

## THE ROOF IS ON FIRE?

### SENTENCE INDICATIONS: PREPARATION, PITFALLS AND THE PROSPECT OF CROWN APPEALS

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"We can try, but I don't think they're gonna buy your guilty plea being taken out of context."

#### Part A: The legislative history

1. *Criminal Procedure Act 2009* (Vic) (CPA)
  - Part 3.3 Division 3 (Magistrates' Court), Part 5.6 (Higher Courts)
2. Introduction influenced by the Sentencing Advisory Council:<sup>1</sup>

The process preserves the accused's right to put the prosecution case to the test, by giving the accused the option of seeking sentence indication. The defence can weigh up the likely benefits and risks of sentence indication before making a request for it. While the request for an indicative sentence implies that the accused is willing to plead guilty as charged, the request for sentence indication does not commit the accused to pleading guilty or compromise a not guilty plea; the accused may 'reject' an indicative sentence and elect to contest the matter without prejudice.<sup>2</sup>

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<sup>1</sup> Report on Sentence Indications and Specified Sentence Discounts (2007).

<sup>2</sup> Victoria, Parliamentary Debates, Legislative Assembly, Second Reading Speech to the Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Bill 2021, 27 October 2021, 4220-1 (Hutchins).

3. The tension – a pathway that provides an incentive to plead guilty even where an accused person might have a defence?
4. A danger of ‘bargained justice’?
5. Second reading speech to the Criminal Procedure Bill 2008:

Clauses 61 and 209 of the bill provide the Magistrates, Children’s, County and Supreme courts with the capacity to provide a sentencing indication to an accused who is considering pleading guilty. In accordance with a recommendation from the Sentencing Advisory Council in its report, Sentence Indication and Specified Sentence Discounts, these sections provide that a decision to give or not to give a sentence indication is final and conclusive.

A sentence indication should only be given where it is likely to be of benefit in concluding proceedings. The reason for restricting review and appeal rights against a decision to give or not to give a sentence indication is to ensure that this decision is final and the substantive proceedings, whether a trial or a plea hearing, can proceed without delay. If review and appeal rights were not restricted, they could defeat the purpose for the introduction of this scheme. Importantly, when a sentence is imposed, each party has rights of appeal against the sentence imposed.<sup>3</sup>

6. *Criminal Procedure and Sentencing Acts Amendment (Victims of Crime) Act 2012*, No. 49/2012

- Where there is insufficient information regarding impact of offence on victim the Court may decline to give a sentence indication.

7. *Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Act 2022*, No. 1/2022

- Significant amendments, including broadening sentence indications in the Higher Courts:

#### **Broadening available sentence indications in higher courts**

The Bill will expand the role of sentence indication hearings in the higher courts, so as to support the continued effective and efficient functioning of the justice system and its recovery from COVID-19, including helping courts to manage and reduce a significant backlog of cases.

A broader sentence indication scheme will generate early and appropriate guilty pleas while also providing benefits to victims in providing an outcome and removing the trauma of giving evidence at trial, and accused persons in

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<sup>3</sup> Victoria, Parliamentary Debates, Legislative Assembly, Second Reading Speech to the Criminal Procedure Bill 2008, 4 December 2008, 4987 (Hulls).

providing clarity of outcome where they are facing a lengthy wait for trial, but may consider pleading guilty.

Currently, the higher courts can only give a sentence indication about whether a sentence of imprisonment will be given. This is of limited utility given the seriousness of cases in the higher courts.

The Bill will therefore expand sentence indications to include the maximum total effective sentence and/or specified sentence type, which is predicted to substantially increase the use of sentence indications as a tool for reducing delay in the higher courts.<sup>4</sup>

## **The Relevant Sections of the CPA**

### **8. Magistrates' Court**

- *CPA*, ss 60-61
- Important things to note:
  - (a) Unlike the Higher Courts, sentence indication limited to type of sentence (and not the maximum total effective sentence);
  - (b) If the indication is not accepted, the court that hears and determines the charge must be constituted by a different magistrate, unless all the parties otherwise agree;
  - (c) Indication can be given “at any time” (but note potential restriction on the presiding magistrate above); and
  - (d) An application for a sentence indication and the determination of the application are not admissible in evidence against the accused in any proceeding. But what about any evidence relied on?

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<sup>4</sup> Victoria, Parliamentary Debates, Legislative Assembly, Second Reading Speech to the Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Bill 2021, 27 October 2021, 4224 (Hutchins).

