AN INDICATION OF INJUSTICE: AN ANALYSIS OF THE PROBLEMS INHERENT TO MAINTAINING THE SENTENCE INDICATION SCHEME IN VICTORIA'S HIGHER COURTS

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This scheme is going to be an absolute disaster! They tried it in New South Wales and that didn't work and now we have it here and the process is very hard to work in a practical sense. It is fraught with a lot of difficulties. The sentencing process is a very delicate one and very difficult, and this process is just creating more steps, more confusion, more difficulties. It will never be a viable scheme in the higher courts (JudiciaryD).[1]

I INTRODUCTION

In 2004, the Victorian Office of the Attorney-General released its platform for reform, the *Justice Statement Part I*. This statement outlined a ten-year, twenty-five step strategic plan to review and modernise Victoria's criminal justice system, with a specific focus on addressing issues of equality, accessibility, fairness and effectiveness.[2] In response, there have been a breadth of changes in Victoria which has seen the enactment of the *Victims' Charter Act 2006* (Vic) and the *Charter of Human Rights and Responsibilities*

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[1] 'JudiciaryD' was a participant in the author's three-year research project examining the justifications for formalising Victorian plea bargaining practices (2006-2009).

[2] Victorian Department of Justice, *New Directions for the Victorian Justice System 2004–2014* (27 May 2004).

Act 2006 (Vic), as well as extensive reviews and reforms to various statutes, including the *Evidence Act 2009* (Vic), *Crimes Act 1958* (Vic) and the *Criminal Procedure Act 2009* (Vic). A key initiative emerging from the former Labor Government's idealistic reform agenda involved a sentence indication scheme, on the premise that encouraging early guilty pleas could reduce court backlogs and the workloads of legal practitioners; the benefits of which extend to all parties by minimising the length of criminal proceedings and offering earlier case resolution, without the expense and trauma associated with running a criminal trial. Thus in line with the recommendations of a report released by the Victorian Sentencing Advisory Council (VSAC) in 2007, a pilot sentence indication trial for summary offences was implemented in the Magistrates' Court in July 2008, governed by ss 60-1 of the *Criminal Procedure Act 2009* (Vic), and a pilot sentence indication trial for indictable offences was implemented into the County (intermediate) and Supreme Courts, governed by ss 208-9 of the *Criminal Procedure Act 2009* (Vic).[3] The legislative guidance pertaining to the higher courts' scheme also included a sunset clause requiring that its effectiveness be reviewed by July 2010, and a decision be made as to whether to maintain it.[4] This review was conducted by the VSAC in 2009, and their report released in February 2010.[5]

This article critically analyses some of the potential flaws in the VSAC review of the sentence indication scheme for indictable offences, which ultimately recommended the scheme be maintained indefinitely in its current form.[6] In particular, it explores the potential inaccuracy of the indications given and the possible impacts of this process on victims. It also examines the minimal impact the scheme has had in reducing court delays and the

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3 Prior to the enactment of the *Criminal Procedure Act 2009* (Vic), the scheme for indictable offences was governed by s 23A of the *Crimes (Criminal Trials) Act 1999* (Vic), and the scheme for summary offences was governed by s 50A of the *Magistrates' Court Act 1989* (Vic).

4 *Criminal Procedure Act 2009* (Vic) s 384; Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4341–4356.

5 Victorian Sentencing Advisory Council [VSAC], *Sentence Indications: A Report on the Pilot Scheme* (2010).

6 Ibid 83.

workloads of legal practitioners, as acknowledged in the review itself,[7] the possible undue pressures indications place upon accused persons to plead guilty, and the inability of the scheme to effect positive changes for the parties for whom the scheme was initially introduced, namely victims and accused persons.[8] While the area of sentence indications may not seem immediately provocative, or saturate the pages of the populist media, this article intends to stimulate discussion regarding the continued use of this scheme, and highlight it as an area worthy of critical consideration. Importantly, the author argues against its continued use in Victoria's higher courts and seeks to highlight the flaws that exist in the VSAC's opposing perspective. Other than to provide a brief overview of the sentence indication scheme operating in Victoria's Magistrates' Courts, this article focuses specifically on the use of sentence indications within Victoria's higher courts.

II METHODOLOGY

This article is informed by the perspectives of Victorian legal practitioners and policy advisors, garnered from 58 semi-structured interviews conducted with 42 participants over a three year period from June 2007 (defence counsel n=11, prosecutors n=19, judiciary n=7 and policy advisors n=5). The interview data shed light on the perspectives of representatives from the Victorian State Office of Public Prosecutions (OPP), Melbourne metropolitan criminal courts, the Criminal Bar Association, Victoria Legal Aid, the Victorian Attorney-General's Department and statutory bodies, including the VSAC. Participants were initially selected based on their availability and professional role, however in order to increase the diversity of responses, prosecutor, defence counsel and judicial participants were representative of a range of experience and seniority. Thus participants ranged from article clerks (n=1), instructing or junior

7 VSAC, above n 5, 31.

8 Victorian Attorney-General's Department, 'The Unveiling of the Victorian Sentencing Advisory Council's Final Report on Sentence Indications and Specified Sentence Discounts' (unpublished, 19 September 2007, Parliament House, Victoria).

solicitors (n=4) and Crown prosecutors and Program Managers (n=8), to education and development staff (n=1), Witness Assistance Service counsellors (n=2), Legal Aid solicitors (n=3) Queens and Senior Counsel (n=3), Magistrates (n=1), Judges (n=4) and Justices (n=2). Within the Victorian OPP, seven of the twelve prosecutorial divisions were represented,[9] and prosecutor, defence counsel and judicial participants were also representative of the three criminal courts, with some participants having experience in more than one court (County and Supreme Courts n=30; Magistrates' Court n=15).

Semi-structured interviews were selected because they are positioned between the ordered technique of structured interviews and the flexible, free-flowing style of in-depth interviews. The questions thus remain sufficiently structured to allow for comparative analysis of responses, while there remains flexibility to probe beyond the questions to seek elaboration and clarification.[10] All participants were asked questions from the same interview schedule which was divided into eleven topic areas, and combined direct and open-ended questions to encourage the expansion of personal opinions, while still allowing for a comparative analysis of responses.[11] The questions were also structured to the professional role of the participant. For example, a prosecutor from the General Prosecutions division with no experience in the Magistrates' Court pre-trial process would not be asked questions concerning the effectiveness of the Magistrates' Court pre-trial Contest Mention hearing. Similarly, a prosecutor from the Committal Advocacy pre-trial division, with no experience outside the pre-trial process, would not be asked questions pertaining to the trial. Consequently, not all

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[9] Policy Advising and Court of Appeal n=3; Specialist Sexual Offences Unit n=4; Committal Advocacy n=4; General Prosecutions n=4; Corruption n=1; Organised Crime n=1; and Witness Assistance Services n=2.

[10] Fiona Devine and Sue Heath, *Sociological Research Methods in Context* (MacMillan, 1999); Irving Seidman, *Interviewing As Qualitative Research: A Guide for Researchers in Education and the Social Sciences* (Teachers Press College, 1998).

[11] The eleven topic areas included: defining plea bargaining in Victoria; benefits of plea bargaining; limitations of plea bargaining; the pre-trial process; court inefficiency and delay; sentence leniency and sentence discounts; sentence indications; victims, their role and rights; accused persons, their role and rights; non-transparency in discretionary decisions and; law reform.

participants were asked every question on the interview schedule; thus when discussing participants' responses, the number of participants who were asked the question is cited in conjunction with the number of participants who supported or opposed the issue. For example, although nineteen prosecutor participants were interviewed, the analysis may state that ten out of twelve prosecutorial participants supported a particular view, because only twelve prosecutors were asked to comment on this issue.

