

# **SENTENCING LAW IN VICTORIA (AUSTRALIA)** **AN OVERVIEW OF REFORM DURING THE LAST 20 YEARS**

*A paper delivered by Scott Bruckard of the Commonwealth DPP in Australia<sup>1</sup>  
June 2007*

## **INTRODUCTION**

The aim of this paper is to provide a brief overview of the key changes made to sentencing law in Victoria (Australia) in the last 20 years.

Victoria is one of a number of States which make up the Commonwealth of Australia. Each State Government generally has responsibility for the administration of criminal law within the boundaries of that State.<sup>2</sup> Whilst minor changes have continued to be made to sentencing law in Victoria during the last 20 years, two waves of more substantial reforms can be identified during this period.

The first wave of sentencing law reform in Victoria occurred in the 1980s. These reforms were largely driven by a realisation of the increasing social and economic cost of imprisonment. The reforms of this period focussed on developing alternatives to imprisonment, legislating to ensure that imprisonment was used only as a penalty of last resort, recognising that many crimes have victims and seeking truth in sentencing through the abolition of remissions.

The second wave of sentencing law reform in Victoria has occurred more recently in the period from around 2002 onwards. The reforms of this period have sought to build on earlier reforms but have adopted new and more innovative approaches to old problems. Many of these reforms appear to have been based on the notion of "therapeutic jurisprudence" resulting in the development of problem solving courts such as drug courts, family violence courts, Koori courts and more recently neighbourhood courts in Victoria.

A number of consistent themes have featured in both waves of reform. The Victorian Parliament has consistently sought to create alternative options to custodial sentences. In addition the Parliament has sought to improve consistency of sentencing outcomes and find ways of involving the community more in the sentencing process. Politicians and the legislature have become increasingly sensitive to public opinion regarding sentencing outcomes.

## **THE FIRST WAVE OF REFORM – THE 1980s**

The 1980s was a busy time for sentencing reform in Australia.

On 11 August 1978 the Federal Attorney-General issued a reference to the Australian Law Reform Commission (ALRC) to comprehensively examine federal sentencing law in Australia. Whilst the final report was not completed and tabled in Federal Parliament until 1988, the ALRC delivered an interim report in 1980 entitled

---

<sup>1</sup> Scott Bruckard is a Senior Assistant Director employed by the Melbourne Office of the Commonwealth DPP. The views expressed in this paper are those of the author and are not necessarily shared by the Commonwealth Director of Public Prosecutions.

<sup>2</sup> The Crimes Act 1914 (C'th) contains provisions which in part govern the sentencing of federal criminal offenders in all Australian States and Territories.

“Sentencing Federal Offenders”.<sup>3</sup> This interim report provides an insight into the mood for reform of sentencing law which existed in Australia at the beginning of the 1980s. An extract from the report summary states as follows:

*“Whatever the lack there may have been in the availability of information and statistics about Federal crime and punishment in Australia, there is no lack of literature on the purposes of punishment and the effectiveness of this or that method. Debate of these themes is as old as civilisation. This report is written at a time of renewed intensity in the debate. It is discussed in Chapter 2. It has centred largely around the issues of fairness, certainty, consistency and severity of punishment. The arguments advanced today are not very different from those which have been advanced for centuries. In many respects we are now witnessing in Australia a turn of the circle. Explanations and justifications of punishment in terms of retribution and deterrence, until lately out of vogue, are once more in the ascendant. There is less confidence today in the capacity of the criminal justice system to provide for the rehabilitation of offenders: an ideal which was generally accepted as a major objective of the criminal justice system during the past few decades. Discussion of the principles of punishment tend to be charged with emotion. Yet experienced judges, daily engaged in the business of punishing convicted offenders, frequently confess that the longer they perform the task of sentencing, the less confidence they have that they know what they are doing. Sentencing has been described as the most “painful” and “least rewarding” of judicial tasks. Critics assert that this is so because judges are given few signposts, little legislative guidance, and totally inadequate preparation and training for the task of sentencing. Serious, knowledgeable and responsible critics of the system of judicial sentencing in Australia and elsewhere chastise the disparities that exist in sentencing and describe the process as a “random lottery” depending too much on capricious and inconsistent factors and on the personality and the idiosyncratic views of the particular sentencing judge.”<sup>4</sup>*

Some of the key recommendations made in this report included:

- Development of punishment principles with a preference being given to non-custodial sentencing outcomes.
- Collection of sentencing information and statistics.
- Establishment of a Sentencing Council.
- Legislative provisions to guide the exercise of judicial sentencing discretion.
- Abolition of parole.
- Compensation for victims of crime

Not all these recommendations were acted upon by the Federal Government and whilst the work undertaken by the ALRC was commissioned for the Federal Government, a number of themes for reform identified in the 1980 ALRC Interim Report were taken up by various State governments, including Victoria.

In 1981 the Victorian Government enacted the *Penalties and Sentences Act 1981 (Vic)* which sought to consolidate relevant sentencing law into one legislative enactment. This Act was amended in 1984 and then replaced by a new *Penalties*

---

<sup>3</sup> Australian Law Reform Commission Report No. 15: Sentencing Federal Offenders, AGPS 1980.

