Jeopardising Justice for What? Keeping Sentence Indications in Victoria

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Abstract

In 2004, the Office of the Victorian Attorney General released the Justice Statement Part I, which outlined a ten-year plan to modernise Victoria’s criminal justice system. A key initiative emerging from this idealistic reform agenda involved a sentence indication scheme for indictable offences, on the basis that it would increase clearance rates; thus in theory, benefiting all parties. In line with the recommendations of a report compiled by the Victorian Sentencing Advisory Council (VSAC) in 2007, a pilot sentence indication trial commenced in the County and Supreme Courts, with the sunset clause that it be evaluated after two years and either fully integrated into legislation or abolished (Criminal Procedure Act 2009 (Vic) ss 208–9, s 384). In February 2010, the VSAC released its evaluative report recommending the scheme be maintained in its current form. This paper critically analyses some potential flaws in the arguments of the VSAC report, with a particular focus on the ineffectiveness of the scheme, and its potential to result in unjust outcomes.

Introduction

In 2004, the Victorian Office of the Attorney General (2004:24) released its ten-year law reform plan, which focused on addressing issues of equality, accessibility, efficiency and effectiveness. In response, there have been a breadth of changes in Victoria, including the enactment of the Victims’ Charter Act 2006 (Vic) and the Charter of Human Rights and Responsibilities Act 2006 (Vic), and reforms to various statutes (Crimes Act 1958 (Vic); Criminal Procedure Act 2009 (Vic); Evidence Act 2009 (Vic)). A key initiative emerging in the former government’s idealistic agenda involved a sentence indication scheme for indictable offences, on the premise that encouraging early guilty pleas can benefit all parties through increased clearance rates and reduced backlogs in the courts. Thus in line with the recommendations of a Victorian Sentencing Advisory Council (VSAC) report (2007), a pilot trial was implemented into Victoria’s County and Supreme Courts, governed by the Criminal Procedure Act 2009 (Vic) ss 208–9.2

Indictable sentence indication schemes are not exclusive to Victoria. They operate by case law authority in the United Kingdom (R v Goodyear) and informally in New Zealand (New Zealand Law Reform Commission 2005). New South Wales (NSW) also employed a scheme for three years in the mid 1990s, although this was ultimately abandoned because inappropriate sentences were being indicated, and it failed to achieve its anticipated efficiency gains (Criminal Procedure (Sentence Indication) Amendment Act 1992 (NSW); Spears et al 1994; Weatherburn et al 1995; Weatherburn and Lind 1995). It was this failure of the NSW process, as well as concerns specific to the proposed Victorian scheme identified in parliamentary debates, which resulted in a sunset clause being included in the legislation to require the VSAC to review the scheme by July 2010, and a decision be made on its future (Criminal Procedure Act 2009 (Vic) s 384; Victorian Parliament 2007:4355).

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2 Prior to the enactment of the Criminal Procedure Act 2009 (Vic), the scheme was governed by s 23A of the Crimes (Criminal Trials) Act 1999 (Vic). A pilot sentence indication trial for summary offences was also implemented in the Magistrates’ Court in July 2008, governed by ss 60–1 of the Criminal Procedure Act 2009 (Vic). For a brief discussion of this scheme, see Flynn (2009, 2010).
This paper explores some potential flaws in the VSAC review, which recommended the scheme be maintained in its current form. In particular, it explores some of the issues pertaining to justice and just outcomes which are raised by the possible pressures that indications place upon accused persons to plead guilty, the potential inaccuracy of the indications, and the minimal impact the scheme has had on clearance rates. While sentence indications may not seem immediately provocative—and nor do they draw the endless attention of populist media outlets—this paper intends to stimulate discussion regarding the continued use of this scheme, and highlight it as an area worthy of critical consideration.