In addition to the initial interviews, fifteen participants were selected for follow up interviews (defence counsel n=3; prosecutors n=7; judiciary n=5). The aim of these interviews was to provide a more detailed assessment of the effectiveness of the sentence indication scheme operating in Victoria's higher courts. The decision as to which participants to approach for follow up interviews was made by determining which participants were most involved in the County and Supreme Courts' pre-trial processes, and therefore most likely to have an in-depth knowledge of, and experience with, the reform. Interviews were only conducted with participants from the prosecution, defence counsel and judiciary groups, as the aim of the interviews were to assess the practical implications of the sentence indication scheme.

The interview data included descriptions of behaviour, institutions, court processes, appearances, actions, interactions, personal narratives and accounts. All participants were also asked to reflect upon whether their views were indicative or representative of the group, agency and/or body they represented. Overwhelming, the participants believed their views were reflective of their colleagues, and others within the legal field not necessarily from their specified group; for example, prosecutors speaking on behalf of defence counsel or members of the judiciary. Only three policy advisor participants indicated that their views were reflective of their opinion only, and not necessarily representative of the agency/body they represented.

Fifty-five interviews were audiotaped and transcribed verbatim, while handwritten notes were made in three interviews. Handwritten notes were only made when participants requested the interview not be audiotaped. The qualitative analysis of the interviews then involved colour-coding the passages based on identified themes, which facilitated thematic and comparative analysis of the data. In order to maintain confidentiality, participants are assigned pseudonyms based on their profession and are referred to as Prosecutor, Judiciary, Defence or Advisor, followed by a randomly assigned sequential letter: for example, ProsecutorA, AdvisorC.

III SENTENCE INDICATIONS AND THE JUSTIFICATIONS FOR THEIR IMPLEMENTATION

Sentence indications involve a judge informing an accused person, prior to the entering of a guilty plea, of the sentence order and/or range that is likely to be received if a guilty plea is entered at that time. Sentence indications are essentially a systems-oriented reform, focusing on "strengthening and increasing the efficiency of existing criminal justice processes", [12] as suggested in the former Government's reform agenda, 'a sentence indication procedure will assist the defendant to weigh up his or her options that should lead to earlier resolution of matters'.[13]

[12] Kay Harris, 'Moving into the New Millennium: Towards a Feminist Vision of Justice' in Eugene McLaughlin, Ross Fergusson, Gordon Hughes, and Louise Westmarland (eds), *Restorative Justice: Critical Issues* (Sage Publications, 2003) 31.

[13] Victorian Department of Justice, above n 2, 29.

The two most common models of sentence indications involve running a dedicated hearing, or inputting the option for indications to be sought within an existing pre-trial hearing.[14] Within these two models, five types of indications are predominantly given: (1) the sentence order (custodial/non-custodial); (2) the sentence order and general outline of severity (short custodial term); (3) the sentence order and specific range (six years imprisonment); (4) the maximum sentence that could be imposed; or (5) the likely sentence if the case proceeded to trial and the accused person were found guilty.[15] For indictable offences, indications are usually requested shortly after the case enters the pre-trial stream in the relevant superior court, as judicial officers in summary courts do not possess the sentencing power for offences that fall outside their criminal jurisdiction.[16]

There has been considerable support expressed for sentence indications in research both nationally and internationally.[17] This support is based primarily upon their potential to attract early guilty pleas by better informing an accused person's pleading decision; the benefits of which can extend to reducing the often drawn-out criminal process for victims and accused persons, and also offer a mechanism to respond to court delays and the increased workloads of legal practitioners.[18] Sentence indications for both summary and

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[14] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report #103, 2006); Asher Flynn, 'Sentence Indications for Indictable Offences: Increasing Court Efficiency at the Expense of Justice? A Response to the Victorian Legislation', (2009) 42 *Australian and New Zealand Journal of Criminology* 244; New Zealand Law Reform Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency* (Report #89, 2005).

[15] Ibid 419.

[16] See *Magistrates' Court Act 1989* (Vic) s 25.

[17] ALRC, above n 14; Arie Freiberg and John Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246; Kathy Mack and Sharon Roach Anleu, *Pleading Guilty: Issues and Practices* (Australian Institute of Judicial Administration, 1995); NZLRC, above n 14; Donna Spears, Patrizia Poletti and Ian MacKinnell, *Sentencing Indication Hearings Pilot Scheme* (Judicial Commission New South Wales, 1994); United Kingdom Office of the Attorney-General, *Fraud Review: Final Report* (Office of the Attorney-General, 2007).

[18] Freiberg and Willis, above n 17; Spears et al., above n 17; VSAC, *Sentence Indications and Specified Sentence Discounts Final Report* (2007a); Don Weatherburn, Elizabeth Matka and Bronwyn Lind, *Sentence Indication Scheme Evaluation: Final Report* (New South Wales Bureau of Crime Statistics and Research, 1995).

indictable offences are therefore not exclusive to Victoria, with schemes operating informally in a number of Australian jurisdictions, including the Contest Mention hearing in Tasmania and the Case Management hearing in the Australian Capital Territory.[19] They have also been informally operating in New Zealand in their pre-trial status hearings.[20]

Sentence indications for summary offences have also been informally given in Victoria's Magistrates Court since the introduction of the Contest Mention in 1993, under s 6 of the *Magistrates Court — Guidelines on Contest Mention 1994* (Vic), for which there has been extensive support of the process from legal practitioners and police prosecutors involved in the hearings.[21] In response to the perceived effectiveness of this scheme, and in line with the recommendations of the VSAC's 2007 report on sentence indications, this process received statutory recognition on 1 July 2008; thus it now officially operates as an optional process within the Magistrates' Court pre-trial procedures. The legislation that guides the scheme permits Magistrates to offer an indication of whether the accused person is likely to receive an immediate custodial sentence or a sentence of a specified type in summary matters or matters involving indictable offences triable summarily, with a value up to $100,000 or a maximum imprisonment term of 5 years.[22]

The formal recognition of the sentence indication scheme for summary offences was supported by 13 of the 15 legal participants

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19 ALRC, above n 14, 412.

20 The New Zealand Ministry of Justice has announced that it will commission an examination into formalised sentence indication processes for summary and indictable offences. See also, Judge Russell Johnson, 'A Looking Glass on Summary Sentencing in New Zealand' (Speech delivered at the National Judicial College of Australia Sentencing Conference, Canberra, Australia, 8 February – 10 February 2008) <http://njca.anu.edu.au/Professional%20Development/programs%20by%year/2008/Sentencing20Conference%202008/papers/Johnson%20R.pdf>; NZLRC, above n 14.

21 VSAC, above n 5, 6; VSAC, above n 18, 88.

22 *Criminal Procedure Act 2009* (Vic) Sch 2.

in the author's research with experience working in the Magistrates' Court pre-trial process. The main reason for this support emerging from participant responses was linked to the potential efficiency benefits of the reform in facilitating earlier guilty pleas, particularly given the sheer volume and the types of matters handled in the court, namely minor summary offences, such as traffic violations. DefenceC claimed, "sentence indications work effectively in the court because it deals with minor matters that don't really need a trial to have their issues sorted out". JudiciaryB similarly maintained that:

> "[B]ecause many summary matters don't involve direct, primary victims and neither the Crown nor defence generally relies upon extensive argument or forensic evidence, the indication is typically straightforward and uncomplicated and it saves going through the motions, when if the defendant had a better understanding of the outcome, he [sic] would plead guilty".

In a similar vein, JudiciaryC claimed that "at the Magistrates' Court a summary is read out, you see what the priors [criminal record] are and you give an indication…the indications are generally jail, no jail, licence, no licence, non-custodial, so it is pretty straightforward". He also pointed to the potentially significant efficiency benefits of indications as a basis for supporting its formal recognition, claiming:

> "The Magistrates' Court would collapse if there were no sentence indications in the Contest Mention, because people go there, they get their indication and they plead. And if all those matters listed for contest went to contest, they would be snowed under like we are in the County Court".

