Duties/Role of the Prosecution in a Sentencing Hearing

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Duties / Role of the prosecution on a plea hearing

1. The duties and role of the prosecution in relation to the sentencing of a federal offender are a manifestation of its wider duties. Those general duties are succinctly summarised in the *Prosecution Policy of the Commonwealth* as follows:[1]

   > *[T]hroughout a prosecution the prosecutor must conduct himself or herself in a manner which will maintain, promote and defend the interests of justice. In the final analysis the prosecutor is not a servant of government or individuals - he or she is a servant of justice.*
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   > *It is also important not to lose sight of the fact that prosecutors discharge their responsibilities in an adversarial context and seek to have the prosecution case sustained. Accordingly, while that case must at all times be presented to the Court fairly and justly, the community is entitled to expect that it will also be presented fearlessly, vigorously and skilfully.*

2. The performance of the prosecution's duty to the court ensures that the defendant knows the nature and extent of the case against him or her, and thus has a fair opportunity of meeting it.[2]

3. In relation to a plea hearing, aspects of these duties may be conveniently grouped under these headings: disclosure; fact-finding; submissions generally; comparable cases; and submissions relating to sentencing dispositions.

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1 *Prosecution Policy of the Commonwealth* (2005 revision), p 2. See also the ethical duties imposed on legal practitioners by the rules of conduct for barristers and for solicitors in each jurisdiction, as they relate to the conduct of a prosecution. In jurisdictions which have adopted the uniform national rules, the applicable rules are the *Legal Profession Uniform Conduct (Barristers) Rules 2015* and the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, as applied by laws in each participating jurisdiction.

2 *R v Tait* (1979) 24 ALR 473, 477. The Court there added, "*A failure by the Crown to discharge that duty may not only contribute to appealable error affecting the sentence, but may tend to deprive the defendant of a fair opportunity of meeting a case which might ultimately be made on appeal.*"

4. **Disclosure:** The prosecution has continuing obligations of disclosure. In particular, subject to recognised exceptions, the prosecution must disclose to an offender (usually by disclosure to the offender's legal representatives) matters that may be reasonably regarded as relevant to sentencing. These may include, for example, full details relating to the known antecedents of the offender, details of charges and dispositions in relation to co-offenders or other persons where the dispositions may raise issues of parity, and any information or material that may affect an assessment of the moral culpability of the offender.

5. Disclosure obligations are dealt with in detail in the CDPP's "*Statement on Disclosure*" (March 2017).

6. **Fact-finding:** Fact-finding is a crucial aspect of sentencing, which may greatly affect the sentence to be imposed.[3] In summary, the duties of the prosecution in relation to fact-finding include making an adequate presentation of the facts, identifying any aggravating features and admitting any mitigating features, fair testing of the offender's case, correcting any error of fact which emerges in the course of the plea and drawing attention to the offender's antecedents, including any sentence of imprisonment currently being served.[4]

7. What constitutes "an adequate presentation of the facts" depends on what is fair, reasonable and practical in the circumstances of the particular case.[5] The duty is not limited to the facts of the offence; the court must be given a balanced view of the facts relevant to sentencing generally.[6]

8. In plea hearings, the rules of evidence usually do not apply and courts commonly receive and act on evidence that would not be admissible if they did. This approach is consistent with s 16A of the *Crimes Act 1914* (Cth).[7] But that does not mean that a sentencing court must accept or act upon all assertions from the bar table or all material put forward on a plea hearing.[8] If an assertion or evidence of a fact is challenged by an opposing party, the position at common law is that it can only be established by admissible evidence.[9] Therefore if an assertion or evidence is put forward by the offender which the prosecution wishes to contest or put in issue, the prosecutor has a responsibility to object to it. A common example is hearsay evidence relating to the offender's state of mind on a matter of significance[10] that the prosecution does not concede, when the offender has not given, and will not give, evidence. If the offender seeks to put forward such material, in relation to a matter that is disputed or not conceded by the prosecution, the prosecutor should object to its reception. If it is

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3 *R v Olbrich* (1999) 199 CLR 270, [1].

