained for cases where there are sufficient mitigating factors. A list that provides exceptions for young people, and for those with, but not limited to, mental illness, cognitive impairment and intellectual disability is appropriate, similar to the exceptions currently contained in section 10A of the *Sentencing Act 1991* (Vic).[[39]](#footnote-39) A non-exhaustive list of special reasons is required, given the likelihood of the uncontemplated case.

The exception in section 10A(2)(b) of the *Sentencing Act* for offenders under the age of 21 who are able to prove they have a particular psychosocial immaturity, should, however, be expanded to offenders up to the age of 25 to reflect the evidence that young people mature at inconsistent rates, and that for some, their cognitive, emotional and physiological systems may not approximate a mature adult before the age of 21.[[40]](#footnote-40)

## (b) Grid sentencing

### Should a grid or matrix scheme be introduced in Victoria?

VLA does not support a sentencing grid or matrix scheme.

As with mandatory sentencing, grids and matrix schemes have the potential to operate in an arbitrary and unjust manner, and are unlikely to be effective in promoting public confidence and enhancing consistency (in more than a superficial sense). They are too blunt an instrument to deal with the complexities of sentencing, and are likely to result in discretion being displaced, rather than reduced.

## (c) Guidance from juries

### Should the jury in Victorian criminal trials be involved in the sentencing process?

VLA opposes jurors being involved in the sentencing process. Practical and methodological difficulties render this proposal unworkable.[[41]](#footnote-41) Juror participation in sentencing is also likely to be counterproductive if the aims are to promote consistency and greater public confidence.

Sentencing is a task “where experience and expertise is at a premium”.[[42]](#footnote-42) To delegate this task, or parts of this task, to a “discontinuous and non-expert body”[[43]](#footnote-43) would be highly inefficient and lead to enormous inconsistencies in sentencing approach – between juries, and also between offenders who plead guilty and those who contest their charges (with the former being dealt with by a judge alone, and the latter involving a jury).

Not only is this proposal likely to lead to greater inconsistencies (which may diminish public confidence), it may also discourage jury service[[44]](#footnote-44) and adversely impact on a defendant’s right to a fair hearing. It may distract jurors from their primary task. For example, a jury might determine a guilty plea is appropriate if they could ensure a lighter sentence is imposed. It may also compromise procedural fairness (where in camera discussions are held between judge and jury), and result in determinations being primarily made in pursuit of personal views and biases, rather than in accordance with legal principle.[[45]](#footnote-45)

## (d) Baseline sentencing

### Should the baseline sentencing scheme be repealed in its entirety?

The baseline sentencing scheme should be repealed in its entirety. No elements of the baseline scheme should be replicated in a new sentencing guidance model.

Not only is the scheme “incapable of being given any practical operation” as found by the Court of Appeal majority in *DPP v Walters*,[[46]](#footnote-46) it is also far too complex.

In VLA’s experience, the ambiguity and mathematical technicality of the provisions made it extremely difficult for lawyers and judges, let alone accused persons to navigate. Significant resources were expended by an already stretched profession in an attempt to comprehend the scheme. Its statistical complexity also made it virtually impossible for defence practitioners to fulfil their ethical duty of providing “clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken”.[[47]](#footnote-47)

The technicality of the baseline legislation compromises sentencing transparency, which in turn has the potential to compromise public confidence. To the extent that the legislation aimed to promote greater predictability and consistency in sentencing, it failed.

Had it not been deemed “incurably defective” by the Court of Appeal,[[48]](#footnote-48) more matters would have proceeded to committal and trial when they may have otherwise resolved to an early plea, compounding court delays. Longer hearings and more appeals against sentence would have been inevitable, exacerbating system-wide inefficiencies.

Any new attempt at legislative guidance should avoid replicating the mistakes of baseline sentencing. In particular, sentencing should not be framed as a “mathematical exercise: mathematical precision is inimical to instinctive synthesis”.[[49]](#footnote-49) A quick fix to replace baseline sentencing should also be avoided. Implementing a new sentencing guidance scheme without sufficient time for scrutiny, consultation, policy deliberation and informed public input and debate, is unlikely to achieve the purposes of consistency and public confidence, and may be counterproductive.

## (e) Standard non-parole and standard sentence schemes

### Should a standard non-parole period or standard sentence scheme be introduced?

VLA opposes the introduction of a standard minimum non-parole period (SNPP) or presumptive sentence scheme.

