SENTENCING AMENDMENT (SENTENCING STANDARDS) ACT 2017

Sections 1–16, 43 and 44 of the *Sentencing Amendment (Sentencing Standards) Act 2017* (the **Act**) commenced on 29 November 2017. The remaining sections commenced on 1 February 2018.

The Act made significant changes to the *Sentencing Act 1991* (the **Sentencing Act**), largely based on recommendations made by the Sentencing Advisory Council (**SAC**) in its 2016 report, *Sentencing Guidance in Victoria* (the **Report**). This document summarises the reforms.

Baseline sentencing scheme repealed

Part 2 of the Act commenced on 29 November 2017. It repealed the baseline sentencing scheme that had been introduced by the *Sentencing Amendment (Baseline Sentences) Act 2014*. However, in *DPP v Walters (a pseudonym)*,[1] the Court of Appeal found the baseline sentencing provisions in the Sentencing Act were incapable of being given practical operation.[2] While the Court did not address whether the minimum non-parole period or aggregate sentences provisions for baseline offences could operate, these were also treated as incapable of operating.

Introduction of standard sentence scheme

Part 3 of the Act introduced the standard sentencing scheme into the Sentencing Act.

Outline of standard sentence scheme

The scheme requires a court to have regard to the standard sentence (if any) for an offence when sentencing an offender.[3] Section 5(2) of the Sentencing Act sets out, in a broad fashion, the factors a court must consider when determining an appropriate sentence e.g. current sentencing practices,[4] any aggravating or mitigating factors,[5] the maximum penalty for the relevant offence.[6] The standard sentence is an extra factor that courts must consider when imposing sentence for a standard sentence offence, or when imposing sentence in respect of multiple offences, at least one of which is a standard sentence offence.

When considering current sentencing practices for a standard sentence offence, a court may only consider sentences previously imposed for the relevant offence where that offence was

[1] (2015) 49 VR 356.

[2] *DPP v Walters (a pseudonym)* (2015) 49 VR 356, [60]–[61].

[3] Sentencing Act s 5(2)(ab).

[4] Sentencing Act s 5(2)(b).

[5] Sentencing Act s 5(2)(g).

[6] Sentencing Act s 5(2)(a).

subject to the standard sentence scheme.[7] This precludes a court from having regard to current sentencing practices for "old" offences (that is, offences to which the scheme does not apply because they were committed prior to the commencement of the scheme).

The standard sentence for an offence is the sentence that, taking into account only the objective factors affecting the seriousness of the offence, is in the middle of the range of seriousness.[8] For the purposes of assessing objective factors affecting the seriousness of a particular offence, matters personal to a particular offender or class of offenders are irrelevant. The assessment must be done wholly by reference to the nature of the offending.[9]

When sentencing an offender for two or more offences, one of which is a standard sentence offence, a court may not impose an aggregate term of imprisonment[10] or an aggregate fine.[11]

Specific provisions apply when setting a non-parole period for a standard sentence offence, or a non-parole period for a standard sentence offence in combination with other offences. These provisions also apply when setting a new single non-parole period where the further sentence is a sentence of imprisonment for a standard sentence offence.[12]

When sentencing an offender for a standard sentence offence, a court must give reasons for imposing that sentence.[13] As part of these reasons, the court must refer to the standard sentence for the relevant offence or offences and explain how the sentence that it imposed relates to that standard sentence or sentences.[14]

The scheme does not apply where an offender was under the age of 18 at the time of committing the offence,[15] nor does it apply to offences heard and determined summarily.[16] This is consistent with the SAC recommendation that the scheme should not apply in either of these circumstances.[17]

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[7] Sentencing Act s 5B(2)(b).
[8] Sentencing Act s 5A(1)(b).
[9] Sentencing Act s 5A(3).
[10] Sentencing Act s 6AC(ea)
[11] Sentencing Act s 51(1A).
[12] Sentencing Act s 11A(2).
[13] Sentencing Act s 5B(4)(1).
[14] Sentencing Act s 5B(5).
[15] Sentencing Act s 5B(1)(a).
[16] Sentencing Act s 5B(1)(b).
[17] Sentencing Advisory Council, *Sentencing Guidance in Victoria* (2016), recommendation 8.