The potential efficiency benefits of summary sentence indications and their perceived effectiveness within the lower courts have resulted in their introduction in courts that hear more serious indictable offences, with the hope of attaining similar outcomes.[23] Sentence indications for indictable offences currently operate by

[23] ALRC, above n 14; VSAC, above n 18.

case law authority in the United Kingdom (UK),[24] informally in New Zealand,[25] and New South Wales (NSW) employed an indication scheme for three years in the mid-1990s, although this was ultimately abandoned in 1996 on the basis that inappropriate sentences were being indicated, and it failed to achieve its anticipated efficiency gains, particularly once the Director of Public Prosecutions began appealing many of the sentences imposed.[26]

There are three common justifications given as the basis for implementing sentence indication schemes within the courts that hear indictable offences, all of which are premised on the scheme increasing the number of early guilty pleas entered. These justifications include: (1) the potential for the scheme to offer a mechanism to respond to court inefficiency by reducing court backlogs and workloads; (2) the potential benefits for accused persons in having more information available to allow them to make an informed pleading decision and; (3) the potential for sentence indications to effective positive changes for victims by increasing the number of early guilty pleas entered, thereby reducing the length of, and their involvement within, criminal proceedings.

The possibility for sentence indications to inform an accused person's pleading decision and offer a mechanism to address court backlogs and delays has commonly been identified as a justification for implementing an indication scheme. As New Zealand Chief District Court Judge, Russell Johnson claims, sentence indications were implemented in New Zealand to "overcome the problem of cracked trials clogging the courts' schedules".[27] Similarly, the NSW scheme was reportedly introduced in response to increasing court delays, at a time when 40 percent of trials were pending for over

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[24] *R v Goodyear* [2005] EWCA Crim 888.

[25] New Zealand Law Reform Commission, above n 14.

[26] *Criminal Procedure (Sentence Indication) Amendment Act 1992* (NSW); Spears et al., above n 17; Don Weatherburn and Bronwyn Lind, 'The Impact of the New South Wales Sentence Indication Scheme on Plea Rates and Case Delay' (1995) 18(2) *University of New South Wales Law Journal* 211; Weatherburn et al., above n 18.

[27] Johnson, above n 20.

twelve months.[28] The argument that court inefficiency will be reduced by sentence indications is based on the notion that one of the main influences on an accused's pleading decision is what their sentence might be, and any uncertainty around this is considered to impact on when, or whether, an accused person will plead guilty.[29] Although Victorian legislation and case law requires that a guilty plea be considered as a mitigating factor in sentencing, such that a discount is applied, because there are no specifications on the discounted amount prior to a plea being entered, this ambiguity does little to inform an accused person's pleading decision.[30] Sentence indications however, can arguably respond to these limitations by offering an outline of the likely sentence or sentence order to be imposed, thus providing the accused person with more detailed information to make an early and informed pleading decision.[31]

In terms of benefiting victims, if sentence indications result in a greater number of early guilty pleas being entered, it not only reduces the length of proceedings, but Mather argues that having accused persons accept responsibility for their actions through an early admission of guilt can allow for victims to experience greater emotional restoration.[32] In addition, an early guilty plea can spare victims from facing accused persons in court or having to experience potentially distressing cross-examination,[33] the benefits of which

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28 Weatherburn et al., above n 18, 1.

29 JUSTICE, *Negotiated Justice: A Closer Look at the Implications of Plea Bargains* (JUSTICE, 1993).

30 *Penalties and Sentences Act 1985* (Vic) s 4; *R v Gray* [1977] VR 147; *R v Morton* [1986] VR 863; *Sentencing Act 1991* (Vic) ss 5(e), 6AAA.

31 Arie Freiberg, 'True Justice at a Discount', *Herald Sun* (Victoria), 5 August 2008, 20; Freiberg and Willis, above n 17.

32 Lynne Mather, *Plea Bargaining or Trial: The Process of Criminal-Case Disposition* (Lexington Books, 1979).

33 John Douglass, *Ethical Issues in Prosecution* (National College of Dallas, Houston University Law Centre, 1988); Rowena Johns, 'Victims and Plea Bargaining: Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services Briefing Paper', (Briefing paper, Parliament of New South Wales, 2002) <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/578C6F10C6D98565CA256ECF00083B4D>.

were identified by the NSW Court of Criminal of Appeal in *R v Thomson*,[34] during which the court stated that:

> A plea permits the healing process to commence. A victim does not have to endure the uncertainty of not knowing whether he or she will be believed, nor the scepticism sometimes displayed by friends and even family prior to a conviction. A victim will also be spared the personal rumination of the events.[35]

The potentially negative impacts of cross-examination have been well documented, particularly in cases involving child or sexual assault victims.[36] However the true benefit of removing the victim's ability to testify in terms of how it affects their sense of closure has been heavily debated.[37] As the NSW Court of Criminal Appeal went on to note in *R v Thomson*,[38] the benefits for victims in not testifying "like the element of remorse…depends on the specific circumstances of the offence and overlaps to a substantial extent with other aspects of the specific case".[39]

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34 (2000) 49 NSWLE 383.

35 Ibid 120.

36 David Brereton, 'How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault trials' (1997) 37(2) *British Journal of Criminology* 242; Sue Lees, *Carnal Knowledge: Rape on Trial* (Penguin, 1997); Mike McConville, 'Plea Bargaining' in Michael McConville and Geoffrey Wilson (eds), *The Handbook of the Criminal Justice Process* (Oxford University Press, 2002); Paul Rock, *The Social World of an English Crown Court* (Oxford University Press, 1993).

37 Bree Cook, Fiona David and Anna Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia* (Research and Public Policy Series #19, 1999); Michael Flatman and Mirko Bagaric, 'The Victim and the Prosecutor', (2001) 6(1) *Deakin University Law Review* 238; Johns, above n 33; Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002).

38 (2000) 49 NSWLR 383.

39 Ibid 120.

IV VICTORIA'S SENTENCE INDICATION SCHEME FOR INDICTABLE OFFENCES

Victoria's sentence indication scheme for indictable offences was officially introduced on 1 July 2008,[40] and amended in March 2009.[41] The scheme operates in both the County and Supreme Courts, and 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.[42] A request for an indication can only be made after the presentment is filed, thus an indication will generally not be sought until after the County Court Case Conference, or after the Supreme Court Section 5 Hearing, which means at least four pre-trial hearings have already occurred.[43] Indication requests can generally only be made once, and the Crown can challenge an accused person's request, in which case a hearing is held before the judge to determine the suitability of an indication being given.[44]

The scheme adopts some of the recommendations outlined in the 2007 VSAC report proposing the introduction of sentence indications in Victorian criminal courts. In particular, it adopts the provisions that seek to offer some protection to accused persons, whereby if a non-custodial indication is given and the accused person pleads guilty at the next available opportunity, which can either be immediately after the indication is given, or at the next pre-trial hearing, this is binding on the judge in later sentencing the accused person.[45] In other words, the judge cannot then impose a custodial penalty. If an accused person pleads guilty to a custodial indication however, this can be reduced to a non-custodial penalty

40 *Crimes (Criminal Trials) Act 1999* (Vic) s 23A.
41 *Criminal Procedure Act 2009* (Vic) ss 208–9.
42 *Criminal Procedure Act 2009* (Vic) s 208.
43 *Criminal Procedure Act 2009* (Vic) s 208. This includes the arraignment, committal mention, committal hearing and the case conference (County Court) or section 5 hearing (Supreme Court).
44 *Criminal Procedure Act 2009* (Vic) s 208(1)(b).
45 *Criminal Procedure Act 2009* (Vic) ss 209(1)(a)-(1)(b).