The Review

Victoria’s sentence indication scheme allows an accused person, or their representative, to request an indication from the judge of whether they are likely to receive a custodial or non-custodial sentence if a guilty plea were entered (Criminal Procedure Act 2009 (Vic) s 208). If a non-custodial indication is given, and the accused person pleads guilty at the next available opportunity (either immediately after the indication or at the next pre-trial hearing), this is then binding on the judge in later sentencing; therefore, a custodial penalty cannot be imposed. However, if an accused person pleads guilty to a custodial indication, this can be changed to a non-custodial penalty after the revelation of all material at the later plea hearing (Criminal Procedure Act 2009 (Vic) ss 209(1)(a)–209(1)(b)). If an indication is given, but the accused does not plead guilty, the case must be relisted before another judge, unless all parties agree otherwise (Criminal Procedure Act 2009 (Vic) s 209(2)). The right to appeal against the sentence is not affected by the scheme, and no restrictions exist on the type of crimes eligible; however, the decision to grant an indication is subject to non-reviewable judicial discretion (Criminal Procedure Act 2009 (Vic) ss 208(4), 209(6)).

The VSAC evaluated the operation of the scheme from 1 July 2008 until 30 June 2009. Data on the number and outcome of indications was obtained from the Office of Public Prosecutions, as no court records pertaining to the scheme were maintained. Interviews were conducted with relevant stakeholders (judicial officers, legal practitioners, witness assistance service employees), and consultations occurred with the major legal associations (Victoria Legal Aid, Criminal Bar Association, Law Institute of Victoria) (VSAC 2010).

During the 12-month review, 27 indications were given, 25 of these in the County Court (VSAC 2010:15). Eighteen indications were for non-custodial penalties; all were accepted (VSAC 2010:26). Nine indications were for custodial penalties, five of which were accepted; however, defence practitioners interviewed in the review noted that some custodial indications included a statement from the judge suggesting that after hearing the plea material, there was a possibility the penalty would be reduced to a non-custodial sentence (VSAC 2010:26). Thus it was arguably more a half custodial/half non-custodial indication to which they pleaded guilty. The most common offences for which an indication was sought were intentionally causing injury and intentionally causing serious injury, followed by drug trafficking and robbery (VSAC 2010:18).

At various stages in the review, the VSAC (2010:10) suggested there was too little data to make conclusive observations or recommendations, stating: ‘in the course of its consultations, the Council has been made aware of a number of issues relating to the operation of the scheme that may require some changes. However, the very small number of cases to date precludes any firm recommendations being made.’ Despite observing this, the VSAC (2010:83) ultimately recommended the scheme be ‘continued indefinitely, consistent with the legislation framework in … the Criminal Procedure Act 2009 (Vic)’.

Pressures on Accused Persons

Many criticisms have been applied to the scheme since its initial proposal. These have ranged from its negative impact on victims, to the possibility for judge shopping or inappropriate indications to be...
given, in a similar vein to the NSW process (Sulan 2000; Victorian Parliament 2007:4345; Weatherburn and Lind 1995). Significant in the context of this discussion are the criticisms that responding to court inefficiency was being prioritised above the interests of justice, and the scheme appeared incompatible with other legislation, particularly the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (‘Charter’), which provided increased recognition of accused person’s rights within criminal proceedings (Flynn 2009; Victorian Parliament 2007:4351). This was a prominent issue recognised by the Scrutiny of Acts and Regulations Committee (SARC) (2007), which identified the incompatibility of sentence indications with s 25(2)(k) of the *Charter*: that people charged with a criminal offence must ‘not be compelled … to confess guilt’. The potential for indications to place undue pressures upon accused persons to plead guilty was also a concern identified in parliament (2007:4348):

> What this legislation will do is introduce a system where people who are disadvantaged and not able to make the judgements which are so fundamental to their future will be under enormous pressure to plead guilty, simply because they think that course of action is better than going to trial.

The potential for the scheme to pressure accused persons into pleading guilty is further strengthened by the requirement that the judge make a statement when giving an indication that a more severe sentence is likely if the case proceeds; thus accused persons may interpret the indication such that they should plead guilty immediately, or face a more severe sentence by contesting the case. As the SARC (2008) noted, ‘this procedure may place such defendants under heightened pressure to plead guilty, especially if the sentence indicated is a generous one’. The requirement for judges to make this statement was justified in the VSAC’s 2007 report, on the basis that the ‘revelation from the judiciary that a more severe sentence would be indicated if a guilty plea was not entered at this point in the process … [will] increase the transparency of the sentence indication’ (VSAC 2007:89). This clarification, however, is likely to have a substantially negative influence on an accused person’s pleading decision; as Willis (1985:141) notes, ‘even for an innocent defendant, the guilty plea with an expectation of leniency can be an attractive soft option’.

