Boulton v The Queen: *The Resurrection of Guideline Judgments in Australia?*

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Abstract

Fair sentencing strives to balance an emphasis on individualised justice with an emphasis on consistency, both of which are essential in promoting just outcomes. While there is an inherent tension between the values, each is essential to a fair sentencing system. In grappling with these dual demands of proportionality and equality, however, different jurisdictions have placed different emphases on these two aspects of justice. The result has been two broad, competing paradigms of fairness in sentencing: 'individualism' versus 'comparativism'. Guideline judgments are one way of promoting consistency in sentencing decisions while respecting the importance of maintaining sufficient discretion to individualise sentences. Despite statutory authorisation, however, the use of guideline judgments has been controversial because they challenge the individualist jurisprudence of the High Court, which characterises practical attempts to operationalise consistency as unduly limiting sentencing discretion. Victoria has traditionally been a proponent of this high individualism. The landmark nature of the Court of Appeal's recent decision to issue the state's first guideline judgment in *Boulton v The Queen* becomes apparent when viewed in this context. Though it suffers from the limitations of being forced to operate in a predominately individualist sentencing framework, *Boulton* hopefully signals the beginning of a more nuanced jurisprudence that recognises that fair sentencing outcomes are not just a question of the *amount* of discretion, they are also the product of practical appellate regulation of the decision-making process aimed at promoting sentences that are both individualised and equal between similar offenders.

Keywords: sentencing – criminal procedure – discretion – consistency – equality decision-making – Victoria

Introduction

Since the 1970s, empirical research has repeatedly demonstrated that unregulated discretion is directly correlated with unwarranted inter-judge disparity in sentencing outcomes (Hogarth

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1971; Palys and Divorski 1986; Steffensmeir, Ulmer and Kramer 1998; Kramer and Ulmer 2009:114). This is not due to conscious bias, but rather because judges interpret sentencing principles and case facts 'in manners consistent with their own schemas' (Homel and Lawrence 1992:534). As one remedial measure, guideline judgments, a form of 'judicial self-regulation' (Anderson 2006:204), have been used without controversy in England (Ashworth and Roberts 2013), Canada (Roberts 2012; *R v Arcand*) and New Zealand (Young and King 2013) to promote equal justice and the rule of law by operationalising consistency in sentencing decisions while respecting the importance of individualisation.

The hope of guideline judgments is that patterns of inconsistency, undue leniency or severity will be redressed by appellate courts setting appropriate standards to guide the exercise of the sentencing discretion (Freiberg 2014:976). By challenging 'the traditional notion that sentencing is primarily a matter of impression for the sentencing judge and only secondarily a matter of principle' (*R v McDonnell* at [65]; Tonry 1996:3), guideline judgments also promote the rule of law, transparency in the decision-making process, and public confidence in the criminal justice system. Appellate courts can deliver various forms of guidance in these judgments. They may advise on the use of penalties, the weighting of case facts, or the relative ranking of sentencing principles and purposes for different types of offence or offender. In this respect, guideline judgments 'offer a degree of coverage and integration of approach' not normally found in appellate judgments (Fox 1987:227). Guideline judgments can offer discursive or narrative guidance or they can 'suggest a sentencing scale, or appropriate starting point, in one or more commonly encountered factual situations' for an offence type (Spigelman 1999:11; cf *Wong v The Queen* at 610–13).

The guidance may take different forms, but the success of any guideline judgment as a method of reducing unwarranted disparity depends on its degree of constraint or 'binding-ness'. Depending on the circumstances in which sentencers are obliged to follow the judgment and when they can depart from it, a guideline judgment may 'serve to strike an appropriate balance between the individual justice achieved through the sentencing discretion and the objectives of consistency of sentencing and maintenance of public confidence in sentencing and the courts' (*Ashdown v The Queen* at [175] (citation omitted)).

Though they are more limited in scope and influence than the formal guidelines researched and promulgated by specialist sentencing commissions in England and Wales and many American jurisdictions (Weisberg 2012; Krasnostein and Freiberg 2014), judicially generated guidelines nevertheless share the same aim of disparity reduction. However, while a number of Australian jurisdictions have statutorily provided for this type of guideline judgment,[1] their use has been controversial because they challenge prevailing sentencing orthodoxy. High Court decisions have repeatedly characterised practical attempts to guide the exercise of sentencing discretion as attempts to unfairly limit that discretion (*Barbaro v The Queen* at [27]; *Bugmy v The Queen* at 592; *Hili v The Queen* at 544–5; *Markarian v The Queen* at 371). These cases strongly asserted the inherent value of a broadly unfettered sentencing discretion and the notion that it should be as wide as possible within the parameters of the maximum penalty, the limiting principle of proportionality, and any statutory constraints (Krasnostein and Freiberg 2014). This 'individualist' approach measures fairness largely in relation to what it sees as each case's unique circumstances and therefore rigorously protects unregulated

[1] *Sentencing Act 1991* (Vic) pt 2AA (introduced 2003); *Penalties and Sentences Act 1992* (Qld) ss 15AA and 15AJ(1)(a) (introduced 2011); *Sentencing Act 1995* (WA) s 143 (introduced 1995); *Criminal Law (Sentencing Act) 1988* (SA) s 29A (introduced 2003); *Crimes (Criminal Procedure Amendment (Sentencing Guidelines) Act 1998* (NSW); *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 36–42A.

discretion to tailor punishment to individual case facts (Krasnostein and Freiberg 2013). A 'comparativist' approach, on the other hand, measures fairness against similar cases, using decision-making tools like sentencing statistics, comparable cases and the analogical reasoning intrinsic to the common law (Krasnostein and Freiberg 2013). The logic of the 'individualist' jurisprudence that prevails in Australia holds that individualised justice is at odds with equal justice; a binary distinction not universally accepted (Krasnostein and Freiberg 2013).