Standard sentence offences

The scheme prescribes standard sentences for 12 offences. These offences (and the standard sentence for each) are set out in the following table:

OFFENCE	STANDARD SENTENCE
Murder	25 years
Murder of custodial officer or emergency worker on duty	30 years
Rape, contrary to s38 of the *Crimes Act 1958*	10 years
Sexual penetration of a child under the age of 12, contrary to s49A of the *Crimes Act 1958*	10 years
Sexual penetration of a child under the age of 16, contrary to s49B of the *Crimes Act 1958*	6 years
Sexual assault of a child under the age of 16, contrary to s49D of the *Crimes Act 1958*	4 years
Sexual activity in the presence of a child under the age of 16, contrary to s49F of the *Crimes Act 1958*	4 years
Causing a child under the age of 16 to be present during sexual activity, contrary to s49H of the *Crimes Act 1958*	4 years
Persistent sexual abuse of a child under the age of 16, contrary to s49J of the *Crimes Act 1958*	10 years
Sexual penetration of a child or lineal descendant under the age of 18, contrary to s50C of the *Crimes Act 1958*	10 years
Sexual penetration of a step-child under the age of 18, contrary to s50D of the *Crimes Act 1958*	10 years
Culpable driving, contrary to s318 of the *Crimes Act 1958*	8 years
Trafficking in a large commercial quantity of a drug of dependence, contrary to s71(1) of the *Drugs, Poisons and Controlled Substances Act 1981*	16 years

The standard sentence is calculated at 40 per cent of the maximum penalty for a relevant offence (except for those offences for which life imprisonment is the maximum penalty). This accords with the SAC recommendation.[18]

Conspiracy, incitement or attempt to commit a standard sentence offence is not a standard sentence offence.[19]

Applying the standard sentence provisions

The Victorian scheme is modelled on the New South Wales defined term standard non-parole period scheme. In New South Wales, the standard non-parole period represents the non-parole period for a specified offence that, taking into account only the objective factors relevant to the relative seriousness of the offence, is in the middle range of seriousness.[20]

The New South Wales Court of Criminal Appeal (**NSWCCA**) initially decided that, when sentencing for a standard non-parole period offence, a court needed to first determine whether the offence was in the middle of the range of objective seriousness.[21] To do this, it needed to decide what was an 'abstract offence in the middle of the range of objective seriousness'.[22] Then, if the offence was in the middle of the range, the court needed to consider the reasons for not imposing the standard non-parole period.[23]

The High Court rejected this approach in *Muldrock v The Queen*.[24] It held that the way the NSWCCA had applied a standard non-parole period was inconsistent with the instinctive or intuitive synthesis approach to sentencing, where the sentencing judge weighs all the relevant factors and comes to a final sentence. What the NSWCCA had done was closer to a two-stage approach, where the sentencing judge ascribes particular values to the individual factors that lead to a final sentence.[25]

The High Court held that, consistent with the instinctive synthesis, the New South Wales scheme did not require sentencing judges to explain the extent to which the seriousness of a particular case differed from a hypothetical offence in the middle of the range of seriousness, as represented by the standard non-parole period. Rather, a sentencing judge needed to consider the standard non-parole period in the same way that he or she considered the maximum penalty: that is, as a 'guidepost' or 'yardstick' to sentencing, not a starting point.[26]

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[18] Sentencing Advisory Council, *Sentencing Guidance in Victoria* (2016), recommendation 13.

[19] Sentencing Act s 5A(2).

[20] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).

[21] The New South Wales legislation originally provided that 'the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness'.

[22] *R v Way* (2004) 60 NSWLR 168, [74].

[23] *R v Way* (2004) 60 NSWLR 168.

[24] (2011) 244 CLR 120.

[25] *Muldrock v The Queen* (2011) 244 CLR 120, 132.

[26] *Muldrock v The Queen* (2011) 244 CLR 120, 132.

Consistent with the decision in *Muldrock*, the SAC suggested that a Victorian standard sentence scheme should be interpreted in the following manner:

- When sentencing, judicial officers must take into account all factors relevant to determining the appropriate sentence for an offence
- In doing this, judicial officers need to be consider two legislated guideposts: the maximum penalty and the standard sentence
- The standard sentence represents the sentence for an offence in the middle of the range of objective seriousness
- When considering the objective seriousness of an offence, matters personal to a particular offender or class of offenders are not relevant. Seriousness is determined solely according to the nature of the offending (this includes consideration of harm and culpability factors e.g. extent of planning, vulnerability of victim)
- The standard sentence does not have determinative significance in the sentencing exercise. It is a legislated guidepost.
- Factors personal to the offender and the offence are equally important in the sentencing exercise.[27]

Given the similarities between the New South Wales scheme and that being implemented in Victoria, it is likely that the High Court would consider this to be the appropriate approach to take when sentencing for a standard sentence offence in Victoria.

