

Sentence Indication and Specified Sentence Discounts: Final Report Summary & Recommendations

Introduction

The Victorian Government identified the introduction of sentence indication and provision of a specified sentence discount for a guilty plea as measures that could assist in resolving criminal cases.

Sentence indication is a process that allows a judge or magistrate to give a defendant an indication, in advance of a guilty plea or finding of guilt being entered, of the sentence that he/she would be likely to receive if he/she pleaded guilty at that stage of the proceedings. A specified sentence discount, which specifies the reduction in sentence that an offender receives for pleading guilty, is intended to provide an incentive for defendants to plead guilty.

Both measures aim to encourage defendants to plead guilty at an early stage of the proceedings.

Guilty pleas play a major role in the administration of justice and in Victoria, most criminal cases conclude with a guilty plea. A guilty plea, voluntarily made, can be regarded as the optimum outcome of criminal proceedings. It signifies the defendant's willingness to accept criminal liability for his/her conduct, brings closure to the victim and assists the victim to begin the process of recovery. From a practical perspective, a guilty plea removes the need for a trial and frees up the resources of the justice system for other matters.

The Terms of Reference

On 22 August 2005, the Victorian Attorney-General, the Hon. Rob Hulls MP, asked the Sentencing Advisory Council for advice on whether a sentence indication scheme should be adopted in Victoria. The Council was asked to examine the advantages and disadvantages of such a scheme, having particular regard to the likely impact on the courts, victims of crime and the community in general. If the Council concluded that Victoria should introduce sentence indication, it was to advise on the form that such a scheme should take and whether it should incorporate a specified sentence discount for a guilty plea.

In February 2007, the Council released a Discussion Paper, called for submissions and convened discussions with interested stakeholders and members of the general community on the issues and options for reform canvassed in the Discussion Paper.

This summary outlines the Council's key findings and recommendations, which are set out in full in its Final Report. The Final Report can be obtained directly from the Council or downloaded from the Council's website at www.sentencingcouncil.vic.gov.au.



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Specified sentence discounts

The Terms of Reference required the Council to consider whether a sentence indication scheme should include a specified sentence discount, i.e. provide a specified reduction in sentence for offenders who plead guilty.

While sentence indication schemes have generally provided some form of sentence discount for pleading guilty at an early stage of proceedings, specified sentence discounts can apply independently of sentence indication schemes.

Specified sentence discounts and sentence indication can therefore be considered as complementary or alternative measures. The Council has therefore examined the merits of introducing a stand-alone specified sentence discount regime as well as the feasibility of incorporating such a provision into a sentence indication scheme.

The current law

A guilty plea is relevant at sentencing as a mitigating factor that reduces the offender's culpability for his/her conduct. It can be considered as an indication of an offender's contrition or remorse or taken into account for its practical value to the justice system.

The *Sentencing Act 1991* (Vic) requires the court to have regard to the fact that an offender has pleaded guilty and the stage of the proceedings at which he/she did so, although it does not require the court to reduce the sentence for that reason.

Just as an offender can receive a reduction in sentence for assisting the police with their investigations, an offender who pleads guilty can receive a reduction in sentence for the 'utilitarian value' of the guilty plea.

However, whereas Victorian courts are under a statutory obligation to state the reduction in sentence allowed for past or future co-operation with law enforcement authorities, they are discouraged from identifying the sentencing value of an offender's guilty plea.

The High Court of Australia regards sentencing as a single, indivisible process by which the sentencer synthesises all the relevant considerations to determine the sentence. The High Court has therefore discouraged Australian courts from specifying the weight given to individual sentencing factors, although it has recognised that by statute courts are required to identify the reduction given to an offender for co-operation with law enforcement authorities.

The options for reform

Under the current regime, when a Victorian court sentences an offender who has pleaded guilty, it has the discretion to determine what factors are relevant in establishing the weight to be given to a guilty plea, whether any reduction in sentence should be allowed and the amount by which the sentence should be reduced.

The Council considered two alternatives to the current discretionary approach: a prescriptive model, loosely based on a guideline issued by the English Sentencing Guidelines Council, and a 'hybrid' model, along the lines of the guideline judgments developed by the South Australian and New South Wales courts of criminal appeal.