Victoria has traditionally been a strong proponent of this high individualism. The sections of the Victorian *Sentencing Act 1991* providing for guideline judgments remained unused for a decade after they were introduced in 2004 to increase consistency and public confidence in sentencing. However, in 2014, the Victorian Director of Public Prosecutions applied for a guideline judgment in respect of the use of the relatively new community corrections order ('CCO') in pt 3A of the *Sentencing Act 1991* (Vic). In granting that application and ultimately deciding to issue a sanction-based guideline judgment in *Boulton v The Queen,* the Victorian Court of Appeal implicitly challenged the status quo. The Court recognised the need for a greater degree of appellate engagement in, and guidance on, sentencing law and policy in order to strike a better balance between the twin imperatives of sentence individualisation and unwarranted disparity reduction. The landmark nature of this decision becomes clear when it is viewed against the backdrop of the fraught Australian experience with guideline judgments. It is hoped that *Boulton* signals the beginning of a more nuanced jurisprudence that recognises that fair sentencing outcomes are not just a question of the *amount* of judicial discretion; they are also the product of effective regulation of the decision-making process in order to promote sentences that are both individualised and substantively equal between like offenders.

The fraught history of guideline judgments in Australia

In 1998, in *R v Jurisic* the first formal Australian guideline judgment was issued by a Full Bench of the New South Wales Court of Criminal Appeal ('NSWCCA') on its own initiative with the aim of improving consistency in sentencing. However, the practice was relatively short-lived due to High Court decisions in 2001 and 2005 that the guidelines had gone too far in restricting judicial discretion. They were also limited by the political decision to introduce standard non-parole periods on the basis that they had not gone far enough in restricting discretion. While the New South Wales ('NSW') guideline judgments issued between 1998 and 2004 continue to function as 'guides' in that jurisdiction (*Lang v The Queen* at [21]; *R v Kelly* at [54]), the guideline issuing function was rendered effectively nugatory by those two forces, despite statutory authorisation.

Guideline judgments in NSW

In *Jurisic,* the NSWCCA established sentencing guidelines for the offence of dangerous driving occasioning death or grievous bodily harm. These guidelines were a corrective measure intended to drive a 'sharp upward movement in penalty' (*Jurisic* at 229) in response to a high rate of Crown appeals, a politically inflammatory media focus on those sentences, and statistical data from the Judicial Commission of NSW showing that judges had failed to follow appellate decisions calling for a significant rise in sentence length following a 1994 penalty increase for the offence.

The then Chief Justice envisaged that a system of guideline judgments would follow and 'in due course, ensure that there is consistency in sentencing practices for particular offences' (Spigelman 1998). In the judgments, his Honour stated that:

> Guideline judgments should now be recognised in NSW as having a useful role to play in ensuring that an appropriate balance exists between the broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the desirability of consistency in sentencing and the maintenance of public confidence in sentences actually imposed and the judiciary as a whole, on the other (at 220).

Never formally binding, the NSW guidelines were 'a mechanism for structuring discretion, rather than restricting discretion' (*Jurisic* at 221). At the same time, however, Spigelman CJ also wrote that '[t]he exercise of that discretion must, however, occur within bounds of consistency', recognising the need to balance sufficient flexibility to individualise sentences with sufficient constraint to promote equal outcomes between relevantly similar offenders (Spigelman 1998). While the guidelines were considered persuasive and an explanation for not following a guideline was expected by the appellate court in sentencing remarks (*R v Henry* at 357; *R v Romanic* at [16]), failure to sentence in line with a guideline never constituted a ground of appeal.

The NSW guideline judgments were not intended to promote identical outcomes. It could be argued that they never even intended to promote an identical approach to sentencing, given the statement in *Jurisic* (at 221) that:

> [t]he existence of multiple objectives in sentencing — rehabilitation, denunciation and deterrence — permits individual judges to reflect quite different penal philosophies. This is not a bad thing in a field in which 'the only golden rule is that there is no golden rule' (*Geddes* at 555 per Jordan CJ).

For some commentators, this broad approach failed to effectively promote consistency (Morgan and Murray 1999:96). Others claimed it was 'not treating everyone equally to impose arbitrary punishment, or to fetter the discretion of the sentence in the manner proposed by NSW Chief Justice Jim Spigelman' (Hampel 1998). The Court was therefore in the invidious position of being criticised for not sufficiently constraining discretion and for constraining it too much (see Zdenkowski 2000:66; ALRC 2006:[21.26]). The Court's approach, however, pragmatically navigated a course between those positions by promoting consistency to the extent that could be achieved by highlighting factors that should normally be taken into account as a matter of sentencing policy. This was intended to keep sentencing practices within a broad but not infinite 'permissible range of variation' (*Jurisic* at 221).

