Submission to the Sentencing Advisory Council

SENTENCING GUIDANCE REFERENCE

To: Sentencing Advisory Council
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Date: 8 February 2016

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INTRODUCTION

The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and those who work with them in the legal sector and represents over 17,000 members.

The LIV Criminal Law Section, which is comprised of over 2,500 members, has a long history of contributing to, shaping and developing effective criminal legislation, and has undertaken extensive advocacy on law reform and policy issues, particularly sentencing.

This submission has been prepared by the Criminal Law Section Executive Committee and overseen by a working group comprised of Executive members:

- Sam Norton, Executive Committee
- Melinda Walker, Executive Committee
- Sam Cooper (LIV Intern)

General comments

The LIV welcomes this review and is grateful for the opportunity to provide the Sentencing Advisory Council (SAC) with a submission to the Consultation Paper on the Sentencing Guidance Reference (the Consultation Paper).

We note that SAC has been asked to advise the Attorney General on the most effective legislative mechanism to provide sentencing guidance to the courts in a way that:

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

Accordingly, we have undertaken some research into sentencing mechanisms in other comparable jurisdictions. We have endeavoured to answer specific questions asked in the Consultation paper, as well as reiterate our positon on sentencing principles generally.

After careful consideration of proposals in the Consultation Paper, the LIV submits that as with the current baseline sentencing scheme, a *presumptive standard non-parole period scheme* or a *presumptive standard sentencing scheme* fails to take into consideration the various ways in which an offence may be committed.

At present, judges are required to make an assessment of the offender's moral culpability. This is a nuanced task which is vitally important to an offender receiving the appropriate sentence. The LIV submits that any form of baseline sentencing scheme is simply a variation on the theme of mandatory sentencing – a concept which the LIV has consistently and strongly opposed.[1]

[1] Law Institute of Victoria, *Statutory Minimum Sentences for Gross Violence* submission to Sentencing Advisory Council (30/06/2011) <http://www.liv.asn.au/getattachment/eabce1e7-36e2-4ba1-bdea-888a5ce2f84f/Statutory-Minimums-for-Gross-Violence.aspx>.

RESPONSES TO QUESTIONS

Chapter 4

Offences of concern

1. **For which offences, or offence categories, in Victoria is there:**

    a. **Evidence of inconsistency of approach in sentencing offenders? And/or**
    b. **Evidence of a lack of public confidence in the criminal justice system? And/or**
    c. **Concern regarding the current sentencing practices for the offence, or a subcategory of the offence?**

The LIV submits that there is no clear evidence of inconsistency of approach in sentencing offenders. The Court of Appeal has over the past decade placed significant emphasis on the role of current sentencing practices when arriving at an appropriate individual sentence. This has led to numerically similar sentences by and large across the range of criminal offences, with like cases being treated alike and different cases being treated differently.

The LIV further submits that the supposed lack of public confidence in the criminal justice system is by no means confined to a particular category of offence and often is a result of individual reporting on individual cases. The LIV believes that the best way to address public confidence issues is through education. Parliament has an important role to play in achieving a greater understanding within the community of the purposes of sentencing and the way in which sentences are arrived at. If the public understood these elements of sentencing, it would likely have more confidence in the sentences handed down by the courts. As discussed in more detail below in response to question eight (8), research in Tasmania demonstrates that a well-informed public generally agrees with current sentencing practices.[2] More work should be done to properly engage the public and to provide a more thorough understanding as to how the Victorian criminal justice system operates.

Chapter 5

Models for sentencing guidance: offence penalties

2. **Are there any issues with the current maximum penalties for any offences of concern, or any other offences?**
    a. **If so, how should those maximum penalties be amended?**

[2] Kate Warner, Julia Davis, Maggie Walter, Rebecca Brandfield and Rachel Vermey, *Public judgment on sentencing: Final results from the Tasmanian Jury Sentencing Study* (February 2011) Australian Institute of Criminology <http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi407.html>.

