Sentencing Amendment (Baseline Sentences) Bill 2014
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Introduced: 2 April 2014
House: Legislative Assembly
2nd Reading: 3 April 2014
Commencement: On the earlier date of the day of Proclamation or 1 July 2015.


For further information on the progress of this Bill please visit the Victorian Legislation and Parliamentary Documents website at http://www.legislation.vic.gov.au
The authors would like to thank Adam Delacorn for his assistance in the writing of this paper.
Introduction

On 2 April 2014, the Coalition Government introduced the Sentencing Amendment (Baseline Sentences) Bill 2014 (‘the Bill’) in the Victorian Parliament. The Bill provides baseline sentences for six serious crimes so as to require the courts to increase the length of sentences imposed for those offences. The Bill amends the Sentencing Act 1991, the Crimes Act 1958, and the Drugs, Poisons and Controlled Substances Act 1981 to establish baseline sentences for the offences of:

- Murder (25 years);
- Incest with one’s, or one’s de facto spouse’s, child under the age of 18 (10 years);
- Sexual penetration of a child under the age of 12 (10 years);
- Persistent sexual abuse of a child under the age of 16 (10 years);
- Culpable driving causing death (9 years); and
- Trafficking a large commercial quantity of drugs (14 years).

It is intended that the new baseline sentences will become the median (the midpoint) sentence for these offences. Hence, sentencing practices are expected to adjust over time so that half the sentences imposed should be less than the baseline and half should be more. The baseline sentences apply to the actual sentence – the ‘head sentence’ – imposed for an offence, rather than to the non-parole period. The Bill provides ratios for minimum non-parole periods in relation to the new baseline sentences.

Stakeholders who oppose the introduction of a baseline sentencing scheme in Victoria have expressed concern that it will restrict judicial discretion to determine the most appropriate sentence for each individual case, and will complicate the already complex sentencing process. The Government has stated that the Bill does not introduce mandatory sentences and does not alter the ‘instinctive synthesis’ process currently used by judges for sentencing, as judges will still be able to take into account the

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1 Explanatory Memorandum, Sentencing Amendment (Baseline Sentences) Bill 2014, p. 2.
2 The Sentencing Advisory Council defines ‘head sentence’ as: ‘The length of a sentence for an individual charge. For example, in a case with one charge, if a court sentences an offender to four years’ imprisonment with a non-parole period of three years, the head sentence is four years. In a case with one charge, the head sentence will also be the total effective sentence’. Thus, in a case with multiple charges, there will be a head sentence for each offence and a total effective sentence taking into account concurrent or cumulative sentences. See: Sentencing Advisory Council (Vic) (2012) Baseline Sentencing Report, SAC, pp. viii, 35, viewed 17 April 2014. [https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/baseline_sentencing_report.pdf](https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/baseline_sentencing_report.pdf).
3 Victoria, Legislative Assembly (2014) Debates, Book 5, 3 April, p. 1277. Note: The Statement of Compatibility for the Bill states that ‘these ratios are consistent with the ratios under current sentencing practices’. See: ibid., p. 1275.
aggravating and mitigating factors of individual cases (in the same manner they do now) in determining sentences up or down from the baseline.5

This Research Brief provides a summary of the Attorney-General's second reading speech for the Bill, background information on the Coalition's baseline sentencing policy, an overview of Victoria's current sentencing framework, and a summary of the Sentencing Advisory Council's *Baseline Sentencing Report*. The Research Brief then provides summaries of the main provisions of the Bill itself, the views of stakeholders, and similar sentencing schemes in other jurisdictions.

### I. Second Reading Speech

The Attorney-General, the Hon. Robert Clark, provided the Victorian Parliament with the second reading speech for the Sentencing Amendment (Baseline Sentences) Bill on 3 April 2014. The Attorney-General opened the speech by stating that the Bill will:

> give Parliament on behalf of the community a far greater say in the overall level of sentences that are imposed in our courts, while still allowing the courts to take into account the facts of individual cases in determining the sentence for each case.6

The Attorney-General said that 'it is clear that sentences for a number of crimes are out of step with community expectations and out of step with what is required to deter crime effectively and protect the community'.7 He said that child sex offences are considered to be amongst the worst kind of offences but that median sentences for these crimes are unacceptably low. He said that the baseline sentencing reform provided by this Bill will change this by acting as a guidepost for judges in determining sentences.8

The Attorney-General stated that the ‘baseline sentence is the figure that Parliament expects will become the median sentence for that offence’.9 He explained that: ‘In other words, the Bill requires courts to increase sentences for the sorts of cases that incur a midpoint sentence from the current median sentence length to the sentence length specified as the baseline sentence’.10 He further explained that ‘Sentences for cases that deserve to incur a higher or lower sentence than the median will then be set having regard to the median sentence length required by the baseline sentence’.11 He said that to ‘the extent that current sentencing practices are inconsistent with the

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5 ibid., pp. 1275-1276.
6 ibid., p. 1275.
7 ibid., p. 1276.
8 ibid.
9 ibid.
10 ibid.
11 ibid.
baseline sentence, the court must depart from the current sentencing practices and
give effect to Parliament’s intention’.12

He said that this Bill and its provision of baseline sentences – for the six serious
offences of murder; incest with one’s, or one’s de facto spouse’s, child under the age
of 18; sexual penetration of a child under 12; persistent sexual abuse of a child under
16; culpable driving causing death; and trafficking a large commercial quantity of drugs –
is the first tranche of baseline legislation. He said that it is the Government’s intention
to progressively extend baseline sentencing to a wider range of serious offences.13

The Attorney-General also stated that the baseline sentences provided by the Bill are
higher than those recommended by the Sentencing Advisory Council report on the
subject because the model put forward in the Bill is different to the model initially
recommended by the SAC. He said that ‘Amongst other differences, the baseline
sentences in the Bill apply to the actual sentence imposed for an offence, rather than
to the non-parole period that must be served.’14 He also said that the Bill provides
ratios in order to ensure that baseline sentences are reflected in the minimum non-
parole periods set by the courts.15

He further said that the baseline sentencing regime will not apply to offences
determined summarily,16 or to offenders who were under 18 when the offence was
committed, and that:

The regime will apply to offenders who are aged 18 to 20 who would be eligible for a
youth justice centre order or youth residential centre order, but it does not prevent
young adult offenders from receiving these orders unless that cannot be done
consistently with the requirements of the regime.17

The Attorney-General concluded his speech by stating that:

With this reform, the government is enabling Parliament to make clear the level of
sentences it expects to be imposed across a range of serious offences, while still
providing flexibility for the courts to apply the law to individual cases in accordance
with the intentions expressed by Parliament.18

12 ibid.
13 ibid., p. 1277.
14 ibid.
15 ibid.
16 The provision that the baselines sentencing regime will not apply to offences determined summarily
refers to offences determined in the summary jurisdiction of the Magistrates Court. The Explanatory
Memorandum to the Bill states that ‘While the offences for which baseline sentences have been
introduced in this Bill cannot be heard and determined summarily, the provision clarifies that if in the
future baseline sentences are introduced for further offences, the requirements will not apply in the
summary jurisdiction.’ See: Explanatory Memorandum, Sentencing Amendment (Baseline Sentences) Bill
2014, p. 4.
17 Victoria, Legislative Assembly (2014) op. cit., p. 1277.
18 Victoria, Legislative Assembly (2014) op. cit.
2. Background

The Background Section of the Research Brief provides information on the Coalition’s baseline sentencing policy platform that it took to the 2010 state election and the sentencing survey then conducted by the Department of Justice and the Herald Sun that supports the policy. It also looks at sentencing studies that have found that the public is less punitive when they are informed about how sentencing works and the details of particular cases.