VLA’s experience is that rigid rules too often create injustice in individual cases and unnecessary complexity. VLA’s experience is echoed by Legal Aid New South Wales, who have advised that their SNPP scheme has made sentencing in New South Wales unnecessarily complex.[[50]](#footnote-50)

According to Legal Aid New South Wales, the scheme has resulted in a greater degree of plea bargaining (in an attempt to avoid offences with a SNPP), protracted litigation on the nuances and ambiguities of the scheme and several unintended “curiosities”. For example, a SNPP does not operate in the New South Wales local court, but if a summary jurisdiction application is refused or an accused elects to have the matter heard in a higher court, a SNPP applies. A SNPP applies to some offences but not others, without clear rationale. Some offences have an SNPP that sit too closely to the maximum penalty, skewing its distribution (for example, aggravated indecent assault has an SNPP of 8 years and a maximum penalty of 10 years). New South Wales practitioners have advised that these complexities and nuances make the scheme very difficult to explain to accused persons.

For most people charged with SNPP offences, the system is difficult to comprehend and lacks transparency. This must only be exacerbated for many legal aid clients who are from linguistically diverse backgrounds and who present with cognitive, mental or intellectual disability.

Legal Aid New South Wales also notes the SNPP scheme has resulted in an increased workload for defence, prosecution and the courts. Hearings are longer and submissions and sentencing reasons are more complex and detailed.

While there is ample evidence to suggest that the SNPP scheme makes the process more time consuming and expensive, there is insufficient evidence to suggest that SNPP schemes achieve greater public confidence or consistency (in the sense of like cases being treated alike).[[51]](#footnote-51) To the contrary, reduced transparency, and the extent to which discretion is displaced elsewhere suggest otherwise.

VLA opposes a defined percentage and presumptive standard sentence scheme for similar reasons – such schemes are likely to increase sentencing complexity, are resource intensive (in time and cost) and have the potential to disproportionately impact the disadvantaged. There is also a lack of evidence to suggest that they work in achieving consistency and greater public confidence.[[52]](#footnote-52) VLA does however agree with the Queensland Sentencing Council in its report on Minimum Standard Non-Parole Periods that a defined percentage scheme is far preferable to a defined term scheme.[[53]](#footnote-53)

### If an SNPP or standard sentence scheme is introduced, what should it look like?

VLA opposes the introduction of a SNPP or standard sentence scheme.

If an SNPP is introduced, the defined terms, or percentage standard non-parole periods set should be evidence-based, avoid two-stage sentencing and retain exemptions for a non-exhaustive list of special reasons (see pages 7-8 above). A SNPP scheme should exclude from its ambit offenders under the age of 21 at the time of offending (to retain youth parole), offenders sentenced to life imprisonment or an indefinite term (on the basis that doing so is illogical), and offences determined summarily.

A SNPP scheme should only attach to a restricted set of offences, and to offending at the higher end of the range of objective offence seriousness.[[54]](#footnote-54) Offences that span a wider degree of behaviour and objective offence seriousness should be excluded, given the potential for unfairness and unintended consequences. As demonstrated by the New South Wales experience, adopting a sentencing methodology that requires an intermediate determination of objective offence seriousness, absent consideration of the circumstances of the accused, is inherently problematic.

If a standard sentence scheme is introduced, it should operate as a ‘guidepost’ (as another factor in the instinctive synthesis process; it should not require two-stage sentencing). It should represent a sentence for a hypothetical charge, rather than a non-parole period, and apply to offences prior to a guilty plea. As set out in respect of SNPP schemes (see above), a standard sentence scheme should retain exemptions for a non-exhaustive list of special reasons and apply to a narrowly targeted set of more serious offences.

## (f) Maximum penalties

### Are there any issues with current maximum penalties?

Some of the perceived lack of confidence in the sentencing system arises from a lack of understanding of the role and purpose of maximum penalties. Too often the media reduces the complexity of sentencing to a simple proposition – if a sentence is substantially lower than the prescribed maximum penalty, the sentencer has failed to have regard to the gravity with which Parliament (and therefore the community), views the offence. However, maximum penalties are only one of a number of factors the sentencing judge must take into account – maximum penalties are not, and *should not*, be singularly determinative or “‘fundamental’ to the fixing of a sentence”.[[55]](#footnote-55)

There is also a lack of understanding that some offences may be constituted by a wide variation in offender behaviour and culpability. For example, aggravated burglary, threat to kill and arson cover a wide variety of conduct, but each have a single maximum penalty. There is likely to be substantial difference between the sentence for lower level offending within these categories and the maximum penalty (which reflects Parliament’s view of the seriousness of the “*worst class* of the offence in question”).[[56]](#footnote-56)

Targeted public education programs have a role to play in improving public understanding of maximum penalties and their purpose and relevance to the sentencing task.

