EFFECTIVE ADVOCACY ON SENTENCE
PREPARATION AND PRESENTATION

Cairns Judiciary 2013/2014 CPD Series 5 February 2014

By The Honourable Justice Henry

Warning from the presenter:

The seminar to which these notes relate occurred on 5 February 2014. At that time the convention in Queensland was that prosecutors were expected to make a submission as to the appropriate sentence range. That convention arose in the early 1990's in response to repeated appellate disquiet over the prosecution seeking a higher level of sentence on an Attorney's appeal without the prosecution having submitted for such a level of sentence at first instance. On February 12 2014 the High Court published its decision in Barbaro v The Queen; Zirilli v The Queen [2014] HCA 2, in which it was said the practice of counsel for the prosecution providing submissions about the range of sentences should cease because it involves offering an opinion and erroneously places the prosecution in the role of surrogate Judge.

It follows the persuasive aim of the prosecutor on sentence, discussed below from [21] et seq, is now more correctly described as properly informing the Court of the facts and legal principles relevant to the imposition of a just sentence.

Introduction

Prelude

[1] Ladies and Gentlemen, welcome to this the second seminar in the Cairns Judiciary Professional Development series for the 2013/2014 CPD Year. Thank you Judge Everson and Judge Harrison for attending in support of today's session.

[2] The hypothetical case around which this seminar will be referenced is *R v Harley Davidson* (Annexure A hereto). It is based upon a real case, a sentence case in which I was defence counsel in the Innisfail District Court some years ago. The case summary has been distributed. To follow our discussion please ensure you have read the case summary and have it to hand for ongoing reference.

Educating both ends of the bar table

[3] Our seminar today is, "Effective Advocacy on Sentence – Preparation and Presentation".

[4] It is intended to educate advocates at both ends of the bar table, that is, both prosecutors and defence lawyers and I am pleased to see representation from both ends here this evening.

[5] It is in the common interest of the profession, the courts and the broader community that all the players in the criminal justice system do their job properly. When all

players approach their task in a properly informed and professional manner the Judge's role is easier to discharge and there is a greater probability that the result that ensues will be a correct and fair result, not one infected with error or injustice to either side.

[6] In short we all share a mutual interest in quality advocacy at both ends of the bar table.

Preparation

[7] As our seminar title suggests, we will focus this evening not only upon presentation in court at sentence but also upon preparation. As the seminar progresses it will soon become apparent to you that effective preparation of the sentence is essential to delivering effective presentation at court. It is simply impossible to achieve the latter without tending to the former. Proper preparation is critical.

No right answers

[8] Other than that constant, there is no single "right" way to approach sentence advocacy. There are many variables involved and there is no such thing as a "one size fits all" approach. So as you consider the answers to some of the questions we will discuss about the case of *R v Harley Davidson* this evening, rest assured that there are no "right answers" to the questions.

Think the case through

[9] There are inevitably advantages and disadvantages in any choice lawyers make in preparing and presenting a sentence. As with the game of chess, to which I often compare litigation, there are many potential moves to make. It is important throughout to be thinking about and thinking through what those moves should be.

[10] Engaging in ongoing thought and reflection about your approach to the case will ensure you properly identify what remains to be done to prepare properly.

Value Adding

[11] It can never be assumed when you begin your involvement in a case that what you have at the outset is adequate without further preparation, yet some purported advocates just use what they receive.

[12] For instance some prosecutors just present whatever the police have gathered. They do not take ownership of their case and they fail to filter out the rubbish. Nor do they gather or requisition the additional information needed to ensure the case is properly prepared for court.

[13] Similarly, some defence solicitors just run reactively with whatever the police have gathered and obtain no more meaningful instructions than that their client admits the elements of the charge. Some barristers in turn just run with whatever the defence

solicitor has briefed them with, as if the barrister's worth to the case flows mysteriously from the divinity of their barrister status rather than the industry they can actually apply to the case.

[14] This "add nothing" approach is contrary to the lawyer's oath to practice "to the best" of the lawyer's knowledge and ability. Professional advocates do not just "roll their arm over" with what they are given. They are constantly thinking through and identifying what needs to be done to best achieve the end object of their role in the case.

Aim of Advocacy on Sentence

[15] What is the end object? What is the aim of advocacy on sentence?

[16] Advocacy is the art of persuasion. A premise of the first part of title of this seminar, "Effective Advocacy on Sentence", is that there is a place for persuasion on sentence.

[17] The ill informed may disagree with that premise. They may say that the adversarial aspect of criminal justice ought relate solely to trials and that the role of legal representatives on sentence should solely be to assist the court on reaching the right sentence. Certainly legal representatives, as officers of the court, do have a duty to the court to act in the interests of the administration of justice,[1] however, as with trials, sentence proceedings are adversarial. They are premised on the contest between rival interests, and the proper exposure and testing of opposing positions involved therein, forging a correct outcome. I say "a" correct outcome rather than "the" correct outcome because, mandatory sentences aside, a variety of different but correct outcomes may be within the range of the proper exercise of the sentence discretion.

[18] Accepting that persuasion has a place on sentence, what is its purpose?

[19] Let us begin with the defence. What is the ultimate persuasive aim of the defence lawyer on sentence? *[…Discussion…]*

[20] The persuasive aim of the defence advocate flows from the duty to the client. That aim, to be pursued within the limits of legal and ethical boundaries, is to secure the most favourable correct result for the defendant. By most favourable "correct" result I mean the most favourable sentence within the limits of the range of sentence appropriate to the case. That qualification is an important one. It is contrary to the client's interest to press for a sentence so manifestly inadequate that a successful appeal will inevitably follow.

[21] What of the persuasive aim of the prosecutor on sentence? Is it simply the converse of the defence lawyer's? The converse would be to secure the harshest possible correct result for the prosecution. Is that the prosecutor's persuasive aim? *[…Discussion…]*

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1 *Barristers Conduct Rules* 2011 (Qld) R 25, *Australian Solicitors Conduct Rules* 2012 R 3.

[22] The prosecutor's persuasive aim is not simply the converse of the defence lawyer's because, unlike the defence lawyer, the prosecutor's role is not to merely represent the interests of a single individual. The prosecutor represents the public interest. The constituents of the public interest necessarily include individuals such as the victim and the defendant – hence the prosecutor's duty of fairness to the charged citizen - but not to the exclusion of the interests of the broader community. The public interest will no more inevitably coincide with the victim's interest than it will the defendant's. The public interest is, inevitably, in a just sentence.

