Recent sentencing issues- Presentation to CQLA by Judge P.E. Smith[1]

Introduction

This paper will discuss recent sentencing issues as follows:

1. The High Court decision in *R v Barbaro and Zirilli* [2014] HCA 2 and its practical effect.

2. Section 9(4) of the *Penalties and Sentences Act* 1992 (Q) ("PSA").

3. Removal of section 9(2) (a) PSA.

4. Victim impact statements.

Barbaro and Zirilli

The recent decision in *R v Barbaro and Zirilli* [2014] HCA 2 has had a substantial effect upon the conduct of sentencing proceedings in Queensland. It had long been the practice in this State for both prosecution and defence to make submissions as to the range of sentence available to a sentencing judge. This was by no means binding on a sentencing judge nor was it done to fetter judicial discretion, but it did provide assistance in the determination of the appropriate sentence.

The practice was different in other states. For example it was often the case in New South Wales that prosecutors made no submissions as to the range of sentence.

[1] I wish to acknowledge the research and assistance of my associate Mr. Nathan Boyd in preparing this paper.

The decision in *Barbaro* brought an immediate end to this practice. On the day the decision was handed down, the practice of prosecutors in this State changed such that prosecutors can only:

- Draw to the attention of the judge what are submitted to be the facts that should be found;
- State the relevant principles that should be applied;
- Inform the court what has been done in other (more or less) comparable cases; and
- The prosecutor **must not** make a statement as to the available range of sentences or the specific sentence to be imposed.

The decision created an atmosphere of uncertainty and confusion in sentencing proceedings at both ends of the bar table. With a blanket prohibition over submissions regarding sentence, prosecutors erred on the side of providing less information to the court in case they should inadvertently make a submission regarding sentence.

Defence counsel were unsure as to whether all, part or none of the decision impacted on their ability to provide submissions on sentence.

To provide some certainty, at least in my court, as to the application of the *Barbaro* decision, I ruled on the matter in *R v Costin* [2014] QDC 39.

On my reading of the High Court decision both parties are prohibited from making any submissions as to the range of sentence. Further the plurality

ruled that a prosecutor should not make any specific submission as to the sentence.

My view of the case was that the defence is not prohibited from making a specific submission for which the party contends. In my respectful view that is not a submission of opinion but more rather a submission.

I understand that judges have taken different approaches to applying the *Barbaro* decision in sentencing. Some courts are preventing any submissions from either party on sentence, while others are allowing submissions on range. Until such time as the Court of Appeal clarifies the issue or there is legislative intervention, counsel will have to adhere to the practice of each specific judge.

This will have more of an impact on defence counsel as opposed to prosecutors, as currently all officers of the Director of Public Prosecutions are prevented from making any submissions regarding sentence.

Prosecutors shall simply continue with their practice of submitting the facts to be found, the relevant principles to be applied and providing comparable authority. This provides the sentencing judge with a “yardstick” against which to examine the proposed sentence.[2]

[2] *R v AAR* [2014] QCA 20 at [43]; *R v Ogden* [2014] QCA 89 at [7]

As defence practitioners, you are currently in a unique position insofar as you are the only party permitted to make submissions as to a specific sentence. The value of this should not be understated.

This can and will only be achieved through providing authority to support the unique features of your client's case.

Section 9(4) PSA

Section 9 (4) PSA was originally s 9(5) prior to the amendments which came into effect on 28th March 2014.

As you would all be aware it provides that in sentencing an offender for an offence of a sexual nature committed against a child under the age of 16, the offender must serve an actual term of imprisonment unless there are exceptional circumstances.

Retrospectivity

In 2010, the *Penalties and Sentences Act* 1992 was amended to reflect the following:

> s (9)(5) Also, in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years—
> (a) the principles mentioned in subsection (2)(a) do not apply; and
> (b) the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.[3]

[3] *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 5

Following a recent amendment, it currently reads as follows:

> s9(4) In sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years, the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.[4]

This amendment was introduced to strengthen the penalties imposed on child sex offenders to reflect the community's condemnation of this behaviour.[5] The practical effect is that child sexual offenders will now be punished with a mandatory custodial sentence, save for exceptional circumstances.[6]

Though the imposition of a custodial sentence for child sexual offenders was already common place, this amendment provided a legislative assurance that it would be enforced.[7] Not surprisingly, prosecutors were eager to have this section apply retrospectively as it would ensure custodial sentences for historical matters, which make up a large portion of the child sex offences brought before the courts.