4 *R v Tait* (1979) 24 ALR 473, 477; *R v Rumpf* [1988] VR 466, 476; *Matthews v R* (2014) 44 VR 280, [27], [153]. The duty to correct any error of fact which might have emerged in the course of the plea must be applied in a common sense way; it does not mean that the prosecutor is obliged to traverse every proposition put on behalf of an accused person in a lengthy sentencing hearing: *DPP v Bulfin* [1998] 4 VR 114, 123.

5 *R v Rumpf* [1988] VR 466, 472.

6 *R v Rumpf* [1988] VR 466, 472.

7 *Weininger v R* (2003) 212 CLR 629, [21].

8 *GAS v R* (2004) 217 CLR 198, [30]-[31].

9 *R v Rumpf* [1988] VR 466, 471. Under s 4 of the Uniform Evidence Acts, while the rules of evidence do not apply to a sentencing hearing, the court may apply them. For an example of a case in which the rules of evidence were applied on the application of the prosecutor see *DPP (Cth) v Besim* [2017] VSCA 158, [74].

10 Such as the existence and extent of contrition, the motive for the offending, whether the offender was affected by duress, or, in a terrorism case, the offender's renunciation of the ideology which motivated the offending. See "3.1.6 Hearsay assertions about an offender's state of mind".

received, the prosecutor should make clear that the matter is not conceded, and should contend (if appropriate) that no weight should be given to the material.

9. The prosecution should make any submissions necessary to assist the court in fact-finding.[11] This may include identifying which facts are agreed or undisputed and which asserted facts are contested or not conceded. In relation to the latter, the prosecution should assist the court by identifying the evidence relevant to those facts, and by making clear and cogent submissions about what factual findings should or should not be made, and about whether (and if so how) the asserted facts are or are not relevant or significant.

10. **Submissions generally:** The Crown has a duty to assist the sentencing judge to avoid appealable error.[12] Errors which may cause the sentencing discretion to miscarry include acting upon a wrong principle, mistaking the facts, failing to take into account some material consideration or being guided or affected by extraneous or irrelevant matters.[13] The breadth of the range of errors which may cause the sentencing discretion to miscarry provides guidance as to the nature of the assistance which the prosecution must give the court.

11. The prosecutor must make appropriate submissions on relevant questions of law, including statutorily prescribed maximum penalties[14] or minimum penalties,[15] and by an appropriate reference to any legislation[16] or special principles of sentencing which might reasonably be thought to be relevant to the case in hand[17] (except to the extent that the legislation or principles are trite[18] or well-known to the sentencing judge[19]).

12. **Comparable cases:** The prosecution must assist the court to fulfil its duty to give proper consideration to previous sentencing decisions.[20] A court sentencing a federal offender has a duty "*to have regard to what has been done in comparable cases throughout the Commonwealth*".[21] Consistency in sentencing for federal offenders is achieved through the work of the intermediate appellate courts (ie not first instance decisions).[22] Reference to comparable cases has two purposes. First, it "*can and should provide guidance as to the identification and application of relevant sentencing principles*".[23]

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11 *Barbaro v R* (2014) 253 CLR 58, [39].

12 *R v Tait* (1979) 24 ALR 473, 477; *CMB v Attorney-General (NSW)* (2015) 256 CLR 356, [38]. This duty is a corollary of the conferral of appeal rights on the prosecution: *R v Tait* (1979) 24 ALR 473, 477; *DPP v Bulfin* [1998] 4 VR 114, 134. A material failure to fulfil the duty may lead an appellate court to dismiss a prosecution appeal, despite error being shown.

13 *House v R* (1936) 55 CLR 499, 505.

14 *R v Travers* (1983) 34 SASR 112, 115-6.

15 *R v Ireland* (1987) 49 NTR 10, 21.

16 *R v Travers* (1983) 34 SASR 112, 115-6.

17 *R v Tait* (1979) 24 ALR 473, 477.

18 *Matthews v R* (2014) 44 VR 280, [153] (Priest JA and Lasry AJA).

19 *R v Travers* (1983) 34 SASR 112, 115-6.

20 *R v Ogden* [2014] QCA 89, [7]; *DPP (Cth) v Thomas* [2016] VSCA 237, [179].