[23] A just sentence is a sentence that has at least two qualities. Firstly, it should be generally consistent with sentence patterns in similar matters. This is because a material (as opposed to incremental) departure from established sentence patterns will invariably engender perceptions of injustice and of a departure from the just principle that we are all are equal before the law. Secondly, to be just, a sentence must give such weight to the various purposes of sentencing as is appropriate to the individual case. This is because punishing without proper purpose is unjust. The relative importance of the overlapping and sometimes competing purposes of sentencing - rehabilitation, deterrence, denunciation and community protection[2] - will vary, depending on the circumstances of the individual case.

Preparation

[24] So what is needed if prosecutor and defence lawyer are to meet their respective persuasive aims of advocating for a just sentence or for the most favourable correct sentence? The advocates' persuasive aims on sentence cannot be achieved unless the court is properly informed of the circumstances of the case that are relevant to the pursuit of their respective aims. Information is the ammunition of the advocate. In one sense, good advocates are like hired guns. They might be good shots but they cannot do their job without the right ammunition. Identifying the need to ensure the proper information is placed before the sentencing court heralds the fundamental importance of preparation to effective advocacy on sentence. It is preparation to which I now turn.

Not a lineal process

[25] The topics now covered will not always arise in the sequence we discuss them. Preparation does not have a fixed lineal sequence. It can involve a mixture of proactive and reactive activity. Some tasks overlap with each other. Others might involve preliminary attention and be revisited repeatedly and in more detail as preparation progresses.

Developing the "Sell"

[26] Whether it is necessary to revisit some areas of preparation in more detail will become more apparent as you gradually identify the sentence you ultimately intend to advocate for. You may learn things during the preparation phase which cause

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2 *Penalties and Sentences Act* (Qld) 1999 S 9(1).

you to change your initial thinking as to what the sentence outcome should be or is likely to be.

[27] Generally speaking, experienced practitioners can predict early in the life of the case what the sentencing court will probably regard the appropriate sentence range to be. However as preparation progresses it may be that information comes to hand which identifies a potential reason why the sentencing court should impose a different sort of sentence than the sentence which is typically handed down for such a matter. If so then such information should be explored further and as that occurs it will soon become apparent whether there is some substance to this developing "angle" or "sell".

[28] Remember courts sentence many offenders for the same sort of offending. They will generally impose the same sort of penalties for the same sort of matters. If you are seeking a higher or lesser outcome than usual then you will need to set your case apart from the day-in day-out run of similar cases with which sentencing courts must deal. You need to identify an angle or argument to sell the special result you are seeking and you need to gather the information which supports that result.

Is the prosecution proceeding?

[29] Our focus today is principally upon those aspects of preparation relevant to effectively advocating at an eventual sentence. The assumption implicit in that focus is that the prosecution will actually proceed. It should be borne in mind though that preparation on both sides ought always involve consideration of whether the case should proceed at all.

[30] In some cases it is so obvious the prosecution should proceed that there is little point in requesting the prosecution to drop the case or to co-operate in arrangements for mediation. Is *R v Harley Davidson* such a case? *[…Discussion…]*

[31] A discontinuance or a mediation followed by a discontinuance is not out of the question here. The prosecution would likely assume from the state of the evidence that it has a reasonable prospect of success. However the mere fact the defendant has admitted punching the complainant and indeed been witnessed by an independent third party doing so does not make it inevitable that the prosecution must proceed. Even strong cases might be discontinued if it is not in the public interest to pursue them.[3] The victim of the alleged offence was one of the defendant's friends. It is not beyond the realms of possibility that he might be prepared to let bygones be bygones or at least participate in mediation. Such a mediation might culminate in an apology from the defendant and perhaps the payment of some compensation with the result that the prosecution might be discontinued. Alternatively, even without mediation, an enquiry of the prosecution might prompt it to consult Melvin Star and discover he has a preference for the matter to be discontinued. His wishes are not determinative but the DPP might conclude there is no public interest in pursuing a prosecution involving friends who have resolved or may at a mediation resolve their differences to the complainant's satisfaction.

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[3] See DPP Guideline 4.

[32] Defence lawyers should bear in mind that while their own client may have some idea of how forgiving or otherwise an alleged victim is likely to be, there are dangers in querying the complainant directly about that. It may, as in Harley's case, involve a breach of a bail condition about no contact. It may be misinterpreted as a sinister attempt to influence a witness. Generally it is safer to leave the enquiry to the prosecution, who will in any event want to make their own enquiry of the complainant.

[33] Let us assume for present purposes that *R v Harley Davidson* will not be dropped. How should it be prepared?

Determining whether the matter is a sentence

[34] It may be thought that the first task of sentence preparation is to determine whether the matter is to be a sentence but in practice that determination may not occur until the life of the case is well advanced. Many other steps relevant to preparation for sentence may have occurred by then. In the case of a sentence following a trial, all of those steps should have occurred because the determination whether the matter will proceed to sentence is dependant entirely upon the verdict at the conclusion of the trial. In the event of a guilty verdict, it is too late to commence sentence preparation then. Courts generally expect the parties to be prepared to proceed directly to sentence after a guilty verdict.

[35] However even if a case resolves as a plea of guilty it is also inevitable that by the time the intention to plead guilty is announced, information that will be relevant on sentence will already have been gathered. In practice the lawyers on both sides should from the outset be approaching their preparation of the case, anticipating the possibility that it may ultimately result in a sentence proceeding, without assuming it will do so. That is not as onerous as it sounds. In practice much of the evidence and instructions which lawyers on either side should set about gathering early in the life of a case will be useful whether the matter goes to trial or results in a plea of guilty.