Identifying 'objective' factors

In New South Wales, the 'nature of the offending' has been interpreted to mean not just the 'ingredients of the crime', but 'the fundamental qualities of the offence'.[28]

An issue that arises in this exercise is what constitutes an 'objective' factor as opposed to a factor personal to the offender. In New South Wales, there has been significant discussion of whether an offender's personal circumstances are ever relevant to the assessment of the objective gravity of the offence. While some decisions have suggested that these factors play no part in assessing the objective gravity of an offence, many authorities have interpreted *Muldrock* as meaning that an offender's personal circumstances will be relevant to this assessment where they are causally related to commission of the offence.[29]

[27] Sentencing Advisory Council, *Sentencing Guidance in Victoria* (2016) p. 168 [7.64].
[28] *Williams v R* [2012] NSWCCA 172, [42].
[29] See, for example, *Biddle v R* [2017] NSWCCA 128; *McLaren v Regina* [2012] NSWCCA 284, [25]–[30]; *Elturk v R* [2014] NSWCCA 61, [33]–[35]; *Martin v R* [2015] NSWCCA 6, [53]; *Cowan v R* [2015] NSWCCA 118, [40] and [61]–[62]; *Ayshow v R* [2011] NSWCCA 240, [39]. For a contrasting view, see *Badans v R* [2012] NSWCCA 97, [53].

In the context of sexual offences in particular, New South Wales appellate decisions have taken the approach that an offender's personal circumstances may be relevant to the assessment of the "nature of the offending". For instance, the age difference between a sexual offender and a victim can be relevant to the assessment of the seriousness of the offending.[30]

The standard sentence as a legislated guidepost

Consistent with the High Court's interpretation of the New South Wales scheme in *Muldrock*, it is suggested that the standard sentence should be seen as an additional marker of the seriousness of a particular offence. It is not, however, "a measure of the appropriate punishment in the particular case or a number in the calculation of that sentence. Its significance in a particular case as a marker will vary."[31]

Courts should not use the standard sentence as a starting point when imposing sentence. Nor should it be considered to have determinative significance.[32]

This contrasts with the position that existed in New South Wales before the decision in *Muldrock*. That position was that the court was required to ask whether there were reasons for not imposing the standard non-parole period. In having regard to that question, the court needed to note the objective seriousness of the offence in light of the facts relating directly to its commission, including those relating to the reasons for offending, in order to determine whether the offence fell within the mid-range of seriousness for the relevant offence, as well as any aggravating or mitigating circumstances that were present.[33]

Standard sentencing not two-stage sentencing

In applying the standard sentencing scheme, courts will need to be careful to ensure that they do not engage in two-stage sentencing. That is:

> The method of sentencing by which a judge first determines a sentence by reference to the 'objective circumstances' of the case. This is the first tier of the process. The judge then increases or reduces this hypothetical sentence incrementally or decrementally by reference to other factors, usually, but not always, personal to the accused. This is the second tier.[34]

This may be contrasted with the instinctive synthesis approach to sentencing, which McHugh J describes as:

> The method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.[35]

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[30] *R v AA* [2017] NSWCCA 84, [55].

[31] *AB v R* [2013] NSWCCA 160, [51].

[32] *Muldrock v The Queen* (2011) 244 CLR 120, 132. See also *Sinkovich v R* [2014] NSWCCA 97, [21].

[33] See *R v Orchard* [2013] NSWCCA 342, [183].

[34] *Markarian v The Queen* (2005) 228 CLR 357, [51] (McHugh J).

[35] *Markarian v The Queen* (2005) 228 CLR 357, [51] (McHugh J).

Non-parole periods for standard sentence offences

Specific provisions apply when setting a non-parole period for a standard sentence offence, or a non-parole period for a standard sentence offence in combination with other offences. These provisions also apply when setting a new single non-parole period where the further sentence is a sentence of imprisonment for a standard sentence offence.[36]

Unless the court considers that it is in the interests of justice not to do so, it must set a non-parole period of at least:

- 30 years, if the offender is being sentenced to life imprisonment
- 70% of the relevant term if that term is 20 years' imprisonment or more
- 60% of the relevant term if that term is less than 20 years' imprisonment.[37]

The "relevant term" is the sentence for the standard sentence offence when sentencing for just that offence, or the total effective sentence, when sentencing for a standard sentence offence in combination with other offences.