The notion that this was a new function was downplayed by the then Chief Justice in the judgment and scholarly articles, where he framed the guideline judgment as a continuation of appellate court practice (*Jurisic* at 217–19; Spigelman 1999:11). At the same time, however, his Honour promoted the guideline as an 'innovative and different approach to the determination of criminal sentences' in an article for *The Daily Telegraph*, stating that '[f]or the first time in Australia, the [Court of Criminal Appeal] will issue guideline judgments for trial judges which establish principles and indicate a range of appropriate penalties for particular offences' (Spigelman 1998). The contradictory claims were consistent with the conflicting but necessary aims of the first guideline judgment: to achieve acceptance from a protective community of judges steeped in highly discretionary sentencing norms (see MacKenzie 2005:48–9; Freiberg 2002:209, 212; ALRC 1980:399); and to convince an electorate desirous of change that an effective mechanism was now in place to address perceived inconsistency and leniency in sentencing and thereby maintain their confidence in the administration of criminal justice and avoid rash legislative change.

The true characterisation of guideline judgments lay in the middle. Such was implicitly acknowledged by Spigelman CJ, writing that 'the laying down of guidelines and sentencing

principles in the traditional manner, does run the risk that the guidelines will be overlooked' (Spigelman 1999:11; Freiberg and Sallmann 2008:49–50). However, this was never merely a labelling issue. The requirement to articulate reasons for departure made guideline judgments a call to compliance that had not existed previously (*Henry* at 357). Over the next five years, the NSWCCA delivered seven other guideline judgments,[2] each one a way of 'striv[ing] for both consistency and individualised justice' (Spigelman 1999:6).

The High Court weighs in: Wong

The first rejoinder from the High Court appeared in *Wong v The Queen*, where the federal drug importation guidelines issued by the NSWCCA were invalidated, although the Court was divided on the consequences. The invalidity was due to the inconsistency between giving determinative weight to one factor — drug quantity — with the requirement for individualisation under the *Crimes Act 1914* (Cth) s 16A and the *Customs Act 1901* (Cth). This approach was found to conflict with fundamental sentencing principles because it was said to ignore the various and conflicting elements that impact on the outcome and did not address the need to consider proportionality (*Wong* at 610–13).

The *Wong* quantitative guideline specified five ranges corresponding to the amount of drug involved. It was not a prescriptive guideline intended to correct sentence practices, but rather a descriptive guideline intended to confirm those practices and therefore 'limit the possibility of aberrant sentences at first instance' while promoting general deterrence by 'increas[ing] the efficiency of the transmission of knowledge about actual sentencing practice' (Spigelman 2000).

The High Court majority further held that quantitative guideline judgments may, for federal offences at least, also be unconstitutional on the grounds that courts cannot generally deal with points of law not the subject of a dispute. A guideline judgment is considered prospective and, because it produces no order or declaration, is not strictly a justiciable 'matter' subject to review (*Wong* at 615; Freiberg and Sallmann 2006:66). There was some concern also that a numerical guideline, which identifies a range of results rather than a reasoning process, passes from being a decision settling a matter to a 'decision creating a new charter by reference to which further questions are to be decided' and thus shifts from a judicial to a legislative function (*Wong* at 613–14). Additionally, their Honours criticised the approach of the NSWCCA as encouraging a two-stage or sequential approach to sentencing that they characterised as likely to lead to error because, unlike instinctive synthesis, it does not allow all relevant elements to be simultaneously and intuitively balanced. The majority was:

> generally antagonistic to guideline judgments, taking the view that it was not a proper role for an appellate court to lay down prescriptive sentencing ranges for future cases, though courts could appropriately make explicit the sentencing principles that might guide sentences in relation to particular kinds of offences (Freiberg 2002:206–7).

Ironically, this decision impugning guideline judgments was supported using the same principle employed in *Jurisic* to justify guideline judgments: equal justice. Gaudron, Gummow and Hayne JJ stated that:

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[2] *R v Henry* (armed robbery); *R v Ponfield* (break, enter and steal); *R v Thomson* (guilty plea); *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (Form 1 matters); *R v Wong* (drug importation, overruled by the High Court); *R v Whyte* (reformulating the dangerous driving guideline); *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Content of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (high-range prescribed content of alcohol).

> To focus on the result of the sentencing task, to the exclusion of the reasons which support the result, is to depart from fundamental principles of equal justice. Equal justice requires identity of outcome in cases that are relevantly identical. It requires different outcomes in cases that are different in some relevant respect. Publishing a table of predicted or intended outcomes masks the task of identifying what are relevant differences (*Wong v The Queen* at 608).

This analysis sits uncomfortably with the fact that the quantitative guidance was non-binding and never intended to be applied to the exclusion of all relevant considerations. The decision is also predicated on the unsubstantiated assumption that the dominant approach to sentencing was not producing unwarranted disparity between similarly situated offenders. Perhaps unsurprisingly, this decision invalidating the federal guideline judgment is itself 'unsatisfactory because of the difficulty of extracting clear guidance from it' (Warner 2003:12). Despite finding that they may be valid in certain instances, the High Court 'created a climate of uncertainty' (ALRC 2006:[21.37]) around guideline judgments.

NSW guideline judgments after Wong v The Queen

Wong v The Queen demonstrated how the experience of guideline judgments was coming to mirror the fraught politics of sentencing more generally. Control over the sentencing discretion was at stake and the tensions this generated played out between the High Court and the NSW Court of Criminal Appeal, between the judicial 'left' and 'right', between 'individualists' and 'comparativists', and between Parliament and the bench.