The LIV recognises that the gravity of any criminal offence should be assessed according to both the degree of harm caused and the culpability of the offender. This involves an assessment of the state of mind of the offender and of the severity of the harm caused by the offender. A statutory maximum penalty for any particular criminal offence, which operates as a legislative guide for sentencers and the community, should reflect this assessment of gravity. It should also provide for the entire range of conduct and harm that comes within the offence, including the worst examples of the crime.

The LIV considers that there are no obvious maximum penalties that require amendment at this time.

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

b. If so, how?

c. Should a court be required to give greater regard to the maximum penalty for an offence than to current sentencing practices, where current sentencing practices are considered to be inadequate?

The LIV advises against amending the way in which a court must have regard to the maximum penalty for an offence. Maximum penalties are an important consideration in determining a sentence.[3] However, maximum penalties do not determine the quantum of a sentence to the exclusion of other factors, with section 5 of the *Sentencing Act 1991* (Vic) setting out a range of matters which sentencing judges must consider when arriving at an appropriate individual sentence. This embodies the complexity of the sentencing task and the range of human conduct and experience which makes up the criminal jurisdiction. To elevate one consideration above the others erodes the intuitive synthesis approach – an approach that the High Court has repeatedly endorsed and which the LIV strongly supports.

The LIV also submits that no change should be made to the way in which a court regards current sentencing practices. The Court of Appeal has shown a willingness to comment upon the adequacy of current sentencing practices in cases where the intuitive synthesis approach is believed to be inadequate. Additionally, individual judges have the capacity to sentence outside the numerical range of sentences for individual crimes where the circumstances justify it.

3. Should mandatory sentences be introduced in Victoria? If so:

a. What form of mandatory sentencing scheme or schemes should apply?

b. To which offences should mandatory sentencing schemes apply?

c. What should the mandatory sentence levels be for those offences?

As stated in previous submissions, the LIV is strongly opposed to the introduction of mandatory sentences in Victoria. As stated in the LIV's submission to SAC on statutory minimum sentences for gross violence,[4] the LIV strongly objects to the introduction of mandatory minimum terms of imprisonment.

Mandatory sentencing does not fulfill its stated aims; mandatory penalties do not provide a significant marginal deterrent effect, reduce crime rates, or provide consistency in sentencing. By their very nature, mandatory sentencing regimes and the "one size fits all" approach to sentencing

[3] *Sentencing Act 1991* (Vic) s 5(2)(a).

[4] Law Institute of Victoria, *Statutory Minimum Sentences for Gross Violence* submission to Sentencing Advisory Council (30/06/2011) <http://www.liv.asn.au/getattachment/eabce1e7-36e2-4ba1-bdea-888a5ce2f84f/Statutory-Minimums-for-Gross-Violence.aspx>.

leads to unjust outcomes, as offenders with unequal culpability and circumstances are sentenced to the same minimum sentence of imprisonment, or more.

The LIV believes that independent, highly qualified, professional and experienced judicial officers are best placed to impose the most appropriate sentence, taking into account all the circumstances of the case.

4. **If a mandatory sentencing scheme were to be introduced in Victoria, should there be provision for exceptions from the scheme in special or exceptional circumstances? If so, should the 'special reasons' exceptions from statutory minimum sentences in section 10A of the *Sentencing Act 1991* (Vic) apply? Or should different reasons or circumstances apply?**

The LIV submits that *should* a mandatory sentencing scheme be introduced in Victoria, there must be provision for exceptions to the scheme in special or exceptional circumstances.

The exceptions in section 10A of the *Sentencing Act 1991* (Vic) provide a solid point of departure for exceptions to a mandatory sentencing regime. However, these exceptions only operate at the sentencing judge's discretion. The LIV has previously submitted in the context of mandatory sentences for gross violence, that mandatory offences cannot and should not apply to juvenile offenders in all cases.

The LIV would also add that first time offenders should be excluded from a mandatory sentencing scheme. This is not an exception in section 10A of the *Sentencing Act 1991* (Vic). As the LIV outlined in its 2011 submission on mandatory sentencing to the SAC[5], mandatory sentences are of dubious value for first time offenders from the perspective of deterrence, punishing the offender and preventing crime.

It is important to note that the LIV would consider any mandatory sentencing scheme to be fundamentally flawed. Introducing a mandatory sentencing scheme would result in great expense, less just outcomes and would not contribute to a "safer" Victoria.