The Background Section then provides a brief overview of the current sentencing framework in Victoria as set out in the Sentencing Act 1991 and the ‘instinctive synthesis’ method of sentencing described by the High Court. It also provides a table showing the current median length of sentences imposed for the six crimes dealt with by the Bill, as well as the statutory maximum penalties for those crimes.

The Background concludes with a summary of the Baseline Sentencing Report produced by the Victorian Sentencing Advisory Council (SAC) in 2012, and the recommendations of the report regarding the implementation of a baseline sentencing regime in Victoria. It provides a comparative table showing the baseline sentences recommended by the Sentencing Advisory Council and the baseline sentences the Government has proposed in the Bill.

Coalition Baseline Sentencing Policy

The Coalition went to the November 2010 Victorian state election with a policy of setting baseline sentences for serious crimes. The policy was part of a broader law and order platform that included sentencing reform.19 Notably, the Coalition baseline sentencing policy at that point pertained to the non-parole period of a sentence or ‘minimum sentence’ rather than to the actual or head sentence as is the case in the Bill.

In the media release which announced the baseline sentencing policy, the then leader of the Coalition, the Hon. Ted Baillieu, said that ‘Too often, current sentencing laws fail to result in penalties for offenders that protect the community and deter would-be offenders’.20 He said that ‘The Coalition will legislate to set a new ‘baseline’ minimum sentence for each offence, which will be the minimum non-parole period that Parliament expects the courts to apply to the typical, or median, case involving that offence’.21 He continued on to say that:

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19 The Attorney-General stated in the second reading speech for the Bill that sentencing reforms introduced by this Government include: abolishing home detention; replacing community orders with community protection orders; introducing statutory minimum non-parole periods for gross violence offences; and abolishing suspended sentences. Victoria, Legislative Assembly (2014) op. cit., p. 1275.
21 ibid.
Baseline minimum sentences will serve two purposes. They will provide a starting point for judges in determining the minimum sentence to be imposed in each case, and they will indicate the sentence that Parliament expects will be the median or mid-point of minimum sentences imposed for cases involving that offence.22

Baillieu additionally said that advice on the matter would be obtained from the Sentencing Advisory Council as well as the community.23 Consequently, the Sentencing Advisory Council was given terms of reference for an inquiry into the best way to implement a baseline sentencing regime in Victoria, and a survey was conducted by the Department of Justice and the Herald Sun newspaper to obtain community views on sentencing.

**Department of Justice and Herald Sun Sentencing Survey**

In mid-2011, the Coalition Government conducted the ‘MyViews’ survey of public views on sentencing.24 The self-selecting survey was available in hardcopy in the print edition of the Herald Sun newspaper and on the Herald Sun and Department of Justice websites. The Herald Sun regularly features articles on sentencing and states that it ‘has campaigned vigorously for adequate sentencing’.25

The Department of Justice report on the sentencing survey explained that 'respondents were asked what they thought the most appropriate sentence would be in 17 hypothetical scenarios covering 15 types of serious crime, each with a unique set of simplified circumstances’.26 The report stated that 18,562 responses to the survey were received with 53 per cent of respondents reporting no prior interaction with the Victorian justice system.27 Of the six crimes featured in the baseline sentencing Bill, three were included in the sentencing survey (murder, trafficking in a large commercial...

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22 ibid.
23 ibid.
27 ibid., pp. 4, 9.
quantity of drugs and culpable driving causing death) each with a hypothetical scenario described in approximately 100 words.\(^{28}\)

For the case of murder, the report stated that the most common choice of sentence and median sentence was life imprisonment.\(^{29}\) The report stated that for those respondents who chose a non-parole period, the most common period chosen was ‘no parole’, and the median non-parole period chosen was 21-25 years.\(^{30}\)

For the case of trafficking in a large commercial quantity of drugs, the most common choice of sentence was life imprisonment with a median sentence of 21-25 years imprisonment.\(^{31}\) The most common non-parole period was ‘no parole’ and the median was 16-20 years.\(^{32}\)

For the case of culpable driving causing death, the most common sentence was 16-20 years imprisonment and the median sentence was also 16-20 years imprisonment.\(^{33}\) The most common non-parole period chosen was ‘no parole’ and the median non-parole period was 11-15 years.\(^{34}\)

These figures are greater than the current median sentences determined by the courts for these offences (see page 10 of this Research Brief for data on the current length of sentences).

**Research Studies of Public Views on Sentencing**

Research conducted by the Australian Institute of Criminology suggests that members of the public are less likely to believe sentences are too lenient if they are informed about how the sentencing process works and the details of particular cases.\(^{35}\) The Law Institute of Victoria has argued that while studies indicate that – in the abstract – the public thinks sentences are too lenient, studies also ‘indicate that the public has very little understanding of crime and sentencing, and rely almost exclusively on the mass

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\(^{28}\) For the hypothetical scenarios for the three crimes see ibid., pp. 11, 37, 41. The survey also included the offence of sexual penetration of a child under 16. This is different to the offence of persistent sexual abuse of a child under 16 that is featured in the Bill. In the survey, the case of sexual penetration of a child under 16 was presented as being between an 18 year old boy and a 15 year old girl who ‘had both decided they wanted to have sex’. The most common sentence and the median sentence chosen by survey respondents was a community corrections order. See ibid., pp. 21-22.

\(^{29}\) ibid., p. 11.

\(^{30}\) ibid., p. 12.

\(^{31}\) ibid., p. 37.

\(^{32}\) ibid., p. 38.

\(^{33}\) ibid., p. 41.

\(^{34}\) ibid., p. 42.

media (who have a vested interest in sensationalising the news, in order to sell more of it) for information in relation to these complex matters”.

In 2005, Chief Justice Gleeson of the High Court wrote that ‘instead of surveying uninformed members of the public, it might be more useful if jurors – as more informed representatives of the public – were asked about the sentences in the particular cases they have deliberated on’.

In response, the Australian Institute of Criminology conducted the Tasmanian Jury Sentencing Study which surveyed 698 jurors from 138 trials between September 2007 and October 2009. The study’s findings, published in 2011, stated that:

more than half of the jurors surveyed suggested a more lenient sentence than the trial judge imposed. Moreover, when informed of the sentence, 90 percent of jurors said that the judge’s sentence was (very or fairly) appropriate. In contrast, responses to abstract questions about sentencing levels mirrored the results of representative surveys. The results of the study also suggest that providing information to jurors about crime and sentencing may be helpful in addressing misconceptions in these areas.

Research by the Sentencing Advisory Council in 2008 highlighted other studies into community perceptions on sentencing, many of which similarly found that people tend to be more lenient in their views on sentencing when given further information on a case.

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Current Sentencing Framework

The sentencing of offenders is governed by legislation enacted by Parliament and common law principles developed by the courts. Courts interpret and apply laws within the framework set by Parliament – this includes interpreting offences defined as criminal by the Parliament (as well as common law offences), the maximum penalties that may be imposed, the sentencing options available for certain offences, and factors that must be taken into account during sentencing. Most importantly, when delivering a sentence, the courts must take into account the principles of sentencing, the purposes of sentencing and the sentencing factors of relevance to the case.