In response to the High Court, the NSW Labor Government fortified the statutory guidelines power and conferred retrospective validity on existing guidelines. The NSWCCA reaffirmed its support for guideline judgments generally, and numerical guidelines specifically (*R v Whyte* at 275–6), and continued its guideline practice until 2004. Another rejoinder from the High Court followed shortly in *Markarian v The Queen*, a successful appeal on the grounds — now in the context of state charges — that the appellate court had placed too great an emphasis on drug quantity without regard to all the facts and that its use of sequential reasoning constituted legal error. While not a guideline judgment, Hulme J in the NSWCCA had exposed his reasoning process, including a starting point of 15 years based on the relevant maximum penalties, additional time for other offences considered and discount for the guilty plea. Tellingly, *Wong* was cited favourably in both findings of error (*Markarian* at 369–70, 373–5, 380). The majority delivered a wholesale rebuttal of judicial efforts to structure decision-making, stating:

> [e]xpress legislative provisions apart, neither principle, not any of the grounds of appellate review, dictates the particular path that a sentencer passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. … As has been pointed out more than once, there is no single correct sentence (*Markarian* at 371).

It is reasonable to assume that this forcefully articulated position, together with the legislative introduction of standard non-parole periods, halted the practice of issuing new guideline judgments in NSW.

NSW guideline judgments and standard non-parole periods

The introduction of standard non-parole periods ('SNPP') in 2002 was politically driven; in a pre-election climate, the NSW Government clearly lost faith in guideline judgments and took a different approach to promote the type of monolithically severe sentences believed to have been sought by the community. Standard non-parole periods effectively overrode existing and future guideline judgments for the offences to which they applied (see NSW Sentencing

Council 2013:10; Anderson 2004:148; *R v JW* at [176]). Significantly, the NSWCCA issued its last guideline in 2004 for the offence of driving with the high-range prescribed concentration of alcohol, a summary offence not covered by the SNPP scheme. Before they too were rendered advisory by the High Court in *Muldrock v The Queen* in the name of individualism, SNPPs operated to increase the severity and uniformity of sentences. They were not demonstrated to reduce unwarranted disparity.

There continues to be sustained reference to guideline judgments in NSW, demonstrating their utility in daily sentencing practice. However, since *Markarian*, the High Court has become more forceful in its view that measures seeking to operationalise consistency constitute an unreasonable fetter on the sentencing discretion and that the fairness of sentencing outcomes is in a direct relationship with the amount of discretion accorded to individualise sentences (*Barbaro v The Queen* at [28]; *Hili v The Queen* at 537; *Green v The Queen* at [29]–[30], [105]; Krasnostein 2014). Freiberg has noted that:

> There are substantial difficulties of determining the nature of the guidance that an appellate court can offer without infringing the High Court's strictures in *Wong v The Queen*, *Markarian v The Queen*, *Hili v The Queen* and *Barbaro v The Queen* that sentencing is an instinctive and individualistic exercise. The clear direction that sentencing guidance should take the form of the consistent application of legal principles, rather than sentencing ranges in the form of numbers, leaves a large amount of indeterminacy in the system (Freiberg 2014:971 (citations omitted)).

Despite their practical utility and demonstrated effectiveness in correcting sentencing practices to promote reasonably consistent outcomes (Barnes and Poletti 2003; Poletti 2005; Barnes and Poletti 2010; Judicial Commission of NSW 2002), NSW has not issued a formal guideline judgment since *Markarian* and — until *Boulton v The Queen* was handed down in December 2014 by the Victorian Court of Appeal — no other state had ever used its statutory power to do so.

The next stage: *Boulton*

Members of the Victorian Court of Appeal have historically been strong supporters of individualist sentencing and antipathetic to guideline judgments, indicated by explicit statements to that effect (*R v Ngui* at 584), resistance to the initial attempts to introduce a statutory guidelines power (Freiberg 2002:206, 209, 212), and the failure to exercise the statutory power for a decade following its introduction. However, a split became clear in recent times, with certain members appearing to invite an application by the Director of Public Prosecutions ('DPP') for a guideline judgment (see *Nash v The Queen* at [12]; *Ashdown* at [175]). The stance of the Court officially changed with the decision in *Boulton*, Victoria's first guideline judgment, handed down on 22 December 2014.

Victorian statutory power

On hearing an appeal against sentence, the Court of Appeal may, on its own initiative or on application by a party to the appeal, decide to give a guideline judgment setting out guidelines about sentencing generally, or about a particular type of offender, court, offence, or penalty (*Sentencing Act 1991* (Vic) ss 6AB and 6AA). Unlike the statutory position in South Australia (*Criminal Law (Sentencing Act) 1988* (SA) s 29A), a guideline judgment may not be made in relation to 'the appropriate level or range of sentences for a particular offence or class of offence'. Despite being included in the original draft proposals, such a power was strongly opposed by the courts — another manifestation of the dominance of individualism. There is, however, much flexibility in the permissible content of such a judgment. It may set out: the

criteria to be applied in selecting among various sentencing alternatives; the weight to be given to the purposes of sentencing or relevant considerations; the criteria for determining the gravity of an offence or for reducing a sentence; or any other matter consistent with the principles contained in the *Sentencing Act 1991* (Vic). A guideline judgment may be given separately to, or included in, the Court's judgment and the Court may issue a guideline judgment even if it is not necessary for determining the appeal. The decision to give the guideline judgment must be unanimous.

If the Court decides to give a guideline judgment it must notify the Sentencing Advisory Council ('SAC') and consider its written views in addition to giving the DPP and Victoria Legal Aid ('VLA') opportunities to appear and make submissions. Importantly, the legislation requires the Court, in considering whether to give a guideline judgment, to have regard to the need to promote consistency of approach in sentencing and the need to promote public confidence in the criminal justice system.

