



Shane Rattenbury MLA

Attorney-General
Minister for Consumer Affairs
Minister for Water, Energy and Emissions Reduction
Minister for Gaming

Member for Kurrajong

Mr Tom Duncan
Clerk
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Our ref: PRO22/3235

Dear Mr ~~Duncan~~ *Tom*

Thank you for your letter of 11 October 2022, regarding petition 22-25 lodged by Mr Jeremy Hanson MLA.

The petition raises concerns about recidivism, particularly for dangerous driving offences, and calls on the Legislative Assembly to review and consider introducing 'Matthew's Law' – sentencing guidelines.

I note that it has been made clear since that the call for sentencing guidelines is not intended as a call for minimum mandatory sentences.

The ACT Government is not aware of sentencing guidelines in use in any jurisdiction in Australia. Sentencing guidelines are in place in England and Wales and they provide a 'starting point' sentence for offences based on an assessment of objective seriousness. Judicial officers are required to follow these guidelines and must provide reasons for departing from them in their judgments. These guidelines are developed by the Sentencing Council for England and Wales as an advisory body to the Ministry of Justice and are informed by research and consultation.

The ACT Government understands that Victoria introduced a similar approach, known as baseline sentencing in 2014, which set baseline prison sentences for the most serious offences, which included culpable driving causing death with a baseline sentence of 9 years.¹ Minimum non-parole periods were also introduced as part of the baseline sentencing scheme. Baseline sentences in Victoria were however abolished after less than two years of operation.

¹ *Sentencing Amendment (Baseline Sentences) Act 2014 (Vic) s 16.*

This followed a Victorian Court of Appeal ruling that denounced baseline sentencing provisions as unworkable.² The scheme was heavily criticised by stakeholders, including for removing judicial discretion, and for being cumbersome and flawed.³ Before the scheme was abolished, Victoria's Sentencing Advisory Council also noted it could have unintended effects on the rate and timing of guilty pleas for serious offending.⁴ In 2018 Victoria introduced 'standard sentences' for 13 offences including culpable driving causing death.⁵ At this stage it is unclear whether this reform has affected rates of offending.

The ACT Government cautions against the introduction of sentencing guidelines without evidence that they effectively contribute to reducing the offences being committed. While I do note the proposal is not for minimum mandatory sentences, other Australian experiences with minimum mandatory sentencing raise some issues that are relevant. The primary problem is the exclusion of judicial consideration and decision-making. Mandatory sentences remove the ability of the judicial officer, after taking submissions from all parties, to customise the sentence to the individual circumstances. They prioritise punishment over all other sentencing purposes.

Mandatory sentences also force sentences to be considered only within the dimension of full-time imprisonment. Evidence continually shows that a range of sentencing options is important, to address the particular criminogenic factors of the individual. Where a singular sentence type is prioritised exclusively, this limits the ability of the court to sentence based on the best prospects for the individual to stop future offending. I would note in this respect that many cases reported on in relation to the campaign for these petitions have involved some stakeholders calling for imprisonment even when the prosecution has not advocated for it.

Guideline sentences, as far as they are detailed, would not exclude the ability of our courts to deliver individualised justice to the same extent. Presumably the circumstances where a guideline is departed from would be wider than the (usually very narrow) circumstances needed to depart from a mandatory sentence. As such, the lessons learnt about mandatory sentencing's ineffectiveness are not directly transferrable, but they are still relevant to consider.

Any recommendation to introduce a guideline sentencing scheme in the ACT would need to involve extensive consultation with the community, a range of experts, the legal profession and judicial officers.

An alternative to sentencing guidelines may be guideline judgements. These are Court of Appeal decisions which give guidance to judicial officers in relation to how they should sentence offenders. Legislation is in place in New South Wales⁶, Queensland⁷ and Victoria⁸ to allow for the issuing of guideline judgments. This legislation permits the Court of Appeal in that jurisdiction to issue guideline judgments of its own motion, and also permits the Attorney-General to apply for guideline judgments.

² *DPP v Walters* [2015] VSCA 303.

³ Sentencing Advisory Council, *Sentencing Guidance in Victoria* (June 2016) p 46.

⁴ Sentencing Advisory Council, *Guilty Pleas in the Higher Courts: Rates, Timing, and Discounts* (August 2015) p 29.

⁵ *Sentencing Amendment (Sentencing Standards) 2017* (Vic).

⁶ *Crimes (Sentencing Procedure) Act 1999* (NSW), div 4.

⁷ *Penalties and Sentences Act 1992* (Qld), part 2A.

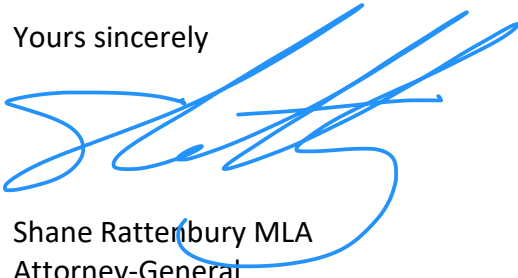
⁸ *Sentencing Act 1991* (Vic), part 2AA.

Victoria's first guideline judgment was made in 2014,⁹ ten years after the enabling legislation was introduced.¹⁰ In NSW there are eight guideline judgments currently in place, one of which relates to dangerous driving.¹¹ The objective of guideline judgments is to reduce inconsistency in sentencing for certain offences. The guideline judgments provide a starting point for legal practitioners to use on sentence, however they do not operate as a 'rule' or 'presumption', instead they are intended to be taken into account only as a 'check, sounding board or guide.'¹²

The ACT Government is undertaking preliminary work to understand how guideline judgments could operate in the ACT. To progress such a project, the ACT Government notes consultation would need to occur with the community, a range of experts, ACT Courts and Tribunal, as well as the legal profession and legal community, prior to any recommendation being made on introducing guideline judgments.

The Government welcomes the referral of this petition to the Standing Committee on Justice and Community Safety, and the potential consideration of these issues by the Committee.

Yours sincerely



Shane Rattenbury MLA
Attorney-General

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⁹ *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342.

¹⁰ *Sentencing (Amendment) Act 2003* (Vic).

¹¹ Supreme Court of New South Wales, *Sentencing Guideline Judgements*,

https://www.supremecourt.justice.nsw.gov.au/Pages/sco2_practiceprocedure/sco2_sentencingguidelinejudgments.aspx

¹² *R v Whyte* [2002] NSWCCA 343 at 113.