The Sentencing Advisory Council explains that the most important principles that form the basis of sentencing decisions can be summarised as follows:

- Parsimony, which requires that a court should impose the least severe sentence required to meet the purposes of sentencing;
- Proportionality, which requires that, in sentencing, the overall punishment must be proportionate to the gravity of the offending behaviour;
- Parity, which requires that there be consistency in sentencing for similar offences and that there should not be sentencing disparities without justification; and
- Totality, which requires that, where an offender is at risk of serving more than one sentence, the overall effect of the sentences must be just, proportionate and appropriate to the overall criminality of the total offending behaviour.  

The main Act governing the sentencing of adult offenders in Victoria is the Sentencing Act 1991. Section 5(1) of the Sentencing Act sets out that the only purposes for which a sentence can be imposed are:

(a) To punish the offender to an extent and in a manner which is just in all of the circumstances; or
(b) To deter the offender or other persons from committing offences of the same or a similar character; or
(c) To establish conditions within which it is considered by the court that rehabilitation of the offender may be facilitated; or
(d) To manifest the denunciation by the court of the type of conduct in which the offender engaged; or
(e) To protect the community from the offender; or
(f) A combination of two or more of those purposes.

Section 5(2) of the Sentencing Act then sets out the factors that must be taken into account in sentencing, which the Sentencing Advisory Council summarises as follows:

- The maximum penalty for the offence;
- Current sentencing practices;

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Judicial Discretion and Instinctive Synthesis

These principles, purposes and factors all inform the sentencing process and a judge may need to consider a large number of complex, interrelated and potentially contradictory matters when deciding a sentence. The considered decision by a judge as to which penalty to impose, and the severity of that penalty is known as the exercise of 'judicial discretion'.

The SAC explains that the sentencing purposes and factors are weighed up by the judge according to how relevant they are to the particular circumstances of the case at hand. Accordingly, the judge balances or ‘synthesises’ the purposes and factors in order to determine the most appropriate sentence.

This process or method of sentencing has been termed ‘instinctive synthesis’. In the 2005 High Court case Markarian v The Queen, the majority of the High Court stated that:

the task of the sentencer is to take account of all of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an ‘instinctive synthesis’.

Instinctive synthesis can be contrasted with a ‘two stage’ approach, which was described by the High Court as ‘a mathematical approach to sentencing in which there are to be increments to, or decrements from, a predetermined range of sentences’.

The Victorian courts in particular have opposed the two-stage approach, viewing it as a ‘departure from the long established practice in Victoria and so likely to lead to error’.

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44 Markarian v The Queen (2005) 228 CLR 357, p. 374.
45 ibid., p. 373.
Current Sentencing Procedure

The current sentencing procedure in Victoria, as explained by the SAC, is that when a court determines that a sentence of imprisonment should be imposed for a single charge in a case, the court firstly determines the head sentence for that charge and then, if it is appropriate, fixes a non-parole period.47

The SAC further explains that when a case involves multiple charges that warrant a custodial sentence: ‘the court first determines a sentence for each charge and then makes orders for concurrency and/or cumulation of those sentences in relation to the sentence determined to be the ‘base’ sentence (usually being the longest sentence imposed)’.48 These orders then produce what is termed a ‘total effective sentence’. The court, if it is considered appropriate, will then fix a single non-parole period for the case as a whole.49

The following table presents data on the median length of head sentences, non-parole periods, and total effective sentences imposed in Victoria’s higher courts, and the current statutory maximum sentence for the six crimes featured in the Bill.

Table 1: Median and Maximum Sentences, SAC Snapshots

<table>
<thead>
<tr>
<th>Offence</th>
<th>Median Head Sentence</th>
<th>Median Non-Parole</th>
<th>Median total effective sentence</th>
<th>Statutory Maximum Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murdera</td>
<td>19 yrs (non-life)</td>
<td>16 yrs</td>
<td>20 yrs (non-life)</td>
<td>Life</td>
</tr>
<tr>
<td>Trafficking in a large commercial quantity of drugsb</td>
<td>7 yrs</td>
<td>4 yrs 6 mths</td>
<td>7 yrs 10 mths</td>
<td>Life</td>
</tr>
<tr>
<td>Incest with one’s, or one’s de facto spouse’s, child or other lineal descendant or step-child under the age of 18b</td>
<td>4 yrs 5 mths</td>
<td>4 yrs 6 mths</td>
<td>7 yrs</td>
<td>25 yrs</td>
</tr>
<tr>
<td>Sexual penetration of a child under the age of 12a</td>
<td>4 yrs</td>
<td>3 yrs 6 mths</td>
<td>5 yrs and 6 mths</td>
<td>25 yrs</td>
</tr>
<tr>
<td>Persistent sexual abuse of a child under the age of 16a</td>
<td>6 yrs</td>
<td>5 yrs</td>
<td>7 yrs</td>
<td>25 yrs</td>
</tr>
<tr>
<td>Culpable driving causing deatha</td>
<td>5 yrs 6 mths</td>
<td>4 yrs</td>
<td>6 yrs</td>
<td>20 yrs</td>
</tr>
</tbody>
</table>

Source: Sentencing Advisory Council (2012-2013) Sentencing Snapshots50; Crimes Act, ss 3, 44, 45(2)(a), 47A and 318; Drugs, Poisons and Controlled Substances Act, s 71.


48 ibid.
49 ibid.
Sentencing Advisory Council Report

In April 2011, the Attorney-General asked the Sentencing Advisory Council for advice on how best to formulate and introduce a baseline sentencing scheme in Victoria. The terms of reference included matters such as the offences that should be included in the scheme, the baseline levels for those offences, how the scheme should operate in practice including how baseline sentences should best apply in cases involving multiple offences, and the likely effects on prisoner numbers.\(^{51}\)

Notably, the terms of reference also specified that the baseline sentence would apply to the non-parole period to be served by the offender (rather than the head sentence which is the case in the Bill).\(^{52}\)

The SAC stated that the Attorney-General did not ask ‘for advice on the merits of a baseline sentencing scheme or whether a baseline sentencing scheme should be introduced’.\(^{53}\) The SAC said that while ‘The majority of stakeholders expressed strong opposition to a baseline sentencing scheme’ it ‘confined its advice to the terms of reference’.\(^{54}\)

The SAC published its Baseline Sentencing Report (‘the SAC report’) in May 2012.\(^{55}\) The report is lengthy and detailed, only a brief summary of some of its recommendations is provided here and readers are directed to consult the report itself for further information.

Proposed Model to Implement a Baseline Sentencing Scheme

The SAC recommended that the baseline sentencing scheme should operate consistently with current sentencing principles and as consistently as possible with current sentencing processes.\(^{56}\) The SAC proposed two baseline sentencing models during consultation to facilitate discussion on how the scheme should best be incorporated into the existing sentencing framework.\(^{57}\)

The SAC explained that the two models – the ‘Combined (Subjective and Objective) Model’ and the ‘Objective Offence Seriousness Model’ – were variations on the guideline sentencing scheme in England and Wales and the standard non-parole

\(^{52}\) ibid., p. xi.
\(^{53}\) ibid., p. xii.
\(^{54}\) ibid.
\(^{56}\) ibid., p. xiii.
\(^{57}\) ibid., p. xiv.
scheme in New South Wales respectively. These schemes are further discussed in the Other Jurisdictions section of this Research Brief.