[36] Imagine you are the prosecutor in the office of the Director of Public Prosecutions ("ODPP") who is allocated the file of *R v Harley Davidson* to prepare when it arrives in the office. You read the file when it arrives. What then? Where do you begin? On the face of it the matter has been committed for trial but it reads as the sort of matter in which the defendant may plead guilty. Do you have anything to lose by telephoning the defendant's lawyer and asking what his intentions are? Should you do that or should you just prepare the matter as a trial until you are told to the contrary, or is there something else you should do first? *[…Discussion…]*

[37] Think through what will happen when you call the defence? Put yourselves in the shoes of the defence lawyer. Imagine you receive a telephone call from the assigned prosecutor asking what your client's intention is. What will your response be? Your first reaction might be, "I'll take some instructions and get back to you". If so, then what will you say to Harley when you consult him? What will Harley want to know? *[…Discussion….]*

[38] Harley will surely ask for your advice. "Can you get me off? What are my chances? What will I get if I plead guilty?" Even if he does not, your obligation is to at least discuss with him what the various possible outcomes might be. Might the prosecution be discontinued? If not, what are his prospects if he goes to trial? What is his sentence likely to be if he pleads guilty compared to a sentence he would receive if he were convicted after a trial? What do you need to know to answer these questions? *[…Discussion…]*

[39] You need to know what charge the prosecution intend to put on the indictment. That is fundamental. Can you assume it will be the same charge Harley was committed on? *[…Discussion…]*.

[40] No. The prosecution are not bound to indict the charge upon which a defendant has been committed. They are entitled to indict whatever charge or charges the evidence adduced at the committal supports. Other than assault occasioning bodily harm, what other charge or charges does this evidence support? *[…Discussion…]*

[41] Harley Davidson may have been committed on a charge of assault occasioning bodily harm but the materials in the police brief suggest the possibility Melvin may have suffered grievous bodily harm. Jaw-bones that are not properly aligned for healing purposes might end up misaligned and diminish the efficacy of the body's ability to chew food. But the materials received contain no medical evidence at all. So, if you are the prosecutor do you requisition some evidence about the injury or do you worry about that later and still press on and telephone the defence lawyer, asking whether or not the defendant is going to plead guilty or not guilty? What would your response be if the defence lawyer asks will you be indicting on the same charge that Harley was committed on? If you say yes but discover before the case is heard that the injury actually amounts to grievous bodily harm, what would you do? *[…Discussion…]*

[42] Hopefully you will realise that no single case is worth trashing your reputation over and you will stand by your word and maintain the charge of assault occasioning bodily harm only. But will you learn from your mistake? In the same position what will you do next time? Do not make a representation to your opponent – a representation your opponent might rightfully act upon – as to what charge will be on the indictment until you have satisfied yourself what the appropriate charge should be.

[43] Thus in a case such as the present before the prosecutor rings the defence and asks about the defence's intentions, the prosecutor should obtain some information about the complainant's injury. This will inevitably be relevant information on sentence, whatever the final charge might be. What information should the prosecutor seek? *[…Discussion…]*

[44] It would be helpful for the prosecutor to requisition an addendum statement from the complainant more thoroughly addressing the nature of his injuries and their physical impact upon him. It would be essential to requisition a statement from a medical practitioner about the injury to the jaw and whether if left untreated it would have been likely to cause a permanent injury to health. It may of course be

that such a requisition does not result in information suggesting the injury amounts to grievous bodily harm. If so, then the prosecutor is in a better position to more confidently represent what will be on the indictment.

[45] On the other hand if the requisition results in a confirmation that the injury does constitute grievous bodily harm what should the prosecutor do? Does it necessarily follow that the charge should be upgraded? *[…Discussion…]*

[46] This may be an appropriate case in the exercise of the prosecutorial discretion to persist with the charge of assault occasioning bodily harm if the matter is to be a plea of guilty, but, if the matter is to go to trial, to indict a charge of grievous bodily harm.

[47] So it can be seen that armed with the proper information at the outset about what charge options might be "on the table" the prosecutor will be better placed in making an enquiry about a defendant's intentions. Indeed the prosecutor may be in a position to put forward a so-called charge bargain or plea bargain offer.

Charge bargaining

[48] Let us assume that you, as prosecutor, do requisition the investigating police to obtain a statement from a doctor and when provided that statement is to the effect that without medical treatment the breaks to Melvin's jaw were such that they would not have healed naturally in proper alignment. Assume the statement goes on to explain that the misalignment would have meant that Melvin would not have been able to move his jaw as freely as before and he would likely have experienced difficulty and pain chewing food effectively. The evidence can prove a charge of grievous bodily harm.

[49] Assuming you are the prosecutor, do you offer a charge bargain? Do you offer to indict assault occasioning bodily harm on the basis Harley is prepared to plead guilty and, if he is not, indicate that you will indict grievous bodily harm? Alternatively do you just indict grievous bodily harm and let the defence make up their own mind whether they will plead guilty or not guilty to it? *[…Discussion…]*

[50] There are no "right" answers to such questions. On an objective analysis however, if the evidence supports a charge of grievous bodily harm then it is in the public interest to pursue such a charge. Surely there ought be some gain or advantage to the prosecution and the public interest it represents before it foregoes the pursuit of the objectively correct charge, a charge it has a reasonable prospect of successfully proving? Is there any such advantage here? *[…Discussion…]*

[51] On the face of it there is no such disadvantage, save for the ever-present risk that something unforeseeable may occur at trial to jeopardise the prosecution's prospects of success. On the face of it, even without Harley's admissions, there is a compelling prosecution case that he struck Melvin with no legal justification whatsoever and caused an injury that meets the definition of grievous bodily harm.

[52] Would your attitude as a prosecutor be different though if Harley had entered a plea of guilty to assault occasioning bodily harm at the committal proceedings? Is there a broader issue at stake here? Should the charged citizen be subjected to a change of mind of this kind by the prosecution? *[…Discussion…]*

[53] Again, there is no right answer to questions such as these. Inevitably there will be some cases in which the prosecution rightly conclude its reputation for plain and consistent dealing is more important than a change of heart in an individual case.

Police and victim consultation

[54] In considering whether to offer or accept a charge bargain should the prosecutor keep the arresting officer and the victim informed about the process? Should the prosecutor consult the arresting officer and the victim about a charge bargain decision? *[…Discussion…]*

[55] Prosecutors ordinarily have an obligation to consult with the arresting officer and victim if discontinuing or reducing a charge.[4] Here the existing charge bargain proposal really involves foregoing pursuit of an increase in the charge, but in any event it is plainly prudent to consult. When such decision-making is occurring, consultation alleviates the risk that additional relevant information in the hands of the police and or the victim is not overlooked. Similarly it will ensure that both the arresting officer and victim have a sense that they each have been considered and that their views are worth something. It will make it more likely they will at least understand, even if they do not necessarily agree with, the decision ultimately made.