<sup>4</sup> Australian Law Reform Commission Report No. 15: Sentencing Federal Offenders, AGPS 1980 – Summary page 23.

*and Sentences Act 1985 (Vic)*. All of these statutes attempted to provide courts with a clearer legislative framework for the delivery of sentencing outcomes.

The *Penalties and Sentences Act 1985 (Vic)* was enacted at a time of considerable criticism by Police, the Judiciary and the Public of the existing legal provisions and administrative practices regarding sentences of imprisonment. The high point of that criticism in so far as the Judiciary was concerned came in the case of Yates v R (1985) VR 41. Yates had been convicted of certain acts of paedophilia and had at first instance been sentenced to 10 years imprisonment with a minimum of 8 years. Yates appealed against his sentence on the basis that, for a man of 68 years of age, the sentence was “crushing”. The DPP argued the sentence was not crushing and noted that the reality was that with remissions, Yates would only serve a sentence of some 4 years duration.

The appeal in Yates was heard by a Full Court of 5 judges in the Victorian Court of Criminal Appeal. In a majority of 4 to 1 the Court upheld the appeal and reduced the sentence imposed on Yates to 7 years with a minimum of 5 years. The majority held that the sentencing court could not have regard to effect of administrative interventions in the sentence passed. The Court held that it was the role of the sentencing court to pass a sentence which was appropriate having regard to the circumstances of the offence and character of the offender. The Court of Appeal observed:<sup>5</sup>

*The mere fact that there can be such a discrepancy between a sentence passed and the period of detention actually served is profoundly disturbing. The fact that there often is such a discrepancy has troubled sentencing judges for some considerable time. They have been troubled because the result of the combination of the labyrinthine provisions of the statutes and regulations relating to sentencing and the manner of their administration operates seriously to undermine the authority of the Court. On the one hand the sentencing judge's task is to fix the sentence which he considers appropriate in all the circumstances to the offence and to the offender. On the other hand, he knows that in all probability the person sentenced will not serve anything like even the minimum term imposed. An intelligent observer who was told about the sentence passed and the period of incarceration actually served would be likely to conclude either that the Court had no authority because little notice was taken of the sentence passed or that the Court was engaged in an elaborate charade designed to conceal from the public the real punishment being inflicted upon an offender. Such conclusions would be understandable unless the Court's role is seen as one of having to fix the scope of the appropriate sentence only without being concerned about the actual time which the prisoner may serve in custody, this being a matter more appropriate for the Parole Board and prison authorities who are able to assess the prisoner's progress during the course of the sentence.*

The decision in Yates created political controversy in Victoria and generated debate regarding the notion of “truth in sentencing”. The Victorian Government appointed a committee to review sentencing policy and practice in Victoria<sup>6</sup>. In the meantime the Government responded quickly and legislated for a new *Penalties and Sentences 1985 Act (Vic)* which introduced a range of new sentencing options in Victoria including suspended sentences and Community Based Orders. A statutory provision

---

<sup>5</sup> Yates v R [1985] VR 41 at 43 – 44.

<sup>6</sup> Victorian Sentencing Committee chaired by The Hon. Sir John Starke QC.

which obliged a Court to take remissions into account was also included as an interim response to the observations made by the Court in Yates.

By the mid 1980s very substantial sentencing reform had taken place at a State level in Victoria including:

- Consolidation of statutory provisions relating to sentence;
- Statutory recognition of imprisonment as a sanction of last resort;<sup>7</sup>
- Discounting of sentences on account of a plea of guilty;
- Introduction of suspended sentences of imprisonment;
- Statutory provision which obliged a Court to take remissions into account;
- Statutory requirement when imposing a fine to consider ability to pay;
- Alternatives to imprisonment for fine defaulters;
- Creation of Community Based Orders (replacing probation and attendance centre orders); and
- Statutory provisions enabling restitution orders to be made on criminal conviction.

These reforms of the 1980s also had an economic agenda. Like many other States in the Commonwealth of Australia at that time, gaol infrastructure was in a serious state of decline in Victoria in the early 1980s. Many of the prisons used to house inmates in Australia at that time had been built in the 1800s.<sup>8</sup> Prisons in nearly all jurisdictions were overcrowded and the cost of housing prisoners was rising substantially. A realistic assessment of prison life revealed it as a “negative and destructive experience”<sup>9</sup> for many offenders which offered little by way of rehabilitation. Reducing the emphasis on imprisonment and creating other sentencing alternatives would, it was thought, deliver economic and well as social benefits.