Models for sentencing guidance: sentencing guidelines and guideline judgments

5. **Should Victoria's guideline judgment scheme be reformed? If so:**
   - **Should the Court of Appeal be able to give guidance on appropriate sentence levels and ranges?**
   - **Should the Attorney-General be able to request a guideline judgment?**
   - **Should the Court of Appeal be able to initiate the guideline judgement process without an appeal?**
   - **Should the guideline judgment scheme be reformed in any other way?**

The LIV recognises that guideline judgments have the ability to promote consistency and public confidence in the sentencing process and also facilitate the development of coherent sentencing practices.[6] The LIV supports reforms to Victoria's guideline judgment scheme that achieve these outcomes. These reforms may entail the Court of Appeal giving guidance on appropriate sentence

[5] Law Institute of Victoria, *Statutory Minimum Sentences for Gross Violence* submission to Sentencing Advisory Council (30/06/2011) <http://www.liv.asn.au/getattachment/eabce1e7-36e2-4ba1-bdea-888a5ce2f84f/Statutory-Minimums-for-Gross-Violence.aspx>.
[6] Boulton v The Queen [2014] VSCA 342, [40].

levels and ranges and allowing the Court of Appeal to initiate the guideline judgment process without an appeal.

The LIV submits that any reforms to Victoria's guideline judgment scheme should however be implemented with caution. If the Attorney-General were able to apply for a guideline judgment separate to proceedings before a court, political issues of the day could influence unnecessary changes to whole areas of criminal law practice and procedure.

The LIV further questions whether the Attorney-General would be better placed than the courts to perceive the need for a guideline judgment. Judges are exposed to witnesses, accused and victims on a daily basis and are in the best position to recognise when current sentencing practices for particular offences are inadequate.[7] The LIV additionally notes that separation of powers issues may arise if the Attorney-General's ability to request guideline judgments interferes with the judicial process.

The LIV stresses that guideline judgments issued on the basis of public misconceptions about the sentencing process should not be allowed to disrupt sound sentencing practices. The former NSW Director of Public Prosecutions, Nicholas Cowdery QC, has praised guideline judgments not for redressing an actual consistency problem, but for redressing the public's impression of one.[8]

The LIV submits that public whims should not dictate the Victorian sentencing regime. Public confidence issues are best addressed through legal commentators, practitioners and other experts educating the public about how the sentencing system operates.

6. Should an external body develop sentencing guidelines for use by courts in Victoria?

- **If so, should the scope and membership of the Victorian Sentencing Advisory Council be amended to allow for the development of sentencing guidelines?**

The LIV supports the introduction of an external body to develop sentencing guidelines for use by courts in Victoria so long as such a body contains members of the legal community.

The LIV submits that an external body that develops sentencing guidelines in Victoria should resemble the Sentencing Council of England and Wales (SC), an external body that develops sentencing guidelines in the UK. Eleven of the SC's fifteen members are practicing lawyers or judges.[9] The Lord Chief Justice of England and Wales is its president. The legal community consequently has significant input into the sentencing guidelines that the SC produces. There is a strong prima facie case that the methodological approach that the SC has introduced to sentencing has led to more consistent sentences in the UK, with high rates of judicial compliance.[10]

[7] Carolyn Ford, 'New Kidd on the block' December 2015 89 (12) LIJ, 19.
[8] Nicholas Cowdery, 'Guideline Sentencing: A Prosecution Perspective' (1999) 11 *Judicial Officer's Bulletin* 57, 58.
[9] Sentencing Council, *Council Members* (2015) <https://www.sentencingcouncil.org.uk/about-us/council-members/>.
[10] Julian V. Roberts, 'Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues' (2013) 76 1 *Law and Contemporary Problems* 1, 23.

If the Victorian Sentencing Advisory Council (SAC) were to develop sentencing guidelines as the SC does, then its governance would likely require significant changes. The legal profession does not currently have a strong presence in the SAC.[11] Any sentencing guidelines that SAC produces may not enjoy the same level of judicial compliance as those produced by a body which contains more members of the legal community, particularly judicial officers, such as the SC.

