2024

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CRIMES (SENTENCING) AMENDMENT BILL 2024

REVISED EXPLANATORY STATEMENT

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CRIMES (SENTENCING) AMENDMENT BILL 2024

The Bill is **not** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

This explanatory statement relates to the *Crimes (Sentencing) Amendment Bill 2024*. It has been prepared to assist the reader of the Bill prior to tabling the Bill in the ACT Legislative Assembly. This explanatory statement does not form part of the Bill and has not been endorsed by the Assembly. The statement is to provide assistance to the reader of the Bill and is to be read in conjunction with the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

PURPOSE

The purpose of the *Crimes (Sentencing) Amendment Bill 2024* is to insert a new section that allows the court to consider a submission made by any party in a proceeding in regard to sentencing. This amendment seeks to address concerns raised that the sentencing submission practises favour the defence in the ACT since the High Court decision of *Barbaro vs. The Queen [2014]*.

The sentencing court remains obliged to reach, and to give effect to, the court's own conclusion as to the appropriate sentence but can expect to be assisted in so doing by appropriate submissions of law.

This amendment will provide an opportunity for balance and further transparency in sentencing practice.

The Act amends the following legislation:

Crimes (Sentencing) Act 2005

Background

Currently in ACT criminal proceedings, the prosecution cannot make recommendation or provide advice to the judge as to the sentence that they feel would be appropriate. A 2014 High Court decision, *Barbaro v The Queen*, set a legal precedent to disallow sentence submissions by the prosecution in criminal proceedings. This amendment Bill would overturn this High Court decision.

The introduction of ‘sentencing submissions’ was a recommendation of the 2021 Sexual Assault Prevention and Response Reform Program Steering Committee report. The report suggested that the current limiting of such submissions potentially leads to an unnecessary increase in appeals and ultimately has detrimental impacts on victim-survivors through the court process. The report stated that *‘limiting such submissions*

has been criticised as potentially leading to an unnecessary increase in appeals based on manifestly inadequate or excessive sentences. Protracted appeals may continue to traumatise victim survivors and do not provide closure.'

The ACT Government noted in its response that it did not see that there was evidence of increased appeals of sexual assault sentences to suggest that this was a problem but would reconsider if further evidence arose.

Following this ACT Government response, the DPP's 21/22 Annual report highlights their increased focus and success rate in sentencing appeals – particularly appeals 'to address sentences for murder and child sexual offending that we considered fell clearly short of community standards for offending of this type' (p.30). The report suggests a 'record number of High Court appeals' for the 2021-22 period. The DPP's Annual Report highlights that it is important that appeals remain rare and exceptional – however, is equally important that sentencing practices reflect legitimate community standards and expectations (p.30).

The 2022 Legislative Assembly Standing Committee on Justice and Community Services Inquiry into Dangerous Driving saw significant debate through the hearings around concerns raised by victims of crime questioning the justice system's delivery of sentences that reflect the harm that is caused by such offences.

CONSULTATION ON THE BILL

This Bill has gone through a significant consultation process. On April 26 2023, Dr Paterson MLA released a discussion paper seeking public input on the proposed changes seen in the *Crimes (Sentencing) Amendment Bill 2024*.

To date the following organisations and individuals responded to the discussion paper, in support of the proposed new section of the *Crimes (Sentencing) Amendment Bill 2024*: ACTCOSS, Victims of Crime Commissions, Director of Public Prosecutions, Australian Federal Police Association, Safer Roads ACT, Women's Legal Centre, Domestic Violence Crisis Service, and the Justice Reform Initiative, along with some individuals who provided their support. The following organisations and individuals did not support the proposed new section of the *Crimes (Sentencing) Amendment Bill 2024* or did not see their being significance for the amendment to be made: Legal Aid, Aboriginal Legal Service and two individual submissions from defence lawyers.