The SAC, following consultation, recommended that a model similar to New South Wales’ Objective Offence Seriousness Model be adopted in Victoria which it termed the ‘Offence Seriousness Model’. The SAC explained that under this model the level of seriousness of the offence committed should be determined by objective factors that relate to the offence itself (such as weapon use and physical violence). Subjective factors that relate to the offender (such as family background and prior convictions) are then taken into account once the court has determined the level of offence seriousness.

The SAC determined that there should only be one baseline level for an offence and that 'this level should represent an offence that is in the middle range of offence seriousness rather than at the lower end or high end of offence seriousness'.

The SAC recommended that when the court sentences an offender for one charge of a baseline offence, the court should use the prescribed ‘baseline level’ as the starting point for determining an ‘adjusted baseline’. The SAC explained that the adjusted baseline: ‘will be the period of time determined by the court after adjusting the baseline level to account for the aggravating and mitigating factors in the case and applying any relevant discount for a guilty plea and/or assistance to authorities’. It said that the adjusted baseline will then be fixed as the non-parole period for the case and the court will then determine a head sentence.

In cases involving multiple offences or charges, the SAC recommended ‘an approach that requires the court to start at the baseline level for the base sentence offence and set an adjusted baseline for that charge before completing sentencing for the case as a whole’.

**The Baseline Levels**

Hence, under the SAC’s proposed model, the baseline level is the custodial sentence that would attach to an offence in the middle range of seriousness for that particular crime. It acts as the ‘starting point’ for the court to then adjust the sentence up or down according to the particular factors of the case. In order to determine the

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58 ibid.
59 ibid.
60 The SAC explained that subjective factors are those that are particular to the offender, like the offender’s family background and prior convictions. Objective factors generally relate to the offence such as weapon use and physical violence. See: Sentencing Advisory Council (2011) *Baseline Sentences Issues Paper*, op. cit., p. 7.
62 ibid.
63 ibid.
64 ibid. For further details on the application of the baseline sentencing scheme to cases with multiple charges see pp. 38 to 49.
recommended length of each baseline level, the SAC took into account the following factors:

- The maximum penalty for the baseline offence;
- Current sentencing practices and median sentence of imprisonment for the baseline offence;
- The derived non-parole period midpoint, a statistical figure produced by the Council to provide a more accurate representation of the middle of the range of an offence than the median;
- Comments by the Court of Appeal (or individual Judges of Appeal) and where relevant the challenge to current sentencing practices by the former Director of Public Prosecutions; and
- The Council’s own research on community attitudes to relative offence seriousness.65

Significantly, the SAC stated that the baseline levels it recommended for sexual offences constitute a considerable increase from current sentencing practices. This increase is greater than is the case with other categories of offending. The SAC stated that in recommending the increased levels for sexual offending, it considered Court of Appeal commentary on the adequacy of current sentences for sexual offences, community views that sexual offences are particularly serious, the statistical discrepancy between current sentences and statutory maximum penalties, and the intention of the baseline sentencing scheme to increase sentences.66

**Baseline Levels and Median Sentences**

In regard to median sentences, the SAC highlighted that although the median represents a statistical midpoint (where half the sentences are below and half are above) it is not necessarily indicative of an offence in the middle of the range of seriousness in the same way that the baseline level is.67

This can be because the median sentence for an offence is influenced by the distribution of offences at the higher or lower end of offending. Hence, offences that have a high volume of instances that cluster at the high or low end of offending will have a median that reflects that distribution.68

It is also because the baseline only takes into account objective factors that are relevant to the offence, whereas the median reflects sentences handed down in their entirety. In this regard, the SAC emphasised that the median will almost always be lower than the baseline level because the median incorporates all the aggravating and mitigating factors, and any discounts for a guilty plea and/or cooperation with the authorities.69

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65 ibid., p. xvii. For more information on the derived non-parole period midpoint, see ibid., p. 121.
66 ibid., p. xvii.
67 ibid., p. xiii.
68 ibid., p. xiii.
69 ibid., p. xiii.
Recommended Baseline Levels

The following table (Table 2) presents the baseline levels recommended by the SAC for the six crimes featured in the Bill. The table also provides the baseline levels proposed in the Bill itself:

Table 2: Baselines Recommended in the SAC Report and Baselines Proposed in the Bill

<table>
<thead>
<tr>
<th>Offence</th>
<th>SAC Baseline Non-Parole (yrs)</th>
<th>Bill Baseline Head Sentence (yrs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>20</td>
<td>25</td>
</tr>
<tr>
<td>Trafficking in a large commercial quantity of drugs</td>
<td>9</td>
<td>14</td>
</tr>
<tr>
<td>Incest with one’s, or one’s de facto spouse’s, child or other lineal descendant or step-child under the age of 18</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Sexual penetration with a child under the age of 12</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Persistent sexual abuse of a child under the age of 16</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Culpable driving causing death</td>
<td>9</td>
<td>9</td>
</tr>
</tbody>
</table>


As shown above, the Bill does not introduce the same scheme as the one proposed in the SAC report, as it has applied baseline sentences to the head sentence – rather than the non-parole period – for six serious offences. Notably, the Explanatory Memorandum to the Bill states that ‘The baseline sentence is not a starting point for sentencing judges nor does it require two-stage sentencing. Rather, the baseline sentence is intended to be considered as part of the instinctive synthesis when a judge is determining the appropriate sentence’.

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71 Explanatory Memorandum, Sentencing Amendment (Baseline Sentences) Bill 2014, p. 2.
3. The Bill

This section of the Research Brief summarises the key provisions of the Sentencing Amendment (Baseline Sentences) Bill 2014. For an overview of the Bill in its entirety, readers are directed to the Explanatory Memorandum.

Part 1 - Preliminary

Purpose

Clause 1 provides that the purposes of the proposed Act are —

(a) to amend the Sentencing Act 1991 to provide for baseline sentences for indictable offences; and

(b) to amend the Crimes Act 1958 to fix a baseline sentence for—

(i) murder; and
(ii) incest with one’s, or one’s de facto spouse’s, child or other lineal descendant or step-child under the age of 18; and
(iii) sexual penetration with a child under the age of 12; and
(iv) persistent sexual abuse of a child under the age of 16; and
(v) culpable driving causing death; and

(c) to amend the Drugs, Poisons and Controlled Substances Act 1981 to fix a baseline sentence for trafficking in a large commercial quantity of a drug or drugs of dependence.

Commencement

Clause 2 provides that the Act comes into operation on a day or days to be proclaimed, but if it has not come into operation on 1 July 2015, it comes into operation on that day.

Part 2 — Amendment of the Sentencing Act 1991

Sentencing Guidelines

Clause 4 of the Bill amends section 5(2) of the Act – which lists the factors a court must have regard to in sentencing an offender – to insert ‘the baseline sentence for the offence’ as the second factor on the list.

New Sections 5A and 5B Inserted – Sentencing for a Baseline Offence and Median Sentence

Clause 5 of the Bill inserts the key new sections 5A and 5B into the Sentencing Act.