## 9. Higher Courts

- *CPA*, ss 207-209A
- Important things to note:
  - (a) The Court can indicate the type of sentence or the maximum total effective sentence;
  - (b) A sentence indication can be given up until the accused pleads not guilty on arraignment in the presence of the jury panel;
  - (c) Must be on application of accused person;
  - (d) Can only be given once, subject to a new facts and circumstances exception;
  - (e) As with the Magistrates' Court, an application for a sentence indication and the determination of the application are not admissible in evidence against the accused in any proceeding;
  - (f) Section 208(2) of the *CPA* initially provided that an application under subsection (1)(a) may be made only with the consent of the prosecutor - now repealed; and
  - (g) Further, s 209(2) of the *CPA* initially provided that if an indication was not accepted by an accused person, at trial the court must be constituted by a different judge, unless all the parties otherwise agree - now repealed.

10. It is clear that the motivation for some of the recent reforms was to respond to the backlogs caused by the COVID-19 pandemic, and to encourage the resolution of cases.

11. For both jurisdictions, the decision to give or to refuse to give a sentence indication is final and conclusive. This is intended to prevent appeals.

12. However, for the Higher Courts it is expressly provided that any right to appeal against sentence is unaffected. As we consider below, this includes the right of the Crown to appeal against sentence pursuant to s 287 of the *CPA*.

## **Magistrates' Court**

13. During COVID-19, the Court introduced sentence indication hearings “[on the papers](#)”. However, this has been revoked (Practice Direction No 11 of 2020).

## **County Court Criminal Division Practice Note (PNCR 2-2022)<sup>5</sup>**

14. Where the accused seeks to make an application for a sentence indication, the defence must obtain the position of the prosecution and any unsuitable dates for the hearing of the application and sentence indication hearing if the application is granted.
15. The defence must contact the Court to obtain a date for the application and advise whether the application is opposed, any unsuitable dates for the listing of the hearing, and the estimated duration of the application and sentence indication hearing if the application is granted.
16. The parties must agree on the proposed charge(s) and facts for the sentence indication hearing before seeking a date and filing the application.

### ***Defence filing requirements***

17. Seven days before the application hearing date, the defence must file and serve on the prosecution:
- An application for a sentence indication hearing, which includes:
    - whether the sentence indication would be the first, second or subsequent sentence indication;
    - if it would be a second or subsequent sentence indication, defence must outline the change in circumstances since the previous sentence indication that is likely to materially affect the sentence indication previously given;

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<sup>5</sup> From p 33.

- the charge(s) on the indictment (or another charge) the accused would plead guilty to; and
- whether the prosecution opposes the application for a sentence indication hearing;
- a brief outline of submissions setting out:
  - facts or evidence which defence seek to rely on, including any mitigating factors; and
  - any submissions which defence might seek to make on a specified maximum total effective sentence;
- any material defence seek to rely on, if available, including:
  - expert reports; and
  - character references.

***Prosecution filing requirements***

18. The prosecution must file and serve on defence, no later than three days before the application hearing date:

- a summary of the agreed factual basis of the alleged offending to which the application relates if a plea of guilty would be accepted to that charge.
- written submissions indicating:
  - whether the prosecution opposes or does not oppose the application. If the application is opposed, the prosecution must outline the reason(s) for opposing;
  - the views of the complainant (if any and known);
  - whether there will be sufficient information before the Court of the impact of the offence on any victim of the offence; and
  - criminal record of the accused (if any).

### ***Sentence indication hearing***

19. If the application is granted, the sentence indication hearing may proceed immediately thereafter.
20. If the application is granted and a sentence indication is given, the matter will be stood down or adjourned for a reasonable period of time to enable the accused to consider the sentence indication.

### ***Plea hearing after sentence indication***

21. The matter will be listed for a plea hearing if:
  - the accused agrees to plead guilty to the charge(s) that would be contained on any plea indictment and/or any related summary offences;
  - the prosecution accepts a plea of guilty to the charge(s) that would be contained on any plea indictment and/or any related summary offence; and
  - the accused accepts the sentence indication given.
22. The plea hearing will be conducted by the judge who provided the sentence indication and the usual processes for a plea will apply.

## **Part B: Two Cases from the Court of Appeal**

23. [DPP \(Vic\) v Browne \[2023\] VSCA 13](#)
  - Kyrou, Forrest and Kennedy JJA
    - Crown appeal against sentence.
    - Offences of dangerous driving causing death and reckless conduct endangering serious injury.
    - Respondent was driving a buggy, with his two-year-old son an unrestrained passenger. The buggy rolled over and his son was thrown and died. The respondent's sister was also a passenger.