While the mere possibility of a harsher sentence if the indication is rejected may pressure an accused person into pleading guilty, when this fact is directly stated to an accused person by a judge, the potential for a coerced guilty plea is increased. The negative impacts of judicial involvement in any process that provides pleading incentives to accused persons were recognised by Baldwin and McConville (1977:33) in their analysis of plea bargaining in the United Kingdom, where they claimed, ‘if the judge involves himself [sic] … all talk of the voluntariness of the defendant’s plea is meaningless. So far as the defendant is concerned, the question of guilt or innocence is no longer an issue’. These concerns can be readily applied to the Victorian scheme, given the judge’s role in stating the potential consequences of not pleading guilty when providing an indication. As McConville and Baldwin’s (1981:67) later research demonstrates, ‘it hardly needs stressing that faced with inducements … the weak, naïve, or less resilient might well be tempted to forego their right to trial and instead plead guilty’.

In responding to such arguments, the VSAC (2010:53) maintained that it did not find any evidence of pressures on accused persons to plead guilty after receiving an indication. However, this conclusion was based on consultations with defence practitioners only, which creates an interesting power dynamic, as it would be unusual for those practitioners involved in the process to say their client(s) felt overtly pressured to plead guilty. What the accused person might say, as highlighted by the pioneering work of Baldwin and McConville (1977, 1981), may differ somewhat. But even within the comments of defence practitioners in the review, some interesting statements regarding pressure were made which seemed to point to an acceptance that some pressure was applied to accused persons, but that the practitioners considered this to be at an ‘acceptable’ level. One participant claimed, ‘it is an inducement, but it is not an improper one … it is a reasonable inducement’ (VSAC 2010:53). Another participant claimed ‘there is a lot of pressure within the system for defendants to plead guilty … The question is whether or not it is improper pressure’ (VSAC 2010:53).
There is quite a significant difference between claiming there was no evidence of any pressures applied to accused persons in the indication process, and the statements given by these participants. This difference is particularly relevant in the context of non-custodial indications, because the judge is effectively saying ‘if you plead guilty now you will not go to gaol, but if you do not plead guilty, you may face a more severe penalty’. Thus despite the claims made by the VSAC (2010) and the Victorian Office of the Attorney General (2010) in accepting their recommendations, it is naive to simply accept or assume these are ‘reasonable’ pressures and inducements, particularly when combined with any additional vulnerabilities that may impact on an accused person’s capacity to make decisions, such as mental illness or drug addiction (Baldwin and McConville 1977; Mack and Roach Anleu 2000:82). The legitimacy of the VSAC’s decision to continue using the scheme is thus questionable, particularly given the likely implications arising in terms of just outcomes, and in the context of the ‘access’ and ‘equality’ aspects inherent to the ten-year law reform agenda (Victorian Office of the Attorney General 2004:24).

Impact on Court Efficiency and Expectations of Just Outcomes

Further to potentially encroaching upon the right not to be compelled to confess guilt, the SARC (2007) noted that the scheme is somewhat contradictory to s 25(2)(c) of the Charter: to have a trial heard without unreasonable delay. The SARC (2007:10) observed that requiring cases to be listed before a new judge if an indication is rejected may ‘result in significant delays in [ultimately hearing] the defendant’s trial’. They also noted that trials might be considerably delayed where the Crown successfully appeals against the sentence resulting from an indication, as the accused maintains the right to withdraw their guilty plea. As such, they questioned whether these provisions may ‘engage a defendant’s Charter right to be tried without unreasonable delay’ (SARC 2007:11), which in turn raises a number of issues pertaining to fairness and justice.