In April 1987 the Victorian Sentencing Committee published a Discussion Paper on sentencing.<sup>10</sup> The discussion paper discussed the principles of sentencing but also examined the economics. The discussion paper noted that:

*“Prisons, like hospitals, schools and other public resources are funded out of the public purse within the economic and social objectives of the Government. If more prisons are to be built money must be found for that purpose within the State budget and at the expense of some other project, activity or service. In times of rising prison populations if new prisons are not built then other options for prison population control including:*

- *decriminalisation;*
  - *non-prosecution;*
  - *changes in sentencing policy; and*
  - *administrative measures*
- must be developed.”*

On 18 April 1988 the Victorian Sentencing Committee Report was provided to the Victorian Government and tabled in the Parliament. This was a very comprehensive report which acknowledged that whilst the *Penalties and Sentences Act 1985 (Vic)*

---

<sup>7</sup> Section 11 of the Penalties and Sentences Act 1985 (Vic).

<sup>8</sup> A Bruner & K Sawdy “New Directions in Correctional Architecture” Dowding & Griffin 1988.

<sup>9</sup> Australian Law Reform Commission Report No. 44 – “Sentencing” - August 1988 - Page 19.

<sup>10</sup> Victorian Sentencing Committee Discussion Paper – April 1987 – Victorian Government Printer.

had created an array of new sentencing options, Judges and Magistrates had been provided with little guidance from the legislature as to the circumstances in which Parliament had intended that these options be deployed.<sup>11</sup>

Recommendations made by the Victorian Sentencing Committee were largely adopted and in 1991 a new *Sentencing Act 1991 (Vic)* was enacted by the Victorian Parliament. The *Sentencing Act 1991 (Vic)*:

- established a hierarchy of sentencing options
- revised the structure of maximum penalties through the introduction of sliding scales of seriousness;
- abolished statutory remissions;
- created Intensive Corrections Orders – a new alternative to imprisonment;
- reviewed, rationalised and simplified sentencing provisions and procedures; and
- stated for the first time in legislation the purposes for which sentences may be imposed.

This legislation represented the last instalment of sentencing reform in Victoria generated out of the 1980s and continued the themes of consolidating sentencing law in one Act, seeking alternatives to imprisonment and improving consistency of outcomes through the application of statutory sentencing principles designed to guide the exercise of sentencing discretion. It is also worthy of note that in 1994 a new Division 1A was inserted into the *Sentencing Act 1991 (Vic)* making provision for a sentencing court to accept a statement from the victims of criminal offending following a finding of guilt. A victim impact statement can be provided in writing in the form of a statutory declaration or delivered orally via sworn evidence. Such statements are now an accepted part of the criminal justice systems of all Australian States.

## **THE SECOND WAVE OF REFORM – 2002 ONWARDS**

The second wave of sentencing law reform began in the early part of the 21<sup>st</sup> century from around 2002 onwards. The reforms of this period have sought to build on earlier reforms but have adopted new and more innovative approaches to old problems. A range of reforms have created new sentencing initiatives and specialised divisions of the Magistrates' Court of Victoria, the principal court of summary jurisdiction within the State. At the same time the Victorian Government has sought to generate greater consistency of outcome and more community consultation at the top of the judicial hierarchy through the creation of a Sentencing Advisory Council and legislation which would permit the Victorian Court of Appeal to issue guideline judgments.

### **Magistrates' Court Initiatives**

"Therapeutic jurisprudence" has seen the development of drug courts, family violence courts, Koori courts and more recently neighbourhood courts in Victoria. These initiatives have evolved in circumstances where it has become apparent that courts acting alone are often very poorly equipped to deal with the underlying causes of some forms of less serious criminal activity. These initiatives have sought to target some of the underlying social causes of such criminal activity through a multi-

---

<sup>11</sup> Sentencing – Victorian Sentencing Committee Report – April 1988 - Vol 1 - Page 7.

disciplined approach. These initiatives have also resulted in the creation of some further new alternatives to imprisonment.

### Diversion

In 2001 Victoria trialled a sentencing initiative known as “diversion” in the Magistrates’ Court of Victoria. The trial was successful and ultimately led to statutory recognition of a diversion scheme in 2002.<sup>12</sup>

Diversion targets less serious criminal conduct brought before the Magistrates’ Court which usually involves young, first time offenders. Diversion provides these offenders with an opportunity to not only avoid a criminal conviction but effectively avoid a record of their appearance before the Court. Road Safety offences are excluded from the operation of the scheme.<sup>13</sup> Diversion is available at anytime before a formal plea is entered to offenders who are willing to acknowledge their responsibility for the offence, appear to the Court to be appropriate candidates for diversion and are willing to participate in the diversion program and have secured the consent of the prosecutor for this purpose. If all these criteria are met, the diversion program empowers the Court to adjourn the proceedings for up to 12 months to enable the offender to undertake the diversion program.

A diversion co-ordinator at the Court will assist the parties to create a diversion program that may be suitable to them and the Court. It is not uncommon for such programs to include a formal apology to the victim and some element of community work. If the offender is able to successfully complete the conditions of the diversion program, the offences will be struck out without the offender ever having been required to enter a plea. A failure to complete the diversion program conditions will result in the formal criminal proceedings returning to a Magistrate to be dealt with in the usual way.