New section 5A is titled ‘Sentencing for a Baseline Offence’ and provides that:

- If an Act states that an offence is a baseline offence then ‘the period specified as the baseline sentence for the offence is the sentence the Parliament intends to be the median sentence for sentences imposed for that offence’ (s 5A(1)).
Sentencing practices must give effect to this intention (s 5A(2)).

In sentencing an offender for a baseline offence, a court must do so in a manner that is compatible with Parliament’s intention, and must disregard any provision of Part 2 of the Sentencing Act that would be incompatible with that intention (including the requirement to have regard to current sentencing practices) (s 5A(3)).

A court which sentences an offender for a baseline offence must state the reasons for it being equal to or greater or lesser than the specified baseline (s 5A(4)).

If a court is sentencing an offender for multiple offences, and one or more of the offences is a baseline offence, the court must sentence in accordance with this section for any baseline sentence included in the total effective sentence (s 5A(5)).

A baseline offence includes an offence of aiding, abetting, counselling or procuring the commission of a baseline offence (s 5A(6)).

Baseline sentencing does not apply if the offender was under 18 at the time when the offence was committed or if the offence is heard and determined summarily (s 5A(7)).

New section 5B is titled ‘Median Sentence’ and sets out how the median sentence referred to in section 5A should be defined and identified. It provides that both custodial and non-custodial sentences are to be considered when calculating the median, other than in situations when the offender was under 18 when the offence was committed, or when the offence is heard and determined summarily (s 5B(a)). The Explanatory Memorandum summarises that section 5B also provides that in calculating the median:

- non-custodial sentences should be treated as a term of imprisonment of zero months;
- it is the head sentence for each baseline offence sentence that should be counted, not the total effective sentence;
- in respect of partially suspended sentences, only the jail component (not the suspended period) should be counted as the term of the sentence; and
- a wholly suspended sentence should be treated as a non-custodial sentence with a term of imprisonment of zero months.

New Section 11A Inserted – Fixing of Non-parole Period for Baseline Offence

Clause 8 of the Bill inserts new section 11A into the Sentencing Act which provides for the fixing of a non-parole period for a baseline offence. Notably, new section 11A(4) sets out the ‘ratios’ for the minimum non-parole periods for baseline sentences and states that the non-parole period must be at least:

- 30 years if the relevant term is the term of the offender’s natural life; or

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72 ibid., p. 7.
73 ibid., p. 7 and see subsections 5B(b) to (e).
• 70% of the relevant term if that term is a term of 20 years or more; or
• 60% of the relevant term if that term is a term of less than 20 years.

Part 3 — Amendment of the Crimes Act 1958

Baseline Sentence for Murder
Clause 12 of the Bill amends section 3 of the Crimes Act to provide that the baseline sentence for murder is 25 years.

Baseline Sentence for Certain Incest Offences
Clause 13 of the Bill amends section 44(1) of the Crimes Act so as to add that the baseline sentence for incest offences with one’s, or one’s de facto spouse’s, child or other lineal descendant or step-child under the age of 18, is ten years.

Baseline Sentence for Sexual Penetration of a Child under 12
Clause 14 of the Bill inserts new section 45(2A) into the Crimes Act so as to provide that the baseline sentence for the sexual penetration of a child under the age of 12 is ten years.

Baseline Sentence for Persistent Sexual Abuse of a Child under 16
Clause 15 of the Bill inserts new section 47A(4A) into the Crimes Act in order to provide that the baseline sentence for the persistent sexual abuse of a child under the age of 16 is ten years.

Baseline Sentence for Culpable Driving Causing Death
Clause 16 of the Bill inserts new section 318(1A) into the Crimes Act so as to provide that the baseline sentence for the offence of culpable driving causing death is nine years.

Part 4 — Amendment of the Drugs, Poisons and Controlled Substances Act 1981

Baseline Sentence for Trafficking in a Large Commercial Quantity of Drugs
Clause 18 of the Bill inserts new section 71(2) into the Drugs, Poisons and Controlled Substances Act to provide that the baseline sentence for the offence of trafficking in a large commercial quantity of a drug or drugs of dependence is 14 years.
4. Stakeholders

The proposed baseline sentencing scheme has stimulated considerable discussion amongst stakeholders, particularly within the legal community and support service groups. There has been less commentary from stakeholders outside the legal community such as those representing victims of crime. This section outlines common issues which have been raised by stakeholders in the recent commentary following the introduction of this Bill, as well as in submissions to the 2012 Sentencing Advisory Council report on baseline sentencing.

Separation of Powers

Some stakeholders expressed concern that baseline sentencing contravene the separation of powers between Parliament and the Judiciary. Youthlaw, a community legal centre for young people, stated in their 2011 submission to the SAC report, ‘We are very concerned that baseline sentencing will be prescriptive and amounts to another attack on the separation of powers and judicial discretion in sentencing’.74

Fitzroy Legal Service were similarly concerned, stating that baseline sentencing limited the discretionary powers of judicial officers and that ‘Judicial discretion is a cornerstone of the separation of powers doctrine’.75

The Attorney-General, however, has stated that it is the role of Parliament to set the sentencing levels for the courts:

The High Court has made clear that it’s Parliament’s job, not a judge’s job, to decide the sentencing levels that the courts apply. The Government has consulted extensively with the courts, the Sentencing Advisory Council and the Office of Public Prosecutions in developing the reforms… However, at the end of the day, the Government and the Parliament are elected by the people of Victoria. It is a matter for the Parliament to set the law and for the courts to apply the law.76

Judicial Discretion

Several stakeholders have expressed concern that baseline sentences will restrict judicial discretion in weighing up factors relating to each case and determining a suitable sentence. As reported in The Age, the Federation of Community Legal Centres stated that baseline sentences ‘undermine the principle that the court, who hears all the facts of the case, is best placed to impose an appropriate sentence’.77

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The issue of judicial discretion was raised in a number of submissions to the SAC report in 2011. Youthlaw, for example, argued that:

Judicial discretion is an integral part of the criminal justice system and allows for judicial officers to consider the circumstances of that individual and the various interests of relevant stakeholders in a particular matter and sentence accordingly… The weight to be applied to these various interests will vary from case to case and cannot be calculated as a fixed formula.78

Victoria Legal Aid similarly stated in their submission that, ‘Those who practice in criminal law both as prosecutors and defence lawyers learn quickly that it is very hard to put cases and offenders into strict categories and that attempts to do so lead to injustice’.79 Victoria Legal Aid further stated their concern that baseline sentencing ‘will unhelpfully fetter judicial discretions’ and undermine ‘a nuanced and individualised approach to victims, offenders and the community’.80

The Attorney-General argued that concerns about baseline sentences limiting judicial discretion were ‘unjustified’.81 He said that judges will still be allowed to determine sentences for individual cases in ‘the same manner as they do at present but – importantly – while requiring an increase in the overall level of sentences’.82

**The Effect on the Sentencing Process**

Stakeholders have expressed concern that baseline sentencing will add complexity to the sentencing process. The Law Institute of Victoria (LIV) has argued that baseline sentencing over-complicates the sentencing process.83 Acting LIV president, Michael Holcroft, stated in 2011 that ‘If introduced, baseline sentencing will require judges to undergo complicated mental gymnastics to analyse offences to determine whether they fall within a low, mid or high range of seriousness’.84 Other stakeholders echoed this concern in their submissions to the SAC report, such as Victoria Legal Aid who argued that baseline sentencing would add complexity not just to the sentencing process, but to the criminal justice system in general.85

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80 ibid.