There is a significant amount of support for the *Crimes (Sentencing) Amendment Bill 2024*, noting that this would be a small step in potentially providing balanced advice, and more transparent and robust justification from judges around sentencing. The

proposed new section of the *Crimes (Sentencing) Amendment Bill 2024* may reduce appeals, which ultimately is beneficial for victims, as well as defendants.

Furthermore, the Queensland Attorney-General was consulted and advised that since they overrode the High Court decision to allow sentencing submissions, Queensland courts have reported no adverse impacts.

In 2016, the Queensland Government legislated to overturn the High Court ruling, to reinstate sentencing submissions.

This explanatory statement will include context provided from the consultation.

The *Barbaro* principle[1]

Barbaro was an appeal from sentences imposed by the Supreme Court of Victoria for serious drug trafficking offences punishable by life imprisonment. As part of the plea arrangement, it was agreed that the Crown would not press for a life sentence, but instead submit that a lesser range was appropriate. On that basis, the plea was entered. The sentencing judge then refused to hear the Crown's submission on range and sentenced Mr Barbaro to life imprisonment. Had Mr *Barbaro* appreciated that the Crown's submissions on range ·would not be received, he would not have pleaded guilty. The defendants appealed on the basis the judge failed to consider the submission of the prosecutor as to the available range.

Five members of the High Court decided the appeal. The plurality (French CJ, Hayne, Kiefel and Bell JJ) reasoned that the role of the prosecutor on sentencing is to assist the Court by bringing to its attention all of the underlying elements relevant to the Court's sentencing task. Critical to the plurality's reasoning, it conceptualised a prosecutor's submission on available range as neither a point of fact nor law, and therefore no more than an expression of opinion (at [7] and [42]). It apprehended that a "bare statement of range", which fails to articulate the assumptions on which is depends, could be of no assistance to the Court (at (37]-[38]). Moreover, lest any submission on range be seen as some constraint or influence on the Court's sentencing discretion {at [33]), the plurality reasoned that a sentencing court should not take it into account (at [49]).

[1] Please note this section is informed in part by a submission from the ACT DPP to Dr Paterson's discussion paper in regard to the proposed new section of the *Crimes (Sentencing) Amendment Bill 2024*.

The ACT position: applying *Barbaro*

In *R v Gordon [2022]* ACTCA 48, the ACT Court of Appeal considered the application of *Barbaro* and other authorities regarding sentencing submissions in the Territory.

The Court of Appeal conceptualised the High Court's decision in *Barbaro* as a "judicial confinement of the common law duty on the prosecution to assist the court" (at [71]). On that premise, it saw no reason to depart from other common law judgments relating to sentencing submissions, one of which being the Victorian Court of Appeal decision in *Matthews v The Queen* [2014] VSCA 294. In *Matthews*, it was held that the defence can make submissions on available sentencing range.

As a result of the High Court's decision in *Barbaro* and the ACT Court of Appeal decision in *Gordon* we now have a situation where the defence is able to make submissions on the sentencing range, they say is applicable in a given matter, but the prosecution is not. Further, a highly artificial situation now exists whereby the prosecution will have in mind what the appropriate range is but cannot articulate it. If a sentence is imposed that falls below the range, the prosecution will be contemplating an appeal on the basis of manifest inadequacy. On the appeal, the prosecution is able to more clearly articulate what it says the range is and how the sentence fell outside of it. Justice Gageler articulated this point (departing from the plurality's reasoning) in his separate judgment in *Barbaro*. His Honour said at:

*The majority of the Court of Appeal of the Supreme Court of Victoria in R v MacNeil-Brown [(2008) 20 VR 677)] (Maxwell P, Vincent and Redlich JJA) was in my view correct to hold that the prosecution duty to assist a sentencing court to avoid appealable error requires the prosecutor to make a submission on sentencing range if the sentencing court requests such assistance or if the prosecutor perceives a significant risk that the sentencing court would make an appealable error in the absence of assistance**. If a sentencing court can be told after the event on an appeal by the prosecution that the sentence it has imposed is outside the available range for reasons articulated after the event by an appellate court which may or may not "admit of lengthy exposition", the same sentencing court should in principle be able to expect to be assisted before the event by a prosecution submission as to the available range supported by such exposition of the reasons for that range as might at that time seem both possible and appropriate.** Such a prosecution submission, where made, has no greater or lesser status than any other submission of law. The sentencing court is not bound to accept the submission and may or may not in the event be assisted by it. The sentencing court remains obliged to reach, and to give effect to, the court's own conclusion as to the appropriate sentence but remains entitled to expect to be assisted in so doing by appropriate submissions of law.*