What is interesting about the diversion program and its success is that it operates from within the Magistrates’ Court, often involves a component of community service but does not entail the offender entering a plea to the charges and being sentenced by the Court. The legislative foundation for diversion is not contained in the *Sentencing Act 1991 (Vic)* given that it is not regarded as a sentencing outcome. Rather it is a matter of procedure set out in the Magistrates Court Act 1989 (Vic)

### Drug Court – Drug Treatment Orders

The Magistrates’ Court of Victoria has also established a number of specialist divisions within the Court to deal with particular classes of offenders. One of these divisions is the Drug Court Division which was established in 2002.<sup>14</sup>

As its name suggests, the Drug Court Division of the Magistrates’ Court is a specialised division of the Court where nominated Magistrates are appointed to deal with offenders suffering from serious drug addiction. This division of the Court is unique in the sense that it is the only Court in the State which has power under the *Sentencing Act 1991 (Vic)* to make Drug Treatment Orders.<sup>15</sup> Drug Treatment Orders are available to offenders in the Magistrates’ Court who plead guilty to offences (other than sexual offences or offences involving the infliction of actual

---

<sup>12</sup> See section 128A of the Magistrates’ Court Act 1989 (Vic).

<sup>13</sup> See section 128A(1) of the Magistrates’ Court Act 1989 (Vic).

<sup>14</sup> See section 4A of the Magistrates’ Court Act 1989 (Vic).

<sup>15</sup> See section 18Y of the Sentencing Act 1991 (Vic).

bodily harm) in circumstances where the Court is satisfied that the offender is drug or alcohol dependent and their dependency contributed to the commission of the offence. Furthermore the Drug Court must, before making such an order, consider that a sentence of actual imprisonment would otherwise be appropriate, have received a drug treatment order assessment report, be satisfied that such an order is appropriate in all the circumstances and has obtained the written consent of the offender.<sup>16</sup>

The *Sentencing Act 1991 (Vic)* requires that Drug Treatment Orders be structured in two parts consisting of a treatment component and a custodial component.<sup>17</sup> When making a Drug Treatment Order the Drug Court must sentence the offender to a period of imprisonment of no more than 2 years albeit that offender is not required to serve the custodial component of the order unless the core or program conditions of the Drug Treatment Order are breached.<sup>18</sup>

### The Koori Court

The Magistrates' Court of Victoria has also established a specialist Koori Court Division.<sup>19</sup> This division of the Court was also established in 2002. The Koori Court Division of the Magistrates Court was established to deal with Aboriginal offenders. The Court exercises its jurisdiction with as little formality and technicality as possible. The Court may regulate its own procedures with the view to enhancing the comprehension of the offender and his or her family members. The Court is excluded from hearing sexual offences or breach of intervention orders in family violence matters.<sup>20</sup> The jurisdiction of the Court is only activated where the offender consents to the matter being heard by the Court and acknowledges his or her responsibility for the offending.<sup>21</sup>

The Koori Court's sentencing procedures enable it to consider oral statements made to it by Aboriginal elders or respected persons. The Court may further inform itself by obtaining evidence or reports from health workers, victims, Koori Court Officers, family members or any other appropriate person.<sup>22</sup> The aim of these provisions is to enable to Court to become better informed about the reasons for the offender's conduct and seek to involve the offender's family and community in developing solutions.

Whilst the Koori Court has specialised procedures for hearing matters referred to it, Magistrates sitting in the Koori Court do not have access to any specialised sentencing orders.

### The Family Violence Court

The Magistrates' Court of Victoria has also established a specialist Family Violence Division.<sup>23</sup> This division of the Court was established in 2004. The Family Violence Division of the Magistrates Court was established to deal with family violence matters. This Family Violence Court has jurisdiction to deal with proceedings arising

---

<sup>16</sup> See section 18Z of the Sentencing Act 1991 (Vic).

<sup>17</sup> See section 18ZC of the Sentencing Act 1991 (Vic).

<sup>18</sup> See section 18ZL of the Sentencing Act 1991 (Vic).

<sup>19</sup> See section 4D of the Magistrates' Court Act 1989 (Vic)

<sup>20</sup> See section 4F of the Magistrates' Court Act 1989 (Vic).

<sup>21</sup> See section 4F of the Magistrates' Court Act 1989 (Vic).

<sup>22</sup> See section 4G of the Magistrates' Court Act 1989 (Vic).

<sup>23</sup> See section 4H of the Magistrates' Court Act 1989 (Vic).

under the *Crimes (Family Violence) 1987 (Vic)* with respect to intervention orders, breach of intervention orders and counselling. The Court also has limited jurisdiction to deal with some matters arising under the *Family Law Act 1975 (C'th)* and the *Child Support (Assessment) Act 1989 (C'th)*.<sup>24</sup>

The Family Violence Court has powers under the *Magistrates Court Act 1989 (Vic)* to enable witnesses to give evidence via closed circuit television from a place outside of the courtroom, using screens to remove the offender from the witness's line of sight and permitting a person to be beside a witness when he or she gives evidence.<sup>25</sup> These provisions also place restrictions on children being present during proceedings or being called as witnesses in circumstances where he or she is a family member of a party to the proceedings.<sup>26</sup>

Whilst the Family Violence Court has specialised procedures for hearing matters referred to it, Magistrates sitting in the Family Violence Court do not have access to any specialised sentencing orders.