after the revelation of all relevant sentencing material at the later plea hearing.[46] Further to these 'protections', because the decision whether to provide an indication is based on non-reviewable judicial discretion,[47] the scheme requires that if the judge rejects the accused person's request for an indication, or the accused person rejects the indication given, a new judge must be assigned to the case for any subsequent pre-trial hearings and for the trial, unless all parties agree otherwise.[48] If a new judge is assigned, they are not bound by the original judge's decision not to grant an indication, or if a guilty plea or finding ultimately results in the case, they are not bound in any way by the original indication in determining the accused person's sentence.[49]

In contrast to the 2007 VSAC report, which recommended restricting the use of indications in sexual assault matters, the legislated scheme does not place restrictions on the type of crimes eligible for the scheme.[50] Moreover, it does not specifically require prosecutors to consult with victims or ascertain their view, prior to the indication hearing. Importantly however, the right of either party to appeal the ultimate sentence imposed is not affected by the indication process.[51]

V THE VSAC REVIEW

The review into the effectiveness of Victoria's sentence indication scheme focused on its operation from 1 July 2008 until 30 June 2009. Data on the number and outcome of sentence indications were obtained from the OPP, as no official court records pertaining to the scheme are maintained. Interviews were conducted with relevant stakeholders including judges, legal practitioners and Witness

46 *Criminal Procedure Act 2009* (Vic) ss 209(1)(a)-(1)(b).
47 *Criminal Procedure Act 2009* (Vic) ss 209(1)(a)-(1)(b).
48 *Criminal Procedure Act 2009* (Vic) s 209(2).
49 *Criminal Procedure Act 2009* (Vic) s 209(3).
50 VSAC, above n 18, 128.
51 *Criminal Procedure Act 2009* (Vic) s 209(6).

Assistance Service employees from the OPP, and consultations also took place with the major legal associations, including Victoria Legal Aid, the Criminal Bar Association and the Law Institute of Victoria. One of the primary aims of the review was to determine the effectiveness of the scheme, which was measured in terms of its impact on:

> a. Case flow (including the proportion of pleas of guilty in all matters determined and the stage in proceedings at which those pleas of guilty are entered);
> b. Sentencing outcomes;
> c. The key people involved, namely victims and the defendant; and
> d. The resources and operation of the key participating agencies.[52]

During the twelve month review, 27 indications were given, 25 of which were heard in the County Court.[53] Of the 27 indications, there was an 85 percent acceptance rate, whereby 18 indications for non-custodial penalties were given and all were accepted, and nine indications for custodial penalties were given, five of which were accepted; however, defence practitioners interviewed as part of the review identified 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.[54] Thus, it was arguably more a half custodial/half non-custodial indication to which they pleaded guilty. Of the four custodial indications that were rejected, two accused persons pleaded guilty before another judge, and two matters proceeded to trial, both concluding in guilty verdicts.[55]

The most common offences for which an indication was sought during the review period were intentionally causing injury, and intentionally causing serious injury, followed by drug trafficking and robbery offences.[56] Further to this, three applications were made for

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[52] VSAC, above n 5, 2.
[53] Ibid 15.
[54] Ibid 26.
[55] Ibid 27.
[56] Ibid 18.

sentence indications in sexual matters, including the sexual penetration of a child under 16, one manslaughter application was made, and two riot, two deception, two driving causing death, two threats to kill and three recklessly causing injury offences made up the remaining applications.[57]

At various stages in the review, the VSAC 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".[58] Despite observing this, the VSAC did ultimately make the firm recommendation that the scheme be "continued indefinitely, consistent with the legislation framework in…the *Criminal Procedure Act 2009* (Vic)".[59]

VI RESPONDING TO COURT BACKLOGS AND PRACTITIONER WORKLOADS

There were a range of criticisms applied to the scheme when it was initially proposed which focused on its potentially negative impact on victims, and the possibility for judge shopping or inappropriate indications to be given, in a similar vein to the NSW process.[60] The scheme was also criticised on the basis that the need to respond to court inefficiency could be prioritised above the interests of the public, the victim and accused persons, and it appeared somewhat incompatible with other legislation; particularly the *Charters*

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57 VSAC, above n 5, 18.

58 Ibid 10.

59 Ibid 83.

60 Victoria, *Parliamentary Debates*, above n 4, 4345; Judge John Sulan, 'Defence Co-Operation in the Trial Process' (Speech delivered at the Australian Institute of Judicial Administration Criminal Trial Reform Conference, Melbourne, Australia, 24 March - 25 March 2000) <http://www.aija.org.au/ctr/SULAN/pdf>; Weatherburn and Lind, above n 26.

introduced in Victoria, both of which provided increased recognition of the rights and role of victims and accused persons within criminal proceedings.[61] This was a particular issue identified by the Scrutiny of Acts and Regulations Committee in December 2007, who noted the incompatibility of the proposed scheme with the rights of accused persons outlined in s 25(2)(K) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which provides that people charged with a criminal offence must "not be compelled to confess guilt".[62] In 2008, the Scrutiny of Acts and Regulations Committee further noted that the indication process could become another step in an already elongated pre-trial system.[63] This issue was also identified by six of fifteen participants in the author's research. As ProsecutorM claimed, there is a "potential for sentence indication hearings to simply become another procedure used to prolong cases". Similarly, ProsecutorN observed that "defendants who are fully aware that the seriousness and criminality of their conduct will result in a term of imprisonment, may request an indication despite knowing it won't assist their [pleading] decision, just to delay the trial".

Concerns surrounding the possible delays inherent to the scheme were validated in December 2008, when the OPP's internal policy on challenging sentence indication applications was amended to address deliberate delay tactics.[64] Accordingly, the policy now states that a prosecutor must challenge an accused person's application for an indication if:

> The prosecutor in the matter has reason to suspect that the accused person is seeking a sentence indication for a reason which is not bona fide or which is improper (for example, to seek a sentence indication in a case in which a custodial sentence is likely as a strategic device in the trial of co-accused); or the listing of the trial of the accused or

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61 *Charter of Human Rights and Responsibilities Act 2006* (Vic); Flynn, above n 14; Victoria *Parliamentary Debates*, above n 4, 4351; *Victims' Rights Charter Act 2006* (Vic).

62 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest No 16 of 2007* (2007).

63 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest No 1 of 2008* (2008).

64 *Director's Policy 4.7.1 2008* (Vic).

> that of the co-accused would be significantly affected if, in the event that a sentence indication were given, it is probable that the accused would not plead guilty.[65]

This concern was further validated in the VSAC review which found that in 22 of the 25 sentence indication requests in the County Court, at least some delay was created by the indication scheme in terms of requiring that additional hearings be held, or adjournments be given.[66]

One of the main criticisms of the scheme emerged in the form of scepticism in regards to whether indications were likely to be effective in influencing an accused person's pleading decision, and in turn reduce court delays.[67] This criticism emerged due to the broad nature of the indications, that being either custodial or non-custodial, which means the success of the scheme relies heavily upon the main factor preventing an accused person from pleading guilty being an indication of simply whether or not they will go to prison; not how long they may spend there.[68] As JudiciaryD claimed, "if we are not going to give numbers then it is useless. If the judge says, you are going to go to jail, the defendant will say, yeah thanks, I knew that, but how much jail time are we talking? And we can't tell them, well that is a problem. That is a real limitation". ProsecutorD further claimed that "at the end of the day, if the indication is that it still involves incarceration, but there is no indication of how long, well that might not be an attractive answer'". A similar argument was offered by ProsecutorN, who claimed "just having a broad indication of custodial or non-custodial, well that is really not going to move the bulk of the delay – it is not likely to encourage defendants to plead".

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65 *Director's Policy 4.7.1 2008* (Vic), s 4.7.1.84.
66 VSAC, above n 5, 31.
67 Flynn, above n 14, 251.
68 Ibid 254.