The English Guideline allowed all offenders to receive a reduction in sentence for a guilty plea, and specified the amount by which the sentence could be reduced, depending almost exclusively on the timing of the plea. This approach gave the courts little scope to adjust the level of the reduction depending on the circumstances of the case.

South Australian and NSW guideline judgments have recommended a range within which a reduction in sentence could be determined and suggested considerations relevant in determining the value of the plea, but indicated that the sentencer should have the discretion to depart from the guidance and/or decide in some cases that no reduction in sentence is warranted.

The Council's proposal for reform

Participants' views on the merits of prescribing a specific reduction in sentence for a guilty plea varied considerably. Some favoured the flexibility that a discretionary regime provides, because it ensures that the reduction is determined according to the particular circumstances of the case. Others favoured a regime that provided a clear and rigid framework, believing that it was preferable to have a consistent approach, even if this gave rise to the risk of disproportionate sentences being imposed in some cases.

In light of experience in other jurisdictions and the views expressed by participants in this inquiry, the Council formed the view that a specified reduction in sentence could have two undesirable consequences: it might unfairly induce guilty pleas and it might give rise to disproportionate and unduly lenient sentencing. Prescribing the value to be given to one mitigating factor, the guilty plea, is also problematic when the weight given to other sentencing factors is still left to the court to determine at its discretion.

Further, it is questionable whether a specified reduction in sentence would deliver the expected benefits within the current sentencing framework. In Victoria, the sentencing range applicable for any given offence is broad. Even if the maximum reduction allowable for a guilty plea were specified or a sliding scale prescribed, the courts would be able to adjust the starting point to ensure that the reduction did not result in the imposition of a disproportionate sentence.

In these circumstances, the Council has concluded that providing explicit guidance on the reduction available for a guilty plea would not provide the degree of certainty and consistency needed to justify confining the court's discretion at sentencing.

The Council has concluded that it is preferable, at this stage, for Victorian courts to retain the discretion to determine whether an offender should receive a reduction in sentence for pleading guilty and if so, how this reduction should be applied on a case-by-case basis.

However, the Council believes there is value in making this aspect of the sentencing process transparent and reviewable. It is in the best interests of the participants in criminal proceedings, the efficient administration of justice and the wider community for a court to state, when passing sentence, the weight that has been given to an offender's guilty plea and what effect if any, the plea has had on the sentence.

To overcome the current limitations on Victorian courts' capacity to disclose this aspect of the sentencing decision, the Council recommends legislating to require Victorian courts to state, when passing sentence, what effect if any, the guilty plea had on the sentence.

Recommendation 1: Courts to state the effect of the guilty plea on the sentence

The *Sentencing Act 1991* (Vic) should be amended to require the court, in passing sentence on an offender who has pleaded guilty, to state whether the sentence has been reduced for that reason and, if so, the sentence that would have been imposed but for the guilty plea.

Once courts are able to articulate the value given to an offender's guilty plea, it may be beneficial for Victorian courts to have some judicial guidance as to the basis on which the value of the plea should be determined. The Victorian Court of Appeal may play an important role in providing this form of guidance.

Sentence indication

Sentence indication presents two issues of principle: whether it compromises the roles of the judicial officer and the prosecution and whether it promotes informal and inappropriate discussions or bargains between the parties.

Sentence indication in principle

The process of sentence indication is contrary to conventional criminal procedure because the indication is given before the defendant's guilt has been admitted or established at a trial.

The provision of sentence indication may impose further obligations on the judge and counsel. A sentence indication process which more closely involves the judicial officer in the pre-trial process could give rise to an expectation that the prosecution will advise the court on the appropriate range of sentence to be indicated. However, the Council concluded that, in principle, it is possible to devise a sentence indication process that does not compromise the roles or duties of the court or counsel.

The Council was asked to consider whether sentence indication was a form of 'bargained justice', which suggested an agreement concluded in a way that falls below the standards of transparency, fairness or propriety required of the criminal justice system.

The Council noted that there were divergent views on the value and appropriateness of informal, out-of-court discussions between counsel. A sentence indication process relies, to a great extent, on the parties having agreed on the charges to be preferred and admitted and the factual basis on which this can be done.

Although there is concern that informal agreements might result in less serious charges being preferred or admitted and less severe sentences being imposed, current research on case management emphasises the importance of engaging counsel at an early stage of proceedings and fostering open communication between the parties.