### Neighbourhood Justice

The Magistrates' Court of Victoria has also established a specialist Neighbourhood Justice Division.<sup>27</sup> This division of the Court was established in 2006 but the first court of this type has only recently commenced operation in an inner suburb of Melbourne. The Neighbourhood Justice Division of the Magistrates' Court has been modelled on the success of the Koori Court. Like the Koori Court, the Neighbourhood Court has been empowered to exercise its jurisdiction with as little formality and technicality as possible. The Court may regulate its own procedures with the view to enhancing the comprehension of the parties to the proceedings. The Court is excluded from hearing sexual offences but its jurisdiction does extend to *Crimes (Family Violence) Act (Vic)* matters.<sup>28</sup> The jurisdiction of the Court is only activated where, in the case of criminal proceedings, the offender resides in the relevant municipal district or, is a homeless person who is alleged to have committed the offence in the municipal district or, is an Aboriginal person with close connection to the municipal district.<sup>29</sup> The Neighbourhood Court also has a civil jurisdiction with respect to local matters.<sup>30</sup>

Like the Koori Court, the Neighbourhood Court may inform itself by obtaining evidence or reports from local health workers, victims, Neighbourhood Justice Officers, community service providers or any other appropriate person.<sup>31</sup>

The Neighbourhood Court does not have access to any specialised sentencing orders.

### Home Detention

In 2003 the *Victorian Sentencing Act 1991 (Vic)* was amended to make available home detention orders. These provisions provide that a court that has sentenced a

---

<sup>24</sup> See section 4I of the Magistrates' Court Act 1989 (Vic).

<sup>25</sup> See section 4K of the Magistrates' Court Act 1989 (Vic).

<sup>26</sup> See section 4L of the Magistrates' Court Act 1989 (Vic).

<sup>27</sup> See section 4M of the Magistrates' Court Act 1989 (Vic).

<sup>28</sup> See section 4O of the Magistrates' Court Act 1989 (Vic).

<sup>29</sup> See section 4O(2) of the Magistrates' Court Act 1989 (Vic).

<sup>30</sup> See section 4O(3) of the Magistrates' Court Act 1989 (Vic).

<sup>31</sup> See section 4Q of the Magistrates' Court Act 1989 (Vic).

person to imprisonment for 12 months or less may make a home detention order directing that the sentence be served by way of home detention.<sup>32</sup> A home detention order cannot be made unless all persons over the age of 18 who will be residing with the offender have been consulted and have consented to such an order being made.<sup>33</sup> Persons with prior convictions for certain offences such as sexual offences, firearms offences and family violence offences may not be the subject of a home detention order.<sup>34</sup> A court may only make a home detention order if the offender consents, a home detention assessment report has been prepared and submitted to the Court, such an order is appropriate in all the circumstances and the Secretary of the Department of Justice has confirmed in writing that a place is available for the offender on the home detention program.<sup>35</sup>

The nature of the surveillance requirements necessary to enforce a home detention order are such that the home detention program is only able to offer limited places. As a result whilst many offenders would like to serve their sentences of imprisonment at home and may meet the criteria, they are not able to secure a place on the program and obtain the necessary consent from the Department of Justice.

Home detention orders are subject to a range of core conditions which include electronic monitoring.<sup>36</sup> Special conditions may also be attached to the order. Any serious breach of the conditions of the order may result in the revocation of the order.<sup>37</sup>

### **Sentencing Advisory Council / Guideline Judgments and Judicial Training**

It is interesting to note that all of the initiatives outlined above have been focussed on outcomes delivered in the Magistrates' Court of Victoria, a Court which sits at the lower end of the judicial hierarchy. The way in which the Magistrates' Court in Victoria has been empowered to adopt a multi-disciplined approach to deal with some forms of criminal activity can be contrasted to the way in which the Government has sought to deal with more serious criminal conduct referred to courts higher up the judicial hierarchy.

Victoria has established a Sentencing Advisory Council, legislated to allow the Victorian Court of Appeal to deliver and review guideline judgments and created a Judicial College. These initiatives are the last in a long line of reforms apparently designed to improve the consistency of sentencing outcome, more closely guide and structure judicial consideration of sentencing matters whilst also providing more opportunity for community consultation and involvement in the sentencing process.

#### **Guideline Judgments**

In 2003 the Victorian State Government amended the *Sentencing Act 1991 (Vic)* to make provisions for guideline judgments. These are judgments of the Victorian Court of Appeal which are expressed to contain guidelines for sentencing particular classes of offences or offenders. The Court of Appeal may deliver such judgments on its own motion or on application of a party. Any guideline judgment issued by the Court

---

<sup>32</sup> See Section 18ZT of the Sentencing Act 1991 (Vic).

<sup>33</sup> See Section 18ZU of the Sentencing Act 1991 (Vic).