Further to the broad nature of the indications making them somewhat ineffective in shifting the timing of when guilty pleas are entered, the scheme also ignores the possibility that there are other factors aside from simply whether an accused person will or will not go to prison which can impact on their pleading decision. As McConville identified, an accused person's pleading decision may be influenced by "a whole variety of reasons, such as to protect a third party, to get the matter over with, or out of inner feelings of guilt unconnected with the alleged crime".[69] A pleading decision may also depend on the type of crime, because some offences carry further implications from a guilty plea than simply a custodial or non-custodial sanction. For example, s 34 of the *Sex Offenders Registration Act 2004* (Vic) requires that all sexual offenders who plead or are found guilty of one or more individual sexual offences involving a child in Victoria, must keep police notified of their location and personal details for between eight years and life, depending on the number and category of offences committed. Thus as ProsecutorK claimed, "because of the *Sex Offender's Registry*…it makes it difficult to get people to plead guilty because that stays with them for life". As such, the ability of the scheme alone to impact on the number of early guilty pleas entered in these cases is, to at least some extent, reduced.

The criticisms surrounding the scheme's ability to inform an accused person's pleading decision can be pointed at both the County and Supreme Courts,[70] but are more prevalent in relation to the Supreme Court because it hears only the most serious indictable offences, such as murder and attempted murder, the penalties for which mostly involve custodial punishments.[71] The severity of penalties given in the Supreme Court is demonstrated by the VSAC's own most recent sentencing snapshots, which found that between 2003 and 2008, of the 141 persons sentenced for murder in

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69 Mike McConville, 'Plea Bargaining: Ethics and Politics' (1998) 23 *Journal of Law and Society* 566.

70 Flynn, above n 14; Victoria, *Parliamentary Debates*, above n 4.

71 *Crimes Act 1958* (Vic).

the court, all 141 received a custodial order.[72] Similarly, between 2001 and 2006, only one of the 21 persons sentenced for attempted murder received a non-custodial order.[73] As this data indicates, a large proportion of accused persons in the Supreme Court will receive custodial sentences if they plead or are found guilty, and given the serious nature of matters heard in the court, it is likely the majority, or at least their legal representatives, are aware a custodial penalty is likely. Therefore, most accused persons will not be in a more informed position to make a pleading decision due to receiving an indication. As DefenceB claimed:

> Any practitioner worth his [sic] salt is able to tell his client in a fairly narrow margin of error what the sentence is likely to be, especially at the higher courts. We have the precedents and authorities and we know the track records of judges and we know what certain crimes attract, so you can tell them. There is not much guesswork in it and when you are facing serious charges, like murder or serious indictable charges, well there is a pretty high chance it will end in prison.

JudiciaryD similarly argued that:

> Sentence indications between immediate custodial or not are, and will remain, an extremely rare occurrence in the Supreme Court. Nearly every case heard by the Supreme Court involves offending which is likely to attract an immediate custodial sentence. Those which are on the brink will be pretty obvious.

In their 2007 report recommending the implementation of sentence indications in the Magistrates' and County Courts, the VSAC

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[72] A custodial order may include a period of imprisonment, custodial supervision order, hospital supervision order or home detention order (see *Sentencing Act 1991* (Vic) Div 2); VSAC, 'Sentencing Snapshot: Sentencing Trends for Murder in Victoria 2003-04 to 2007-08' (2009), <http://www.sentencingcouncil.vic.gov.au/wps/wcm/connect/89c7f5004056ad14b78ebfe505682c73/Murder_Higher_Courts_2009.pdf?MOD=AJPERES>.

[73] VSAC, 'Sentencing Snapshot: Sentencing Trends for Attempted Murder in the Higher Courts of Victoria 2001-02 to 2005-06' (2007b) <http://www.sentencingcouncil.vic.gov.au/wps/wcm/connect/Sentencing+Council/resources/file/eb89c501f238505/Attempted_Murder_Snapshot_2007.pdf>.

justified the use of broad indications in the County Court claiming that on average, 50 percent of persons receive non-custodial sanctions, yet a large portion do not realise this is a likely outcome until after they are sentenced; and it is this lack of knowledge which is a primary factor preventing them from pleading guilty at an early stage.[74] While this might be a legitimate argument for a percentage of the 50 percent of persons who receive non-custodial sentences, it does not account for at least the other 50 percent of persons who receive custodial penalties and are in no better position to assess the length of time they will spend in custody before or after receiving an indication. This justification also does not address the issues from the Supreme Court where custodial penalties are already known to be a likely outcome; an issue that was identified by the VSAC itself in its 2007 report, where it recommended against the implementation of the scheme in the Supreme Court because "sentence indications would be unlikely to have a significant impact on the timing of defendants' plea decisions in the Supreme Court or [on] that court's case load".[75]

In exploring the efficiency of the scheme, the VSAC review focused on the ability of the scheme to minimise court backlogs in the County Court, largely because only two indications were given in the Supreme Court, and there was subsequently no possible impact on the court's efficiency levels to report. In examining the County Court scheme, the VSAC found that the number of cases resolved by sentence indications in the twelve month review made up less than one percent of the 2,231 criminal cases resolved during this time.[76] In an attempt to bolster this figure, under the guise of attaining more accurate statistics, the VSAC argued that due to the timing of when an indication can be sought, which is after four pre-trial hearings have already taken place, it needed to remove the guilty pleas entered by this stage from the equation, and also to remove the percentage of cases that were ultimately resolved by a

[74] VSAC, above n 18, 123. The VSAC final report shows these figures as 51.4 percent in 2005–2006, 49.5 percent in 2004–2005 and 53.2 percent in 2002–2003.

[75] Ibid 9.

[76] VSAC, above n 5, 23.

trial, as opposed to a guilty plea. After removing these figures, the VSAC claimed that sentence indications could realistically only impact on 553 resolved cases in the County Court, of which the number resolved by sentence indications leapt to a significant 4.2 percent.[77] At this stage, even the VSAC acknowledged the figure was slight, 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…[and] the impact of the scheme on the case load of practitioners involved in sentence indications has been minimal".[78] The VSAC 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 as a whole".[79]

Despite these results, the VSAC focused on the 4.2 percent resolution rate as a basis for demonstrating the potential of the scheme to work effectively, and it highlighted the 100 percent 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 somewhat diminished in the context of Victoria's law and order political climate, where the use of suspended sentences as a punishment for many indictable offences heard within the County and Supreme Courts has been repealed by s 12 of the *Sentencing Amendment Act 2010* (Vic).[80] 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.[81] As suspended

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77 VSAC, above n 5, 23-24.

78 Ibid 31, 60.

79 Ibid 82.

80 Section 12 of the *Sentencing Amendment Act 2010* (Vic) introduces s 27(2B) into the *Sentencing Act 1991* (Vic) which now reads, '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. See also, Reid Sexton, 'Sentencing Moves Spark Concerns' *The Age* (Victoria, online), 15 May 2010, <http://www.theage.com.au/victoria/sentencing-move-sparks-concerns-201005 14 -v4na.html>.

81 VSAC, above n 5, 35.

sentences have been abolished as a possible sentencing outcome for all cases heard in Victoria from 1 January 2012, this is likely to significantly reduce the number of non-custodial indications that can be given or accepted. Accordingly, the justification for maintaining the scheme for efficiency reasons, based on the acceptance rate of non-custodial indications is limited, as it is unrealistic to expect the scheme would achieve significant increases in the number of early guilty pleas entered, if there is going to be an increase in the number of custodial indications given.