Boulton v The Queen

The three appellants, Boulton, Clements and Fitzgerald, were each sentenced to a community correction order ('CCO'). In applying for a guideline judgment, the DPP submitted that there was a need for appellate guidance about the relevant considerations in deciding whether to impose a CCO and, if so, what the duration should be and what conditions should be attached (*Boulton* at [11]). The DPP submitted that 'there was a real risk of inconsistency in the use of CCOs' unless 'an authoritative statement of the principles to be applied in determining the period of a CCO' was given, illustrated in part by the fact that the appellants' orders were 'statistical outliers' (at [42] and [57]). Respectively, Boulton, Clements and Fitzgerald received CCOs of eight, ten, and five years duration.

The argument for guidance regarding CCOs

From January 2012, CCOs replaced community-based orders, intensive correction orders and to some extent, suspended sentences. Under the *Sentencing Act 1991* (Vic) s 36, the purpose of a CCO is to provide a non-custodial sanction that can be adapted, through the use of a range of novel special conditions, to a wide range of offending and offenders. As the then Attorney-General stated, the CCO was intended to:

> provide an alternative sentencing option for offenders who are at risk of being sent to jail. These offenders may not yet deserve a jail sentence but should be subject to significant restrictions and supervision if they are going to live with the rest of the community. The broad range of new powers under the CCO will allow courts wide flexibility to tailor their response to address the needs of offenders and set appropriate punishments (Victoria 2011:3292).

In a highly discretionary sentencing framework, this flexibility is the order's greatest strength and greatest weakness. Besides the core conditions included in every CCO, 11 special conditions may also be attached. These conditions are: unpaid community work; treatment and rehabilitation; supervision; non-association; residence restriction or exclusion; place or area exclusion; curfew; alcohol exclusion; bond; judicial monitoring; and a catch-all, residual condition (*Sentencing Act 1991* (Vic) ss 48C–48L, 48). Richard Fox has noted that these special conditions yield 2053 possible combinations of order, on top of which the sentencer must also decide the question of duration (Fox 2012).

A CCO can be imposed by the Magistrates' Court for a period of two years for one offence, four years for two offences or five years for three or more offences. In the higher courts, a CCO can be imposed for the greater of two years or the maximum penalty for the relevant offence, presuming a false equivalence between very different types of punishment that

sentencers may or may not recognise. In the absence of appellate guidance, therefore, there is ample opportunity for sentencers' personal views about culpability, rehabilitation, and the deterrent value of a non-custodial sanction to govern the initial decision between a CCO or imprisonment for offences falling in the mid-range of seriousness and the subsequent decisions about special conditions and duration. Further opportunities for unwarranted disparity also exist in decisions whether to vary the CCO during the life of the order and how to deal with breaches of the order. Given the broad discretion exercised by sentencers in an area of law where 'the only golden rule is that there are no golden rules' (*R v Geddes* at 555), the chances for variation based more on the judge who happened to decide the case than on the case facts were high.

Empirical evidence indicated that this potential for unwarranted disparity in the imposition and structure of CCOs had become a practical problem. Sentencing Advisory Council data suggested, and all the institutional participants submitted, that CCOs were not being fully utilised by sentencers (Clare and Krasnostein 2014). The new conditions available as part of the CCOs — and on which their effectiveness relies — were being used 'only rarely' (*Boulton* at [47]–[49]). Sentencing Advisory Council analysis of the CCOs imposed from January 2012 to December 2013 highlighted the nature of this underutilisation:

- as the rate of imposition of suspended sentences decreased by 16.8 per cent, sentences of imprisonment rose by 11.4 per cent, but the use of CCOs rose by only 2.3 per cent;
- the median length of CCOs imposed by the higher courts was two years, with only 15 per cent being of longer duration; and
- in most cases, the conditions attached to a CCO in the County Court were those requiring offenders to undergo assessment and treatment (81 per cent), supervision (75 per cent) or community work (74 per cent).

Victoria Legal Aid submitted that, contrary to the legislative intention and '[d]espite its protean nature', the potential of the CCO was not being reached because the new conditions and increased range for duration were used infrequently (*Boulton* at [24]). In addition, VLA argued for a guideline judgment on the basis of a number of other considerations. First, there was a lack of transparency concerning the purpose for which CCOs were being imposed and the basis of decisions regarding duration and conditions. Second, there was a need for greater clarity and appellate guidance given that, apart from exceptional cases, CCOs were unlikely to be tested through the traditional appeal process. Third, the uncertainty surrounding CCOs makes it difficult to advise clients. Last, by structuring the approach to be taken in determining whether to impose a CCO as well as its conditions and duration, a guideline would 'enhance consistency and transparency, and promote greater public confidence in the criminal justice system' (*Boulton* at [24]).

These arguments were supported by empirical data indicating that the lack of practical sentencing guidance was resulting in unwarranted disparity between similar offenders. The SAC conducted quantitative and qualitative analyses of sentencing remarks in 437 of 460 CCOs imposed in the higher courts over the 18-month period following their introduction. Analysing the choice between a CCO and a custodial sentence, the qualitative analysis found that relevant similarities in case facts indicated that 'the difference [in imposition of a CCO or term of imprisonment] may … be attributable to differences in the weighting of similar case facts', while the quantitative analysis found that 'the majority of case variables do not predict if a CCO or short term of imprisonment will be imposed' (Clare and Krasnostein 2014:1–2, 19–22).