21 *R v Pham* (2015) 256 CLR 550, [24]. In *Pham*, the High Court held that It is an error for a State court sentencing a federal offender to sentence in accordance with the sentencing practices of that State to the exclusion of sentencing practices in other Australian jurisdictions. However in *R v Nakash* [2017] NSWCCA 196, [18], Simpson JA observed that nothing in the judgment of the plurality in *Pham* prevents reference to sentences imposed in respect of comparable offences under State law, and that such reference may be particularly necessary where there is no relevant pattern of sentencing in respect of the Commonwealth offence.

22 *R v Pham* (2015) 256 CLR 550, [29], [50]; *R v Mitric* [2017] SASCFC 178, [32]; *R v Burtt* [2018] SASCFC 5, [64]-[65].

23 *R v Pham* (2015) 256 CLR 550, [27].

Second, it "*may yield discernible sentencing patterns and possibly a range of sentences against which to examine a proposed … sentence*";[24] that is, examination of comparable cases may provide a "*yardstick*".[25] However sentences are not binding precedents, and do not necessarily disclose the correct range or otherwise determine the upper and lower limits of sentencing discretion.[26] These principles must underlie prosecution references to comparable cases.

13. The prosecution must ensure that the sentencing court is "*properly informed*" about comparable sentences. The authorities provide guidance on how that duty is, and is not, to be fulfilled. In *Pham*, the plurality emphasized that "*presentation in the form of numerical tables, bar charts and graphs of sentences passed on federal offenders in other cases is unhelpful and should be avoided.*"[27] This precept is directed to the use of "*bare statistics*" about sentences passed, which tell the sentencing judge "*very little that is useful if the sentencing judge is not also told <u>why</u> those sentences were fixed as they were*".[28] A table of sentences imposed in other cases "*is useful if, but only if, it is accompanied by an articulation of what are seen as the unifying principles which those disparate sentences may reveal*".[29]

14. A table or schedule of previous sentencing decisions can be of great assistance to judges, but only if it offers considerably more than numerical information.[30] It must be accurate[31] and it must contain sufficient information about the features of each case to enable useful comparisons to be drawn.[32] Its function is to provide a sound basis from which the judge may determine whether there is a relevant sentencing pattern to be discerned from the history of sentences available.[33] In sentencing for quantity-based drug offences, reference to the relevant quantities in other cases by use of a common denominator (such as the proportion of a commercial quantity) is essential for meaningful comparisons.[34]

15. For a table of decisions provided by the prosecution to be of assistance, the prosecution must, in addition to providing necessary information about the cases, make clear how each case is relied upon:[35] that is, whether it is comparable,[36] or whether its relevance is that it is so different that the sentence imposed there would not lie within a sound exercise of the discretion in the present case.[37]

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24 *R v Pham* (2015) 256 CLR 550, [27].

25 *Hili v R* (2010) 242 CLR 520, [54]; *R v Pham* (2015) 256 CLR 550, [29].

26 *R v Pham* (2015) 256 CLR 550, [27].

27 *R v Pham* (2015) 256 CLR 550, [28]. This echoes what was previously said in *Hili v R* (2010) 242 CLR 520, [48].

28 *Wong v R* (2001) 207 CLR 584, [59] (emphasis in original). See the analysis in *DPP (Cth) v Thomas* [2016] VSCA 237, [179].

29 *DPP (Cth) v Thomas* [2016] VSCA 237, [179], referring to *Wong v R* (2001) 207 CLR 584, [59].

30 *DPP (Cth) v Thomas* [2016] VSCA 237, [179].

31 *DPP (Cth) v Thomas* [2016] VSCA 237, [181].

32 *DPP (Cth) v Thomas* [2016] VSCA 237, [180].

33 *DPP (Cth) v Thomas* [2016] VSCA 237, [182].

34 *DPP (Cth) v KMD* [2015] VSCA 255, [54]-[57]. However, care must be taken not to treat the quantity as if it were the chief factor in fixing the sentence: see *Wong v R* (2001) 207 CLR 584, [67]-[78].

35 *DPP (Cth) v Thomas* [2016] VSCA 237, [186].