### Should the way in which the court must have regard to the maximum penalty and/or current sentencing practices be amended?

Courts should not be legislatively required to have greater regard to the maximum penalty than to current sentencing practices. Such an approach is incapable of achieving the stated aims of consistency and public confidence and may result in significant unfairness and uncertainty for particular accused persons.[[57]](#footnote-57)

To the extent that sentencing practices are found to be inadequate for a particular offence type, guidance should be provided by the Court of Appeal through the sentence appeal or guideline judgment process.

## (g) Sentencing guidelines and guideline judgments

### To what extent can guideline judgments assist in improving consistency and public confidence?

Guideline judgments are the most appropriate vehicle for improving consistency and transparency and therefore public confidence in sentencing.

By *structuring* rather than limiting discretion, guideline judgments strike an appropriate balance between consistency in sentencing and the need to have regard to the individual circumstances of a case. Guidelines allow for “incremental development of the law”, can respond to changing circumstances, and are consistent with the appellate process.[[58]](#footnote-58) Guidelines can better take into account community views through the role of the SAC, which has the responsibility of gauging public opinion on sentencing matters.[[59]](#footnote-59) Guidelines are also able to avoid many of the costs and weaknesses of mandatory legislative regimes. For example, guidelines are able to guard against disadvantaged classes of people being subject to disproportionate sentencing outcomes.

It is critical that, in considering or reviewing a guideline judgment, courts are *explicitly* required to have regard to the need to promote consistency of approach and public confidence in sentencing.[[60]](#footnote-60) As stated in the Second Reading to the Bill introducing guideline judgments “[t]hese requirements recognise the need for the criminal justice system to be responsive, representative, transparent and accountable.”[[61]](#footnote-61)

By enhancing transparency, consistency and clarity in sentencing approach, guidelines can promote understanding and community confidence, which can serve to benefit the interests of the community. Guidelines can also better enable practitioners to assist the court and advise clients in respect of pleading guilty, sentencing outcomes and appeal prospects.

The proposition that guideline judgments are capable of increasing consistency is empirically supported.[[62]](#footnote-62) There is also “academic and practitioner support for the balanced manner in which they do so.”[[63]](#footnote-63)

While there has been historical resistance to guideline judgments by both the Court of Appeal and the profession, the pursuit of a guideline by the DPP in *Boulton v The Queen* (which was strongly supported by VLA and the SAC); and the delivery of Victoria’s first guideline by a unanimous 5-member bench, indicates a preparedness by the Court and institutional stakeholders to pursue, and give, practical sentencing guidance through the guideline judgment scheme.[[64]](#footnote-64)

### Should the Court of Appeal give guidance on appropriate sentence ranges?

The Court of Appeal is currently empowered to give guidance on particular offences, and can set out the weighting to be given to relevant criteria. There may be merit in the Court of Appeal giving guidance on sentencing ranges (in respect of low, medium and high levels of objective offence seriousness, rather than being numerical or “tariff orientated”[[65]](#footnote-65)) and listing a non-exhaustive series of factors that may aggravate or mitigate sentence.

Any proposed amendment of this nature should, however, structure, not restrict judicial discretion. It should not be rigidly or mechanistically applied, avoid two-step sentencing (for example, by making an available range a factor to steer by like the maximum penalty), avoid prescribing specific sentence outcomes (but rather, provide for ranges), and take into account High Court concerns about prescriptive numerical guidance.[[66]](#footnote-66)

### Should the Attorney-General be able to request a guideline judgment?

VLA supports the Attorney-General being able to request a guideline judgment, provided, as is the case in New South Wales, the Court of Appeal retains the discretion to determine whether or not to issue a guideline judgment, and what form the guideline judgment should take.[[67]](#footnote-67) Such a facility may alleviate the current difficulty of waiting for an appeal before the Court to initiate the guideline judgment process.