[56] Experience suggests that where an arresting officer and or victim disagree with a decision but have been consulted and understand it, they are much less likely to complain publicly about the decision-maker or the decision. The chance of a public outcry from such persons is much greater where they have not been properly consulted.

[57] In the case at hand another obvious benefit of consultation with the victim is that the victim may have something to add in an evidentiary sense to the content of his statement. You already know from the statement initially taken from Melvin that when the statement was taken his jaw still hurt when he ate. An addendum statement taken from him might now be able to clarify what, if any, ongoing deficit he has.

[58] Let us also assume your consultation reveals no additional information favouring the exercise of the prosecutorial discretion to only charge assault occasioning bodily harm. You conclude the prosecution should not make a charge bargain offer. You draft an indictment charging grievous bodily harm and forward a copy of it with a covering letter to the defence explaining that is the indictment you will present. You ask the defence to let you know whether Harley intends to plead guilty or not guilty to the indictment.

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4 DPP Guideline 15 (vi) says it should occur. Also see s 12(c) *Victims of Crime Assistance Act 2009* (Qld).

Requisitioning relevant evidence

[59] Remaining a moment longer at the prosecutor's desk having sent off your announcement that you are pursuing a charge of grievous bodily harm and asking about the defence intentions, do you put a pause on your preparations and wait to hear from the defence? Do you requisition any further evidence at this stage? Or wait? Why would you bother incurring the cost of requisitioning additional evidence gathering by the investigating police when it appears to be objectively likely, given the strength of the evidence, that the matter will probably resolve as a plea of guilty? *[…Discussion…]*

[60] There is a degree of brinkmanship involved in deciding whether you ought ask the police or a member of ODPP to gather additional evidence when you are preparing a matter it seems unlikely will go to trial. The obvious difficulty is that memories fade and the evidentiary trail becomes more difficult to pursue with the passage of time. A relevant consideration in considering the dilemma in a case such as the present is that information likely to be of use in preparing or presenting a sentence is almost certainly likely to be of use in the preparation of a trial. Is there such evidence missing from the brief in this case and if so what is it? *[…Discussion…]*

[61] More people than Melvin and the barmaid Grace Goodes witnessed the critical event in this case. There were other people in the bar. At least one of those persons would almost certainly have witnessed part of the critical event and more importantly, has an involvement in the history leading up to them – Aphelia Bingle. Should the prosecution requisition a statement from Aphelia Bingle at this stage? *[…Discussion…]*

[62] If this matter is to go to trial, plainly the prosecution will want to be in a position where they will either call Aphelia or at least rest comfortably in the knowledge that attempts have been made to obtain a statement from her and she is not cooperative. If it is a sentence it is extremely likely that the defence will endeavour to mitigate their penalty by reference to the context in which the assault occurred. Aphelia Bingle will inevitably be in a position, if she is cooperative, to provide a statement shedding light on that context. The fact that a statement from her has not been included in the brief may well reflect the reality that she has declined to cooperate with the police investigation but at the very least, an inquiry about that should be made and if she is cooperative a statement should be obtained

Advising the defendant on the decision to plead guilty and not guilty

[63] Turning to the defence preparation, you will recall we have reached the stage where the defence has received a letter from the prosecution advising them of the upgrade of the charge to grievous bodily harm and asking for an indication whether the accused intends to plead guilty or not guilty. You are Harley's lawyer. What will you do when you get the letter from the prosecution (and stop cursing Harley's former solicitor for not resolving the case as an assault occasioning bodily harm in the Magistrates Court)? What will you do next? *[…Discussion…]*

[64] Clearly you need to have a conference with Harley. You need to explain not only what the prosecution has done, but also advise Harley on the inevitable questions he will have about what course he should take.

[65] So, the day of the conference has come. Harley enters your office at the appointed time in company with his mother. You explain the prosecution's decision to bring the charge of grievous bodily harm and explain what grievous bodily harm involves. You answer their inevitable questions about how the prosecution can do such a thing and then you focus the conversation on the need to decide whether to plead guilty or not guilty.

[66] The first thing Harley will want to know is what his chances of success are if he goes to trial. What are Harley's prospects of successfully defending the charge of grievous bodily harm? What will you advise him? *[…Discussion…]*

[67] His prospects of success appear to be poor. His complaint of police misconduct in procuring the taped interview from him is probably academic in that the prosecution have a powerful case even without his admissions. The effect of Harley's instructions and what he claims to have told the police is that he was provoked into the final decision to punch Melvin by Melvin's implied insult that Harley had been violent to his girlfriend in the past. But even if the jury heard evidence from Harley to that effect at trial and considered it to be possibly true, provocation is no defence to grievous bodily harm because assault is not an element.[5] The medical evidence which has been gathered about the fact the injury would be likely permanent in the absence of medical treatment is unremarkable and not the kind of evidence which is likely to be contradicted by another expert engaged by the defence. Assume then that you would advise Harley that you would do your best for him on a trial but your professional opinion is that his prospects for success are poor.

[68] Harley asks you what is in it for him if he pleads guilty? What will you tell him the penalty will be if he pleads guilty compared to if he is found guilty after a trial? *[…Discussion…]*

[69] Your advice would likely be that grievous bodily harm cases involving injuries of this seriousness tend to attract sentences after trial in the range of about two and a half to three years imprisonment. On the other hand, you might say after a plea of guilty the sentence would probably be towards the lower end of that range combined with a parole release date or a partial suspension after typically serving about a third of that time. You would explain the concept of early parole and partly suspended sentences to him. You would explain the less serious sentence options involving him not going to goal at all but point out there is little support for such leniency in the comparative sentences.

[70] Should you provide Harley with copies of any comparative sentences? *[…Discussion…]*

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5 *Kaporonovski v R* (1973) 133 CLR 209.

[71] Where a defendant is illiterate or is unlikely to be sufficiently intelligent to understand sentence appeal cases there may be little to be gained by providing copies thereof. However a literate person of at least average intelligence is likely to be able to make sense of court of appeal sentencing decisions. It is sometimes helpful to provide two or three of the closest comparable cases to illustrate the kind of sentence range a defendant is facing. It inevitably tends to provoke a more realistic attitude to the process on the part of the defendant and loved ones supporting him or her and enhances confidence in your advice.