36 In *Nguyen v R* [2016] VSCA 198, [73], Redlich JA (with whom Tate and Whelan JJA agreed) observed, "*Cases are likely to be comparable where the objective seriousness of the offender's conduct is similar to that of the subject offence. … [A]ppellate courts … may seek to identify the applicable range by characterising the objective seriousness of the offence as falling within the low, mid or the high range of seriousness of the offence.*"

37 *DPP (Cth) v Thomas* [2016] VSCA 237, [180]. Although in *Thomas*, the Victorian Court of Appeal said (at [182]) that the table will be of limited assistance if it "*does not <u>on its face</u> illuminate the relevance of the cases listed*" (emphasis added), in *DPP (Cth) v Haynes* [2017] VSCA 79, [35], the Court cited *Thomas* as authority for the proposition that

These principles are reflected in IIE PGI [02] which provides guidance to prosecutors on the use of sentencing schedules:

> *"The purpose of the national sentencing schedules is to assist a prosecutor in identifying the authorities which he/she might wish to rely upon in a sentencing hearing. Past cases may, for example, provide identification of the application of relevant sentencing principles. Additionally, an analysis of comparable cases may yield discernible sentencing patterns and possibly a range of sentences against which to examine a proposed or impugned sentence. By looking at the master schedule, a prosecutor will be assisted in selecting a relatively small number of cases (ie about four to five) to put before the sentencing judge. The prosecutor should outline to the court by way of oral or written submission, the relevance of the cases that they are placing before the court, and detail the various factors which are similar or different from the case before the court. To be clear, if a subset table of the four to five judgments is handed to the sentencing judge, the fact that those cases appear in a table form does not relieve the prosecutor from the requirement of reading those cases, or providing those cases in full to the judge. The subset table at most acts as an aide memoir for the prosecutor and saves note taking by the Judge. It is also, of course, ultimately the responsibility of the individual prosecutor to ensure that any document handed to the sentencing judge is correct."*

16. Tables summarising decisions of intermediate appellate courts on sentencing for the subject offence (or related offences) may be particularly helpful, if they provide sufficient information about the features of each case to enable useful comparisons to be drawn.[38] If there are decisions of intermediate appellate courts which summarise sentences imposed in other cases for the relevant offence (or related offences), those decisions should be referred to.[39]
17. The mere fact that the number of relevant comparable cases is limited does not lessen the need for the prosecution to make clear its position as to where the sentencing range falls; that could be done by reference to broadly 'like' or 'unlike' cases.[40]
18. If there are no directly comparable cases at the intermediate level, courts will need to adopt "*the conventional common law method of reasoning by analogy and extrapolation from the available sentencing information … and applying established sentencing principles*".[41] In terms of the type of submission that a prosecutor might put to a court in such a situation, it is recommended that the following submission be used:

> *The High Court has made clear that the need for sentencing consistency throughout Australia requires the court to have regard to sentencing practices across the country and to follow decisions of intermediate appellate courts in other States and Territories unless convinced that*

"*statistics and tables of cases can only be of assistance to a sentencing judge if they are spoken to by counsel; that is, if their precise relevance for the sentencing task is actually explained*" (emphasis added). Similarly, in *DPP (Cth) v Masange* [2017] VSCA 204, [49], the Court said, "*In order to discharge its duty to assist the sentencing judge to avoid appealable error, the prosecution must speak to such a schedule and articulate the unifying principles revealed by the cases referred to*" (emphasis added). There does not seem to be any reason in principle why the prosecution could not explain the relevance or significance of a case cited in a table either in written or oral submissions, rather than only in the table itself.

38 *DPP (Cth) v Brown* [2017] VSCA 162, [71]. The table provided by the prosecution in that case is attached as an Appendix to the judgment.

39 See *DPP (Cth) v KMD* [2015] VSCA 255, [67]-[81].

40 *DPP (Cth) v Haynes* [2017] VSCA 79, [35].

41 *DPP (Cth) v KMD* [2015] VSCA 255, [127]. The absence of comparable authorities does not leave open a wider range of permissible sentences than otherwise would be the case: *R v Goodwin; ex parte Attorney-General (Qld)* [2014] QCA 345, [5].