- It was accepted by the prosecution that the respondent had PTSD which enlivened a special reason exception to the presumptive sentencing provisions.
- However, it was found that the respondent's moral culpability was high given the ignoring of safety warnings, exceeding the passenger capacity of the vehicle, overriding the seatbelt speed interlock, and the respondent having his son unrestrained.
- After a sentence indication, respondent sentenced at the VCC to a 3-year CCO with conditions including 250 hours of community work.
- The Court of Appeal found the sentence was manifestly inadequate.
- One of the primary issues on the appeal was whether the fact of the sentence indication was relevant to the Court when deciding whether to exercise the residual discretion (to not interfere with a sentence that is manifestly inadequate).<sup>6</sup> It has been held to be relevant in comparable jurisdictions.<sup>7</sup>
- The Court left open three important issues regarding the management of Crown appeals.
- First, is the fact of the sentence indication relevant to the residual discretion?
- Secondly, should prosecutors be expected to obtain instructions to announce in Court whether there will be a Director's appeal against sentence should the sentence indication be given and accepted?
- Thirdly, what should an Appellate Court do when considering whether a respondent to a Crown appeal should be able to seek to withdraw their plea of guilty? Should the Court of Appeal adopt the

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<sup>6</sup> *CMB v Attorney-General (NSW)* [2015] HCA 9; (2015) 256 CLR 346, 359 [34] (French CJ and Gageler J), citing with approval *R v Hernando* (2002) 136 A Crim R 451, 458 [12] (Heydon JA). See also 371 [69] (Kiefel, Bell and Keane JJ).

<sup>7</sup> See, eg, *Cartmill v Long* [2023] NTSC 54; (2023) 378 FLR 200, 206-7 [34]-[41] (Blokland J).



procedure in the New South Wales cases: *R v Glass*<sup>8</sup> endorsed in *Warfield*?<sup>9</sup>

- The Court said:

[78] the respondent contended that, where an appellate court upholds a Crown appeal following a sentence imposed in accordance with a sentence indication, an offender may be placed in a position not only of double jeopardy but also of “triple jeopardy”. The triple jeopardy was said to arise because the offender will be put in the position of having to decide whether to seek leave to withdraw the plea of guilty and face the possibility of a substantially longer sentence because of the unavailability of moderation in sentence resulting from a guilty plea.

- Because the respondent’s position was that he would not seek to change his plea if the appeal was to be allowed, the Court could not identify any prejudice to the respondent other than ‘double jeopardy’ (which is prohibited from being taken into account on a Crown appeal).<sup>10</sup> The Court observed:

[79] It follows that the sentence indication in the present case is not relevant to the exercise of the residual discretion and, even if it were, it could not affect the result of its exercise. It is not necessary for us to consider whether, in other cases, a sentence indication might be relevant to the exercise of the residual discretion and, if it were, what its impact might be.

- The Court did not decide the other two issues noted above:

[81] ...it is not necessary for us to make a decision on these submissions. The first option that the parties raised may involve practical issues which should be fully explored in a case where that option arises for consideration. As senior counsel for the respondent made it clear that the respondent will not seek leave to withdraw his plea of guilty in the event that the appeal is allowed, we need not address the second option and the observations made in *Glass* and *Warfield* in relation to it.

- Crown appeal allowed, re-sentenced to 15 months’ imprisonment with a NPP of 6 months.

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<sup>8</sup> *R v Glass* (1994) 73 A Crim R 299, 304 (*Glass*).

<sup>9</sup> *R v Warfield* (1994) 34 NSWLR 200, 210-11, 214 (*Warfield*).

<sup>10</sup> *CPA*, s 259(3).

- Court observed the case has unique features limiting its precedential value.

24. [DPP \(Vic\) v Richardson \[2023\] VSCA 241](#)

- Emerton P, Priest and Taylor JJA
  - Offences including attempting to traffick in a large commercial quantity of a drug of dependence (100kgs of 1,4-Butanediol, five times the LCQ).
  - After a sentence indication, sentenced to a TES of 4 years' imprisonment with a NPP of 3 years.
  - Crown appeal dismissed, sentence lenient but not wholly outside the range in light of respondent's impaired mental functioning, the utility of his early plea of guilty, and the principle of totality given an earlier sentence.
  - The respondent submitted that, if the appeal were allowed, imposing a period of imprisonment of more than 4 years without permitting him to withdraw his guilty pleas would produce injustice.
  - This issue was not determined because the Crown appeal was dismissed.
- This case was different to *Browne*, in that the respondent had indicated that if the court was proposing to increase the sentence on appeal he would have sought leave to appeal his conviction. He argued that by entering a plea, after a sentence indication, he had given up the opportunity of running a legitimate legal argument that could have led to the exclusion of much (if not all) of the evidence against him.
- The legal argument *Richardson* abandoned was:
  - The respondent was arrested at a known drug trafficking location;
  - He was arrested for breaching his parole;

- The respondent's car was searched and no drugs were found;
- Whilst the respondent was kept in the cells a custody officer picked up the respondent's phone, which had been receiving messages and calls and guessed the respondent's password (being his date of birth) to access the phone;
- Incriminating material was then found on the phone when the custody officer looked through his phone which then led to further searches;
- The argument to exclude evidence would be based on the illegal search of his phone.