81 Clark (2014) op. cit.

82 ibid.


84 ibid.

85 Victoria Legal Aid (2011) op. cit., p. 5.
Baseline Sentences as a Deterrent
Some stakeholders have questioned whether baseline sentences will be an effective deterrent against crime. LIV President Geoff Bowyer stated in a media release following the introduction of the Bill that ‘Studies show that while the threat of a prison sentence acts as a small deterrent, increasing the severity of that sentence does nothing to increase the deterrence’.86 Liberty Victoria President Jane Dixon also cited a lack of evidence to support the efficacy of baseline sentencing as a deterrent.87

Several submissions to the SAC report also pointed to a lack of evidence that baseline sentencing worked as a deterrent and resulted in crime reduction. In their submission, the Criminal Bar Association expressed doubt about the efficacy of baseline sentencing by citing the Queensland SAC inquiry, which ‘noted an absence of evidence that baseline sentencing schemes have been effective’.88

However, the Attorney-General maintained that increased jail time under baseline sentences will have a crime prevention effect: ‘Some have questioned whether longer sentences actually prevent crime. But when dangerous offenders are behind bars they can’t be on the streets reoffending’.89

The Effect on Prisons, Police and Courts
Some stakeholders have expressed concern that baseline sentencing will result in an increase in prison numbers, as well as further pressure on police and the court system. LIV President Geoff Bowyer stated ‘we believe the only likely outcome to flow from these new laws will be an increased burden on our prisons, police and courts’.90 The LIV President emphasised the current pressures on Victoria’s ‘over-burdened’ prison and courts systems and expressed concern that baseline sentencing could exacerbate these problems.91

However, the Attorney-General argued that the Government has allowed for additional prison capacity as 500 prison places are being built to meet the requirements of the Government’s sentencing reform.92 The Attorney-General also argued that baseline sentencing would not add to prison numbers in the short term, as numbers would not increase ‘until offenders have served the sentences to which they would otherwise have been sentenced’.93

Cost
The economic cost of baseline sentencing has been raised by stakeholders. The LIV questioned how the Government will pay for longer jail time for offenders, stating that

86 Law Institute of Victoria (2014) Baseline Sentencing a Mistake, op. cit.
88 Criminal Bar Association of Victoria (2011) op. cit., p. 2. See also Fitzroy Legal Service (2011) op. cit., p. 5.
89 Clark (2014) op. cit.
90 Law Institute of Victoria (2014) op. cit.
91 ibid.
92 Clark (2014) op. cit.
93 ibid.
‘every prisoner [is] costing Victoria around $98,000 per year’.94 Liberty Victoria echoed these concerns, stating ‘harsher sentences mean a big rise in the prison population, coming at a massive economic cost’.95

The LIV pointed to the introduction of baseline sentencing in New South Wales and argued that one of the consequences has been additional costs in many areas:

In NSW, baseline sentencing has resulted in increased prison and corrections costs. It has also created an additional burden on the justice system with more cases needing to be heard in the County or Supreme Courts, leading to delays and additional costs in that area as well.96

A different view was expressed by other stakeholders, who argued that increased jail time for serious offenders under baseline sentencing is worth the cost.97

**Crime Prevention, Education and Rehabilitation Programs**

Some stakeholders argued that Government funding could be better spent on crime prevention, education and rehabilitation, rather than in imprisoning offenders for longer sentences. Liberty Victoria stated that ‘If the Government is serious about reducing crime and making the community safer it should look at introducing measures that are targeted at the causes of crime rather than superficial and harsh responses’.98

Similarly, the LIV stated that ‘we’ll see offenders possibly locked up for longer, requiring many millions of dollars of investment in our prisons that could have been far more effectively channelled into crime prevention, education and rehabilitation programs’.99 Similar views were also expressed by Jesuit Social Services in their submission to the SAC report.100

**The Effect on the Number of Guilty Pleas**

Some stakeholders have argued that the possibility of longer jail time under the baseline sentencing scheme could result in less guilty pleas, as there will be less incentive to plead guilty. Victoria Legal Aid stated in their submission to the SAC report that baseline sentencing could result in ‘A reduction in the number of pleas of guilty, due to the high likelihood of a sentence of imprisonment even on a guilty plea, and a consequent increase in lengthier, more complex trials’.101

Premier Napthine, however, does not support the view that there would be fewer guilty pleas under baseline sentencing, stating that ‘we believe that this will not have

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94 Law Institute of Victoria (2014) op. cit.
96 Law Institute of Victoria (2014) op. cit.
97 For example, see T. Elliott (2014) ‘Worst Crims Need Some Retribution’, Herald Sun, 12 April, p. 13.
99 Law Institute of Victoria (2014) op. cit.
101 Victoria Legal Aid (2011) op. cit., p. 6.
any impact on the length of trials or the propensity for people to plead guilty, because there are still benefits in pleading guilty for people.\textsuperscript{102} The Attorney-General stated that courts would still be able to give reductions based on guilty pleas.\textsuperscript{103} He also argued that the possibility of fewer guilty pleas should not be a factor in determining whether sentences should be increased: ‘If the argument is that sentences should never be increased because any increase in sentences will deter people from pleading guilty, then the Government doesn’t accept that argument and we don’t think the community accepts it either’.\textsuperscript{104}

\textbf{The Effect on Victims of Crime}

Stakeholders have raised differing viewpoints as to how baseline sentencing may affect victims of crime. Some stakeholders felt that victims of crime would support baseline sentencing. As reported in the \textit{Shepparton News}, Hume Victims Assistance and Counselling Program acting manager Katrina Watts stated that the longer sentences under baseline sentencing may help victims in their healing: ‘For victims and their families, increased sentences for serious crime is something that may assist in helping them to move forward with their lives… It is a step in the right direction for them’.\textsuperscript{105} The Attorney-General also argued that victims would be in favour of baseline sentences as they would prefer the stress of a trial to seeing offenders receive inadequate sentences.\textsuperscript{106}

However, Acting LIV President Michael Holcroft stated in 2011 that he believed baseline sentencing could ‘disappoint’ victims of crime by unduly raising their expectations.\textsuperscript{107} Jesuit Social Services further argued that baseline sentencing may result in increased trauma for victims, as the possibility of longer sentences may lead to fewer guilty pleas, more cases going to trial and victims increasingly being required to testify. Jesuit Social Services stated ‘This is an experience that can be traumatizing, especially when added to a situation where the offence committed has already put significant emotional and mental stress on the victim’.\textsuperscript{108}

\textbf{Rehabilitation of Offenders}

Some stakeholders voiced concerns that longer jail time under baseline sentencing would increase the chances of institutionalisation, making it more difficult for offenders to be rehabilitated and able to re-enter the community. The LIV argued that:

\begin{quote}
the social impact of boosting the number of long-term prisoners in our jails means the offenders will become increasingly institutionalised, making it so much harder to
\end{quote}

\textsuperscript{103} Clark (2014) op. cit.  
\textsuperscript{104} ibid.  
\textsuperscript{106} Clark (2014) op. cit.  
\textsuperscript{107} Law Institute of Victoria (2011)‘LIV Calls for Sentencing Rethink’, op. cit.  
successfully rehabilitate and reintegrate them into the community once their sentence is served.\textsuperscript{109}