The Director submitted that a guideline judgment in these circumstances would 'serve the statutory objectives of promoting consistency of approach and promoting public confidence in the criminal justice system' (*Boulton* at [3]). In granting the application for a guideline judgment hearing, the Court stated:

> we are here dealing with Community Correction Order provisions which are new and radically different to any which have appeared in the *Sentencing Act 1991* before now, and it is arguable that, in the circumstances which apply, there is both a unique opportunity and need for the court to provide guideline judgments to avoid sentencing disparity in the short and medium term ahead (at [13]).

CCO guideline judgment

The Court ultimately agreed that this was 'a proper case' for a guideline given that the CCO was 'a radical new sentencing option, with the potential to transform sentencing in [Victoria]' (at [4], [24]). As such, it was 'vitally important … that sentencing courts be given as much guidance as possible about how a CCO can serve the various purposes for which a sentence is imposed' (at [4]). The Court stated that the 'inherent difficulty' of the sentencing task — that is, the need to balance a range of conflicting purposes in formulating a punishment that adequately matches the particular facts of each case — means that '[t]he potential for inconsistency … is particularly acute when a radically new sentencing option such as the CCO becomes available' (at [35]–[36]).

The Court dealt with a number of 'specific issues' concerning the imposition of CCOs, the issues on which judges were routinely differing and that were leading to disparity in the use and application of the sanction. The first issue resolved by the Court was the extent to which this non-custodial disposition could be punitive. The Court settled that the CCO was 'intrinsically punitive and is capable — depending on the length of the order and the nature and extent of the conditions imposed — of being highly punitive' (at [124]). This was illustrated by the nature of the mandatory conditions, which 'materially impact on an offender's liberty', the 'significant burdens' brought on by contravention of the order, and — 'most clearly' — by 'the range and nature of the conditions which may be attached to such an order' (at [91]–[93]). After reinforcing the punitive nature of the CCO, the Court highlighted that judges and counsel would need to direct their inquiries as to how to tailor conditions to achieve the appropriate punitive, and rehabilitative, effects for individual offenders envisaged by the legislature in a way that 'enables all of the purposes of punishment to be served simultaneously, in a coherent and balanced way, in preference to an option (imprisonment) which is skewed towards retribution and deterrence' and that has criminogenic consequences (at [108]–[113]; see *Alam v The Queen* at [20]; *Cole v The Queen* at [21]–[22]).

In relation to duration, the Court settled that comparisons with the available term of imprisonment were 'of very limited assistance' in light of 'the differences between the two types of sanction in punitive character and in rehabilitative capability' (at [122]), but that, 'other things being equal, the term of a CCO is likely to be longer — often, markedly longer — than the term of imprisonment which may otherwise have been imposed' (at [122]).

On the issue of deterrence, the Court held that CCOs can 'very effectively' achieve specific deterrence but stated that, while the CCO 'is a very significant punishment', it is 'not self-evidently punitive' for the purposes of general deterrence (at [124]–[130]). Thus, while getting out 'the message' about CCOs 'rests with the government', the 'task of communication must begin with the sentencing court' and should involve the reasons for the conclusion that a CCO is a sufficient punishment being 'clearly set out' (at [126]–[127]).

The Court addressed the question of whether there were offences for which a CCO would ordinarily be unsuitable. It found that:

> a CCO may be suitable even in cases of relatively serious offences which might previously have attracted a medium term of imprisonment (such as, for example, aggravated burglary, intentionally causing serious injury, some forms of sexual offences involving minors, some kinds of rape and some categories of homicide) (at [25]).

However, it was 'both undesirable and unnecessary to seek to impose in advance any outer limits on the availability of this sentencing option' because more time would be needed to explore the scope for utilising CCOs — an endeavour that depends on proper correctional support and resourcing (at [131]–[135]).

The Court offered guidance on a range of other issues on which reasonable minds had been differing: how to combine a CCO with a sentence of imprisonment (at [136]–[145]); the significance of punishment in determining the length of a CCO (at [146]–[156]); the exercise and implications of the power to vary or cancel a CCO (at [157]–[165]); how to estimate the period required for a CCO ([166]–[170]); the impact of anticipated difficulties of compliance with CCO conditions ([175]–[182]); the content of a pre-sentence report (at [175]–[182]); special considerations applying to CCOs for young offenders ([183]–[194); the use of the judicial monitoring condition (at [191]–[195]); considerations impacting the choice between a CCO or a non-parole period (at [196]–[200]); and issues affecting an offender's consent to a CCO (at [201]–[202]).

Given the length of the judgment, the Appendix usefully contains stand-alone 'guidelines for sentencing courts' in relation to CCOs. These are divided into four parts: General Principles; Imprisonment or CCO?; Determining the length of a CCO; and Determining the conditions to be attached to a CCO. While the guidelines should be understood in the context of the decision, their status as a practical decision-making tool is evident from the Court's statement that they are intended to be 'in a form suitable for use by sentencing courts without the need to refer to the full judgment' (*Boulton* Appendix 1). Because of the High Court's prohibitions on sequential reasoning and numerical starting points, the guidelines do not set out a decision-making process nor do they give numerical boundaries for duration. Instead, they contain narrative or discursive policy statements concerning the use of the CCO sanction and its conditions.

CCO Guidelines: A new hope for disparity reduction?