7. Should a sentencing grid scheme or matrix scheme be introduced in Victoria?

The LIV strongly opposes introducing a grid scheme or matrix scheme in Victoria. All the major criminal offences embrace a huge range of different acts. A schoolyard threat to steal a chocolate bar that the victim complies with is just as much robbery as is a handbag snatch. To superimpose a matrix on the current structure of criminal offences would therefore negate the basic principle that sentences are to be commensurate with the 'seriousness of the offence' and would subvert rather than promote justice.[12] Grid schemes or matrix schemes are justifiably seen by Australian courts as being overly restrictive on the exercise of judicial discretion and against the concept of individualized justice.[13]

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

The LIV opposes jury involvement in the sentencing process in Victorian criminal trials. The LIV believes that judges are best placed to sentence offenders. The LIV's position is based on a number of considerations:

- Judges are familiar with sentencing principles and sentencing options, whereas jurors are rarely acquainted with the law;
- It is vitally important to have parity between cases. Judges are aware of what sentences have been passed in other similar cases, and can apply this knowledge to determine what sentence should be imposed in the case at hand. Jurors do not have this knowledge. Disparity between sentences can lead to appeals, which can increase cost and delay;
- Explaining sentencing principles and options to jurors would be a difficult and lengthy process which can subsequently lead to delay;
- There is a period of time between a finding of guilt and a plea hearing while practitioners collate plead material such as character references. If jurors were to consult with judges about sentence, they would have to come back to court to be provided with the same information as the judge and to partake in discussions. This would cause inconvenience for the jurors, and increase cost as jurors would have to be paid for an additional day of jury duty;
- Involving jurors in the sentencing procedure would overly complicate the sentencing procedure; and

[11] Sentencing Advisory Council, *About Us: Council Directors* (2015) <https://www.sentencingcouncil.vic.gov.au/about-us/council-directors>.
[12] Neil Morgan, 'Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?' (1999) 28 2 *Western Australian Law Review* 259, 284.
[13] The Law Library of Congress, *Sentencing Guidelines: Australia* (01/05/2015) <https://www.loc.gov/law/help/sentencing-guidelines/australia.php>

- Involving jurors in the sentencing process is arguably unnecessary. Research in Tasmania suggests that jurors are likely to sentence offenders similarly to (if not more leniently than) sentencing judges.[14] We note that similar research is currently underway in Victoria. Such research programs or surveys should be ongoing and their results widely publicized. The LIV urges the Victorian Government to engage in an education campaign disseminating the data obtained under the Tasmanian research program.

Models for sentencing guidance: presumptive or standard sentence schemes

9. Should the baseline sentencing regime be repealed in its entirety?
- **If so, are there elements of the baseline sentencing scheme that should be replicated in any new sentencing guidance model?**
- **If not, how should the scheme be amended?**

The LIV submits that the baseline sentencing regime should be repealed in its entirety.

As the LIV stated in its 2011 submission on baseline sentencing[15], the Victorian baseline sentencing regime erodes judicial discretion, leads to the imposition of unjust sentences, contributes to court delay and over-complicates sentencing. The baseline sentencing regime is also unnecessary. Whilst baseline sentencing regimes are introduced to alleviate public perceptions of leniency, the Tasmanian jury study demonstrates that an informed public believes that standard sentencing practices are, in fact, appropriate. The baseline sentencing regime as it currently exists is also practically defective. As the Court of Appeal stated in *DPP v Walters*, the Victorian baseline sentencing regime is 'incapable of being given any practical operation' due to the failure to provide any mechanism for the achievement of the intended future median sentences.[16]

The LIV strongly submits that no element of the current baseline sentencing scheme should be replicated in any new sentencing guidance model.