Negotiating with the prosecution

[72] Harley will no doubt want to know if the prosecution would be prepared to reduce the charge back to assault occasioning bodily harm. You might point out to Harley that the prosecution sometimes increases the charge upon which a defendant was committed with a view to the defendant offering to plead guilty to the original lesser charge. You should ask Harley whether he would be prepared to plead guilty to assault occasioning bodily harm if the prosecution would revert to that charge. You should explain that, paradoxically, his instructions about Melvin provoking him with the comment about violence to his girlfriend only has a chance of resulting in his acquittal of assault occasioning bodily harm, but point out that the prosecution is only likely to return the charge to one of assault occasioning bodily harm in return for him pleading guilty to it. You point out to him that there is no harm in putting such an offer to the prosecution but express pessimism about whether it might be accepted. Is there another offer that you ought obtain instructions from Harley about? If the prosecution turn out to be un-prepared to reduce the charge back to assault occasioning bodily harm is there anything else to be negotiated with them that might be relevant to Harley's decision to plead guilty or not guilty? *[…Discussion…]*

[73] In a case like the present there is some prospect that even if the prosecution is not interested in reducing the charge to assault occasioning bodily harm in return for a plea of guilty it might be prepared to undertake that should the defendant plead guilty to grievous bodily harm it would concede that in the unusual circumstances of this case a wholly suspended sentence or a sentence involving immediate release on parole is within range.

The worth of agreements between the parties about sentence submissions

[74] Let us assume you approach the prosecutor and indicate your client would be prepared to plead guilty to assault occasioning bodily harm if that charge was offered instead of the more serious charge of grievous bodily harm. Let us assume the prosecution rejects that offer. You then inquire of the prosecution what it would be prepared to concede about sentence range in the event that Harley pleads guilty to the charge of grievous bodily harm.

[75] What is the worth of such concessions? Are they even worth pursuing? *[…Discussion…]*

[76] Agreements of this kind may have utility in the right case but are susceptible to creating two problems in particular. The first is that when a prosecutor submits something slightly differently than what a defence lawyer thinks was agreed to earlier, unedifying arguments about dishonesty of practitioners going back on their word unfold. The best guard against such a problem is to ensure that whatever concession is agreed to is properly documented, at least by way of a file note, but preferably by an exchange of correspondence.

[77] The other common problem with such agreements arises when the concession the prosecution has agreed to make appears to involve conceding a sentence that is manifestly inadequate. Sentencing judges are normally reluctant to disregard concessions made by one party in support of another, but where a concession is obviously not properly supported by authority or the particular circumstances of a case, it is unlikely to carry significant persuasive weight with the court. It follows it is never in the interest of the defendant to persuade the prosecution to make a concession which is so generous as to suggest that the prosecutor making it has erred. If a court is to give an obviously more lenient than average sentence it is unlikely to do so merely because the parties agree on such a generous sentence range and more likely to do so if presented with credible argument.

Signed timely instructions regarding guilty plea

[78] Let us assume the defence attempt at negotiating with the prosecution results neither in a charge reduction or an agreement to concede a generous sentence range. What does the defence lawyer do next? *[…Discussion…]*

[79] A conference must be held with Harley to decide whether he is pleading guilty or not guilty. It must be emphasised to him that if he is to plead guilty he will get the greatest benefit from doing so by communicating the decision to plead guilty in a timely way. It is important not to brow beat him into a plea of guilty – the choice is his, not yours. But he should be reality tested. His version of events and the prosecution's version should be discussed in greater detail with him, if needs be, in order to ensure he appreciates where the greater advantage lies between a plea of guilty compared to a plea of not guilty in this case.

[80] Assume Harley instructs you he intends to plead guilty. Do you take signed instructions from him about his decision to plead guilty? If so what should be included in those instructions? *[…Discussion…]*

[81] Signed instructions as to the defendant's intention to plead guilty or not guilty are principally for the purpose of protecting the defence lawyer against a rogue client who after sentence claims a plea of guilty was not made in an informed, voluntary way. It is obviously a matter of degree as to how much detail ought be included, but generally speaking the main issues that have been discussed in the course of advising Harley where the preponderance of advantage and disadvantage lies ought be included.

Timely communication of guilty plea

[82] Having secured Harley's instructions that he intends on pleading guilty it is imperative that you inform the prosecution as soon as practicable. By doing so you will be laying the basis for a submission in court that the plea of guilty is an early or at least a timely one. Should you put this communication with the prosecution in writing or is it enough simply to tell the prosecutor orally? *[…Discussion…]*

[83] It is surprising how rarely defence lawyers inform a sentencing court of the date upon which they informed the prosecution of the defence intention to plead guilty. It is surprising because the time at which the defence inform the prosecution of the intention to plead guilty is an express consideration on sentence pursuant to s 13 *Penalties and Sentences Act 1992* (Qld). If you do inform the prosecution orally then at the very least a written file note should be taken so that the information is available for reference at the sentence. However the preferable course is to put the communication in writing so as to remove any doubt or possibility of dispute as to when the prosecution was informed.

Written instructions about the circumstances of the offence

[84] Let us assume as defence lawyer you have instructions from Harley that he intends to plead guilty and you have or are in the process of taking his written instructions to that effect. What other information should you obtain from him in writing? *[…Discussion…]*

[85] Save for instructions as to his intention to plead guilty, the only other written materials generated by the defence to date are Harley's former solicitor's notes of his instructions taken prior to the committal proceedings. For the purposes of sentence the defence lawyer will need access to a written version of Harley's account of events. A statement detailing Harley's recollection of the events should be taken from him. The defence lawyer will already have revisited Harley's version in reality testing and discussing the pros and cons of pleading guilty or not guilty with him. The information he gave as part of that process, the information already given in his pre committal instructions and any other detail he can recollect should be put into a written statement to be signed by him. Why? It is unlikely that you will ever disclose this statement to the other side. Why should you bother to have a signed version of events from Harley? *[…Discussion…]*

[86] There are three reasons. Firstly, it is another form of protection for the defence lawyer from an after the event allegation by a rogue client that he was in fact innocent or that he told you mitigating information and you ignored him. Secondly, and more relevantly to effective advocacy on sentence, it enables the sentence advocate to be more properly informed of those aspects of Harley's account which might warrant some emphasis in sentencing submissions. Thirdly it allows the sentencing advocate to know what Harley would say if a contest arises on sentence and it becomes necessary to call him as a witness.