The argument for its retrospective operation is found in s204 PSA and s14(H)(1)of the *Acts Interpretations Act 1954.* When read in conjunction, the effect of s204 is that the PSA, as amended from time to time, applies to the imposition of a sentence regardless of when the offence occurred.[8] This is based on the premise that the amendment is merely procedural in construction.

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[4] *Penalties and Sentences Act 1992* (Qld) s 9(4)
[5] Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010 pg 2
[6] *Penalties and Sentences Act 1992 (Qld)* s9(5)(b)
[7] Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010 pg 4. See also R v Quick ex parte Attorney general [2006] QCA 477 at [5].
[8] *R v Carlton* [2009] QCA 241, [62]

The contrary stance is that s180 PSA and s11 *Criminal Code Act* operate to prevent the application of s9(5)(b) PSA to acts committed prior to its commencement as it was a substantive change that operated to increase the minimum sentence imposed. This would offend the right of an accused to be charged and sentenced on the laws that were in effect at the time of the offence.

The issue was brought to head in *R v Koster* [2012] QCA 302. The appeal concerned an historical child sex offence where the sentencing judge had applied s9(5)(b) (now s9(4)) in deciding upon sentence. The ruling of the Court of Appeal was unanimous on this point. Holmes JA stated:

> It is clear that s9(5)(b)… is not merely procedural; it has substantive effect, making the imposition of actual imprisonment mandatory in the ordinary case. By doing so, it can be said… to increase the minimum sentence within the meaning of s180(1) of the Penalties and Sentences Act; with the result that the increase should be taken to apply only to offences committed after s9(5)(b) commenced.[9]

The rule at common law states:

> …that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction. It is said that statutes dealing with procedure are an exception to the rule and that they should be given a retrospective operation. It would, we think, be more accurate to say that there is no presumption against retrospectivity in the case of statutes which affect mere matters of procedure.[10]

Thus, the issue of retrospectivity turns on whether a change in law is of a substantive or procedural nature.

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[9] *R v Koster* [2012] QCA 302, [38]
[10] *Rodway v The Queen* (1990) 169 CLR 515, 518

Exceptional circumstances

The term “exceptional” is not defined in the section although s9(5) PSA provides that in deciding whether there are exceptional circumstances the court may have regard to the closeness in age between the offender and the child.

The term “exceptional” is not unknown to the law.

In Attorney-General v Francis [2008] QSC 69 McMurdo J said at [7]:

> In Baker v The Queen (2004) 223 CLR 513 Callinan J referred with approval to what Lord Bingham of Cornhill CJ had said in R v Kelly (Edward) [2000] QB 198 namely:
>
> ‘We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.’

In *R v Tootell; ex parte Attorney-General* [2012] QCA 273 the Court of Appeal allowed an appeal where an offender had been sentenced to a fully suspended sentence at first instance.

The court noted that s9(6) PSA did not specifically refer to exceptional circumstances but each of the matters mentioned in the subsection were relevant to the sentencing exercise (see[11]).

It was then held that the expression must be read in its statutory context (see [19]). A combination of circumstances can lead to exceptionality. There needs to be a “careful assessment” on whether the “aggregation of features warrants the conclusion the offender should be spared imprisonment.”

Practical effect of amendments

The intention of s9(4) is very clear; that protection of our most vulnerable members of the community is a paramount concern and this is to be achieved through emphasising general deterrence, punishment and the community's condemnation of the conduct when deciding upon sentences.[11]

The practical effect of the amendments for defence counsel is two fold:

1. They must be aware of when the different sentencing guidelines will be in effect, using authority from the appropriate time period;
2. There is now an onus on defence to show exceptional circumstances to prevent their client from receiving a custodial sentence.

As the amendment only operates prospectively from its commencement date of 26 November 2010, the correct sentencing principles as they stood at the time of the offence must be applied. Though the sentencing judge should be alive to this issue, both parties are obliged to inform the court whether the presumption of a custodial sentence is applicable in the circumstances.