<sup>34</sup> See Section 18ZV of the Sentencing Act 1991 (Vic).

<sup>35</sup> See Section 18ZW of the Sentencing Act 1991 (Vic).

<sup>36</sup> See Section 18ZZB of the Sentencing Act 1991 (Vic).

<sup>37</sup> See Section 18ZZI of the Sentencing Act 1991 (Vic).

of Appeal in Victoria must be unanimous.<sup>38</sup> Notice must be given to the Director of Public Prosecutions and Victoria Legal Aid ahead of any hearing likely to result in the issue of a guideline judgment.<sup>39</sup>

Whilst these provisions have been in operation in Victoria for several years now, the Victorian Court of Appeal has not yet issued any guideline judgments. The approach of the Victorian Court of Appeal can be contrasted to the New South Wales Court of Appeal which has issued guideline judgments on a range of topics including:

- High range prescribed content of alcohol cases under the Road Safety Act.<sup>40</sup>
- Criminal procedure rules relating to sentencing hearings where other offences are taken into account.<sup>41</sup>
- Guilty pleas.<sup>42</sup>
- Break, enter and steal cases.<sup>43</sup>
- Armed robbery cases.<sup>44</sup>
- Dangerous driving cases.<sup>45</sup>
- Drug importation cases (subsequently overturned by the High Court of Australia – see below).<sup>46</sup>

Any judicial enthusiasm for guideline judgments was dealt a blow by the High Court of Australia in the matter of Wong v The Queen (2001) 207 CLR 584. Wong was a federal prosecution for narcotics offences under federal law. In that case the Commonwealth DPP had appealed against the sentences imposed on the appellants on the basis that they were manifestly inadequate. The NSW Court of Criminal Appeal agreed that the sentences imposed were inadequate and used the appeal as a vehicle in which to consider sentences for the federal offence of importation of narcotics more generally. A Court of Criminal Appeal comprising 5 judges determined the appeal and issued a guideline judgment under the relevant NSW law. The appellants then appealed to the High Court of Australia arguing in part that it was beyond the power and jurisdiction of the Court of Appeal to issue guideline judgments in federal matters. This argument was ultimately upheld by the High Court. However a number of Justices of the High Court went further than the jurisdictional issue and appeared to cast doubt on the utility of numerical guidelines. In the joint judgment of Gaudron, Gummow and Hayne JJ, their Honours referred to the table of sentences outcomes contained within the Court of Appeal guideline judgment which outlined the sentencing ranges applicable to different levels of drug trafficking associated with different quantities of narcotics. Their Honours observed that:

*“Secondly and no less importantly the reasons of the Court of Criminal Appeal suggest that a mathematical approach to sentencing in which there*

---

<sup>38</sup> See section 6AB of the Sentencing Act 1991 (Vic).

<sup>39</sup> See section 6AD of the Sentencing Act 1991 (Vic).

<sup>40</sup> Application by the Attorney-General under section 37 of the Crimes (Sentencing Procedure) Act for a guideline judgment concerning the offence of high range prescribed content of alcohol under section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002) (2004) 61 NSWLR 305.

<sup>41</sup> Attorney-General's Application under section 37 of the Crimes (Sentencing Procedure) Act 1999 No. 1 of 2002 56 NSWLR 146.

<sup>42</sup> R v Thompson & Houlton (2000) 49 NSWLR 383.

<sup>43</sup> R v Ponfield (1999) 48 NSWLR 327.

<sup>44</sup> R v Henry (1999) 46 NSWLR 346.

<sup>45</sup> R v Jurisic (1998) 45 NSWLR 209 and R v Whyte (2002) 55 NSWLR 252

<sup>46</sup> Wong v The Queen (2001) 207 CLR 584.

*are to be “increments” to, or decrements from, a predetermined range of sentences. That kind of approach, usually referred to as a “two stage approach” to sentencing, not only is apt to give rise to error, it is an approach that departs from principle. It should not be adopted.”<sup>47</sup>*

Despite the rejection of guideline judgments by the High Court of Australia in Wong, appeal courts in a number of States (such as New South Wales) have continued to produce and review guideline judgments under State laws relating to criminal offences within the jurisdiction of State. The decision of the High Court in Wong only prohibits the application of State laws relating to guideline judgments to federal criminal offences.

The utility of guideline judgments and numerical analysis was dealt a further blow in the subsequent High Court decision in Makarjian v The Queen (2005) 215 ALR 213. The appellant in that case was a heroin addict who had pleaded guilty to a number of offences relating to the supply of narcotics. The appellant, who had relevant prior convictions, was at first instance sentenced to 2 and a half years gaol with a minimum non-parole period of 15 months. Following a Crown appeal the sentence was increased substantially to eight years imprisonment with a non-parole period of 4 and a half years gaol. In his judgment delivered in the NSW Court of Appeal<sup>48</sup> Hulme J (with whom Heydon JA and Carruthers AJ agreed) disapproved of the approach to sentencing taken by the judge at first instance which he characterised as one of instinctive synthesis. His Honour wondered whether pursuant to this approach, “figures have not just been plucked out of the air.” His Honour said that in his experience there were far more advantages “in reasoning to a conclusion”.<sup>49</sup> In this way his Honour adopted a staged approach to formulating the appropriate sentence whereby he nominated a starting point referable to the statutory maximum and then navigated to the appropriate final sentence after taking into account a range of factors.