Boulton v The Queen is a landmark case in Victorian and Australian sentencing jurisprudence for a number of reasons. It is the first time since the stream of NSW judgments that ceased to be issued a decade ago that an appellate court has explicitly operationalised the value of consistency through the use of sanction-based guidelines for sentencers. A marked break with past abstentionism in Victorian appellate practice, it implicitly recognises that merely supporting consistency as a sentencing value at the level of principle (see, for example, *R v Boaza* at [44]) was insufficient to result in disparity reduction. Without practical policy guidance across a range of issues, differences between sentencers were resulting in unacceptable unwarranted disparity in the imposition, duration and structure of punishment for similarly situated offenders. Further, the decision to issue the CCO guideline validated the crucial role of empirical evaluation in the development — and defence — of sentencing

policy.[3] Finally, the decision showed a bench taking proactive steps to keep sentences within a reasonable range in a year during which the High Court, in *Barbaro v The Queen*, came down once again on the side of almost unfettered discretion to individualise sentences.[4]

In these respects, the guideline judgment in *Boulton* was more than should have been expected given the current state of sentencing jurisprudence and the traditional conservatism of the Victorian Bench. But it was also less than ideal. The Court stated:

> The function of a guideline judgment is to provide assistance to sentencing courts in the application of the law. Such assistance seems particularly appropriate in the present case, given how new the CCO regime is and how markedly different it is from the sentencing options previously available (at [27] (citations omitted)).

Yet the very same factors which supported this guideline for the 'new and radically different' CCO penalty (*Boulton* at [13]) — namely, the lack of judicial agreement about how best to balance competing sentencing goals in the imposition, structure, and duration of punishment — exist equally in relation to the traditional penalties of fines and imprisonment. Assertions that a guideline was necessary predominately because of the novelty of CCOs may mitigate the disapproval of an individualist High Court but, disappointingly, they also reduce the possibility of guideline judgments being issued in relation to these other sanctions or to offences, in the case of offence-based guideline judgments, or to general issues, like the impact of a guilty plea or totality, in the case of generic guideline judgments that apply to a range of offences. The English experience has shown that practical guidance is equally desirable across all these areas in order to reduce unwarranted inter-judge disparity in the sentencing decision-making process (Ashworth and Roberts 2013). Confining the justification for a guideline judgment to the novelty of CCOs was an opportunity lost for applying the benefits of appellate policy guidance more broadly. In addition, the level of constraint that accompanies the *Boulton* guideline is not ideal. The Court stated that:

> The provision of a guideline judgment can promote consistency and public confidence in the sentencing process by articulating elements that must be taken into account in a particular sentencing context, and by giving guidance as to a unified approach. It can also facilitate the development of coherent sentencing practice by way of unified application of principle and, in turn, assist the identification of relevant similarities and differences between cases (at [40]).

However, in order keep the guideline within the ambit described by the High Court, it also emphasised that 'the giving of a guideline judgment does not fetter the discretion of the sentencing court in any way. The only constraints on the exercise of the sentencing discretion are those imposed by the common law and by the substantive provisions of the Act' (at [27] (citations omitted)).

The 'critical element' (Roberts 2012:336) of any guideline scheme is the degree to which it binds sentencers. Mandatory schemes constrain discretion too tightly, producing the

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[3] As a result of the SAC's research and the Department of Justice's monitoring of the introduction of the CCO, which found underutilisation — together with rapidly growing prison numbers — the Government brought in legislation after the application in *Boulton*, but before the judgment, to provide more legislative guidance as to the use of CCOs: see *Boulton* at [117]ff; *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 16 (introducing *Sentencing Act 1991* (Vic) s 5(4C) providing that a court must not impose a custodial sentence unless it considers that the purpose for which the sentence is imposed cannot be achieved by a CCO with certain specified conditions).

[4] The Victorian Court of Appeal attempted to limit the effect of *Barbaro* in *Matthews v The Queen*, a case which — together with *Boulton* — indicates that there is a clear difference of opinion between the benches on judicial methodology.

injustice of treating differently situated offenders similarly. Advisory or voluntary schemes operate on an opt-in basis: sentencers are advised — but not required — to 'have regard to' the guidelines promulgated. Presumptive schemes require judges to articulate reasons justifying departure, such reasons being subject to appellate review. Often those reasons are limited; for instance, a guideline must be followed unless the court finds 'substantial and compelling reasons' to do otherwise or because it is 'contrary to the interests of justice' to follow the guideline. A presumptive guideline would have been the most effective way of balancing compliance and flexibility in order to ensure that the CCO guidance was applied routinely and in consistent ways. However, it was necessary for the Court to issue advisory guidelines and emphasise that they do not constitute any type of 'fetter' in order to keep the decision within the bounds of *Wong* and *Markarian*. The absence of a sufficiently binding mediating nexus between the guideline and its application by sentencing judges (that is, a presumptively binding level of constraint) has the effect of diminishing its regulatory effect as means of ensuring consistency of approach and reliably reducing unwarranted disparity.

Apart from these specific criticisms, there is a larger question around the effectiveness of even the best judicially generated guideline judgments as a mechanism for reducing unwarranted disparity. Aside from the difficulties posed by the High Court's individualist jurisprudence, guideline judgments suffer from a number of inherent limitations related to the institutional function of the appeal courts that issue them.