In terms of reducing court backlogs and the workloads of legal practitioners, the scheme appears, as indicated by the VSAC itself, to have had no real impact. As a result, the review has done little to discredit one of the major criticisms of the scheme. Furthermore, the recommendation to maintain the scheme indefinitely in both courts, despite the entire review focusing on the County Court and only two indications having been given in the Supreme Court, one accepted and one rejected, raises some questions over the legitimacy of this recommendation. It may be possible that this recommendation is loosely based on the rationale informing the decision to maintain the scheme in the County Court; that is, for its potential to reduce court backlogs and practitioner workloads, because, of the two indications given in the Supreme Court there was a 50 percent acceptance rate, which perhaps demonstrates the scheme's potential to increase efficiency levels in the Supreme Court if used more regularly. Alternatively, it perhaps indicates an oversight in the review in responding to the criticisms applied to the scheme, even those which the Council itself identified prior to its enactment in statute.[82]

VII INACCURACIES IN THE INDICATIONS

Another primary concern of the scheme is the lack of evidentiary material upon which indications are based, and the absence of any specified requirements of what evidentiary material is required; both

[82] VSAC, above n 18, 9.

of which could lead to injustice, inconsistencies and inaccuracies within the process.[83] A similar concern was explored by the New Zealand Court of Appeal in *R v Gemmell*,[84] in which the court stated that:

> The matter of judicial sentence indications presents difficulties. In principle it seems inappropriate for matters of sentence to have any judicial consideration prior to conviction and without the aid of essential pre-sentence and victim impact reports. Any indication given in such circumstances must be so qualified as to be no real indication at all and certainly no reliable basis on which to plead.[85]

The Victorian scheme requires that the evidence prepared by the filing of the presentment be available to the judge, and it is then up to non-reviewable judicial discretion to determine whether this is sufficient to provide an indication.[86] Although some evidentiary concerns regarding inadequate information being available are reduced by the lack of specification surrounding the sentence indications, in terms of the quantum of the sentence, the ability of the judge to make an informed decision as to whether a custodial or binding non-custodial order is appropriate based only on the material available at the presentment is still restricted. This is particularly problematic in relation to the accused person, because much of their personal mitigating and aggravating factors, including their circumstances at the time of offending, psychiatric or intellectual problems, drug addictions, their future prospects and their "response to the offence and prosecution (e.g. remorse, acts of reparation)",[87] may be unknown to the judge at the time of the indication hearing.

The potential consequences of not having adequate personal mitigating and aggravating factors available to a judge in sentencing an accused person is demonstrated by a recent study conducted in

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83 Flynn, above n 14, 259.

84 [2000] NZLR 695 (CA).

85 Ibid 13.

86 *Criminal Procedure Act 2009* (Vic) s 208(4).

87 Jessica Jacobson and Mike Hough, 'Personal Mitigation' (2008) 35 *The Barrister* 10. See also, Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge, 1981).

the UK, 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.[88] Judges further identified at least one factor of personal mitigation as relevant to the sentence imposed in almost half of the 162 cases observed.[89] Importantly, such factors were also cited by judges 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 person 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.[90] This is a particularly vital finding in the context of Victoria's sentence indication scheme in light of the certainty assured by the legislation, which binds the court to its original non-custodial decision. As such, there is a strong basis for arguing that without all relevant personal mitigation, Victorian judges cannot be in an appropriate position to accurately provide a custodial or binding non-custodial indication.

In exploring this issue, the VSAC focused on the beneficial aspect of the scheme in terms of its flexibility, in that of the four accused persons who pleaded guilty following a custodial indication, three had sentences reduced to non-custodial penalties.[91] In other words, three quarters of accused persons who received custodial indications, ultimately received non-custodial penalties. The VSAC identified this as a positive outcome because it meant 'the material tendered at the full plea can have an effect on the sentence ultimately imposed',[92] thus concerns about the absence of evidentiary material at the initial indication hearing are theoretically addressed in the later plea hearing. Although cited as a positive however, this is another example of how the indication process is ineffective, potentially inaccurate, and quite possibly results in unjust outcomes.

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88 Jessica Jacobson and Mike Hough, *Mitigation: The Role of Personal Factors in Sentencing* (Prison Trust Reform, 2007) 12.

89 Ibid.

90 Ibid 12, 40.

91 VSAC, above n 5, 33. Five accused persons pleaded guilty to custodial indications during the review period, however one of these sentences had yet to be determined at its conclusion.

92 Ibid 33.

If three of the four custodial indications were deemed inaccurate after the revelation of all relevant sentencing material, how many of the binding non-custodial indications were deemed inaccurate after the plea hearing? The flexibility assigned to the custodial indication 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 relevant material, it raises questions as to how many injustices were not righted in these cases. Ultimately, this 'benefit' identified in the review, strengthens concerns surrounding the absence of evidentiary material at the initial indication hearing, and fails to address the effectiveness, accuracy or injustice concerns applied to the scheme in any way.

VIII IMPACTS ON THE VICTIM

Another prominent limitation of the scheme which was perhaps the main reason, or at least the most politically motivating reason for the sunset clause in the legislation, is its potential to impact negatively on victims.[93] There are a range of legal requirements on the courts and prosecutors in Victoria in relation to keeping victims informed, and taking account of their needs and wants in regards to the prosecution of cases; albeit these operate within an adversarial framework which restricts the victim from having a determinative say.[94] In the context of sentencing, legislative guidance requires that the victim and the impact of the offence upon them are considered by the *Sentencing Act 1991* (Vic) ss 5(2daa), 5(2da) and 5(2db), which outlines that 'in sentencing an offender, a court must have regard to the impact of the offence on any victim of the offence; the personal circumstances of any victims of the offence and; any injury, loss or damage resulting directly from the offence'. In order to inform the judge of this information, prior to imposing a sentence, a victim impact statement is read to or by the judge which details the effects the victim(s) has experienced both physically and mentally as a result of the crime, including any physical and emotional harm,

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93 Victoria, *Parliamentary Debates*, above n 4.

94 *Public Prosecutions Act 1994* (Vic); *Sentencing Act 1991* (Vic); *Victims' Charter Act 2006* (Vic).

property loss or damage, and other effects, such as ongoing suffering.[95]

The victim impact statement is a significant, yet highly contentious victim-focused reform, and its (in)effectiveness in addressing victims' needs has been a significant focus of much research and debate.[96] While not immune to criticism, victim impact statements provide an avenue for victims' voices and needs to be addressed and considered in sentencing, and in line with recent reforms advocating victims' rights in Victoria, they offer an opportunity for victims to play a greater role than simply that of a prosecution witness.[97] Accordingly, these statements have become an important part of the sentencing process, both in terms of ensuring proportionality in sentencing, and in providing some consideration to victims.

Despite being a sentencing process, the sentence indication scheme does not include provisions for victims. There are no requirements on the prosecution to consult with victims in regards to challenging an accused person's request for an indication, and there is no requirement that the impact of the offence on the victim be considered by the judge prior to making a potentially binding indication. In fact, under s 95(A) of the *Sentencing Act 1991* (Vic), the victim can provide a victim impact statement to the court only if the person is found guilty of an offence, whether by guilty plea or trial. The key words in this requirement are 'found guilty', because the very nature of the indication process allows an accused person to make a request for an indication of their sentence, before any admission of guilt is made. Thus legally, a victim impact statement

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[95] Ybo Buruma, 'Doubts on the Upsurge of the Victim's Role in Criminal Law', in Hendrik Kaptein and Marijke Malsch (eds), *Crime, Victims and Justice: Essays on Principles and Practice* (Ashgate, 2004); Leslie Sebba, *Third Parties: Victims and the Criminal Justice System* (Ohio State University Press, 1996).

[96] See, eg, Cook et al., above n 37; Jo Goodey, *Victims and Victimology: Research, Policy and Practice* (Pearson Longman, 2005); Sebba, above n 95; Strang, above n 37.

[97] *Victims' Charter Act 2006* (Vic).

cannot be heard or read by a judge before they give a possibly binding sentence indication.