10. Should a defined term standard non-parole period scheme be introduced in Victoria? If so:
- **To which offences should the scheme apply?**
- **Should the defined term standard non-parole period scheme exclude:**
- **Offences determined summarily?**
- **Offenders aged under 18 at the time of offending?**
- **Offenders sentenced to life imprisonment or an indefinite sentence?**
- **Should the standard non-parole period represent a non-parole period for a charge of an offence in the middle of the range of objective seriousness? If not, what should the standard non-parole period represent?**
- **How would a requirement for the court to have regard to a standard non-parole period for an offence be reconciled with the requirement in Victoria for the court to**

[14] Kate Warner, Julia Davis, Maggie Walter, Rebecca Brandfield and Rachel Vermey, *Public judgment on sentencing: Final results from the Tasmanian Jury Sentencing Study* (February 2011) Australian Institute of Criminology <http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi407.html>.
[15] Law Institute of Victoria, *Baseline Sentences* submission to Sentencing Advisory Council (28/10/2011) <http://www.liv.asn.au/getattachment/a62a45ff-6dd7-48b4-b799-100fb190e99b/Baseline-Sentences.aspx>.
[16] *DPP v Walters* [2015] VSCA 303, [9].

impose a single non-parole period on a case, rather than separately on each charge of an offence?

- **Should the sentencing process in Victoria be changed to require the fixing of individual non-parole periods on each charge of an offence?**
- **Should the standard non-parole period represent the presumptive non-parole period for a case involving at least one charge of an offence for which a standard non-parole period has been prescribed?**

The LIV submits that a defined term standard non-parole period (SNPP) should not be introduced in Victoria.

While an evaluation of the defined term SNPP scheme in NSW by the Judicial Commission of NSW indicated that the scheme had resulted in greater uniformity and consistency in sentencing outcomes, it is not possible to tell whether dissimilar cases are now being treated uniformly in order to comply with the statutory regime.[17] In other words, any consistency being achieved through the NSW defined term SNPP scheme may be coming at the cost of injustice, where unlike cases are given similar sentences so that they conform to the NSW sentencing scheme.

A defined term SNPP scheme is also unlikely to increase public confidence in sentencing procedures given such a scheme's complexity and opacity. The NSW scheme has come under considerable criticism for being overly complex and raising the expectations of victims of crime without delivering additional transparency.[18]

Other criticisms of defined term SNPP regimes based on the NSW model include:[19]

- The scheme in NSW has resulted in overcharging practices by police to encourage successful plea negotiations later in the process;
- The scheme has resulted in greater difficulty in securing bail for those defendants charged with defined term SNPP offences;
- Since the introduction of the NSW scheme, there has been a corresponding increase in offenders pleading guilty (which is a grounds for departure from the application of the scheme in NSW), with concerns that offenders, particularly vulnerable offenders, are being pressured to plead guilty;
- The scheme has created additional work for the OPP in prosecuting matters and presenting sentencing submissions;
- The scheme has led to an increase in matters being dealt with in the superior courts, with corresponding higher costs;
- The scheme has resulted in greater complexity and additional time required for the hearing of sentences, longer defence and prosecution submissions, and longer time required for judges to draft their sentencing remarks, thus contributing to court backlogs;

[17] Judicial Commission of NSW, *The Impact of the Standard Non-Parole Period Sentencing Scheme on Sentencing Patterns in New South Wales* (2010, Research Monograph 33), 60-61.
[18] Sentencing Advisory Council (Queensland) *Minimum standard non-parole periods Final Report*, September 2011, 9.
[19] Sentencing Advisory Council (Queensland) *Minimum standard non-parole periods Final Report*, September 2011, 9.

- The complexity of the scheme has led to an increase in appeals due to errors in applying the scheme; and
- The scheme has led to longer sentences and this has resulted in higher prison and corrections costs.

The LIV further opposes introducing a defined term SNPP because it represents a 'two-tier' approach to sentencing that differs from the 'instinctive synthesis' approach that Victorian judges currently use. A defined term SNPP scheme requires judges to start at a notional non-parole period then determine the head sentence accordingly. The High Court has held that this kind of approach "is apt to give rise to error…it should not be adopted".[20] According to the High Court, a two tier sentencing process does not properly account for the fact that there are many conflicting and contradictory elements which bear upon sentencing an offender. The instinctive synthesis approach better captures this reality.