Though many offenders whose offending conduct occurred prior to 26 November 2010 would face custodial sentences in the normal course, it is important to note that authorities from prior to the amendment will be more persuasive to the sentencing judge for offences committed pre-amendment.

This will be of particular importance for lower range offences where the decision to incarcerate becomes more blurred. Post-amendment authorities

[11] Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010, pg 2

will provide less assistance in the sentence of pre-amendment offences in lower range matters. Authority from the relevant time period will be crucial to ensure the defence of these offenders.

With respect to post-amendment offences, with a presumption of a custodial sentence, it is now for the defence to persuade a sentencing judge that exceptional circumstances exist. These will only be present in the minority of cases, however it is not an unachievable threshold. As McMurdo P stated in *Attorney-General v Francis,* there must be a *"circumstance which is as such to form an exception*."[12] This may be one dominant feature or a confluence of factors that, when viewed in totality, show exceptionality.

Such features will necessarily be unique to each case and I do not propose to attempt to list any here.

Importantly, the onus of proof is on defence to show exceptionality. Any submission to this effect should be supported by evidence and/or authority before it will be persuasive upon a sentencing judge. As I discussed earlier, the prosecution will be restrained from making submissions to the contrary by virtue of the decision in *R v Barbaro and Zirilli.*

This is not unachievable. I myself have found exceptional circumstances in at least 3 cases this year. In certain cases, it will be the just outcome. However, it is essential that such cases are identified early by defence so that appropriate evidence can be tendered to give maximum force to such a submission.

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[12] *Attorney-General v Francis* [2008] QSC 69 at [7]:

This change in law (and any subsequent amendments regarding like offences) will remain relevant for decades to come. As we are beginning to see more people speak out about abuse they have suffered as children, historical sexual offence cases will likely see a marked increase. It is essential for justice to be served that the correct sentencing guidelines are followed in each case.

Removal of section 9(2)(a) PSA

The *Youth Justice and Other Legislation Amendment Bill 2014* came into effect on 28 March 2014. Contained within this bill is an important amendment to the *Penalties and Sentences Act 1992*. Clause 34(1) removes s9(2)(a) from the *Penalties and Sentences Act.* S9(2)(a) PSA used to provide that a custodial sentence should be imposed only as a last resort and that a sentence that allowed an offender to stay in the community is preferable.[13] Clause 39 of the Bill inserts a new s234 into the *Penalties and Sentences Act* which stipulates that this amendment is to have effect retrospectively.

There is no issue with this amendment applying retrospectively. This type of amendment was addressed in *R v* Carlton [2009] QCA 241, where it was held that *"a change to the factors, or a reordering of their priorities is not…properly described as changing the substantive law*."[14]As a procedural change to the

[13] *Penalties and Sentences Act 1992* (Qld) s9(2)(a)
[14] *R v Carlton* [2009] QCA 241, [88]

law rather than a substantive one, there is no obstacle to it applying retrospectively.[15]

Practical effect

I anticipate the practical effect of this amendment will be most visible in cases that were previously borderline on whether the defendant should serve an actual term of imprisonment. The current case law will be of less assistance in answering this question as the vast majority of decisions were decided when s9(2)(a) was in operation. Until a body of case law is developed, both prosecutors and defence will need to place greater emphasis on the individual factors outlined in s9(2) when arguing borderline cases.

One result that is foreseeable from the amendment is an increase in custodial sentences for low level offending that previously narrowly avoided actual time in custody. There may also be some inconsistency between different sentencing courts while they adapt to the restructuring of sentencing guidelines.

As defence practitioners, you no longer have the luxury of a custodial sentence being a last resort. Cases that you previously thought would avoid custody now have that as a very real possibility.

What is the practical implication of this? You will need to be more persuasive to keep your client out of gaol and in the community.

[15] *Rodway v The Queen* (1990) 169 CLR 515, 518

The case law is presently of little assistance, therefore you must stress any and all mitigating factors against a custodial sentence. Submissions on this point may not be sufficient; evidence to support the submissions advanced will carry greater weight. Evidence such as: references, medical reports, employment records, drug/alcohol tests and rehabilitation clinics are just a few examples of evidence that will give greater weight to any mitigating features.

Gaol is traditionally a punishment for those persons that society deems unfit and unsafe to remain in the community. Your role as defence counsel is to persuade the sentencing judge that your client is a fit and proper person to remain in the community; and is capable of making positive contributions to society.