One of the main reasons why a victim impact statement is not made available to the parties until after guilt is established either by a trial or plea is because it typically contains information about the victim's personal circumstances, and there is a risk of it being used by the defence in cross-examination. For example, if the victim claims they suffered psychologically because of the crime, they could be cross-examined about the crime's impact on their mental state, and the credibility of their testimony could be questioned as a result of their suffering from psychological damage. As ProsecutorJ maintained:

> If the victim impact statement says, he hit me in the face and then in the stomach and this has led to me having plastic surgery and being frightened leaving my house, and then when they testify they say, he hit me in the stomach and then the face, then that small alteration may become a turning point for the defence who can then use that as a basis for claiming the victim is lying or doesn't remember, and their testimony is then not as reliable.

There are also reasons from an accused person's perspectives as to why a victim impact statement detailing the effects the crime has had on the victim cannot be accessible to a judge prior to a finding of guilt, because it may contain information that is prejudicial or inaccurate, depending on what charges the accused person ultimately pleads guilty to, or is found guilty of. Thus in direct contrast with the New Zealand, UK and (previous) NSW systems, in which victim statements are/were provided to the judge before indications are/were given, the Victorian scheme does not require that a victim impact statement be available to the judge before an indication is determined. As a consequence, the scheme creates some concerns in terms of victim consideration, and compatibility with the rights afforded to victims by the former Labor Government's own *Victims' Charter Act 2006* (Vic).[98]

[98] AdvisorC; NZLRC, above n 14, 97.

Within both the VSAC's initial report on sentence indications,[99] and in their 2010 review, many participants identified the absence of victim consideration in the legislation as a limitation, and highlighted the importance of having information about the victim impact statement available to the judge at the time of the indication hearing.[100] In the VSAC's 2007 report, participants representing Victoria Police identified this limitation as creating and fuelling power imbalances and secondary victimisation, with one participant claiming that many victims "may feel frustrated, as there will no longer be the opportunity for the defendant to have to confront the victim's accusations".[101] Similarly, a submission from the West Centre against Sexual Assault stated there "would not be any significant advantage to its clients [victims] through the introduction of sentence indications".[102] These concerns were also identified by JudiciaryC in the author's research, who claimed "the scheme doesn't focus on the victim. The focus is essentially on increasing pleas, thereby reducing backlog. The victim is not a driving factor in this reform".

The lack of consideration given to victims was also a prominent concern identified during parliamentary debates on the proposed legislation, during which it was stated that:

> A judge is bound not to hand down a sentence higher than the sentence indication; therefore one can only assume that the influence of victim impact statements, which are so important and vital for people who are victims of crime, will be diminished as a consequence of this piece of legislation.[103]

A judicial participant in the author's research also claimed that "the inability of the judge to consider the impact of the crime on the

[99] VSAC, above n 18, 77-78.
[100] VSAC, above n 5, 48.
[101] VSAC, above n 18, 77.
[102] Ibid 78.
[103] Victoria, *Parliamentary Debates*, above n 4, 4351 (Nick Wakeling, Member for Ferntree Gully).

victim by way of victim impact statement or other is a huge downfall of the scheme for victims, and no doubt, for the community".[104]

In contrast to these claims, former Victorian Attorney-General, Robert Hulls, disputed the notion that the victim is not a prominent consideration in the scheme, instead claiming "it's wrong to suggest that courts could not consider a victim impact statement before deciding whether an indication would be given…Prosecutors could veto sentence indications and would do so if it was not in victims' interests".[105] While the former Attorney-General is correct in that a provision exists for the prosecution to challenge the accused person's application for an indication, as highlighted, the former Labor Government did not include any requirement in the legislation that this decision be informed by the victim's opinion, despite being recommended by the VSAC and identified as a key limitation of the proposed legislation in parliament.[106] In addition, due to the potential consequences of a victim impact statement being provided to the defence or the judge before guilt is determined, they have not been obtained for the sentence indication hearings, and are therefore not available for judicial consideration prior to an indication being determined.[107] This fact is noted in the VSAC review itself, which states:

> Under the current practice, the OPP will not have any victim impact statements when the request is made. The victim impact statements will only be requested after the offender has pleaded guilty following the sentence indication. Therefore in most cases there will not be a victim impact statement before the court at the time a sentence indication is made.[108]

In response to the former Attorney-General's comments, ProsecutorM maintained that:

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[104] JudiciaryD.
[105] Peter Gregory, 'Doubt's on Victoria's Sentence Indication Scheme', *The Age* (Victoria), 8 December 2008, 5.
[106] Victoria, *Parliamentary Debates*, above n 4, 4343.
[107] ProsecutorJ.
[108] VSAC, above n 5, 44.

> From what the AG [Attorney-General] has said, it means we should veto any application for an indication that is not in the victim's interests. Well, you could argue that it would never be in the victim's interests for the offender to get an indication based on this scheme. There is not enough evidence available to the court before they make a decision. So, how could this ever be good for the victim? Even if it benefits them because they won't then have to testify, the scheme itself is flawed, which means that using that scheme even to get that benefit is not in the victim's interests…I guess if that is what he [the Attorney-General] thinks, then we should probably be challenging most applications.

These strong comments condemning the scheme clearly highlight its potentially negative impact on victims, which is ironic given that this directly contrasts with one of the primary reasons for maintaining the scheme identified by the former Attorney-General in February 2010, where he claimed the "sentence indication scheme eases victims' burden". [109] ProsecutorM's discussion of challenging indication applications on the basis of victims' interests also alludes to a further resource disadvantage of the legislation resulting from the former Attorney-General's interpretation of the Crown's role in the process. If, as implied by then Attorney-General, the OPP were to challenge applications on the premise that without consideration of a victim impact statement, an indication of the likely sentence order would not be in the victim's interests, there are likely to be quite significant financial, resource and emotional costs incurred. Importantly, this would not only disadvantage victims and accused persons by prolonging proceedings, but it would also further limit the ability of the scheme to effectively respond to court delays and minimise the workloads of legal practitioners.

In responding to the possibly negative impact of the scheme on victims, particularly in relation to the lack of consideration given to an impact statement prior to an indication being given, the VSAC review states that:

[109] Victorian Attorney-General's Department, 'Sentence Indication Scheme Eases Victims' Burden' (Press release online), 4 February 2010, <http://www.premier.vic.gov.au/component/content/article/93 17.html>.

> The fact that a victim impact statement is not before the court at the time a sentence indication is requested does not necessarily mean that the court cannot be informed of, and take into account, the impact of the offence on the victim when giving a sentence indication. Nor does this mean that a victim will not be entitled to make a victim impact statement to be taken into account by the judge in sentencing once the defendant has pleaded guilty (although the court would be bound by the indication if it was for a non-immediate custodial sentence).[110]

They also noted that an internal (non–legally binding) policy at the OPP already requires prosecutors to make some attempt to inform the court of the impact of the offence on the victim prior to an indication being given, thereby reducing the significance of the claim that victims are not considered in the indication process.[111] A very similar argument was detailed by the former Government when initially debating the implementation of the scheme, whereby a then Government Minister stated:

> The prosecution, in making the case, and the judge in determining the sentence that will be imposed will still be required to give consideration to the impact of that crime on the victim…There is nothing in the bill that changes whatsoever the consideration that the court will give to the victim impact statement…There is nothing in the bill that extinguishes that. There is nothing in the bill that in any way limits those provisions.[112]

As acutely identified by this Minister, the problem is 'nothing'. There was nothing in the bill for victims, and there remains nothing in the legislation for victims, and instead of altering this, the VSAC suggested that if necessary, the courts could include a statement within their internal *Practice Notes* allowing the prosecution to give a statement outlining the victim's views and the impact of the offence upon them.[113] In other words, they did not change this

[110] VSAC, above n 5, 44.
[111] Ibid 49. See also, Office of Public Prosecutions (Vic), *Crown Role on Plea and Sentence: Policy 9* (Victoria, 2010).
[112] Victoria, *Parliamentary Debates*, above n 4, 4352 (Rob Hudson, Member for Bentleigh).
[113] VSAC, above n 5, 55.

outcome, other than suggesting shifting the OPP's non–legally binding internal policy into the court's non–legally binding internal policy. Furthermore, although as identified in the VSAC review, the victim has the opportunity to have their victim impact statement considered by the judge at the plea hearing when an accused person accepts an indication, if a non-custodial order is indicated, there is no scope for the judge to change the sentence order to custodial following the revelation of this material.[114] Therefore, the impact of the crime on the victim remains a factor that is not considered by the judge in the determination of that sentence order, and thus the review has offered little in the way of minimising or discrediting the significant concerns surrounding this aspect of the scheme, particularly the issues relating to the consideration of the impact of the offence on the victim, the consideration of victims' interests and needs, and the scheme's possible contradiction with the ideals of the *Victims' Charter Act 2006* (Vic).