### **Part C: The proposed procedure for allowing a respondent to appeal the conviction**

25. The respondent's in *Brown* and *Richardson* asked the Court of Appeal to consider whether to:

- (a) encourage prosecutors, if dissatisfied with a sentence indication given by a trial court, to obtain instructions about the prospect of a Crown appeal and openly indicate those instructions before an accused commits to a guilty plea following a sentence indication;<sup>11</sup> and/or
- (b) adopt the procedures suggested by the New South Wales Court of Criminal Appeal in *R v Glass*, an analogous case involving a Crown appeal against a sentence imposed following a sentence indication. In that case Finlay J said:

... if the sentences were to be overturned the respondent should be permitted to withdraw the plea if he wished to and, in order to do so time should be enlarged to permit him to appeal against conviction ...

I would propose that, should this Court be of the view that the Crown appeal should be upheld and longer sentences substituted, the following steps in the circumstances of this case should take place:

- 1. The Court should indicate such a view and the proposed substituted sentences, but refrain from making formal orders until the respondent on advice considers his position.
- 2. That the respondent should have the opportunity, if he elects to do so, to have the time enlarged to permit him to appeal against his

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<sup>11</sup> *Glass*, at 303.

conviction and to withdraw his pleas of guilty. Should he not elect to so do then the proposed orders of this Court upholding the appeal and resentencing the respondent be formally made.<sup>12</sup>

26. In *R v Warfield*, the New South Wales Court of Criminal Appeal endorsed the observations in *Glass*. Further, Hunt CJ at CL endorsed a submission that in these circumstances there was an ‘element of “triple jeopardy”’.<sup>13</sup>

#### **Part D: Preparing Sentence Indications**

27. The accused person needs to understand that there is always the prospect of a Crown Appeal after a favourable sentence indication.

28. Preparation of material:

- Instructions - ethical issues if the matter does not resolve?
- Documents (including psychological or psychiatric reports and references)
  - do they contain admissions? Can they be used in subsequent proceedings?
- Expressions of remorse?

29. May be safer to view the indication as a “ceiling” and then provide further plea material if the indication is accepted.

30. Important ethical duties regarding “pleas of convenience”:

- Rule 41:

Where a barrister is informed that the client denies committing the offence charged but insists on pleading guilty to the charge, the barrister:

- (a) must advise the client to the effect that by pleading guilty, the client will be admitting guilt to all the world in respect of all the elements of the charge,
- (b) must advise the client that matters submitted in mitigation after a plea of guilty must be consistent with admitting guilt in respect of all of the elements of the offence,

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<sup>12</sup> *Glass*, at 304.

<sup>13</sup> *Warfield*, at 210.

- (c) must be satisfied that after receiving proper advice the client is making a free and informed choice to plead guilty, and
- (d) may otherwise continue to represent the client.

### **Unresolved Questions**

31. What if the picture changes significantly between indication and final plea?

- For example, what if there has been serious subsequent offending relevant to prospects of rehabilitation/ community protection/ specific deterrence?
- Or what if information not provided at time of indication later emerges?

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## RELEVANT STATUTORY PROVISIONS

### CRIMINAL PROCEDURE ACT 2009 - SECT 60

#### Court may give sentence indication

- (1) At any time during a proceeding for a summary offence or an indictable offence that may be heard and determined summarily, the Magistrates' Court may indicate that, if the accused pleads guilty to the charge for the offence at that time, the court would be likely to impose on the accused—
  - (a) a sentence of imprisonment that commences immediately; or
  - (b) a sentence of a specified type.

#### Note

Section 126 of the Magistrates' Court Act 1989 enables the court to close a proceeding to the public.

S. 60(2) inserted by No. 49/2012 s. 4.

- (2) Without limiting its discretion under subsection (1), the Magistrates' Court may decide not to give a sentence indication under subsection (1) if the Magistrates' Court considers there is insufficient information before it of the impact of the offence on any victim of the offence.

#### Note

Under section 5(2)(daa) of the Sentencing Act 1991, in sentencing an offender a court must have regard to the impact of the offence on any victim of the offence.