If the Attorney obtains the power to apply for a guideline judgment, appropriate safeguards are required to ensure the appropriate separation and independence of judicial and executive functions.[[68]](#footnote-68) That the Attorney be empowered to request a guideline judgment was proposed by Professor Freiberg in his 2002 *Pathways to Justice Report* (the report that led to the introduction of the guideline judgment provisions), however this recommendation was not taken up at the time.[[69]](#footnote-69)

### Should the Court of Appeal be able to initiate the guideline judgment process without an appeal?

The current approach in section 6AB of the *Sentencing Act 1991* (that the Court is only empowered to initiate a guideline where an appeal is before it) is more consistent with the Court’s traditional role.[[70]](#footnote-70)

VLA does however acknowledge that there may be limitations in relying on an appeal before the Court. Waiting for the right appeal vehicle means guidelines are likely to be “generated slowly… more reactive than proactive…. [and] piecemeal.”[[71]](#footnote-71) The restrictions on DPP initiated appeals, and the tendency for appeals to involve serious rather than summary crimes (which may also be benefitted by a guideline), may also limit the matters potentially subject to a guideline judgment.[[72]](#footnote-72) Delaying the resolution of matters pending a guideline judgment may also have disadvantages for an accused. There may, therefore, be some merit in providing greater flexibility to the Court of Appeal to initiate a guideline absent an appeal with input from institutional stakeholders, or to separate consideration of a guideline from an appeal before the Court.

### Should an external body develop sentencing guidelines for use by courts?

The Court of Appeal should retain the responsibility for developing guideline judgments, using the SAC to provide research, including statistics and evidence of community views, and involving the DPP and VLA as institutional parties. These institutional parties are uniquely placed to assist the Court, given their statutory functions and roles, presence in criminal jurisdictions across the State and practical experience, including access to client data. More proactive use of the current scheme is likely to deliver on the stated aims.

VLA does, however, recognise there are advantages of an external judge-guided body developing draft guidelines. A UK-style body dedicated to the development of guidelines may be able to produce guidelines more expeditiously than a busy court (court-prepared guideline judgments will have significant implications for judicial time, resources and supports). An external body may be able to institute a more formalised process for obtaining the input of the wider community (although this can currently occur through the role of the SAC, subject to appropriate resourcing). Such a body may also be more likely to provide guidance in respect of offence types not typically seen by the Court of Appeal or within the court’s direct experience.[[73]](#footnote-73) If not dependent on a vehicle before the court, cases would not be delayed for lengthy periods of time pending the promulgation of a guideline judgment (noting that delay may disadvantage an accused).

If a UK-style body is contemplated, care must be taken to ensure the model adopted does not offend instinctive synthesis or compromise judicial independence.

### Should Victoria’s guideline judgment scheme be reformed?

Section 6AD of the *Sentencing Act* should be amended to clarify that the SAC, the DPP and VLA have standing to appear and make a submission on the question of whether a guideline judgment should be given or reviewed (standing is currently predicated on the Court of Appeal “decid[ing] to give or review a guideline judgment”).

Further reforms to the guideline judgment scheme are required to give effect to changes contemplated above. For example, if sentencing ranges are contemplated, section 6AC should explicitly provide that a guideline may set out the ‘appropriate sentence ranges for a particular offence or class of offence’.[[74]](#footnote-74) Consideration should also be given to whether common law limitations should be expressly overruled to allow for the provision of sentence ranges, and whether the guideline provisions should be further amended to ensure courts can give guidance on the adequacy of current sentencing practices and the manner in which they are taken into account.

Any other amendments to the guideline judgment scheme must ensure judicial discretion is retained.

## (h) Other sentencing schemes

### Are there any other sentencing guidance schemes that should be introduced?

Any new form of guidance should be evidence-based and increase transparency and consistency, without restricting discretion. Changes should reduce, rather than increase sentencing complexity.

VLA is not aware of any other sentence guidance scheme that should be introduced in Victoria. Given its independence and function, the SAC is best placed to investigate whether there are other viable schemes available in comparable jurisdictions and their potential application for Victoria.

## Preferred mechanisms for addressing public confidence and consistency

### Guideline judgment

For the reasons stated at pages 12-13 above, guideline judgments provide the most appropriate vehicle for improving consistency and transparency and therefore public confidence in sentencing.

If we are serious about improving public confidence and consistency, priority should also be given to research, evaluation, education and making the law more accessible.

### Research and evaluation

If a new legislative mechanism is to be adopted, the problem and its solution must be evidence-based. Yet evidence is lacking as to whether public confidence and consistency of approach are in fact ‘problems’ to be fixed; and whether the legislative solutions canvassed are capable of achieving these purposes. To the extent an evidence base does not exist, the focus should be on obtaining that evidence, rather than legislating in a vacuum.[[75]](#footnote-75)

Reactive law and order politics, and the lack of evidence-based approaches to sentencing policy development, have led to a patchwork of overly complex, fragmented Victorian sentencing laws. As with other successful areas of reform, such as the recent amendments to jury directions, sentencing reform requires a consultative, research-based approach.