A related concern is the possibility that these provisions, and the existence of the scheme itself, will become simply another step in an already elongated pre-trial system. There is also the potential for indications to become another procedure used to prolong cases (SARC 2008). Such concerns were validated in December 2008, when the Office of Public Prosecutions’ internal policy on challenging indication applications was amended to address deliberate delay tactics (Director’s Policy 4.7.1 2008 (Vic)). This concern was further validated in the VSAC review (2010:31), which found that in 22 of the 25 indication requests in the County Court, at least some delay was created from requiring additional hearings be held, or adjournments given.

The scheme’s effectiveness in terms of its impact on clearance rates was a primary focus of the review. In evaluating this issue, the VSAC (2010:23) focused on the County Court (most likely because only two indications were given in the Supreme Court, thus there was no impact on efficiency levels to report), and it found that sentence indications helped resolve less than one per cent of the 2231 cases finalised during the review period. In an attempt to bolster this figure, under the guise of attaining more accurate data, the VSAC argued that due to the timing of when indications can be sought (after four pre-trial hearings have already occurred), any guilty pleas already entered by this stage, and those cases resolved at trial, needed to be discounted. After removing this data, it was argued that sentence indications could only assist in finalising 553 County Court cases, of which the number resolved specifically by sentence indications leapt to a significant 4.2 per cent (VSAC 2010:23–4). At this stage, even the VSAC (2010:31,60) acknowledged the minimal impact on clearance rates, stating ‘while there has been some impact in terms of increased resolution of cases, the contribution that this would have made on case flow has been limited’. It further stated that ‘those involved in the scheme, whom the Council was able to speak with … reported minimal impact on case flow and workload across the system’ (VSAC 2010:82).

Despite this finding, the VSAC highlighted the 4.2 per cent resolution rate as demonstrating the scheme’s potential, and noted the 100 per cent acceptance rate of non-custodial indications as a basis for claiming that once used more regularly, particularly for non-custodial indications, the scheme
would impact on clearance rates. The legitimacy of this argument, however, is diminished in the context of Victoria’s law and order political climate, where the ability to use suspended sentences as a punishment for many indictable offences has been repealed by s 12 of the *Sentencing Amendment Act 2010* (Vic). Suspended sentences were the most common sanction imposed after an accused person pleaded guilty to a non-custodial indication during the review, used in 16 of the 18 cases (VSAC 2010:35). Thus without the suspended sentence option, the number of non-custodial indications that can be given or accepted is likely to be significantly reduced. Accordingly, the justification for retaining indications based on the ‘potential’ of the scheme is limited, as it is unrealistic to expect the scheme would achieve significant increases in clearance rates, if there were an increase in the number of custodial indications given.

**Inaccuracies in Indications**

The decision to recommend the continued use of the scheme in light of Victoria’s political climate also seems somewhat incompatible with the increasing influence of emotionally driven/punitive tendencies in law and order politics. As Freiberg and Carson (2009:13) observe, legal policy, and sentencing reform in particular, has less to do with ‘reducing crime rates and more about a re-assertion of social values’. This argument is largely linked with concerns surrounding the lack of evidentiary material upon which indications are based and the absence of any specifications of what evidentiary material is required, both of which could lead to injustices, inconsistencies and inaccuracies and, in turn, a likely dissatisfied and emotional community (Flynn 2009:259; *R v Gemmell*).

The legislation requires that the evidence prepared by the filing of the presentment be available to the judge, who can then use non-reviewable discretion to determine whether this is sufficient to provide an indication (*Criminal Procedure Act 2009* (Vic) s 208(4)). Although some concerns surrounding inadequate information being available are reduced by the broad nature of indications, the judge’s ability to make an informed decision as to whether a custodial or binding non-custodial order is appropriate remains restricted. This is particularly problematic because much of the accused person’s personal mitigating and aggravating factors—including their circumstances at the time of offending, psychiatric/intellectual problems, drug addictions, future prospects and their ‘response to the offence and prosecution (e.g. remorse, acts of reparation)’ (Jacobson and Hough 2007:10)—may be unknown to the judge at the time of the indication hearing.