### CRIMINAL PROCEDURE ACT 2009 - SECT 61

#### Effect of sentence indication

- (1) If—
  - (a) the Magistrates' Court gives a sentence indication under section 60; and
  - (b) the accused pleads guilty to the charge for the offence at the first available opportunity—

the court, when sentencing the accused for the offence, must not impose a more severe type of sentence than the type of sentence indicated.

- (2) If—
  - (a) the Magistrates' Court gives a sentence indication under section 60; and

- (b) the accused does not plead guilty to the charge for the offence at the first available opportunity—

the court that hears and determines the charge must be constituted by a different magistrate, unless all the parties otherwise agree.

- (3) A sentence indication does not bind the Magistrates' Court on any hearing before the court constituted by a different magistrate.
- (4) A decision to give or not to give a sentence indication is final and conclusive.
- (5) An application for a sentence indication and the determination of the application are not admissible in evidence against the accused in any proceeding.
- (6) This section does not affect any right to appeal against sentence.

## **CRIMINAL PROCEDURE ACT 2009 - SECT 207**

### **Court may give sentence indication**

- (1) At any time after the indictment is filed but before the trial commences, the court may indicate that, if the accused pleads guilty to any charge on the indictment at that time or another charge, the court would be likely to impose on the accused—
  - (a) a sentence of a specified type; or
  - (b) a specified maximum total effective sentence.

#### **Note**

See section 210 for when a trial commences.

- (2) A sentence indication is given in relation to any charges specified in the application under section 208, not an individual charge.

#### **Note**

The Open Courts Act 2013 enables the court to close a proceeding or part of a proceeding to the public.

## **CRIMINAL PROCEDURE ACT 2009 - SECT 208**

### **Application for sentence indication**

- (1) A sentence indication under section 207 —
    - (a) may be given only on the application of the accused; and
- S. 208(1)(b) amended by No. 1/2022 s. 112(1).

- (b) may be given only once during the proceeding, unless subsection (3A) applies.

Note to s. 208(1) inserted by No. 1/2022 s. 112(2).

**Note**

See section 9B of the Victims' Charter Act 2006 for obligations of the DPP to a victim in relation to an application for a sentence indication.

S. 208(2) repealed by No. 1/2022 s. 112(3).

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- (3) If an application under subsection (1)(a) is made in respect of a charge that is not on the indictment, the accused must specify the charge in the application.

S. 208(3A) inserted by No. 1/2022 s. 112(4).

- (3A) A second or subsequent sentence indication may be given if there has been a change in circumstances since the previous sentence indication that is likely to materially affect the sentence indication previously given.

- (4) The court may refuse to give a sentence indication under section 207.

S. 208(5) inserted by No. 49/2012 s. 5.

- (5) Without limiting subsection (4), the court may refuse to give a sentence indication under section 207 if the court considers there is insufficient information before it of the impact of the offence on any victim of the offence.

**Note**

Under section 5(2)(daa) of the Sentencing Act 1991, in sentencing an offender a court must have regard to the impact of the offence on any victim of the offence.

## **CRIMINAL PROCEDURE ACT 2009 - SECT 209**

### **Effect of sentence indication**

S. 209(1) substituted by No. 1/2022 s. 113(1).

- (1) If—
- (a) the court gives a sentence indication under section 207; and
  - (b) the accused pleads guilty to any charge to which the sentence indication relates at the first available opportunity—

the court, when sentencing the accused for the offence, must not impose a more severe sentence than the sentence type or maximum total effective sentence indicated.

S. 209(2) repealed by No. 1/2022 s. 113(2).



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- (3) A sentence indication does not bind the court on any hearing before the court constituted by a different judge.
- (4) A decision to give or not to give a sentence indication is final and conclusive.
- (5) An application for a sentence indication and the determination of the application are not admissible in evidence against the accused in any proceeding.
- (6) This section does not affect any right to appeal against sentence.

S. 209A inserted by No. 1/2022 s. 114.

## **CRIMINAL PROCEDURE ACT 2009 - SECT 209A**

### **Review of amendments—Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Act 2022**

- (1) The Attorney-General must review the operation of the amendments made to Part 5.6 and section 9B of the Victims' Charter Act 2006 by the Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Act 2022 to determine—
  - (a) their effectiveness in reducing delay in the courts; and
  - (b) their impact on victims; and
  - (c) the availability of information before the courts of the impact of an offence on any victim of the offence at the time that the court is considering an application for a sentence indication.
- (2) A review under subsection (1) must be conducted not later than 2 years after the amendments are made to Part 5.6 by the Justice Legislation Amendment (Criminal Procedure Disclosure and Other Matters) Act 2022.