Written antecedents

[87] As defence lawyer let us assume you have secured appropriately detailed signed information from Harley about the circumstances of the events. What other information do you want in writing from Harley? What about Harley's antecedents? Should that be taken now or is it something you can safely leave to take on the morning of the sentence? *[…Discussion…]*

[88] There is no doubt that the antecedents of the defendant should be taken as soon as practicable. Ideally it should be reduced to writing in a written statement much the same as the client's version of events should be. It might be included in that statement. Of itself it will be an important document for the defence lawyer on sentence to have regard to in selecting what the court should be told about the defendants antecedents. But it is information which should be gathered well before the sentence. The taking of the defendant's antecedents at an early stage allows the defence lawyer to start to understand the defendant. In the context of sentence preparation it will help in identifying what it is about the defendant and his history that might help make a difference and set him apart as a defendant worthy of a lenient sentence. It will also identify the potential lines of enquiry that ought be made in order to properly prepare other personal material about the defendant to place before the court in mitigation.

Witness statements

[89] We have already discussed the desirability of the prosecution seeking out Aphelia Bingle and taking a statement from her. Let us presume the prosecution has not afforded the defence such a statement. Should the defence try and take a statement from Aphelia Bingle? *[…Discussion…]*

[90] It ought not be thought, just because this matter is resolving as a plea of guilty, that there is no need to take witness statements. Whether a need exists to take a statement from Aphelia Bingle will be readily identified by the information you gather from Harley about the circumstances of the events and his antecedents. Obviously that information should include reference to his relationship with Aphelia. He might, for example, tell you that Aphelia knew from his past patterns he would likely be at the hotel that night and Harley suspects she therefore would have been reluctant to go there and might have been pressed into doing so by Melvin. If she is sought out as a witness she may well confirm Harley's suspicions and help support a submission that Melvin was deliberately looking to provoke a response from Harley. However Harley actually tells you that when he and Aphelia broke up they had a physical fight in which she suffered a black eye and told him he better not ever come near her again. That information, which seems consistent with the comment Harvey claims Melvin made about hitting his girlfriend, suggests it might be counter-productive to approach Aphelia for a statement and better to hope she simply does not surface as a witness for either side.

Medical psychiatric and psychological reports

[91] Having taken detailed antecedents from Harley you will have ascertained whether or not there are any medical or psychiatric or psychological issues relevant to his offending behaviour or the appropriate sentence. Let us assume Harley tells you that his parents separated when he was 15 years old after years of drunken violence by his father towards him and his mother. He tells you that left him deeply upset and angry and affected his academic performance at school resulting in him leaving school before completing year 12 and getting a job with a local electrician as an apprentice. He tells you he has never received any counselling or other professional assistance to cope with his anger and hurt. He says he was feeling more sad and frustrated about his life than normal when Aphelia broke up with him and saw his G.P. two days before the offence because he felt so down. He says his G.P. told him his feelings were natural and he did not need to be put on anti depressants. Do you seek a report? From whom? *[…Discussion…]*

[92] There are times when it appears that reports, particularly psychological reports, are obtained not on the basis of need but on the basis that a defendant can afford to pay for one. Lengthy psychological reports that do little more than reduce the client's antecedents to writing in the form of a report have become regretfully common. They are unpersuasive and unhelpful documents.

[93] It is important that defence lawyers are discerning about the types of cases in which professional reports ought be sought. There will be some cases in which the emotional issues are self-evident or can be verified by laypersons close to a defendant through a reference from them. Further, the defendant is likely to have some insight into whether there exists a more deep-seated problem that should be addressed by a psychologist or psychiatrist. Harley has given some information suggesting the possibility that his psychological or psychiatric state may have been adversely affected in some way by the break up of his parents and more particularly by the violence in the household. He was struggling after the breakup with Aphelia. Why not ask him further questions calculated at finding out whether he considers he might benefit from consulting a psychologist or psychiatrist about whether any of that background may have left him with anger management issues or some other recurring emotional difficulty that caused his offence or whether he might benefit from talking matters through with a professional.

[94] Assume his answers suggest he is coping okay now and that he does not believe his parents marital breakdown and his father's violence are relevant to why he punched Melvin and you decide against seeking out a psychologist or psychiatrist. What about his doctor? Should you seek a report from him? *[…Discussion…]*

[95] Yes you should. At the very least his G.P. will confirm what a poor emotional state Harley was in shortly before the offence. This will better inform the sentencing Judge of how raw Harley's emotions would have been when he unexpectedly saw Melvin kissing Aphelia.

References

[96] Let us assume Harley confirms that he is still in employment as well as successfully progressing his apprenticeship. He has a new girlfriend who he has been with for the last nine months. He plays representative rugby league for the district under 21 side and he coaches his girlfriend's younger brother's junior rugby league side. He shares a unit with one of his best friends from his school days and tells you that friend has been very supportive over this case and he has found it helpful to talk through a lot of what happened with him. Should references be gathered from anyone in this case? If so, who? *[…Discussion…]*

[97] Harley's mother, girlfriend, flatmate and employer are obvious candidates to provide references. It is likely they can corroborate the nature of his rugby league career and well as the assistance he provides in coaching the junior rugby league side but preferably someone associated with the local rugby league can provide a reference corroborating these matters too.

[98] Some might think it is inappropriate to get references from persons who are closely related to a defendant, for example, Harley's mother in this case. Should a reference be obtained from Harley's mother? *[…Discussion…]*

[99] Parents of youthful offenders will invariably be appropriate sources for references. It may be the term "reference" gives rise to a perception that it is inappropriate to have close relatives provide such documents. However in the context of the criminal sentence, references ought hardly be limited to authors of a kind who provide references when one is seeking a job. References for use on sentence serve a different purpose. They might just as easily be described as statements or letters to the court. Their essential purpose is to inform the court about the character of the defendant and, where the author is able, to provide validating information about the defendant's character and background. In some circumstances they can also inform the court about the defendant's attitude to the offending behaviour, in particular whether the defendant has said or done things demonstrating insight about the impact of his offending behaviour and the importance of changing his ways in the future.

[100] In this case Harley has mentioned how supportive his long-standing friend and flatmate has been. It is at least likely this person, along with perhaps Harley's girlfriend and mother, can provide a reference going beyond the norm. If Harley has in fact had long and tearful conversations with these persons about the stupidity of his behaviour and his concern over having harmed his former friend Melvin then this is information that should be addressed in their references. It is information a sentencing court is likely to find valuable in fine-tuning the sentence that is appropriate in the circumstances of this case.