> *they are plainly wrong. Unfortunately, in relation to this offence, there is no body of comparable sentences from intermediate appellate courts that would properly be regarded as providing a sentencing pattern which would bear upon the assessment of the sentence in this case.*
>
> *In those circumstances, your Honour may be assisted by sentences imposed by your fellow judges, but it is acknowledged and emphasised that they are merely indicators of particular aspects of the spectrum of seriousness for this offence. In the absence of a body of comparable intermediate appellate authority, the assessment should be based upon general sentencing principles, and with regard to the guidepost of the maximum penalty provided by Parliament.*

19. **Submissions relating to sentencing dispositions:** Since the decision of the High Court in *Barbaro and Zirilli v R*,[42] the prosecution is precluded from stating to a sentencing court the bounds of an "*available range*" of sentences, or from proferring "*some statement of the specific result*" of the exercise of sentencing discretion. In *Barbaro* the High Court overruled the decision of the Victorian Court of Appeal in *R v MacNeil-Brown*,[43] which had required that, upon request by a sentencing court, the prosecution was obliged to provide a submission about the bounds of the available range of sentences (eg a submission that a head sentence between x and y years with a non-parole period between a and b years, was the "appropriate range" in a given case). The plurality in *Barbaro* deprecated the practice required by the decision in *MacNeil-Brown.* The plurality held that the prosecution is not required, and should not be permitted, to make such a statement of bounds to a sentencing judge, as it was not a submission of law but merely a statement of opinion. The plurality said that it was "*neither the role nor the duty of the prosecution to proffer some statement of the specific result which … should be reached or a statement of the bounds within which that result should fall.*"[44]

20. However subsequent decisions have clarified that *Barbaro* does not limit the scope of the Crown's pre-existing duties in relation to submissions concerning the exercise of the sentencing discretion. For example, in *Castle*,[45] the Queensland Court of Appeal held that a submission by the prosecutor that the sentencing court should make a serious violent offence declaration, or should declare a later date for parole eligibility, would not have been inconsistent with the decision in *Barbaro*. And, in *Holder*,[46] the Victorian Court of Appeal held that the prohibition on a prosecutor making submissions on a sentence range did not relieve the prosecutor from his/her obligation to assist the court, and that the failure of the prosecutor to offer appropriate assistance to a sentencing judge may be determinative of the result of a Crown sentence appeal. The prosecutor was not precluded from submitting to a sentencing court that sentences imposed on co-offenders were so low as to reduce or negate the operation of the principle of parity, and in that case the failure the prosecutor to do so precluded the Crown from so submitting on appeal.[47]

21. The obligations of the prosecution include the following:

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42 *Barbaro and Zirilli v R* (2014) 253 CLR 58.
43 *R v MacNeil-Brown* (2008) 20 VR 677.
44 *Barbaro and Zirilli v R* (2014) 253 CLR 58, [39].
45 *R v Castle; ex parte Attorney-General* [2014] QCA 276, [20].
46 *DPP v Holder* [2014] VSCA 61, [32], [34].
47 *DPP v Holder* [2014] VSCA 61, [27]-[34].

(a) The prosecution must make clear what type of sentencing disposition, whether imprisonment or otherwise, it contends is necessary or appropriate.[48]

(b) If it is submitted for an offender that he or she should receive a non-custodial disposition or a suspended term of imprisonment, or if the sentencing judge indicates that he or she is considering such a course, the prosecution should make clear whether it contends, and if so why, a disposition of the kind proposed would not be a proper exercise of sentencing discretion.[49] One way to express opposition to a wholly-suspended sentence is to submit that an immediate custodial sentence is the only available option.[50]

(c) If the prosecution contends that a sentence of imprisonment is the only appropriate option, the prosecution should also make clear (if applicable) that the appropriate head sentence or aggregate sentence should be such that a recognizance release order is not available, or that a recognizance release order is presumptively required (as the case may be).[51] In *Haynes*,[52] the Victorian Court of Appeal held that the duty of the prosecution to assist a sentencing judge to avoid appealable error required that if it believed that a recognizance release order (under s.20(1)(b) of the *Crimes Act 1914* (Cth)) was not reasonably open (because a head sentence of more than 3 years was required, and such a sentence would preclude the making of a RRO), the prosecution must make such a submission to the sentencing judge. In that case, the Director was not permitted to make such a submission on appeal, as it had not been made on the plea hearing.