In addition to the issues of justice and fairness arising from not having adequate information pertaining to the accused available to judges in sentencing, there are also potential consequences that arise in terms of sentencing outcomes. These are demonstrated by a recent study conducted in the United Kingdom, which found that in almost one-third of cases where the sentence was reduced from custodial to non-custodial, the major reason cited was personal mitigation (Jacobson and Hough 2007:12). Judges further identified at least one factor of personal mitigation as relevant to the sentence imposed in almost half of the 162 cases observed (Jacobson and Hough 2007:12). Importantly, judges also cited personal factors as the primary reason that a non-custodial penalty could be changed to a custodial penalty; for example, if at the plea hearing the accused had failed to address the problems that led to their criminal behaviour, such as drug or gambling addictions, they were more likely to receive a custodial sanction than a non-custodial sanction (Jacobson and Hough 2007:12,40). This is a vital finding in the context of Victoria’s scheme, in light of the certainty assured by the legislation, which binds the court to its original non-custodial decision. Thus there is a strong basis for arguing that without all relevant information pertaining to the accused, Victorian judges cannot be in an appropriate position to accurately give a custodial or binding non-custodial indication.

In exploring this issue, the VSAC (2010:32) focused on the scheme’s flexibility, in that, of the four accused persons who pleaded guilty after receiving custodial indications, three had sentences 3

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3 S 12 of the *Sentencing Amendment Act 2010* (Vic) introduces s 27(2B) into the *Sentencing Act 1991* (Vic) which reads that, ‘despite subsection (1), a court must not make an order suspending the whole or a part of a sentence of imprisonment imposed on an offender for a serious offence’. This is applicable for serious offences committed after 1 January 2012.
reduced to non-custodial penalties.\(^4\) The VSAC (2010:33) indicated that this was a positive because it meant ‘the material tendered at the full plea can have an effect on the sentence ultimately imposed’. Therefore, any concerns pertaining to fairness or justice emerging from the absence of evidentiary material at the initial indication hearing can be theoretically addressed in the later plea hearing.

Although cited as a positive, this is another example of how the indication process is ineffective, potentially inaccurate and unjust. If three of the four custodial indications were deemed inaccurate after the revelation of all relevant sentencing material, how many binding non-custodial indications were deemed inaccurate after the plea hearing? The flexibility assigned to custodial indications allows for these potential injustices to be corrected, but because there is no scope in the legislation for non-custodial indications to be changed upon the revelation of all material, it raises questions as to how many injustices were not righted in these cases. Ultimately, this ‘benefit’ strengthens concerns surrounding the absence of evidentiary material available to the judge, and fails to address the fairness, accuracy or injustice concerns surrounding the scheme in any way. The acceptance of these outcomes as a benefit also fails to take into consideration the importance of social values and emotions within the policy-making process, which Freiberg and Carson’s (2009:29) analysis suggests can result in a reform that is less likely to meet its objectives, including public approval.

**Conclusion**

The rationale behind introducing sentence indications is legitimate and important. Court backlogs and decreasing clearance rates are major and ongoing concerns in Victoria’s higher courts. While the problems of delay and inefficiency must be addressed, the scheme, in its current form, is not an appropriate mechanism to do so, particularly given the potential inaccuracy of indications, the possible injustices created for accused persons, and because there remains no data to support the claim that by jeopardising justice in this way, there will be a positive impact on clearance rates.

As noted in the introduction, sentence indications are not immediately provocative; they do not feature in law and order campaigns; and, despite being a sentencing process, they do not receive significant media attention. It is thus this author’s concern that this scheme is simply slipping under the radar, like so many procedural reforms that are quietly implemented. But it is important that the flaws and potential injustices inherent to this scheme are recognised and, in a climate of legal change, the scheme should not be permitted to be lost within an idealistic reform agenda.

**References**


\(^4\) Five accused persons pleaded guilty to custodial indications during the review, however one of these sentences had yet to be determined by the conclusion of the review period (VSAC 2010:35).


Legislation

*Charter of Human Rights and Responsibilities Act 2006* (Vic)

*Crimes Act 1958* (Vic)

*Crimes (Criminal Trials) Act 1999* (Vic)

*Criminal Procedure Act 2009* (Vic)

*Criminal Procedure (Sentence Indication) Amendment Act 1992* (NSW)

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Cases

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