IX PRESSURES ON ACCUSED PERSONS

Another concern identified by the Scrutiny of Acts and Regulations Committee,[115] and in the parliamentary debates on the proposed scheme, was the possible pressure indications may place upon accused persons to plead guilty:

> 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 indication that has been given to them convinces them to think, although I didn't commit this crime, I'm better to take this option of pleading guilty to the charge because it will spare me the effects of a trial in all its forms, personal, financial and otherwise.[116]

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[114] VSAC, above n 5, 48.

[115] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest No 2 of 2008* (2008).

[116] Victoria, *Parliamentary Debates*, above n 4, 4348 (Peter Ryan, Leader of National Party).

This concern was also identified by DefenceC in the author's research, who claimed that:

> The indications will work even if the defendant thinks they can win the case because there is not enough evidence against them, because if there is no jail involved, they won't hold out pleading guilty, because there is no jail involved. So it could, in those instances, be seen more as a pressure than advice.

The potential for the scheme to place undue pressures on accused persons to plead guilty is further strengthened by the requirement that the judge make a statement when giving the 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 Scrutiny of Acts and Regulations Committee noted in December 2008, "this procedure may place such defendants under heightened pressure to plead guilty, especially if the sentence indicated is a generous one".[117] The requirement for judges to make a statement outlining the potential consequences of not pleading guilty as part of their sentence indication 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".[118] This clarification, however, is likely to have a substantially negative influence on an accused person's pleading decision. As Willis notes, "even for an innocent defendant, the guilty plea with an expectation of leniency can be an attractive soft option".[119]

While the mere perception that a harsher sentence may be received if the indication is rejected may pressure accused persons into pleading guilty, when this fact is directly stated to an accused person by a judge, the potential for coerced guilty pleas is increased. The negative impacts of judicial involvement in any process that

[117] Scrutiny of Acts and Regulations Committee, above n 115.
[118] VSAC, above n 18, 89.
[119] John Willis, 'Sentencing Discount for Guilty Pleas' (1985) 18 *Australian and New Zealand Journal of Criminology* 141.

provides pleading incentives to accused persons were recognised by Baldwin and McConville in their analysis of plea bargaining in the UK, 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".[120] These concerns can be readily applied to Victoria's sentence indication scheme, given the involvement of the judge in stating the potential consequences of not pleading guilty when providing an indication. As McConville and Baldwin's research further 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".[121]

In responding to these concerns, the VSAC maintained that it did not find any evidence of pressures on accused persons to plead guilty after receiving an indication, [122] however this conclusion was based on consultations with defence practitioners only, which creates an interesting power dynamic as it would be unusual for defence practitioners who were involved in the process to say their client felt overtly pressured to plead guilty. What the accused person might say when asked this question, as highlighted by the pioneering work of Baldwin and McConville, may differ somewhat.[123] But even within the comments of the defence practitioners in the review, some interesting statements regarding pressure were made which seemed to point to an acceptance that some degree of pressure was in fact applied to accused persons, but that the practitioners considered this to be an 'acceptable' level of pressure. One participant claimed, "it is an inducement, but it is not an improper one…it is a reasonable inducement".[124] Similarly, 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".[125]

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[120] John Baldwin and Mike McConville, *Negotiated Justice: Pressures To Plead Guilty* (Martin Robinson, 1977) 33.
[121] Mike McConville and John Baldwin, *Courts, Prosecution and Conviction* (Oxford University Press, 1981) 67.
[122] VSAC, above n 5, 53.
[123] Baldwin and McConville, above n 120.
[124] VSAC, above n 5, 53.
[125] Ibid.

There is quite a significant difference between claiming there was no evidence of any pressure applied to accused persons in the indication process, and the statements given by the participants in the VSAC review. This difference is particularly relevant in the context of a non-custodial sentence indication, because the judge is effectively telling the person 'if you plead guilty now you will not go to jail, but if you do not plead guilty, you may face a more severe penalty'. Thus despite the claims made by both the VSAC,[126] and the former Attorney-General in accepting the review's recommendations,[127] 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, language difficulties or drug addiction.[128]

X SINCE THE REPORT

In publishing its review, and recommending that the sentence indication scheme in the County and Supreme Courts be continued indefinitely, the VSAC also called for continued monitoring and better data collection on how the scheme operates in practice.[129] In particular, the review stated that:

> There should be procedures in place to ensure that accurate information is gathered about sentence indication applications to the prosecution and the courts and sentence indication hearings in order to allow for its review in the future… The Office of Public Prosecutions will still need to be the collection point in relation to applications for sentence indication.[130]

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[126] VSAC, above n 5, 53.
[127] Victorian Attorney-General's Department, above n 109.
[128] Baldwin and McConville, above n 120; Kathy Mack and Sharon Roach Anleu, 'Choice, Consent and Autonomy in a Guilty Plea System' (2000) 17(1) *Law in Context* 82.
[129] VSAC, above n 5, 333.
[130] Ibid.

However, after contacting the OPP in October 2010 to obtain the most recent data available on the indication process, the author was informed that specific statistics on the number of sentence indication hearings are not recorded by the OPP, and that while if an indication is given the outcome is noted in sentencing reviews, this information was not in an easily accessible or accurate structure to be released. Thus at this stage, it appears that there remains significant problems with the collection and collation of data surrounding the sentence indication scheme for indictable offences, and it remains unclear whether there have been any dramatic changes to the percentage figures discussed in the VSAC review, in relation to any increased use of the scheme in either the County or Supreme Courts.

XI CONCLUSION

The rationale behind introducing sentence indications in Victoria's higher courts is legitimate and important. Court backlogs and increased workload pressures among legal practitioners are major and ongoing concerns in Victorian courts, and the perceived success of the scheme implemented in the Magistrates' Court provides an example of how sentence indications can offer a mechanism in high caseload courts to clear backlogs, and encourage informed, early guilty pleas. While the problems of delay and inefficiency must also be addressed in Victoria's higher courts, in its current form, this scheme is not an appropriate mechanism to do so, particularly given the potential inaccuracy of indications, the possibility for the scheme to create injustices for victims and accused persons, and because there remains no sufficient data to support the claim that it will substantially increase court efficiency levels by enhancing clearance rates.

As noted in the introduction, sentence indications are not immediately provocative, they are not a focus of law and order campaigns, and despite being a sentencing process, they are not a criminal justice procedure that receives significant media attention. It is thus the author's concern that this scheme is simply slipping under the radar, like so many legal reforms quietly implemented in Victoria; a concern that is heightened by the continued under-recording of the occurrence of sentence indication hearings, despite the recommendations outlined in the VSAC review. It is therefore important that the flaws inherent to Victoria's sentence indication scheme for indictable offences, which were not adequately detailed or addressed in the VSAC review, are vocalised, because maintaining the current scheme has and will continue to have negative repercussions on the basic rights and interests of victims, accused persons and the general community. In a climate of efficiency driven reform, this scheme should not be permitted to be lost within an idealistic reform agenda.