As I have previously stated, defence no longer have the benefit of the principle that a custodial sentence is one of last resort. Prosecution and defence are now on a level playing field. If your client is a borderline case, and you are submitting for a non-custodial sentence, it is essential that this submission is supported by appropriate evidence for it to be persuasive.

Victim Impact Statements

As a result of the push for greater victim involvement in the trial process, the use of victim impact statements is now a well established practice in this State.

The use of victim impact statements is important for two key reasons:

1. The therapeutic benefit to the victim of having their story heard; and

2. Informing the Court of the impact the offending conduct has had on those concerned.

Section 9 PSA establishes that a sentencing court is to consider victim impact statements when exercising its discretion. What is unclear from the legislation is the proper role of a victim impact statement in the sentencing process. Through the course of several decisions, the Queensland Court of Appeal has clarified the role and correct use of victim impact statements.

It is important for the vigorous defence of their client's interests that defence counsel are aware of the proper use of victim impact statements and when objections should be taken to allegtions made within.

Legislation

Section 9 PSA provides the guidelines which a Court must follow when exercising its discretion in a sentencing proceeding.

> s(9)(2) In sentencing an offender, a court must have regard to—
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> (b) the nature of the offence and how serious the offence was, including—
>
> (i) any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim given to the court under the Victims of Crime Assistance Act 2009, section 15…

This section provides the legislative foundation for the use of Victim Impact Statements in sentencing proceedings, however it is silent on the role and procedure governing their use.

For that we must turn to s15 of the *Victims of Crime Assistance Act 2009 (Qld) ("VOCA"),* which sets out the procedure for obtaining and tendering a Victim Impact Statement at a sentencing proceeding.

> **15 Giving details of impact of crime on victim during sentencing**
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> (1) A victim of a prescribed offence is to be permitted to give the prosecutor for the offence details of the harm caused to the victim by the offence, for the purpose of the prosecutor informing the relevant sentencing court.
>
> Note—
> If the offender's mental condition relating to the offence is referred to the Mental Health Court under the Mental Health Act 2000, see section 284 of that Act for the information a victim of the offence may give that court to help it make a decision on the reference.
>
> (2) The prosecutor may continue with the sentencing proceeding without having received details of the harm if it is reasonable to do so in the circumstances, having regard to—
>
> (a) the interests of justice; or
> (b) whether permitting the details of harm to be given would unreasonably delay the sentencing of the offender; or
> (c) anything else that may adversely affect the reasonableness, or the practicality, of permitting details of the harm to be given.
>
> (3) If details of the harm are given to the prosecutor, the prosecutor is to—
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> (a) decide what (if any) details are appropriate to be given to the sentencing court; and

(b) give the appropriate details to the sentencing court, whether or not in the form of a victim impact statement given under subsection (5).
Note—
In sentencing the offender, the sentencing court must have regard to the harm done to, or impact of the offence on, the victim under—
(a) the Penalties and Sentences Act 1992, section 9(2)(c)(i); or
(b) if the offender is a child—the Youth Justice Act 1992, section 150(1)(h).

(4) In deciding what details are not appropriate, the prosecutor may have regard to the victim's wishes.

(5) Details of the harm may be given to the prosecutor in the form of a victim impact statement prepared by—

(a) the victim; or
(b) someone else if the victim can not give the statement because of the victim's age or impaired capacity.

(6) The fact that details of the harm caused to a victim by the offence are absent at the sentencing does not of itself give rise to an inference that the offence caused little or no harm to the victim.

(7) To remove any doubt, it is declared that it is not mandatory for a victim to give the prosecutor details of the harm caused to the victim by the offence.

(8) Subject to section 15A, the sentencing court is to decide if, and how, details of the harm are to be given to the court in accordance with the rules of evidence and the practices and procedures applying to the court.

Example of how details of harm may be given to sentencing court—
production of victim impact statement to the sentencing court

(9) In this section—

victim impact statement means a written statement that—

(a) is signed and dated; and
(b) states the particulars of the harm caused to a victim by an offence; and
(c) may have attached to it—
(i) documents supporting the particulars, including, for example, medical reports; or

(ii) photographs, drawings or other images.