The appellant’s appeal to the High Court of Australia brought into clear focus some of the issues left unresolved by the decision in Wong – particularly the question of what was the preferred method to be adopted in approaching the task of sentencing in Australia. This has been referred to as the debate between the “two staged approach” versus “instinctive synthesis”. The “two staged approach” usually involves the sentencing court postulating a sentence and then adjusting that sentence to take into account matters of aggravation and mitigation so as to arrive at an appropriate sentence. By contrast the “instinctive synthesis” approach usually involves the sentencing court considering all relevant matters to arrive at an appropriate sentence.

Whilst in their joint judgment Gleeson CJ, Gummow, Hayne and Callinan JJ rejected the notion that a universal approach to sentencing should be adopted; their Honours expressed a clear preference for the approach described as “instinctive synthesis” and warned against “indulgence in arithmetical deduction by the sentencing judge”.<sup>50</sup> However the majority also pointed out that the law strongly favours transparency and that the process of “instinctive synthesis” should not be regarded as shorthand for some arcane process into the mysteries of which only judges can be initiated. Accessible reasoning, it was said, is necessary in the interests of victims, of the

---

<sup>47</sup> Wong v The Queen (2001) 207 CLR 584 at 611.

<sup>48</sup> [2003] NSWCCA 8

<sup>49</sup> (2003) 137 A Crim R 497 at 508.

<sup>50</sup> Markarian v R (2005) 215 ALR 213 at 225.

parties, appeal courts and the public.<sup>51</sup> In a separate judgment, McHugh J adopted a much stronger opposition to the staged approach to sentencing than the majority noting that in so far as its proponents claim that two-tiered sentencing makes sentencing more scientific, its results in this case suggested that it was “junk science” that belonged in “fairytales”.<sup>52</sup>

It should be noted that a strong dissenting judgment was delivered by Kirby J in Makarjian. That judgment was critical of the “instinctive synthesis” approach to sentencing, particularly on the issue of transparency. In addition his Honour noted that the instinctive synthesis approach to sentencing appeared to be inconsistent with the growing trend of federal and state legislatures in Australia to spell out specific considerations that are to be taken into account in the process of arriving at an appropriate sentence.<sup>53</sup> In some instances these provisions require a sentencing court to articulate what a sentence would have been but for a reduction.<sup>54</sup>

It is fair to say that the Victorian Court of Appeal has been a longstanding proponent of the “instinctive synthesis” approach to sentencing.<sup>55</sup> It is therefore perhaps not surprising that whilst the Victorian State Government has legislated to allow the Victorian Court of Appeal to deliver guideline judgments, the Court is yet to exercise any of its new powers under these legislative provisions.

Some academic commentators, such as Professor Freiberg of Monash University, who is also Chairman of Victoria’s Sentencing Advisory Council, have been very critical of the High Court decision in Makarjian and the “instinctive synthesis” approach to sentencing that it supports. Professor Freiberg argues that the “instinctive synthesis” is opaque at best and unhelpful at worst. He argues that this approach is aimed at deterring the bringing of sentencing appeals by offenders.<sup>56</sup>

#### Judicial College of Victoria

In 2001 the Victorian Government legislated to create the Judicial College of Victoria.<sup>57</sup> The College commenced operation in 2002 and was officially launched by the Victorian Attorney-General on 13 May 2003.<sup>58</sup>

The functions of the College are as follows:<sup>59</sup>

- (a) to assist in the professional development of judicial officers;
- (b) to provide continuing education and training for judicial officers;
- (c) to produce relevant publications;
- (d) to provide (on a fee for service basis) professional development services, or continuing judicial education and training services, to persons who are not judicial officers within the meaning of this Act; and
- (e) to liaise with persons and organisations in connection with the performance of any of its functions.

<sup>51</sup> Markarian v R (2005) 215 ALR 213 at 226.

<sup>52</sup> Markarian v R (2005) 215 ALR 213 at 234 and 235.

<sup>53</sup> Markarian v R (2005) 215 ALR 213 at 234 and 247

<sup>54</sup> See section 21E of the Crimes Act 1914 (C’t’h).

<sup>55</sup> See R v Young [1990] VR 951 and R v Nagy [1992] 1 VR 637.

<sup>56</sup> “Twenty Years of Changes in the Sentencing Environment and Courts’ Responses” – a paper delivered by Professor Arie Freiberg at the Sentencing - Principles, Perspectives & Possibilities Conference in Canberra 10-12 February 2006.

<sup>57</sup> Judicial College of Victoria Act 2001 (Vic).