Guideline judgments on pressing issues are generated slowly. They are more reactive than proactive (Fox 1987:227). For this reason as well, the guidance they offer is piecemeal; such judgments cannot take a methodical, system-wide approach to disparity reduction. Delivered by courts of appeal, they are likely to concentrate on more serious offences that do not constitute the bulk of sentencing (Young 2008:182–3). This points also to the fact that the judiciary lacks the time, resourcing and, arguably, the mandate, to undertake systemic policy reform. Strictly speaking, the guideline portions of such judgments are 'massive obiter dicta' (Ashworth 2010:36–7) and are thus less reliable as a source of authority, although the legislation does allow for a guideline judgment to be issued even in the absence of a case (*Sentencing Act 1991* (Vic) s 6AB(3)). Finally, in terms of their practical application, they have been met with 'very strong interventions' (Freiberg and Sallmann 2008:68) geared at limiting their impact both by the High Court, on the grounds that they went too far in limiting discretion, and by government, on the grounds that they did not go far enough.

On the other hand, there is much in their favour. In important ways, appellate judges are intimately aware of the problems frequently arising in sentencing practice in the lower courts and are able, through the 'process of dialogue' on a multi-appellate judge bench, to resolve the question of appropriate sentencing considerations and ranges (*Whyte* at 281–2). Guidance with the appeal courts' imprimatur is more likely to encourage acceptance by sentencing judges than legislative interventions (Ashworth 1998:229). Such judgments are amenable to modification to suit changing circumstances and needs. Unlike traditional appeals, guideline judgments 'allow an evaluation and not just a description of current practices' (Morgan and Murray 1999) and can thus move into highly influential normative statements about the use of certain penalties or the appropriate weighting of certain considerations in order to offer practical assistance to lower courts.

There has been empirical support for the proposition that judicially initiated guideline judgments increase levels of consistency, and academic and practitioner support for the balanced manner in which they do so (see NSW Law Reform Commission 2013:390; Warner 2003; Cowdery 2006; Schoff 2003:321). The problem posed by lack of resources is overcome when a court has access to the specialist expertise of a sentencing council, as was the case in

Boulton when the SAC provided extensive empirical data as well as a draft guideline to the Court. Last, the proactive response of the appellate court to instances of unwarranted disparity or public disapproval may deflect or limit more constraining, punitive legislative responses like mandatory minimum sentences (McClellan 2013:93).

The strengths and weaknesses of guideline judgments as a mechanism for reducing unwarranted inter-judge disparity speak to a larger point that fair sentencing outcomes cannot depend on one tactic alone. They are the product of a system of mechanisms working in concert: appellate review; the production of sentencing information and regular evaluation by specialist sentencing councils; the use of that information by judges; judicial sentencing education; and effective sentencing legislation. However, such a system must be supported by case law that allows for the practical implementation of efforts to achieve consistency. This is not the jurisprudence we currently have. Instead, it is likely that the regulatory effects of guideline judgments — and all these mechanisms for promoting consistency — have been diminished by the sentencing jurisprudence of a High Court that has repeatedly struck down efforts to operationalise consistency (*Barbaro v The Queen* at [27]; *Bugmy v The Queen* at 592; *Hili v The Queen* at 544–5; *Markarian* at 371).

Conclusion

Despite the practical limitations of guideline judgments and the individualist limitations within which *Boulton v The Queen* was confined, the decision of the Victorian Court of Appeal to actively engage in practical sentencing guidance is a positive step for equal treatment in the administration of criminal justice. Without such policy guidance, sentencers are left to decide anew with each case and according to their disparate personal philosophies matters of sentencing policy.

The unwarranted disparity that results is not only unfair; it attracts further injustice by inviting blunt legislative interventions to fill the void left by a 'hands-off' appellate stance. As the NSW experience shows, an appellate court's willingness to issue considered guidelines is not always sufficient to prevent such measures in the face of political exigency.[5] A fortiori, appellate courts should enter this space as much as possible to attempt to avoid the adverse effects of knee-jerk law and order politicking. It was probably a good dose of such politicking by the recently ousted Victorian Liberal Government,[6] combined with the publication of empirical data demonstrating the existence of unwarranted disparity (Clare and Krasnostein 2014; Sentencing Advisory Council 2014) that drove the Victorian Court's decision to break with its past practice of appellate abstentionism. Strangely novel in the arena of sentencing, this use of empirical evaluation promotes legal and policy responses that can optimise the fair and effective use of sentencing discretion. Hopefully the SAC will continue to be supported in generating analysis of unwarranted disparity in the imposition of other penalties, as well as in sentencing for particular offences. Traditionally lacking in Australia — and, to varying

[5] The recent issue of 'one-punch' manslaughter in 2014 provided another example of the guideline judgment avenue being abandoned in favour of short-term politicking when the government application for a guideline judgment was withdrawn in favour of mandatory sentencing legislation (*Crimes Act 1900* (NSW) ss 25A, 25B).

[6] By introducing baseline sentencing and reducing the use of parole without making a distinction between offenders, the Victorian Government bluntly limited the exercise of sentencing discretion while increasing the use of imprisonment: see, eg, the Sentencing Amendment (Baseline Sentences) Bill 2014 (Vic), which introduced a model of baseline sentencing different to that recommended by the Sentencing Advisory Council and which, contrary to the Council's recommendation, did not include a custodial threshold. See also Sentencing Advisory Council, *Annual Report 2013–2014* (2014); Corrections Amendment (Parole Reform) Bill 2013.

extents, in all comparable jurisdictions — empirical sentencing data has great power to act as a catalyst for reform in the search for a better balance between the twin imperatives of individualisation and consistency.

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