A further issue with introducing a defined term SNPP in Victoria would be that doing so would represent a dramatic departure from well-understood sentencing practices in how a head sentence and a minimum term is set. Currently, an appropriate head sentence is set first, taking into account all the circumstances of the case using an instinctive synthesis approach, and then a minimum non-parole term is set.[21] Introducing a defined term SNPP would mean that a non-parole period is set first, and then the head sentence is adjusted accordingly. This approach turns sentencing in Victoria on its head. This would also greatly complicate the sentencing process where a person is convicted of both offences subject to a defined term SNPP scheme and offences not subject to such a scheme.

11. Should a defined percentage standard non-parole period scheme be introduced in Victoria? If so:
- **To which offences should the scheme apply?**
- **Should the defined percentage standard non-parole period scheme exclude:**
  - **Offences determined summarily?**
  - **Offenders aged under 18 at the time of offending?**
  - **Offenders sentenced to life imprisonment or an indefinite sentence?**
- **What should be the minimum proportions of the total effective/head sentence required to be imposed as a non-parole period?**
- **Should there be defined special or exceptional circumstances, where a court may depart from imposing a minimum proportion of the total effective/head sentence as the non-parole period? If so, what should those circumstances be?**

The LIV submits that a defined *percentage* SNPP scheme is preferable to a defined *term* SNPP scheme because it allows sentencing judges to maintain the current practice of setting an appropriate head sentence first, and then determining a minimum non-parole period.

The LIV nevertheless submits that a defined percentage SNPP scheme should not be introduced in Victoria. As would be the case if a defined term SNPP scheme was introduced in Victoria, introducing a defined percentage SNPP scheme would likely result in:

- greater complexity and less transparency in sentencing;
- delays in delivering sentences;

[20] *Wong v The Queen* [2001] HCA 64.
[21] *R v Grmusa* [1991] 2 VR 153.

- no increase in public confidence in sentencing;
- overcharging by police;
- greater difficulty in securing bail for defendants;
- increases in guilty pleas;
- additional work for the OPP;
- a prioritising of consistency over justice;
- higher court costs;
- more errors in sentencing; and
- increased prison and correction costs.

Further, a defined percentage SNPP is also difficult to reconcile with an intuitive synthesis approach to sentencing, in which contradictory factors are weighed against one another rather than departing from a pre-determined fixed percentage when determining the non-parole period for a sentence.

12. Should a presumptive standard sentence scheme be introduced in Victoria? If so:
- **Should the presumptive standard sentence represent the sentence for a charge of an offence in the middle of the range of objective seriousness (where an offender has not pleaded guilty)? If not, what should the presumptive standard sentence represent?**
- **To which offences should the presumptive standard sentence scheme apply?**
- **Should the presumptive standard sentence scheme exclude:**
    - **Offences determined summarily?**
    - **Offenders aged under 18 at the time of offending?**
    - **Offenders sentenced to life imprisonment or an indefinite sentence?**
- **Should the presumptive standard sentence scheme also require a court to impose a minimum proportion of the total effective head sentence as a non-parole period?**
- **If so, should there be defined special or exceptional circumstances, where a court may depart from imposing a minimum proportion of the total effective/head sentence as the non-parole period?**
- **If so, what should those circumstances be? Should that be the same as the 'special reasons' in section 10A of the *Sentencing Act 1991* (Vic)?**

The LIV opposes the introduction of a presumptive standard sentencing scheme in Victoria. The LIV submits that introducing a presumptive standard sentencing scheme is undesirable for the following reasons:

- A presumptive standard sentencing scheme would make the sentencing process more complex. SAC has suggested that Victorian courts could regard presumptive standard sentences as a 'guidepost' or a 'yardstick' in much the same way as the court currently considers the maximum penalty. This adds an additional layer of complexity to the sentencing judge's task when determining the length of a sentence.

- A presumptive standard sentencing scheme appears to be an example of 'two-tiered' approach to sentencing. SAC contends that the court would not use the presumptive standard sentence as a starting point. However, the language of '*presumptive* standard sentence' suggests that the presumptive standard sentence is the proper point of departure for a sentencing judge, rather than merely one of many factors to be reconciled in an intuitive synthesis approach. The

LIV advises against introducing a two-tiered sentencing model for the reasons outlined above in the response to question ten (10).