Section 15 of VOCA allows a victim of an offence to inform the prosecutor of the details of the harm suffered.

Once this information is provided to the prosecutor, they must then exercise their discretion as to what information is provided to the court.[16] It is the responsibility of the prosecutor to only provide 'appropriate' information to the court.[17] In determining what information is appropriate, a prosecutor can have regard to a victim's wishes, however they must also be cognizant not to include unfounded or misleading statements that could potentially lead the court into error.

s15A of VOCA permits a victim to read their statement aloud during sentencing. This is a purely therapeutic measure and has no greater evidential value above a statement in document form.[18] The non-requirement for a statement to be sworn or affirmed highlights the lack of probative value a victim impact statement holds as stand alone evidence.

A sentencing judge will not draw an inference that the offence has caused little or no harm should the victim elect not to provide a statement.[19]

Situations will arise where a prosecutor may seek to rely upon facts within a victim impact statement. This is likely to occur where there is certain information that is only known to the victim and this evidence is relevant in

[16] *VOCA* s15(3)
[17] Ibid s15(3)(a)
[18] Ibid s15A(4)(a)
[19] Ibid s15(6)

determining sentence. s132C of the *Evidence Act 1977* (Qld) permits judicial discretion to find facts from a victim impact statement at sentence:

> **132C Fact finding on sentencing**
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> (1) This section applies to any sentencing procedure in a criminal proceeding.
>
> (2) The sentencing judge or magistrate may act on an allegation of fact that is admitted or not challenged.
>
> 3) If an allegation of fact is not admitted or is challenged, the sentencing judge or magistrate may act on the allegation if the judge or magistrate is satisfied on the balance of probabilities that the allegation is true.
>
> (4) For subsection (3), the degree of satisfaction required varies according to the consequences, adverse to the person being sentenced, of finding the allegation to be true.
>
> (5) In this section allegation of fact includes the following:
>
> (c) information given to the court under the Victims of Crime Assistance Act 2009, section 15.

Given the test outlaid in s132C, combined with the unsworn nature of the evidence, it is not surprising that a sentencing Court finding facts from a victim impact statement can be a contentious issue. Though the legislature has provided some guidance as to the use of victim impact statements, it has been left to the Courts to interpret their proper purpose when sentencing. This has resulted in some courts applying differing emphasis on the probative value of facts alleged.

Cases

We must look to several Court of Appeal decisions to confirm the correct use and consideration of victim impact statements by sentencing judges.

The role of victim impact statements was addressed the in oft-cited obiter dicta of Fryberg J in *R v Singh* [2006] QCA 71.[20] Fryberg J endeavoured to explain the role of a victim impact statement as well as the correct approach a sentencing court should take to relying upon facts alleged within:

> Sentencing judges should be very careful before acting on assertions of fact made in victim impact statements. The purpose of those statements is primarily therapeutic. For that reason victims should be permitted, and even encouraged, to read their statements to the court. However, if they contain material damaging to the accused which is neither self-evidently correct nor known by the accused to be correct (and this includes lay diagnoses of medical and psychiatric conditions) they should not be acted on. The prosecution should call the appropriate supporting evidence. It is unfair to present the accused with the dilemma of challenging a statement of dubious probative value, thereby risking a finding that genuine remorse is lacking, or accepting that statement to his or her detriment.[21]

Fryberg J has provided some assistance in clarifying the correct consideration of victim impact statements, however with respect to His Honour, there may be some doubt that the purpose is primarily therapeutic and that sentencing judges should be very careful before acting upon facts alleged.

Firstly, whilst victim impact statements can provide a therapeutic benefit to a victim, they are also important in ascertaining the actual consequences of offending conduct.

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[20] *R v Evans and Pearce* [2011] QCA 135, [3]
[21] *R v Singh* [2006] QCA 71

While many crimes could be deemed similar, no two are the same; as such the impact of each crime will be unique to each victim. In a majority of circumstances, the victim will be the person best positioned to elucidate the effects the crime has had on them. For a sentencing court to properly exercise its discretion, it must be aware of all the circumstances surrounding and resulting from the offending conduct.[22] Given this, it can be said that a victim impact statement holds a dual purpose; one of evidential value and one of therapeutic value. The question of which purpose is dominant will turn on the facts of each case.