[101] Remember it is the quality of references that is persuasive, not the quantity.

Writing references

[102] References should be legible. Type written references are probably preferable although a neat handwritten reference has the compelling advantage that the court can tell that it must have been written in the actual words of the referee. There is nothing wrong with the defendant's lawyer taking references, in much the same way as lawyers can take statements, although the cost of gathering references in this way maybe prohibitive. If you do take a reference as a lawyer it is important as with the taking of any witness statement that you endeavour to take the document substantially in the words of the author and not using the words that you would choose. Using the words of the witness or referee invariably makes the document a more persuasive one.

[103] Assume though that this case, like most, is one where there are insufficient resources for the lawyer to directly seek out referees. Let us assume the task of gathering references is delegated to Harley. What do you tell him to tell the referees to put in their reference? *[…Discussion…]*

[104] Ideally you should hand Harley copies of an instruction sheet you have prepared, explaining how to provide a reference. He can provide those copies to each of his potential referees so they can use it as a guide to what should be placed in the document. Informing the client orally about that information and relying on the client to in turn reliably pass that information on to the author of a reference is fraught with risk of misunderstanding.

[105] As to the information which should be provided to referees about what to include in references it ought at least include a request that the referees clearly indicate in the reference their name, their address, their telephone number, their occupation, any additional position of significance they hold in the community (eg Rotary Club President), an indication they are aware the reference will be used on Harley's sentence for the offence of grievous bodily harm and an explanation of how they know the defendant. Plainly the referee ought be told to go on and provide information about their knowledge of the defendant and his character and, if they are aware of it, his attitude to the offending behaviour.

Checking facebook and social media

[106] Harley is 18 years old, part of the digital generation. The odds are that at least some component of the circumstances relevant to this case has already been played out in social media long before the lawyers were involved. Do you explore this with Harley? What might you ask him about on the topic? *[…Discussion…]*

[107] Let us assume Harley tells you that he is still a member of Aphelia's facebook page and on it he can see that Melvin is still her boyfriend. He tells you there were photos posted on her page following New Years Eve showing her and Melvin out and about dancing and showing Melvin sculling drinks dancing arm in arm with a group of other socialisers dressed up in party hats at what looks like a night club. Might that information be relevant? What if anything will you ask Harley to do about it? *[…Discussion…]*

[108] It remains to be seen whether Melvin will provide a victim impact statement and what it might contain. However this information from Aphelia's facebook page might prove helpful insurance in being able to demonstrate, if the need arises at sentence, that Melvin seems to have gone on with his life just fine. You should instruct Harley to print copies of those facebook postings as soon as possible. Bear in mind if that task is not tended to properly there is the ever present risk that Harley may later be denied access as a facebook friend of Aphelia's or that the post may be removed.

Victim impact statement

[109] Returning to the prosecutor, we have already dealt with the gathering of information from witnesses by the prosecution. What of the victim impact statement? When should it be obtained and when should it be disclosed? *[…Discussion…]*

[110] The answer to those two questions must surely be as soon as possible and immediately. If the prosecution knows that the matter is proceeding as a sentence then it also knows that the court will be prepared to receive evidence about the impact of the offence upon the victim. This is information that will be gathered as part of the preparation exercise in advance of sentence and not left until the eve of sentence. Moreover once the victim statement is obtained there is no excuse for not disclosing it to your opponent.

[111] Let us assume the victim impact statement that has been provided is, like so many references provided on behalf of defendants, written without the close supervising hand of a lawyer. Let us assume when it arrives it contains a paragraph in which Melvin expresses his concern about violence in hotels and that he was the subject of such a growing epidemic. His statement indicates he wants the court to "throw the book" at Harley and put him in jail for a long time. What will you as the prosecutor do about such a statement? Will you leave it as it is? Will you make arrangements for an amended or new version to be obtained? *[…Discussion…]*

[112] Information of this kind appears all too often in victim impact statements that are tendered at sentence. This strongly suggests that they are either being obtained too late to allow the prosecution time to obtain amended versions or alternatively prosecutors are being undiscerning about the content of the victim impact statement which has been obtained. There is no question that assertions of this kind have no place in a victim impact statement. They are not evidence of victim impact. They are commentary or editorial by the victim purporting to encroach upon the sentencing role of the court. Moreover such inappropriate content detracts significantly from the persuasive power of the document.

Criminal history and traffic history

[113] It hardly needs to be emphasised that the prosecution should procure a fresh criminal history of the defendant. It may well be that as here a QP9 states the defendant has no criminal history. However time moves on and there is always a possibility that a criminal history entry may have appeared after the time that the

QP9 was drafted. Let us assume for the future purposes of this exercise that a further criminal history check is done and no criminal history is detected.

[114] What though of traffic history? Occasionally prosecutors tender a defendant's traffic history. Is that relevant here? *[…Discussion…]*

[115] It is difficult to see on the known facts how any traffic history could conceivably be relevant as a consideration on sentence here.

Comparatives

[116] A critical component of the preparation of both sides for sentence is researching and obtaining comparable or closely comparable case authorities. Where might you look? What search terms might you employ? *[…Discussion…]*

[117] The starting point generally will be gaining internet access to Queensland Court of Appeal Cases. This can be affected easily through the Queensland Courts web site, which contains the judgments of the Court of Appeal. It might also be achieved through other web sites such as Lexis Nexis which has a particularly good search engine. The sort of search terms which ought be engaged would at the very least be "grievous bodily harm", "sentence" and, in a case such as the present, the search might easily be narrowed to terms such as "unprovoked", "youth" or "broken jaw". There are of course other possible permutations.

[118] If the Court of Appeal cases provide no particular guidance do not over look the option of checking interstate on other courts' websites and do not over look accessing single judge decisions, for instance through QSIS.

Applicable legal principles

[119] Bear in mind that in addition to seeking out cases involving similar factual circumstances there will also be cases, which, while not comparable, identify sentencing principles of particular relevance to a case such as the present. What principles might be helpful to support with authority in a case such as the present? *[…Discussion…]*

[120] On one view this case involves unprovoked, alcohol fuelled, public violence. Some case authorities speak of the need for behaviour of that kind to be visited with deterrent penalties. A prudent practitioner on either side might at least have ready such authorities, whether for the purpose of applying them or distinguishing them should the need arise.