Liberty Victoria shared this view, stating ‘In the long term this also increases the rate at which institutionalised prisoners are released back into the community, ill-equipped to deal with a changed society’.\textsuperscript{110}

Jesuit Social Services argued in 2011 that the interests of community safety are best served when people are kept out of prison in other sentencing outcomes, as imprisonment can lead to a higher rate of recidivism.\textsuperscript{111} Jesuit Social Services also emphasised that ‘disadvantaged and developmentally vulnerable young people are at greatest risk within the prison system’.\textsuperscript{112}

However, some stakeholders placed less emphasis on the possible rehabilitation of offenders in the sentencing process, focussing more on imprisonment as a form of punishment for offenders and protection for society.\textsuperscript{113}

\textbf{Existing Avenues to Appeal Low Sentences}\n
Some stakeholders have argued that it is not necessary to introduce baseline sentencing as a means of raising sentencing levels, as avenues for appealing low sentences already exist. Liberty Victoria President Jane Dixon stated that people may be unaware that the Director of Public Prosecutions can appeal a sentence to the Court of Appeal if they feel the sentence is inadequate, and that ‘Every sentence imposed in the County and Supreme Courts in Victoria gets reviewed in this way’.\textsuperscript{114}

The Criminal Bar Association also raised this point in their 2011 submission to SAC:

\begin{quote}
There already exists a powerful mechanism for the correction of sentences which are too low. Since the introduction of appeals by the Director of Public Prosecutions, they have been an effective means of redressing inadequate sentences… The CBA is not clear as to why the availability of Director’s appeals is not regarded as a sufficient safeguard against the imposition of inadequate sentences for serious offences.\textsuperscript{115}
\end{quote}

\textbf{Community Perceptions on Sentencing}\n
Some stakeholders have questioned the Government’s assertions that the community views current sentencing as too lenient. In submissions to the SAC report, the Criminal Bar Association, Fitzroy Legal Service and LIV cited research which suggests the community is less punitive in their opinion on sentencing once they are given more

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\textsuperscript{109} Law Institute of Victoria (2014) op. cit.
\textsuperscript{110} Liberty Victoria (2014) op. cit.
\textsuperscript{112} ibid.
\textsuperscript{113} For example, see Elliott (2014) op. cit.
\textsuperscript{114} Liberty Victoria (2014) op. cit.
\textsuperscript{115} Criminal Bar Association of Victoria (2011) op. cit., p. 6.
\end{flushright}
information about a case. This research has been discussed in the Background section of this Research Brief.

Accordingly, several stakeholders have argued that longer sentences under a baseline sentencing regime would be unlikely to alter public opinion as community perceptions would be better addressed through education about sentencing. LIV suggested broadcasting or publishing sentencing remarks as a way of increasing public confidence in the sentencing process. Youthlaw were in favour of ‘targeted community education campaigns’ to enhance community understanding of the role of the courts and the sentencing system.

However, Premier Naphthine maintained that the community is calling for longer sentences for serious offenders, stating ‘The community has been crying out for tougher sentences for years and years and years. And our baseline sentencing system will ensure that community expectations – community standards – are met in sentencing’.

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120 Naphthine (2014) op. cit.
5. Other Jurisdictions

Baseline sentencing, or other comparable minimum non-parole schemes, have been introduced in a variety of jurisdictions in Australia and internationally. For example, New South Wales has a standard non-parole scheme that acts as the median term of imprisonment for certain offences, while South Australia, the Northern Territory and Queensland have statutory minimum non-parole periods for selected serious offences. In England and Wales, a system of staged guidelines is administered by the Sentencing Council, while in New Zealand guidelines issued by the Court of Appeal operate in conjunction with minimum non-parole periods for offences attracting lengthy sentences. These schemes are discussed in detail below.

New South Wales

New South Wales has a system most similar to that proposed by the Coalition during the 2010 election campaign, in that 'standard non-parole periods' are prescribed for certain serious offences against the person and murder. These standard non-parole periods range from 25 years for aggravated murder through to three years for unauthorised possession or use of firearms. In comparison to the offences covered by the Bill, NSW has standard non-parole periods of 20 years for murder; 15 years for manufacture, production or supply of a large commercial quantity of a prohibited drug; and 15 years for sexual intercourse with a child under the age of ten. While these are similar periods to those introduced by the Bill, the NSW model is far more punitive as it applies to non-parole periods (the NSW model stipulates the median amount of time an offender should spend in custody, as opposed to the median sentence).

Under the Crimes (Sentencing Procedure) Act 1999 (NSW), the court must impose these standard non-parole periods unless it determines, and records, that there are reasons for a longer or shorter non-parole period (ss 44, 54A-54D). The non-parole period must represent no less than 75 per cent of the term of imprisonment, unless the court determines and records that a longer head sentence is necessary (s 44).

Following its introduction in 2003, this system was applied in a two-stage manner whereby the standard non-parole period was used as a starting point for mid-range offences, and the aggravating or mitigating factors were then applied. However, following a High Court decision in 2011, the standard non-parole period has been interpreted as providing guidance, to be taken into account when making a more holistic decision that incorporates all of the factors of sentencing.122

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121 Where the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim’s occupation or voluntary work, or where the victim was under 18 years of age.
The Judicial Commission of NSW evaluated the impact of the standard non-parole sentencing scheme in 2010 and found that guilty pleas for offences that attracted a standard non-parole period had significantly increased, severity of penalties and duration of sentences had increased, and uniformity and consistency of sentences had improved.123 In regard to appeals, there was an increase in Crown appeals and a decrease in severity appeals, while the success rate of severity appeals increased. The Judicial Council noted that this may suggest that ‘at least initially the statutory scheme was not easy to apply in the absence of appellate guidance’.124 It also cautioned against the measures of uniformity as it was unclear whether this was a benign effect, stating that ‘To put it another way, it is not possible to tell whether dissimilar cases are now being treated uniformly in order to comply with the statutory scheme’.125

South Australia

South Australia has minimum non-parole periods as a proportion of the head sentence for certain serious offences, as opposed to standard non-parole periods. This ensures that the minimum time served in prison is more closely linked to the head sentence, rather than encouraging the specific length of a non-parole period.

Minimum non-parole periods are provided for under the Criminal Law (Sentencing) Act 1988 (SA). The non-parole period for ‘serious offences against the person’ must be no less than four-fifths the length of the sentence (s 32(5)(ba)). Under section 32(10)(d), such serious offences against the person include:

(i) a major indictable offence (other than an offence of murder) that results in the death of the victim or the victim suffering total incapacity; or
(ii) a conspiracy to commit an offence referred to in subparagraph (i); or
(iii) aiding, abetting, counselling or procuring the commission of an offence referred to in subparagraph (i).

A person sentenced to life imprisonment for murder must be given a non-parole period of at least 20 years (s 32(5)(ab). The courts may impose a shorter non-parole period if ‘special reasons’ exist, including that the victim’s conduct or condition substantially mitigated the offender’s conduct, the offender pleaded guilty, and the offender co-operated with the investigation (s 32A(3)).

Under Division 4 of Part 2 of the Act, the Full Court may also establish and review sentencing guidelines detailing a range of penalties for particular offences, as well as the effect of particular aggravating or mitigating factors (although courts are not bound to follow these guidelines if they have good reasons not to do so).