If a new legislative mechanism is adopted, it should also be accompanied by a process for ongoing monitoring, evaluation and review. It should be measured against its ability to meet the stated rationale, as well as for unintended consequences, such as its cost implications and the extent to which it has a disproportionate impact on disadvantaged people.

### Education

The research on public opinion (see pages 3-4 above) make it clear that education of the community (and the media) is critical to improving public confidence.[[76]](#footnote-76) There needs to be renewed emphasis on the community’s ability to access and understand the law. Further resources should be allocated to community education, including, but not limited to the expanded delivery of the SAC’s “You Be The Judge” platform, and community legal education programs delivered by VLA and Community Legal Centres.

Expending greater resources on education and justice reinvestment strategies rather than incarcerating offenders through harsh legislative regimes, is also likely to better facilitate other important aims of sentencing, including community protection and deterrence.

### Plain language reasons

Public confidence and consistency can be greatly enhanced by a clear, plain language explanation of the factors taken into account in sentence and their weighting. A clear statement of reasons (publicly available, where appropriate) provides greater clarity for clients on sentencing outcomes and appeal prospects, and facilitates “community and media understanding of the process (including apparent superficial inconsistencies)”.[[77]](#footnote-77)

Although there has been a greater focus in recent years on the importance of plain language judgments, the ability of the public, and sometimes the profession, to access and digest reasons remains very much an issue in many cases. While further judicial education will assist, the capacity of the bench to deliver clear, plain language reasons partly depends on the complexity of the law and the court time that can be allocated to the task. The more complex as with baseline sentencing (and the less time available given busy court lists), the more difficult it is for the bench to deliver reasons the community can digest.

Plain language summaries, published at the same time as sentencing reasons are also very useful, particularly for high profile, controversial cases, and should be provided in respect of a broader range of cases and courts.

### The role of the media

Noting the ability of the media to guide, relay and influence public opinion, media providers could and should play a far more proactive role in this space – for example in facilitating publication of plain language case summaries, or providing links to sentencing information through online publications. Responsible media can also assist in encouraging informed public debate on sentencing topics.

## Should a new guidance scheme replace current schemes?

VLA supports reforms that remove unnecessary complexity in sentencing. Law and order politics have led to the progressive amendment of the *Sentencing Act.* As a result,a patchwork of complex and technical sentencing schemes operate concurrently in Victoria. Rather than just overlaying the *Sentencing Act* with yet another scheme, consideration must be given to whether current provisions are fit for purpose, sufficiently clear and internally consistent. Baseline and statutory minimum sentencing provisions should be repealed (for the reasons stated above, see pages 6-9), and serious consideration should be given to the efficacy and inter-relationship of other sentencing schemes (for example the serious offender provisions).

To enhance transparency, public confidence and consistency, a simplified and better integrated sentencing framework should be the goal – an outcome predicated on evidence-based decision making, and the proper review and evaluation of our current sentencing regime.

