



**Dr Marisa Paterson MLA**

ACT LEGISLATIVE ASSEMBLY

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MEMBER FOR MURRUMBIDGEE

**Discussion Paper *for public comment*:**  
**Proposal to allow ‘sentencing submissions’ in  
Australian Capital Territory criminal proceedings**

**April 26, 2023**

**Prepared by**

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**Member for Murrumbidgee**

**ACT Legislative Assembly**

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### OVERVIEW

Dr Marisa Paterson, MLA, is proposing an amendment to the *ACT's Crimes (Sentencing) Act 2005* to allow for recommendations on sentencing to be made by both the prosecution and defence in ACT criminal proceedings.

There has been significant public discussion about sentencing in the ACT over the last couple of years. It is important as a jurisdiction that we continually looking at ways to improve our criminal justice system. One aspect that has not been publicly explored in the ACT is the introduction of 'sentencing submissions'.

In ACT criminal proceedings, the prosecution cannot make recommendation on their own determination to the judge as to the sentence that they feel would be appropriate. This is due to a 2014 High Court decision, *Barbaro v The Queen* [2014], that set a legal precedence to disallow sentence recommendations in criminal proceedings by the prosecution.

An amendment to allow sentencing submissions in the ACT would override the High Court decision.

The provision of a 'sentencing submission' is not complicated reform and would provide an avenue that law reform experts and victim advocates suggest may go some way in alleviating the often disempowering experience of the criminal justice process.

### Background discussion:

The introduction of 'sentencing submissions' was a recommendation of the 2021 Sexual Assault Prevention and Response Reform Program Steering Committee report in respect to sexual assault cases. The law reform committee 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 that 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 their response to the report that it did not see that there was evidence in sexual assault sentences to suggest that this was a problem but would reconsider if further evidence arose.

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The number of sentencing appeals for the most heinous crimes in the ACT, murder and child sexual abuse have, however, been highlighted in the DPP's 21/22 Annual report. The report highlights the DPP's 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 recent inquiry into dangerous driving also saw significant debate around community expectations of sentencing for dangerous driving offences. One aspect of this public debate is around how disempowering the court process (in particular, sentencing) is for victims of serious dangerous driving crimes.

Pulling all the evidence together over the past couple of years, this appears to be a timely opportunity to try something new in the ACT.

### **Interstate precedence:**

The High Court ruling has been challenged in Queensland.

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.

There appears to be no unintended consequences reported in the literature or commentary as a result of allowing either party to provide a submission.

However, in Victoria, a practice has developed of a sentencing judge asking counsel for the prosecution to make a submission as to the "available range" of sentences.

The Crown can give information to the court about:

- the facts of the case
- the circumstances of the offender (for example, the prosecution could point out the offender's criminal history, and the defence could point out that the offender has shown remorse)

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- relevant sentencing principles
- *the type of sentence the offender deserves (for example, imprisonment or a community correction order)*
- *examples of sentences in similar cases.*

The judge or magistrate can ask questions to seek information and clarify issues.

The information given in a sentencing hearing helps the judge or the magistrate to decide the sentence to impose. Although, Victoria has not actually legislated to reverse Barbaro.

### **Current proposal:**

Regardless of legislation being introduced to allow sentencing submissions - the sentence as a decision is still entirely at the judges' discretion. However, a sentencing submission is an opportunity for the prosecution and defence to provide more information if they see fit, contributing to greater transparency and more robust representation in the court.

It is proposed in this paper that a 'sentencing submission' would go some way a more balanced process, allowing all parties to provide sentencing advice. The legislation may also provide judges in the ACT with some context of differing expectations on sentencing and require more robust reasoning for the sentences that they deliver. There is potential that this will have an impact on the number of appeals as a result of greater transparency in sentencing.

This paper is seeking feedback on a definition of a 'sentencing submission' in legislation that could look something like: *In deciding how an offender should be sentenced (if at all), a court may consider a submission made by a party to the proceeding stating the sentence or range of sentences, the party considers appropriate for the court to impose.*

### **How to make comment**

Please provide feedback to the Office of Dr Marisa Paterson by COB May 12<sup>th</sup> via email: [paterson@parliament.act.gov.au](mailto:paterson@parliament.act.gov.au)

Feedback is received confidentially.

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