The Council noted that plea bargaining involving the court is not part of Victorian criminal practice and concluded that it is possible to devise a sentence indication process that meets the standards of openness and fairness required of the criminal justice system.

Some of the most complex problems appear to be practical: the difficulties associated with devising a process that meets all the requirements of justice and is nevertheless simple and flexible enough to resolve, and not complicate, criminal proceedings.

Sentence indication in summary cases

Sentence indication has been available in contest mention hearings in the Magistrates' Court of Victoria since 1993, when it commenced as a pilot scheme in the Broadmeadows Magistrates' Court. It has operated under the Chief Magistrate's general authority to give directions for the conduct of proceedings and to make rules of court for matters relating to the practice and procedure of the Court in criminal proceedings.

Data showing the proportion of cases resolved at or after a contest mention hearing attest to the effectiveness of this process in resolving contested summary matters.

While it was not possible to isolate the role played by sentence indication, it appears that the provision of sentence indication has been a vital tool in the early identification of cases that could resolve with a guilty plea, because it addresses defendants' concerns about the type of sentence likely to be imposed.

The Council found strong support for formalising this successful scheme, to optimise and extend its use. It therefore recommends that the *Magistrates' Court Act 1989* (Vic) be amended to provide magistrates with explicit statutory authority to give an indicative sentence, and to authorise the Chief Magistrate to make any rules or directions needed to administer this process.

The Chief Magistrate should have explicit authority to extend the provision of sentence indication or vary the circumstances in which it is made available.

Recommendation 2: Statutory support for sentence indication in summary cases

The *Magistrates' Court Act 1989* (Vic) should be amended to provide explicit statutory authority for magistrates to indicate the sentence likely to be imposed on a guilty plea entered at that stage of the proceedings, and for the Chief Magistrate to give any directions and make any rules required for this purpose.

Sentence indication and sentence discounts

Consistent with the Council's view that courts should be required to state, when passing sentence, the value given to the guilty plea, the Council considers that the court should be required to state, in giving an indication, whether the indicative sentence would have been indicated but for the guilty plea. The Council therefore recommends that when providing an indication, the court should be required to state what effect, if any, a guilty plea has had on the indicative sentence.

Recommendation 3: The effect of the guilty plea on the indication

The Chief Magistrate should issue a note or direction to require a magistrate, when providing an indication of the sentence likely to be imposed on a guilty plea entered at that stage of the proceedings, to state whether, but for such a guilty plea, a more severe sentence would be indicated.

Sentence indication in indictable cases

Sentence indication has been used in summary proceedings in several jurisdictions for over a decade, but only rarely, and then with limited success, in indictable proceedings.

The challenge is to devise a workable scheme that preserves the informality and flexibility of the summary process without diminishing the fairness and transparency of the proceedings. Indictable matters involve more complex charges and evidence and are punishable by more severe sentences. They are therefore subject to more complex and stringent procedural and evidentiary rules and conventions.

A pilot scheme that operated in the New South Wales District Court during 1993–95 was ultimately abandoned when it was found to have given rise to sentencing disparities without delivering the expected gains in efficiency. English courts have been permitted to provide sentence indication in indictable matters since 2005, but it is too early to ascertain the impact of this initiative.

The Council noted the pitfalls encountered during the operation of the NSW sentence indication scheme.

Having regard to the experience of sentence indication in other jurisdictions, the Council has identified certain pre-requisites for an effective process.

Firstly, the indication needs to be broad enough to ensure that the sentencing court can determine an appropriate, proportionate sentence at its discretion. However, the indication must also be reliable: the defendant needs to be certain that if he/she receives an indication and pleads guilty on the strength of it, the sentencing court will not impose a more severe sentence.

Secondly, in order to be efficient, the process needs to be simple. As the primary purpose of sentence indication is to address concerns that impede the early resolution of indictable matters, it would be counter-productive if the sentence indication process itself added to the complexity and length of the proceedings.

In practice, this means that the indication should be based on materials already available at the commencement of proceedings in the County Court and that the provision of sentence indication should not require a new process or additional preparation.

Finally, as sentence indication is a means of averting a contest and resolving the case by agreement, it is vital that the process recognises the rights, interests and duties of all the relevant parties: the defence, the prosecution and the victim.

The Council has concluded that sentence indication could be a valuable tool in the resolution of indictable matters in the County Court, but only within a carefully defined framework.