1. Victoria Legal Aid, *Annual Report* *2014-2015*. [↑](#footnote-ref-1)
2. [2015] VSCA 303. [↑](#footnote-ref-2)
3. [2014] VSCA 342. [↑](#footnote-ref-3)
4. *Legal Aid Act 1978* (Vic) ss 4, 7(1)(a). [↑](#footnote-ref-4)
5. Victoria Legal Aid, *Strategy 2015-2018*. [↑](#footnote-ref-5)
6. See Sentencing Advisory Council (Queensland), *Minimum Standard Non-Parole Periods: Final Report* (2011), 32. [↑](#footnote-ref-6)
7. Arie Freiberg, *Pathways to Justice: Sentencing Review* (2002), 208-209; Victoria, Parliamentary Debates, Legislative Assembly, 20 March 2003, 378, 479-480 (R Hulls, Attorney General); NSW Parliamentary Library Research Service, *Mandatory and Guideline Sentencing: Recent Developments*, No 18/98, 17. [↑](#footnote-ref-7)
8. Ibid. [↑](#footnote-ref-8)
9. This question focuses on sentencing “*approach”* – not simply sentencing outcome. In this submission, consistency of “approach” is defined as ensuring account is taken of similar factors, with similar weight given to those factors. “Numerical equivalence” is not required – there is a permissible range of sentences rather than a ‘correct’ sentence. Evidence of inconsistency must be unjustifiable (meaning legally relevant) and systematic. [↑](#footnote-ref-9)
10. [2014] VSCA 342. [↑](#footnote-ref-10)
11. It is also multidimensional: Kate Warner et al, ‘Public judgment on sentencing: Final results from the Tasmanian Jury Sentencing Study’, *Trends & issues in crime and criminal justice* (Australian Institute of Criminology, no 407, 2011). [↑](#footnote-ref-11)
12. Dennis Byles and Chris Gill, ‘Citizen Judges’ (2014) 88(12) *Law Institute Journal*, 52. [↑](#footnote-ref-12)
13. Kate Warner et al, ‘Public judgment on sentencing: Final results from the Tasmanian Jury Sentencing Study’, *Trends & issues in crime and criminal justice* (Australian Institute of Criminology, no 407, 2011). [↑](#footnote-ref-13)
14. There was an even split between jurors that said the sentence was “very appropriate” and those that found it “fairly appropriate”: ibid. [↑](#footnote-ref-14)
15. Kate Warner et al, ‘Jury Sentencing Survey’, Criminology Research Council (2010), 52. [↑](#footnote-ref-15)
16. See University of Tasmania, Faculty of Law, Victorian Jury Project (University of Tasmania, 2015). [↑](#footnote-ref-16)
17. Sentencing Advisory Council (Tasmania), *Sex Offence Sentencing: Research Paper*, April 2013, 26-36. [↑](#footnote-ref-17)
18. Sentencing Advisory Council, *Community Attitudes to Offence Seriousness* (2012). [↑](#footnote-ref-18)
19. For example, the prevalence of lower-end offending may skew the results. Where cases tend to involve multiple charges (e.g. sexual penetration for a child under 12), statistics shown by charge may paint a different picture to case-based statistics. [↑](#footnote-ref-19)
20. Kate Warner et al, ‘Jury Sentencing Survey’, Criminology Research Council (2010), 79, 94. [↑](#footnote-ref-20)
21. Ibid, 95. [↑](#footnote-ref-21)
22. The significant public outcry in respect of people smuggling and ‘three strikes you’re out’ mandatory sentencing schemes, may in fact suggest mandatory schemes are more likely to *reduce* the confidence of an informed public. See further, page 7 below. [↑](#footnote-ref-22)
23. Sentencing Advisory Council (Tasmania), *Sex Offence Sentencing: Research Paper*, April 2013, 38 (quoting David Indermaur). [↑](#footnote-ref-23)
24. *Legal Aid Act 1978* (Vic) s 7(1)(a). [↑](#footnote-ref-24)
25. Current sentencing practices are defined as “the approach currently adopted by sentencing judges when sentencing for the particular offence. That is, the inquiry is directed particularly, but not exclusively, at the kinds of sentences imposed in comparable cases”: *DPP v CPD* (2009) 22 VR 533, [77]-[78]. [↑](#footnote-ref-25)
26. *Winch* (2010) 27 VR 658; *Hogarth* [2012] VSCA 302; *DPP v CPD* (2009) 22 VR 533. [↑](#footnote-ref-26)
27. (2009) 22 VR 533. [↑](#footnote-ref-27)
28. Ibid, per Maxwell P, Redlich JA and Robson AJA, [53], [68]. [↑](#footnote-ref-28)
29. *Ashdown v The Queen* (2011) 37 VR 341, per Redlich JA, [180] (with whom Ashley JA agreed). [↑](#footnote-ref-29)
30. *DPP v Avici* [2008] VSCA 256, [29] per Maxwell P (with whom Buchanan and Redlich JJA agreed); *Hogarth v The Queen* [2012] VSCA 302, [38]. [↑](#footnote-ref-30)
31. Australia, Attorney-General, ‘Director of Public Prosecutions – Attorney-General’s Direction