Secondly, Fryberg J rightly pointed out the undesirable consequences that can arise from an incorrect finding of fact, but there remains some doubt that a court must be *'very careful'.*

This statement may be in contrast to s132C *Evidence Act 1977* (Qld), which provides a framework for the exercise of judicial discretion. Further, it is clear that it was the intention of the legislature that sentencing judges were to engage in fact finding from victim impact statements should justice require it.[23]

The role of victim impact statements was further addressed in *R v Evans and Pearce* [2011] QCA 135. Fryberg J's obiter in *R v Singh* was specifically addressed in the judgments. Each judgment sought to qualify the principle in *R v Singh*, with Chesterman JA providing the most pertinent summary:

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[22] *PSA* ss9(2)(d), 9(2)(q)
[23] *Evidence Act 1977* (Qld) s132C; *PSA* 1992 (Qld) s9(3)(a)(i)

> …Some qualifications are necessary to the remarks contained in R v Singh [2006] QCA 71.
>
> Two comments may be appropriate. The first is that it is not clear (at least to me) that the primary purpose of victim impact statements is therapeutic. Such statements may serve other purposes, such as informing the court of "details of the harm caused ... by the offence", which is often a factor relevant to the level of sentence imposed.
>
> The second comment is that there is nothing in the legislative provisions referred to by the President which require a court to be "very careful before acting on assertions of fact made in victim impact statements." The level of care required is that described in s 132C of the Evidence Act 1977 (Qld), and the process described by the President.[24]

This position was echoed by Fryberg J in *R v Major; Ex-Parte A-G(Qld)* [2011] QCA 210, where the evidential role of Victim Impact Statements was affirmed:

> His Honour was not limited to the facts in the statement of agreed facts. Facts put forward by the prosecution in the victim impact statement are not to be ignored. They must be given their due weight.[25]

In my view, the proper role of the Victim Impact Statements is found through applying the qualifications in *R v Evans and Pearce* to the principle in *R v Singh.*

Practical Effect

As defence counsel, it is your responsibility to scrutinize all statements alleged within a victim impact statement. If unsubstantiated prejudicial statements are contained within a victim impact statement, this needs to be

[24] *R v Evans and Pearce* [2011] QCA 135, [16]
[25] *R v R v Major; Ex-Parte A-G(Qld)* [2011] QCA 210, [102]

addressed prior to the commencement of sentencing proceedings to avoid any negative inferences being drawn against your client.

The impact of a failure to do so was outlined by Fryberg J in *R v Singh*:

> … if they contain material damaging to the accused which is neither self-evidently correct nor known by the accused to be correct (and this includes lay diagnoses of medical and psychiatric conditions) they should not be acted on. The prosecution should call the appropriate supporting evidence. It is unfair to present the accused with the dilemma of challenging a statement of dubious probative value, thereby risking a finding that genuine remorse is lacking, or accepting that statement to his or her detriment.[26]

His Honour outlined the correct approach to objecting to allegations contained in victim impacts statements in *R v Evans and Pearce*:

> If defence counsel believes his client is exposed to unfairness of the sort referred to, it behoves him or her to speak to the prosecutor before the day of hearing and request that the Crown provide appropriate supporting evidence in conformity with what was said in Singh. If that is not done the sentencing judge should be made aware of any dilemma which the prosecution's approach poses to the defence.[27]

A simple example of an unreliable statement is a victim's description of the impact of a physical injury. Most injuries will have consequences that are expected or reasonably foreseeable to a lay observer. However, a victim may allege injury or suffering that would ordinarily require a medical professional to diagnose. Such lay diagnoses may not be considered by a sentencing judge unless supported by the appropriate evidence as it could have a prejudicial effect against the defendant. A prosecutor who sought to rely upon

[26] *R v Singh* [2006] QCA 71 per Fryberg J
[27] *R v Evans and Pearce* [2011] 2 Qd R 571

unsupported medical diagnoses in a victim impact statement could potentially mislead the court. From a defence perspective, if such statements were accepted by a sentencing judge, this could have an aggravating effect upon the sentence handed down.

Conclusion

In conclusion this paper has covered four topics of recent and important relevance in the field of sentencing.

It is hoped that counsel have gained something from the paper which may assist in their presentation of sentences in court.