The decision in *Gordon* is arguably incongruent with the High Court's reasoning in *Barbaro*. The decision does not squarely deal with the five discrete reasons identified in *Barbaro* as to why the prosecution ought not be able to submit on range.

It is the intent that the proposed new section of the *Crimes (Sentencing) Amendment Bill 2024* would rectify the discrepancies in the *Gordon* decision by allowing sentencing submissions from the prosecution in criminal court proceedings.

Interstate precedence

In 2016, the Queensland Government legislated to reverse the High Court Decision, *Barbaro v the Queen*. Queensland legislation currently allows prosecutors the opportunity to make a "sentencing submission" on their view of an applicable sentence or sentence range.

Advice from the QLD Attorney General stated that, *"The HCA judgement, which held that prosecutors were not permitted to make a submission to the court on the appropriate sentence or the bounds of the range of appropriate sentences, resulted in a significant change to sentencing practice in Queensland.*

As such, the 2016 amendments to the PS Act and the Y J Act did not represent a change in sentencing practice for Queensland but rather restored a longstanding and established sentencing practice of submissions being provided for the assistance of the court."

During the second reading speech for the Queensland Bill which introduced provisions restoring the practice in that jurisdiction of practitioners making submissions on sentencing range, the Attorney-General said:

"The bill also makes amendment to the Penalties and Sentences Act and the Youth Justice Act 1992 to allow a court to receive a submission from a party on what they consider to be the appropriate sentence or sentence range for the court to impose. This amendment addresses the effect of a 2014 High Court decision in Barbaro & Zirilli v The Queen [2014) HCA 2 that prohibited the longstanding practice in Queensland of prosecutors making a submission to the court in relation to the appropriate penalty range. The amendment will therefore restore the practice and improve consistency in sentencing and assist in courtroom efficiency."

In Queensland, the opposition supported that amendment noting it *"had very broad ranging support from the Bar Association and other submitters"* and commended the

government on clarifying the issue. The amendments in relation to abolishing the rule in *Barbaro* were supported during the debate.

The proposed new section of the *Crimes (Sentencing) Amendment Bill 2024* for the ACT follows the same definition of 'sentencing submission' as that of Queensland legislation, whereby *"**sentencing submission**, made by a party, means a submission stating the sentence, or range of sentences, the party considers appropriate for the court to impose."*

SUMMARY OF AMENDMENTS

Crimes (Sentencing) Act 2005

The Bill amends the *Crimes (Sentencing) Act 2005* to create a new section 34AA. This section expands the ability for parties involved in a court proceeding to submit recommendations in how an offender should be sentenced (if at all) for an offence.

CONSISTENCY WITH HUMAN RIGHTS

International human rights law places obligations on governments to "respect, protect and fulfil" rights. During the development of this amendment due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004.*

The preamble to the HRA notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society.

The obligation to respect means governments must ensure its organs and agents do not commit violations themselves; the obligation to protect means governments must protect individuals and groups from having rights interfered with by third parties and punish perpetrators; and the obligation to fulfil means governments must take positive action to facilitate the full enjoyment of rights.

Section 28(2) of the HRA provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

- the nature of the right affected
- the importance of the purpose of the limitation
- the nature and extent of the limitation
- the relationship between the limitation and its purpose

- any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

An assessment against section 28 of the HRA is provided below.