    2012’ in Commonwealth of Australia, Gazette, No GN 35, 5 September 2012, 2318. [↑](#footnote-ref-31)
32. Robert Corr, ‘Discretionary Sentencing’, (2014) 39(3) *Alternative Law Journal* 200 (quoting Chris Berg). [↑](#footnote-ref-32)
33. For example, juries may refuse to find a person guilty of an offence where a mandatory penalty is involved, if they consider the imposition of that penalty to be unjust. Juries may be more likely to find alternate charges are made out (that is, charges that are not associated with a mandatory penalty), if doing so will avoid an unjustly harsh outcome. [↑](#footnote-ref-33)
34. As stated by Nicholas Cowdery, “there must be a qualified meaning of consistency: it is the imposition of consistent punishment for like behaviour by similar persons”. See further, Nicholas Cowdery, ‘Mandatory Sentencing’, Sydney Law School, Distinguished Speakers Program (2014). [↑](#footnote-ref-34)
35. For example, the suicide of a 15-year old Western Australian Aboriginal boy after he had been sentenced to a mandatory 28 days in jail for a minor property offence (namely stealing stationery), led to “intense national interest” and widespread demand for government intervention: see Roberts et al, *Penal Populism and Public Opinions: Lessons from five Countries* (Oxford University Press, 2003), 56-57. [↑](#footnote-ref-35)
36. Donald Ritchie, *Sentencing Matters. Does Imprisonment Deter? A Review of the Evidence* (Sentencing Advisory Council, 2011), 2. [↑](#footnote-ref-36)
37. Ibid, 19. [↑](#footnote-ref-37)
38. Where matters resolve, the threat of a mandatory penalty may place undue pressure on a defendant to plead guilty to a lesser charge. [↑](#footnote-ref-38)
39. VLA also supports retaining an exception for those with autism spectrum disorder, a neurological impairment and where a Court Secure Treatment Order or Residential Treatment Order is proposed: see section 10A, *Sentencing Act 1991* (Vic). [↑](#footnote-ref-39)
40. See, for example: C.M Chu. and J.R.P Ogloff, ‘Sentencing of Adolescent Offenders in Victoria: A Review of Empirical Evidence and Practice’, (2012) 19(3) *Psychiatry, Psychology and Law* 325. [↑](#footnote-ref-40)
41. For example, how would a failure to agree on precise sentence be resolved? Would it (absurdly) require an averaging of 12 determinations? [↑](#footnote-ref-41)
42. Criminal Law and Penal Methods Reform Committee of South Australia, *First Report: Sentencing and Corrections* (1973), 25-26. [↑](#footnote-ref-42)
43. Ibid. [↑](#footnote-ref-43)
44. The time commitment and stress of further involvement is likely to further discourage jury involvement, resulting in a greater number of occupational exemptions and other excusals, and subsequently a less representative jury pool. [↑](#footnote-ref-44)
45. See New South Wales Law Reform Commission, *Role of Juries in Sentencing* (No 118, 2007), 41-54. [↑](#footnote-ref-45)
46. *DPP v Walters* [2015] VSCA 303, [8] (Maxwell P, Redlich, Tate and Priest JJA). [↑](#footnote-ref-46)
47. Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015, clause 7. [↑](#footnote-ref-47)
48. *DPP v Walters* [2015] VSCA 303, [10] (Maxwell P, Redlich, Tate and Priest JJA). [↑](#footnote-ref-48)
49. Freiberg and Krasnostein, ‘Statistics, Damn Statistics and Sentencing’, (2011) 21 *Journal of Judicial Administration* 73. [↑](#footnote-ref-49)
50. Teleconference with Legal Aid New South Wales (with practitioners representing appeals, indictable and committals programs, and regional offices), 22 January 2016. [↑](#footnote-ref-50)
51. See Sentencing Advisory Council (Queensland), *Minimum Standard Non-Parole Periods: Final Report* (2011), xv. See also Judicial Commission of New South Wales, The Impact of the Standard Non-Parole Period Sentencing Scheme on Sentencing Patterns in New South Wales (2010, Research Monograph 33), 60-61: “it is not possible to conclude that the statutory scheme has only resulted in a benign form of consistency or uniformity whereby like cases are being treated alike and dissimilar cases differently. To put it another way, it is not possible to tell whether dissimilar cases are now being treated uniformly in order to comply with the statutory scheme.” [↑](#footnote-ref-51)
52. See Sentencing Advisory Council (Queensland), *Minimum Standard Non-Parole Periods: Final Report* (2011). [↑](#footnote-ref-52)
53. Ibid, xvi. [↑](#footnote-ref-53)
54. Given the conceptual difficulties involved, a SNPP should not apply where a combined CCO and imprisonment order is imposed. See further, *Boulton v The Queen* [2014] VSCA 342, [199]. [↑](#footnote-ref-54)