<sup>58</sup> See Judicial College of Victoria Website at : <http://www.judicialcollege.vic.edu.au>

<sup>59</sup> See section 5 of the Judicial College of Victoria Act 2001 (Vic)

At the launch of the Judicial College of Victoria on 13 May 2003 the Victorian Attorney-General spoke not only of the role the College would play in judicial education but also of the message that the establishment of the College would send to the community. The Attorney-General said that the establishment of the College sends a message that the judiciary was not isolated, that it is eager to adapt to developments in the law and in society and that it wants to remain connected and engaged with the community. He said that this was a message designed to help secure the community's confidence in the judiciary at a time when judicial decisions are continuing to be the subject of growing public scrutiny.<sup>60</sup> The establishment of the Judicial College of Victoria has been an important development as over the last decade greater emphasis has been placed on cultural, gender and social diversity in appointments to Courts and Tribunals in Victoria. This has resulted in some less experienced Judges and Members being appointed so giving rise to greater developmental requirements for these appointees.<sup>61</sup>

### Sentencing Advisory Council

In 2003 the Victorian State Government also amended the *Sentencing Act 1991* to make provisions for establishment of a Sentencing Advisory Council. The stated function of the Council is to<sup>62</sup>:

- (a) state in writing to the Court or Appeal its views in relation to the giving or review of a guideline judgment;
- (b) provide statistical information on sentencing;
- (c) conduct research and disseminate information to members of the judiciary and other interested persons on sentencing;
- (d) gauge public opinion on sentencing;
- (e) consult with government, interested parties and the public on sentencing matters; and
- (f) advise the Attorney-General on sentencing matters.

The Victorian Sentencing Advisory Council is made up of 12 members from diverse backgrounds including an academic, senior police officer, prosecutor, defence barrister, community and victim of crime representatives.<sup>63</sup>

The Victorian Sentencing Advisory Council has a substantial budget and has, since its inception, published a number of papers including an interim report on suspended sentences, a report on maximum penalties for repeat drink driving offences and various "sentencing snapshots". Current projects of the Council include investigating sentencing issues pertaining to indigenous offenders, advising on the merits of a possible sentencing indication scheme, examining how provocation has featured in sentencing decisions for non-fatal offences in Victoria, looking at options for the post sentence supervision of high risk offenders and embarking on a community education program relating to sentencing issues.<sup>64</sup>

---

<sup>60</sup> Judicial College of Victoria Launch by the Victorian Attorney-General 13 May 2003. Available at <http://www.judicialcollege.vic.edu.au>

<sup>61</sup> See "State of The Victorian Judiciary" an address delivered by the Honourable Justice Marilyn Warren AC, Chief Justice of Victoria, on 22 May 2007 – page 19. This address is available on the Supreme Court website at: [www.supremecourt.vic.gov.au](http://www.supremecourt.vic.gov.au)

<sup>62</sup> See section 108C of the Sentencing Act 1991 (Vic).

<sup>63</sup> Council members are detailed on the Sentencing Advisory Council website at: [www.sentencingcouncil.vic.gov.au](http://www.sentencingcouncil.vic.gov.au)

<sup>64</sup> See Council website at: [www.sentencingcouncil.vic.gov.au](http://www.sentencingcouncil.vic.gov.au)

A tension would appear to exist in Victoria between the Legislature and the Judiciary on the issue of guideline judgments and the role of the Sentencing Advisory Council. On the one hand the Government is pursuing a clear objective of what it sees as increasing public confidence in the sentencing process undertaken by Courts through the creation of the Sentencing Advisory Council and making provision for guideline judgments. These initiatives are clearly designed to improve consistency of outcome and involve the community more in the sentencing process. On the other hand the Court of Appeal, supported by the High Court of Australia, continues to state a preference for “instinctive synthesis” over the “staged approach” to sentencing. Only time will tell if or when this tension will be resolved.

## **CONCLUSION**

The last 20 years has been a time of substantial reform for sentencing laws in Victoria. The first wave of reform took place in the 1980s and involved the consolidation of sentencing law, the development of new alternatives to imprisonment and legislative recognition that imprisonment should be seen as a penalty of last resort. This was also a time when the political controversy arose regarding the notion of “truth in sentencing” and the voice of the victims of crime began to receive greater recognition.

Whilst the pace of reform in this area slowed in the 1990s, the new millennium has been witness to a second wave of sentencing reform. Many of these reforms appear to have been based on the notion of “therapeutic jurisprudence”. A range of new divisions have been created within the Magistrates’ Court of Victoria to deal with particular classes of crime and / or particular classes of offender. These initiatives have been targeted at a community level and have recently resulted in the creation of the State’s first Neighbourhood Court.

All of these reforms have featured two constant themes. The first has been to create alternative options to custodial sentences. The second has been to improve the consistency of sentencing outcome and find ways of involving the community more in the sentencing process. Initially this second theme was manifested in the 1980s through legislative provisions which began to appear in the statute books and which sought to guide judicial discretion on sentencing and establish a hierarchy of sentencing outcomes. In more recent years this desire has seen the Parliament establish a Sentencing Advisory Council, a Judicial College and legislate for the handing down of guideline judgments by the Victorian Court of Appeal.