Rights Engaged

Broadly, the Bill engages the following *Human Rights Act 2004* (HRA) rights:

- Section 16 – Freedom of expression
- Section 21 – Fair trial
- Section 22 – Rights in criminal proceedings

Section 16 of the HRA provides that everyone has the right to hold opinions without interference, and everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

This Amendment Bill engages positively the right to freedom of expression by establishing an appropriate legal framework for all parties to proceedings to express their view on what an appropriate sentence may or may not be. This Amendment Bill seeks to provide balance in both the prosecutor's and defence's ability to express their views on appropriate sentencing arrangements. This Amendment Bill will improve transparency and articulation of the sentences, and the sentencing judge will continue to have the final say in all sentencing matters.

Section 21 of the HRA provides that everyone has the right to a fair trial, including having criminal charges, and rights and obligations recognised by law, decided by a competent, independent, and impartial court or tribunal after a fair and public hearing.

Allowing the prosecution to enter a submission on range does not limit or alter in anyway the competency, independence, or impartiality of a Court. Indeed, Justice Gaegler in his decision in R v MacNeil-Brown in the Court of Appeal of the Supreme Court of Victoria stated*"in my view correct to hold that the prosecution duty to assist a sentencing court to avoid appealable error requires the prosecutor to make a submission on sentencing range if the sentencing court requests such assistance or if the prosecutor perceives a significant risk that the sentencing court would make an appealable error in the absence of assistance. If a sentencing court can be told after the event on an appeal by the prosecution that the sentence it has imposed is outside the available range for reasons articulated after the event by an appellate court which may or may be admit of lengthy exposition, the same sentencing court should in principle be*

able to expect to be assisted before the event by a prosecution submission as to the available range supported by such exposition of the reasons for that range as might at the time seem both possible and appropriate".

A reduction in appealable errors reduces lengthy court proceedings and uncertain futures for all parties involved, ensuring a fair trial. Many of the submissions received in the consultation of this Bill put forward the view that reducing appeals to child sexual abuse and sexual assault trials would have a significant impact on witnesses in reducing the trauma experienced as a result of lengthy, drawn-out court proceedings. There is significant research evidence that details the re-traumatisation of victim/survivors who appear as witnesses in trials. Lengthy appeal processes also have significant detrimental impacts on defendants. Therefore, avoiding appealable error is of benefit to all parties. To again reference Justice Gaegeler in R v MacNeil-Brown *"The sentencing court is not bound to accept the submission and may or may not in the event be assisted by it. The sentencing court remains obliged to reach, and to give effect to, the court's own conclusion as to the appropriate sentence but remains entitled to expect to be assisted in so doing by appropriate submissions of law."*

Section 22 of the HRA provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. It also provides that anyone charged with a criminal offence is entitled to minimum guarantees, which includes adequate time and facilities to prepare his or her defence and to communicate with lawyers or advisors chosen by him or her. The right to the presumption of innocence is not impeded by this Bill. This Bill speaks to a person that has been found to be guilty and is being sentenced. This Bill does not alter or impact the provision of adequate time and facilities for their defence.

In summary, this Bill reinstates an aspect of ACT sentencing law that ensures the upholding of human rights applicable to sections 21 and 22 of the HRA. It is my view that the High Court decision limited rights applicable to section 21 that has had a detrimental impact on our justice system. This Bill overturns that decision.

CLAUSE NOTES

Clause 1 Name of Act

The clause provides that the name of the Act is the *Crimes (Sentencing) Amendment Bill 2024.*

Clause 2 Commencement

This clause provides for the commencement of the Act. The Act identifies that the legislation will commence on the day after its notification day.

Clause 3 Legislation Amended

This Clause identifies that the legislation that will be amended it the *Crimes (Sentencing) Act 2005.*

Clause 4 Sentencing – submissions

New Section 34AA

This clause intends to create the legislative framework to allow submissions to be made by a party to the proceeding stating the sentence, or range of sentences, the party considers appropriate for the court to impose. This means that both the offence and defence have the opportunity to recommend how an offender should be prosecuted (if at all) for an offence.