- A presumptive standard sentencing scheme also suffers from the same general drawbacks of any form of baseline sentencing regime. As stated in the responses to questions ten (10) and eleven (11) above in relation to SNPP schemes, introducing a presumptive standard sentencing scheme would likely result in:

    - greater complexity and less transparency in sentencing;
    - delays in delivering sentences;
    - no increase in public confidence in sentencing;
    - overcharging by police;
    - greater difficulty in securing bail for defendants;
    - increases in guilty pleas;
    - additional work for the OPP;
    - a prioritising of consistency over justice;
    - higher court costs;
    - more errors in sentencing; and
    - increased prison and correction costs.

Chapter 6

Levels in a standard non-parole period or presumptive standard sentence scheme

13. If a standard non parole period (SNPP) scheme were to be introduced in Victoria, what should be the standard non-parole periods for the offences to which the scheme should apply?
If a presumptive standard sentence scheme were to be introduced in Victoria, what should be the presumptive standard sentences for the offences to which the scheme should apply?

The LIV is opposed to the introduction of either a SNPP or a presumptive standard sentencing scheme in Victoria. Consequently, the LIV does not deem it necessary to comment on the quantum of standard non parole periods or presumptive standard sentences.

Chapter 7

Other sentencing guidance schemes

14. Are there any other sentencing guidance schemes, from comparable jurisdictions, that should be introduced in Victoria?
    - **If so, what are those schemes, and how would they operate in Victoria?**

The LIV submits that sentencing guidance schemes from other jurisdictions should not be introduced in Victoria.

Complexity of sentencing inhibits consistency and confidence

15. Should any new sentencing guidance scheme in Victoria replace (as far as is practicable) any sentencing schemes currently in the *Sentencing Act 1991* (Vic)?
- **If so, which sentencing schemes should be replaced?**

The LIV submits that the mandatory minimum sentences for gross violence should be repealed.

The LIV takes the view that the intuitive synthesis approach remains the best approach to achieving just outcomes in individual cases.

CONCLUSION

The LIV recognises that the sentencing of offenders tends to generate a great deal of public interest. We acknowledge that the community needs to rely on a justice system that is reasonable, sensible, and effective.

The sentencing of offenders is a highly complex task, and judicial officers are under enormous pressure and often, unfortunately, at the forefront of sentencing criticisms.

Victorian Chief Justice Marilyn Warren has been quoted in numerous papers, stating:

> "Of the thousands of cases dealt with in higher courts each year, most appeals against sentence complain that they are too severe.
>
> Those cases are rarely reported in the media. It is not surprising, therefore, that the public may gain a distorted impression of sentencing practices in Victoria".[22]

As stated in our previous submissions[23], sentencing has the capacity to reduce reoffending, promote a higher return on investment in the justice system, and ultimately contributes to a safer community.

Fundamentally, it is vital to note that studies have called into question the deterrent value of imprisonment; and while the threat of imprisonment may generate a small general deterrent effect, increases in the severity of sentence or length of prison sentences do not produce a corresponding increase in the general deterrent effect.[24]

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[22] Judicial Conference of Australia, *Judge for Yourself: A Guide to Sentencing in Australia* (29/08/2006) <http://www.judcom.nsw.gov.au/research-and-sentencing/judge.pdf>.
[23] Law Institute of Victoria, *Reviw of Sentencing Options for Drug Related Offending* to Victorian Attorney General (02/11/2015) <http://www.liv.asn.au/getattachment/7c7628e7-e19d-4375-804e-b51542986cf2/Review-of-Sentencing-Options-for-Drug-Related-Offe.aspx>.
[24] Richie, D *Does Imprisonment Deter? A Review of the Evidence,* Sentencing Advisory Council (Victoria), April 2011, 18.

We reiterate our position that baseline sentences (or any mandatory type sentencing scheme) erodes judicial discretion, leads to the imposition of unjust sentences, contributes to court delay, and over-complicates sentencing.

We submit that public perceptions of leniency are best addressed through increasing transparency and accessibility to sentencing reasons, rather than making dramatic changes to sentencing policy.

The LIV would be happy to participate in any ongoing work proposed by the Sentencing Advisory Council in addressing these issues.