If a court imposes a non-parole period when sentencing an offender for a standard sentence offence or offences, and that non-parole period is shorter than the relevant minimum term, it must give reasons for doing so.[38] As part of these reasons, the court must refer to the standard sentence for the relevant offence or offences and explain how the sentence that it imposed relates to that standard sentence or sentences.[39]

These minimum non-parole periods do not apply when sentencing an offender for an offence or offences that are not standard sentence offences.[40]

The inclusion of minimum non-parole periods deviates from the recommendations made by SAC in its Report, where it noted that it did not:

> Consider it appropriate for the standard sentence scheme to include a minimum non-parole period, given that the operation of the scheme is premised on the preservation of judicial discretion. A recent Council report on the imposition of non-parole periods in Victoria shows no evidence of any issues with the way in which Victorian courts fix non-parole periods. Further, to require a minimum proportion non-parole period would conflate two models of sentencing guidance – namely a defined term and a defined percentage scheme.[41]

[36] Sentencing Act s 11A(2).
[37] Sentencing Act s 11A(4).
[38] Sentencing Act s 5B(4)(2).
[39] Sentencing Act s 5B(5).
[40] Sentencing Act s 11A(6).
[41] Sentencing Advisory Council, *Sentencing Guidance in Victoria* (2016) p. xxix.

Reasons required for standard sentence offences

At the time that a court sentences an offender for a standard sentence offence, the court must state its reasons for imposing the sentence, and its reasons for imposing any non-parole period that is shorter than the percentage minimum non-parole period specified for the standard sentence offence.[42]

The court's reasons must refer to the standard sentence, and explain how the sentence given relates to that standard sentence.[43]

Transitional matters

The standard sentence scheme applies to offences alleged to have been committed on or after the date on which the scheme commences.[44]

If an offence is alleged to have been committed between two dates, one before and one after the date on which the scheme commences, the offence is deemed to have alleged to have been committed on the earlier date.[45]

A court is not precluded from taking into account the effect the scheme will have on current sentencing practices when sentencing an offender for an offence committed before the scheme commences.[46] According to the Explanatory Memorandum to the Sentencing Amendment (Sentencing Standards) Bill 2017, this acknowledges that while offences committed before the Act's commencement:

> will continue to be sentenced in accordance with "old" (pre-standard sentence scheme) law, the requirement to consider current sentencing practices under section 5(2)(b) of the Sentencing Act 1991 will mean that sentencing for these "old" offences may still be indirectly impacted by the standard sentence scheme. That is, commencement of the standard sentence scheme is expected to increase the length of imprisonment terms for standard sentence offences and, over time, this will be reflected in current sentencing practices. While new section 5B(2) of the Sentencing Act 1991 (inserted by clause 19) will prevent a court from having regard to the standard sentence when sentencing an offender for an "old" offence, standard sentencing may indirectly influence the sentencing outcome through consideration of current sentencing practices.[47]

[42] Sentencing Act s 5B(4).

[43] Sentencing Act s 5B(5).

[44] Sentencing Act s 162(2).

[45] Sentencing Act s 162(4).

[46] Sentencing Act s 162(3).

[47] Sentencing Amendment (Sentencing Standards) Bill 2017, Explanatory Memorandum, cl 42.

Extension of serious offender offences to arson offences committed outside Victoria

Clause 5 of Schedule 1 to the Sentencing Act applies the serious offender provisions of the Sentencing Act to certain arson offences. This clause has been amended so that the list of arson offences to which the serious offender scheme applies extends to any other offence, the essential elements of which consists of elements that constitute any of the offences already contained in clause 5.[48]

Changes to guideline judgment scheme

The Act also makes significant changes to the guideline judgment scheme, as provided for in Part 2AA of the Sentencing Act. These amendments are based on recommendations made by SAC in its Report.[49] In summary, the amendments:

- Enable the Attorney-General to apply to the Court of Appeal to give a guideline judgment or review one the Court has given previously, if the Attorney-General believes that is necessary in order to address a broad or systemic sentencing issue, and it is in the public interest to make an application.[50]
- Provide for guideline judgments to include numerical guidance as to the appropriate level or range of sentences for a particular offence or class of offences. [51]
- Amend the procedural requirements for the making of guideline judgments. [52]

[48] *Sentencing Amendment (Sentencing Standards) Act 2017* s 43. This section commenced on 29 November 2017.
[49] Sentencing Advisory Council, *Sentencing Guidance in Victoria* (2016), recommendations 4-6.
[50] Sentencing Act s 6ABA.
[51] Sentencing Act s 6AC(eb).
[52] Sentencing Act s 6AD(1). Currently, these requirements are only imposed on the Court of Appeal where it decides to give or review a guideline judgment.