As almost half the defendants sentenced in the County Court do not receive an immediately servable term of imprisonment, such an indication may be useful in resolving matters in which the defendant's fear of receiving a prison sentence had caused him/her to contest the matter or defer entering a guilty plea. The provision of sentence indication in the Supreme Court is unlikely to have a comparable impact on the timing of defendants' plea decisions or that court's case load, and for this reason the Council does not see value in introducing sentence indication in this court.

In order to establish the likely use and impact of such a scheme on those directly affected by the proceedings the Council has recommended that sentence indication initially be introduced in the County Court by way of a pilot project. This approach will allow the scheme's impact on case flow, on sentencing, on the interests of victims and defendants, and on the operation of all the relevant participating agencies (the County Court, the DPP and the OPP, and Victoria Legal Aid) to be monitored before a commitment is made to make sentence indication more broadly available on an ongoing basis.

The preferred approach for the pilot project is designed to replicate the informality that makes the Magistrates' Court's process successful, and avoid the complexity and uncertainty that characterised the operation of the New South Wales scheme.

The Council suggests that the pilot project should be carefully monitored to assess its impact not only on the County Court, but also on sentencing outcomes and the operation of the key participating agencies: the Office of Public Prosecution and Victoria Legal Aid. The Department of Justice should co-ordinate the monitoring and evaluation of the project. The Council indicates its willingness to assist in evaluating the impact of the process on sentencing outcomes.

As for the Magistrates' Court scheme, the Council recommends that the provision of an indicative sentence in County Court proceedings be given statutory underpinning to provide judges with clear statutory authority for the provision of an indication. The Chief Judge should also be empowered to give any directions and make such rules as are required to establish the administrative framework needed

Recommendation 4: A pilot sentence indication project in the County Court

(i) A pilot process for the provision of sentence indication should be established in the County Court in accordance with the framework set out in Recommendation 6; and

(ii) The Department of Justice, in collaboration with the County Court, the Office of Public Prosecutions, Victoria Legal Aid and the Sentencing Advisory Council, should monitor its impact on case flow, on sentencing, and on the resources and operation of the key participating agencies.

Recommendation 5: Statutory support for sentence indication in the County Court

The *Crimes (Criminal Trials) Act 1999* (Vic) should be amended to authorise judicial officers to provide a sentence indication as outlined in Recommendation 6 and to allow the Chief Judge to give any direction and make such rules as are required for this purpose.

Under the Council's proposed scheme, sentence indication should only be provided if all the relevant parties agree that its provision is appropriate: the defence may only seek sentence indication with the consent of the prosecution and the court may refuse to provide it. The prosecution should consult with the victim before responding to a request.

The scope of the indication must be restricted to whether an immediately servable term of imprisonment would be likely to be imposed on a guilty plea entered at that stage of the proceedings. In the rare case when a sentence of life imprisonment was likely to be imposed, the court may indicate whether a non-parole period would be set if a guilty plea were entered at that stage of the proceedings.

This limited form of indication could be provided without the preparation of any additional material or the introduction of a designated sentence indication hearing.

Recommendation 6: A framework

The County Court should adopt a sentence indication procedure that incorporates the following elements:

1. The defence should be permitted to request an indication during proceedings in the County Court, subject to the agreement of the prosecution.
2. There should be a requirement for the victim to be consulted if a request for sentence indication is made.
3. The defence should only be permitted to seek an indicative sentence once during the proceedings, unless the Director of Public Prosecutions agrees otherwise.
4. The indication should state whether an immediately servable term of imprisonment would be imposed on a guilty plea entered at that stage of the proceedings or, in the event that a term of life imprisonment would be likely to be imposed, whether a non-parole period would be set.
5. The judge should have the discretion to refuse to provide an indication. The judge should not provide an indicative sentence unless he or she is satisfied that the material available is sufficient to provide a binding indication.
6. If the judge indicates that an immediately servable term of imprisonment is not likely to be imposed (or a non-parole period set in relation to a term of life imprisonment), and the defendant pleads guilty at that stage of the proceedings, the court should not be permitted to impose an immediately servable term of imprisonment (or life without parole).
7. (i) If the judge indicates that an immediately servable term of imprisonment will not be imposed, he or she should be required to state whether, but for a guilty plea being entered at that stage of the proceedings, a more severe type of sentence would have been imposed.
(ii) If the judge indicates that a non-parole period will be set in relation to a sentence of life imprisonment, he or she should be required to state whether, but for the guilty plea being entered at that stage of the proceedings, life imprisonment without parole would have been imposed.
8. The sentence indicated should be binding on the sentencing court only if the defendant pleads guilty at the time when the sentence indication is provided.
9. A refusal by a judge to give an indication should not be reviewable. However, the prosecution and defence should retain their rights to appeal the sentence ultimately imposed.