124 ibid., p. 60.
125 ibid., p. 61.
Queensland

In Queensland, eligibility for parole is provided for under the *Corrective Services Act 2006*. Prisoners sentenced to life imprisonment are not eligible for parole until they have served the following minimum non-parole periods (ss 181 and 181A):

- 30 years for multiple convictions for murder;
- 25 years for the murder of a police officer in the course of their duties;
- 20 years for murder;
- 20 years for repeat serious child sex offences;
- 15 years for any other term of life imprisonment.

Serious violent offences attract a minimum non-parole period of the lesser of 80 per cent of the term of imprisonment or 15 years (s 182). Offenders sentenced for a drug trafficking offence must serve at least 80 per cent of their term of imprisonment (s 182A). Persons convicted of certain sexual offences who have been deemed incapable of controlling their sexual instincts must serve a minimum of half the term of imprisonment (s 183). All other sentences of more than three years (or of any length if it is a sexual offence) attract a minimum non-parole period of at least half of the term of imprisonment, unless an earlier parole eligibility date is set by the Court (s 184).

The Queensland Sentencing Advisory Council inquired into minimum standard non-parole periods in 2011. While it put forward a proposed model to apply to serious offences, in line with its terms of reference, the majority of the Council did not support a standard non-parole scheme for Queensland. The Council was abolished by the Newman Liberal National Party Government under the *Criminal Law Amendment Act 2012*. The same Act increased the minimum non-parole period for multiple murders from 20 to 30 years imprisonment, and introduced the minimum non-parole period for murder of a police officer.

Northern Territory

Similar to South Australia, the Northern Territory has minimum non-parole periods for murder and aggravated murder, as well as a percentage minimum for other offences. Under the *Sentencing Act 1995* (NT), the standard non-parole period for murder is 20 years, with murder in specific circumstances (such as that the victim was under 18 years of age) attracting a minimum non-parole period of 25 years (s 53A). All other sentences of 12 months imprisonment or more must have a non-parole period

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that is at least 50 per cent of the term of imprisonment (s 54). The Full Court also has the power to establish sentencing guidelines (s 29A).

**England and Wales**

In England and Wales, baseline sentences are not incorporated into legislation, rather they are governed by the Sentencing Council who draft guidelines. The Sentencing Council is the advisory body for sentencing in England and Wales (other jurisdictions within the United Kingdom, such as Scotland and Northern Ireland, have separate criminal justice systems). It publishes sentencing guidelines and evaluates the impact of the guidelines and government policy on sentencing practices. For any offences committed on or after 6 April 2010, the court must follow any relevant sentencing guidelines. The Council may decide which offences it creates guidelines for and the content of those guidelines (Coroners and Justice Act 2009 (UK), s 120).

This model is what the SAC referred to as a ‘Combined (Subjective and Objective) Model’ of baseline sentencing. It involves a staged approach where the sentencer must first consider what category of seriousness the offence falls in to (usually three categories ranging from low culpability/harm to high culpability/harm), before applying baseline sentencing processes. This approach differs from the instinctive synthesis approach preferred in Australia.

The staged approach adopted in the guidelines aims to promote consistency across the system – this is particularly important as magistrates in England and Wales are lay people. More than 95 per cent of all criminal cases in England and Wales are dealt with in a magistrates’ court, where a panel of three lay magistrates will hear the case. The court has the option of multiple baseline sentences (or ‘starting points’) for each offence, depending on the seriousness of the offence. It then delivers a sentence within the range applicable to the offence seriousness category. For example, for assault occasioning actual bodily harm, the maximum penalty is five years custody. However, for an offence involving greater harm and high culpability (Category 1) the court has a starting point of 1.5 years custody and would be expected to deliver within the category range 1-3 years custody. Conversely, a Category 3 assault involving lesser

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harm and lower culpability would have a starting point of a medium level community order with the court considering a sentence within the range of a fine through to a high level community order.\(^\text{134}\)

Thus, in determining a sentence for assault occasioning actual bodily harm, the court would take the following nine steps:

1) Determine the offence category (degree of harm and culpability);
2) Identify the starting point and sentence range for that offence category;
3) Consider any other factors which indicate a reduction, such as assistance to the prosecution;
4) Grant a reduction for guilty pleas;
5) Consider whether having regard to the dangerousness of the offence it would be appropriate to award an extended sentence;
6) If the offender is being sentenced for more than one offence, apply the totality principle so that the total sentence is just and proportionate;
7) Make any compensation or ancillary orders;
8) Give reasons for, and explain the effect of, the sentence;
9) Take into consideration any remand time served in relation to the final sentence.\(^\text{135}\)

For the majority of offences in the UK, a determinate sentence is issued and the offender is released ‘on licence’ after serving half of their sentence. Offenders on extended sentences are eligible for parole after serving two-thirds of their sentence.\(^\text{136}\)

**New Zealand**

According the SAC report, a sentencing scheme similar to that in England in Wales was provided for in the Sentencing Council Act 2007 (NZ), however the government never established the Sentencing Council.\(^\text{137}\) A 2006 New Zealand Law Commission report had recommended the establishment of a council with the mandate to draft sentencing guidelines to ‘promote consistency in sentencing practice between different courts and judges’ as well as ‘ensure transparency in sentencing policy’.\(^\text{138}\) The report also recommended a minimum non-parole period of at least two thirds of the full-term sentence.\(^\text{139}\)

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\(^{137}\) Sentencing Advisory Council (2012) op. cit., p. 23.


Guidelines were prepared for the incoming Sentencing Council, but have never been implemented in the absence of its establishment. Instead, guideline judgements are delivered by the New Zealand Court of Appeal, drawing on past cases to establish a sentencing range and identify common aggravating features of particular offences. The Court of Appeal may correct sentences if it sits outside the sentencing range for that offence.

Non-parole periods are provided for in the Parole Act 2002 (NZ). For long term sentences, they are one-third of that sentence and for life sentences there is a non-parole period of ten years (s 84). However, the court may impose a longer 'minimum period of imprisonment' under s 86 of the Sentencing Act 2002 (NZ) if is satisfied that the period stipulated in the Parole Act is insufficient for the purposes of:

(a) holding the offender accountable for the harm done to the victim and the community by the offending;
(b) denouncing the conduct in which the offender was involved;
(c) deterring the offender or other persons from committing the same or a similar offence;
(d) protecting the community from the offender.

In such an instance, the minimum period of imprisonment cannot exceed the lesser of two-thirds of the full term sentence, or ten years.

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References

Relevant Legislation

Victoria
Sentencing Act 1991 (Vic)
Crimes Act 1958 (Vic)
Drugs, Poisons and Controlled Substances Act 1981 (Vic)

Other jurisdictions
Corrective Services Act 2006 (Qld)
Crimes (Sentencing Procedure) Act 1999 (NSW)
Criminal Law (Sentencing) Act 1988 (SA)
Criminal Law Amendment Act 2012 (Qld)
Sentencing Act 1995 (NT)
Coroners and Justice Act 2009 (UK)
Parole Act 2002 (NZ)
Sentencing Act 2002 (NZ)
Sentencing Council Act 2007 (NZ)

Cases
Markarian v The Queen (2005) 228 CLR 357
Muldrock v The Queen (2011) 85 ALJR 1154
Punch v The Queen (1993) 9 WAR 486
R v Young [1990] VR 951

Works Cited