(d) If it is submitted for an offender that an aggregate penalty should be imposed for two or more offences, or if the sentencing judge indicates that he or she is considering such a course, the prosecution should make clear whether it contends, and if so why, such an aggregate penalty would not be a proper exercise of sentencing discretion.[53]

(e) If defence counsel contends for a particular sentence, or for a sentence within a particular range, it is permissible for the prosecution to respond by telling the judge whether in its submission it would be open to sentence within that range; if the prosecution contends

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48 *Matthews v R; Vu v R; Hashmi v R* (2014) 44 VR 280, [27]. The reference to "*necessary or appropriate*" appears to countenance a submission in every case that a particular sentence type would be appropriate, or more appropriate than another sentence type. That is, the prosecution is not restricted to submitting that imposing a sentence of another particular type would constitute appealable error. See also *Matthews* at [22]-[25]; *R v Malvaso* (1989) 50 SASR 503, 509.

49 *Malvaso v R* (1989) 168 CLR 227; *Everett v R* (1994) 181 CLR 295. See also *R v Jermyn* (1985) 2 NSWLR 194, 197-8, 203-5; *DPP v Waack* (2001) 3 VR 194. This principle continues to apply after *Barbaro*: *Matthews v R; Vu v R; Hashmi v R* (2014) 44 VR 280, [27]; *DPP (Cth) v Haynes* [2017] VSCA 79, [58]-[59]. In *CMB v Attorney-General (NSW)* (2015) 256 CLR 356, [64], Keifel, Bell and Keane JJ said, "*Where the sentencing judge indicates the form of proposed sentencing order and the prosecutor considers that such a penalty would be manifestly inadequate, the prosecutor discharges his or her duty to the court by so submitting.*"

50 *DPP v Gany* [2006] VSCA 148, [24].

51 *DPP (Cth) v Haynes* [2017] VSCA 79. As to when a sentencing court has an open discretion to impose, or is presumptively required to impose, a RRO, or conversely when it is precluded from doing so, see "5.10.4 Non-parole period (NPP) or recognizance release order (RRO)?". In most cases a RRO is *optional* if the sentence of imprisonment, or total effective sentence (or total period including other unserved periods of imprisonment for a federal offence) for federal offences, is 6 months or less, is *presumptively required* if it is more than 6 months but not more than 3 years, and *precluded* (in favour of a non-parole period) if it is more than 3 years. Therefore the effect of the decision in *Haynes* is that the prosecution should consider into which of the relevant bands the sentence or total effective sentence (or total including other unserved periods) should fall, or below which it should not fall, and should frame its submission in relation to a RRO, straight sentence or non-parole period accordingly, by reference to the applicable legislation. Failure to do so may preclude such a submission being made on appeal.

52 *DPP (Cth) v Haynes* [2017] VSCA 79.

53 *DPP v Frewstal Pty Ltd* (2015) 47 VR 660, [113]-[124].

that it would not, it may rely on comparative cases, current sentencing practice and other relevant considerations in support of that contention. However the prosecution may not respond to a defence range by putting an alternative range.[54]

22. The prosecution is required to make its submissions as to sentence fairly and in an even-handed manner; the Crown does not, as an adversary, press for a heavy sentence.[55]

23. In some jurisdictions, legislation has also affected the application of the decision in *Barbaro*. In Queensland, the effect of *Barbaro* has been reversed by statute in relation to the sentencing for state offences. A sentencing court is now specifically empowered to receive a sentencing submission made by a party stating the sentence, or range of sentences, the party considers appropriate for the court to impose.[56] However, this provision is not applicable to sentencing for federal offences, as it is not picked up and applied as surrogate federal law pursuant to s 68 or 79 of the *Judiciary Act 1903* (Cth).

54 *Matthews v R; Vu v R; Hashmi v R* (2014) 44 VR 280, [22]-[25].
55 *R v Tait* (1979) 24 ALR 473, 477.
56 *Penalties and Sentences Act* 1992 (Qld), s 15