The victim's role: Statutory support

There is general agreement on the importance of having a mechanism that enables victims to be consulted when the defence notifies the prosecution that it wishes to seek an indicative sentence.

Existing laws and conventions of criminal procedure oblige the prosecution to consult with the victim when the defence indicates to the prosecution that it is prepared to admit some or all of the charges preferred.

The Council considers that the prosecution should bear a similar responsibility when the defence signals that it wishes to seek sentence indication. Further, the Council believes that a victim's right to be consulted if a defendant requests sentence indication should have statutory underpinning.

Currently, the *Public Prosecutions Act 1994* (Vic) confers a general obligation on the prosecution to discharge its role while giving appropriate consideration to the concerns of victims of crime, and the *Victims' Charter Act 2006* (Vic) requires the prosecution to keep victims informed of developments in relevant criminal proceedings. The combined effect of these provisions appears to be to create a statutory obligation on the prosecution to confer with the victim and a corresponding right of victims to be consulted on key developments that occur during the course of criminal proceedings.

To ensure proper consultation with a victim if a defendant requests sentence indication, the Council recommends that the Government review the relevant provisions to establish whether any legislative action is necessary.

Recommendation 7: Victims' rights in the sentence indication process

The Victorian Government should review whether the current statutory provisions governing the involvement of victims in criminal proceedings are adequate to ensure that victims will be consulted if a defendant requests sentence indication, and enact any amendments required to achieve this effect.

Sentence indication and sentence discounts

Consistent with the approach to sentence indication and sentence discounts in the summary jurisdiction, the Council recommends that when providing an indication in indictable proceedings, the court should be required to state what effect, if any, a guilty plea has had on the indicated sentence.

Recommendation 8: The effect of the guilty plea on the indication

The Chief Judge should issue a note or direction to require a judge, when providing a sentence indication, to state whether, but for a guilty plea being entered at that stage of the proceedings, a more severe sentence (an immediate term of imprisonment) would be indicated.

Availability of sentence indication in the County Court

Having considered the data on defendants' plea behaviour and participants' opinions on the matters that might be most or least suitable for inclusion in a pilot project, the Council recommends that there should be no formal restrictions on the types of cases in which sentence indication can be made available.

However, in view of the particular sensitivity of proceedings relating to sexual offences, the Council cautions against the inclusion of sexual offence proceedings in a pilot sentence indication process. Proceedings in relation to fraud, other property offences and illicit drug matters may be particularly suitable for inclusion in a pilot project.

Recommendation 9: Eligibility criteria

There should be no formal restrictions on the types of cases in which sentence indication can be made available.

The Council cautions against the inclusion of sexual offence proceedings in a pilot sentence indication scheme and suggests that proceedings in relation to fraud, other property and illicit drug offences may be particularly suitable for inclusion in a pilot project.

The way forward

The Council's proposals recognise that the provision of sentence indication and the law governing the reduction in sentence available for a guilty plea serve distinct but complementary purposes.

If courts articulate the weight given to a guilty plea and defendants are able, in appropriate cases, to obtain sentence indication, defendants will be in a better position to make an early plea decision. However, other factors, such as the readiness of the prosecution's case, access to legal advice and a defendant's personal circumstances also affect the defendant's capacity to make an early plea decision.

While these two proposals may resolve some of the concerns that cause defendants to defer entering a guilty plea, they should not be regarded as the prime strategies for expediting criminal proceedings and tackling the problem of delay. In fact, the Council has adopted a principled approach, eschewing reforms that would offer an explicit incentive to plead guilty or that would compromise the independence of the court or the prosecution.

Published by the Sentencing Advisory Council, Melbourne
Victoria Australia, September 2007.

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September 2007.

Authorised by Sentencing Advisory Council, 4/436 Lonsdale
Street, Melbourne. Printed by Bigprint, 50 Lonsdale Street,
Melbourne.