55. *R v AB [No 2]* (2008) 18 VR 391. [↑](#footnote-ref-55)
56. Ibid. [↑](#footnote-ref-56)
57. Such an approach is likely to result in greater disparity in sentencing approach – within offence categories, and between offence categories. For example, it may have disproportionate impact on a *low-severity* offender, where the particular offence charged is constituted by a wide degree of offender behaviour and culpability. It may also be more difficult to advise a client on sentence outcome, which may impact upon readiness to enter an early plea. [↑](#footnote-ref-57)
58. Arie Freiberg, *Pathways to Justice: Sentencing Review* (2002), 208-209; Victoria, Parliamentary Debates, Legislative Assembly, 20 March 2003, 378, 479-480 (R Hulls, Attorney General); NSW Parliamentary Library Research Service, *Mandatory and Guideline Sentencing: Recent Developments*, No 18/98, 17. [↑](#footnote-ref-58)
59. Ibid. [↑](#footnote-ref-59)
60. *Sentencing Act 1991* (Vic), s 6AE. [↑](#footnote-ref-60)
61. Victoria, Parliamentary Debates, Legislative Assembly, 20 March 2003, 378, 479 (R Hulls, Attorney General). [↑](#footnote-ref-61)
62. Sarah Krasnostein, ‘Boulton v The Queen: The Resurrection of Guideline Judgments in Australia?” [2015] *Current Issues in Criminal Justice* 10, citing the New South Wales Law Reform Commission (2013) Sentencing Report 139, 390; Kate Warner (2003) ‘The Role of Guideline Judgments in the Law and Order Debate in Australia’, *Criminal Law Journal* 27(1), 8–22; Nicholas Cowdery (2006) ‘Guideline Judgments: It Seemed Like a Good Idea at the Time’, Speech at The International Society for the Reform of Criminal Law 20th International Conference, 2–6 July 2006, Brisbane, Australia; D Schoff (2003) ‘The Future of Guideline Judgments’, *Current Issues in Criminal Justice* 14(3), 321. [↑](#footnote-ref-62)
63. Sarah Krasnostein, ‘Boulton v The Queen: The Resurrection of Guideline Judgments in Australia?” [2015] *Current Issues in Criminal Justice* 10. [↑](#footnote-ref-63)
64. See further, ibid. [↑](#footnote-ref-64)
65. Arie Freiberg, *Pathways to Justice: Sentencing Review* (2002), 213. [↑](#footnote-ref-65)
66. *Wong v The Queen* (2001) 207 CLR 584; *Hili v The Queen* (2010) 242 CLR 520. [↑](#footnote-ref-66)
67. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 37. See, for example, the refusal of the Court of Appeal to entertain a guideline for the offence of “assault police”: Attorney General’s Application under s 37 of the *Crimes (Sentencing Procedure) Act 1999 No 2 of 2002* [2002] NSWCCA 515. [↑](#footnote-ref-67)
68. The Attorney should also be precluded from requesting a guideline in proceedings in respect of a particular offender. This reflects the position in New South Wales: see *Crimes (Sentencing Procedure) Act 1999* (NSW), s 37(3). [↑](#footnote-ref-68)
69. Arie Freiberg, *Pathways to Justice: Sentencing Review* (2002), 215. [↑](#footnote-ref-69)
70. A guideline judgment can be sought even if it is not necessary to resolve the dispute before the Court: *Sentencing Act 1991* (Vic), s 6AB(3). [↑](#footnote-ref-70)
71. Sarah Krasnostein, ‘Boulton v The Queen: The Resurrection of Guideline Judgments in Australia?’ [2015] *Current Issues in Criminal Justice* 10. [↑](#footnote-ref-71)
72. Other legislative steps could potentially be taken to enable matters to be before the Court (absent an appeal through the usual process), for example, through a modified case-stated procedure. [↑](#footnote-ref-72)
73. Courts, whether or not they are granted the power to initiate guideline judgments absent a vehicle before them, may be less likely to provide guidelines in respect of offences they are not accustomed to. See e.g. in New South Wales, *Attorney General’s Application under s 37 of the* *Crimes (Sentencing Procedure) Act 1999 No 2 of 2002* [2002] NSWCCA 515, [53]. [↑](#footnote-ref-73)
74. This is a modification of a recommendation proposed by Arie Freiberg in his *Pathways to Justice: Sentencing Review* (2002) that was not taken up in the *Sentencing Act 1991* (Vic). [↑](#footnote-ref-74)
75. *Myths and Misconceptions*: Public Opinion versus Public Judgment about Sentencing, Victoria, Sentencing Advisory Council, Research Paper. [↑](#footnote-ref-75)
76. Lenny Roth, ‘Public Opinion on sentencing – recent research in Australia’, NSW Parliamentary Research Service (No 8, 2014). [↑](#footnote-ref-76)
77. New South Wales Law Reform Commission, *Sentencing*, Report 79, 1996, 14-15. [↑](#footnote-ref-77)