[121] Another striking feature of this case is the youth of the offender. When that is combined with what looms as the court being informed that he has no previous convictions it is likely to be a significant mitigating feature of the case. Once again prudent practitioners on either side should gather authority dealing with the circumstances under which the youth of an offender will make a material mitigating difference to the sentence that might otherwise be imposed.

Presentation

Obtaining a sentence listing

[122] It is difficult for legal practitioners to control the court's timetabling but to the extent that they have any say in it thought should be given to a sentence date which is convenient for the purpose of professional availability and which is sufficiently far in the future to allow sentence preparation to have occurred. Thought should also be given, particularly if there is a choice about available dates, as to which is the better day to litigate a sentence of this kind before the court.

[123] If you have a choice about it would you rather it be listed on a day when there are five other sentences listed? Would you rather it be listed as the only sentence at 9.15am on a day when the Judge is due to start a trial at 10.00am? Or would you rather pick a vacant day when there is nothing else presently listed at all? *[…Discussion…]*

[124] If you want to seek a sentence, which is pressing the upper or lower boundaries of the usual sentence range, then you do not want the court to feel pressured by time and the diverting pressure of multiple parties wanting to have their matter dealt with. If you have a choice, plainly the day upon which the court is less concerned with other activity is the preferable day.

Performance preparation

[125] Before we move to the day of presentation it is important to emphasise the need to prepare for your actual performance in court; that is, performance preparation.

[126] The good work of properly preparing the case for sentence will be for nothing if the advocate fails at the final hurdle and does not prepare for his or her looming performance in court. The advocate must review all the materials and master their content, but that is not enough. Nor is it enough merely to tab and highlight materials for ready reference or to make notes of the main arguments and submissions to be advanced.

[127] You should plan a coherent overall structure for your submissions and plan your subsets of arguments on particular issues. To that end you must think through how the case should be presented in court.

[128] The good advocate asks and develops answers to questions such as: What is my main angle here? What is the best use of my materials to sell the outcome I am aiming for? What are my most powerful points? What sequence should I address the issues in? What should I emphasise to the judge? How will I ensure the Judge grasps the key passages in the reports and references? How will I distinguish the cases against me? What will my opponent's main arguments be? What can I counter them with?

[129] By "moving the chess pieces around", contemplating the various permutations of how the case is likely to play out in court and what will likely work best in this case, the advocate will bring focus to his or her planning for the presentation ahead and best identify how the materials and submissions should best be presented.

Know your Judge

[130] Judges are not all the same. We each have our own pet preferences and our own pet dislikes. We each might be perceived by others as having a particular leaning to leniency or harshness in sentencing types of offending. If you were going to appear before a Judge before whom you have no previous experience what should you do? Should you bother to research the judge at all? If so how? *[…Discussion…]*

[131] The obvious answer is that you should ask your professional colleagues who do have experience before the relevant sentencing judge. Failing that it may be that you can, through a search of judgments, locate sufficient of the Judge's past decisions to glean something of how he or she approaches the sentencing task.

Providing material to the court in advance

[132] In the present case assume that by 3.00pm on the afternoon before the sentence the defence has acquired a total of five references, which, it is intended, will be tendered on sentence. Another two references have been received but they needed amendment and the freshly signed versions will not be available until the defendant arrives at the lawyer's office on the morning of sentence.

[133] Do you provide the five references that are ready to the Court this afternoon so the judge can read them in advance of the sentence? *[…Discussion…]*

[134] Only provide materials in advance if it serves a positive purpose. If it might detract from the impression you are hoping to convey in court then do not provide them. Here the reference materials are not all ready. The mild advantage of the judge saving a very small amount of time reading through some references in advance is likely to be outweighed by the advantage of waiting and presenting the references as part of an overall package, hopefully maximising their collective force in a way which cannot be achieved by trickle feed provision of the references.

[135] Assume you have all seven references by 3.00pm the afternoon before. Should you provide them to the court to read in advance? *[…Discussion…]*

[136] My preference both as an advocate and as a judge has consistently been that it is advantageous to provide such materials in advance, assuming of course that you first secure the consent of your opponent to do so. It assists the judge in allowing him or her to read and absorb some of the more voluminous materials in advance. It also allows the judge to embark upon the proceedings with some idea of the likely issues and relevant circumstances in advance. There is also some mild forensic advantage to the party providing the material in that it may blunt the potentially overwhelming impact of the aggravating features of the case that will dominate the initial sequence of submissions in court.

[137] What if the same set of materials is available to you by 8.30am the following morning and the sentence starts at 9.15am? Will you bother to try and deliver them to the Judge in advance? *[…Discussion…]*

[138] No. By the time the materials arrive the Judge will have little time to read them before court and they will be an unwanted distraction.

Getting the peripheral players to court

[139] Part of the presentation of the case in court is the presentation in court of the persons associated with each camp.

[140] On the prosecution side it is a matter of common courtesy that the victim and the arresting officer are told when and where the sentence is on. Would it be helpful to the prosecution's advocacy of the case if the arresting officer and victim were specifically told they are welcome to attend and watch from the public gallery? How might their presence assist the prosecutor's advocacy of the sentence? *[…Discussion…]*

[141] In most cases it is likely to be of some mild forensic assistance to the prosecution's advocacy of the case if those persons are present and their presence is mentioned in the course of submissions. In a subtle way the weight of their presence is likely to assist the prosecutor's submissions to be taken a little more seriously.

[142] What of the defence side? Is it helpful to have a collection of the defendant's family and other supporters present in the gallery. *[…Discussion…]* The answer is the same. The weight of their presence in support of the defendant is likely in a subtle way to assist the defence submissions in mitigation to be taken a little more seriously.

[143] It flows from these observations in respect of both sides that in the course of submissions the court should be informed of the presence of these peripheral players in the gallery.

Attire

[144] The defendant should have been advised prior to the day of court about the appropriate dress standard. But if you were defending him would you go further? Would you double-check what he is actually planning on wearing? Would you make specific suggestions what he should wear? *[…Discussion…]*

[145] Appearances and first impressions count. Defendants should be told quite specifically what to wear to court and all risk of misunderstanding should be eliminated.

[146] It is likewise important that the laypersons attending in association with either side are also informed of the appropriate dress standard.

The arraignment

[147] The defendant's lawyer should ensure the defendant is familiar with the charge or charges to be read. It is a poor persuasive start if the defendant appears to be confused about what he is pleading guilty to or, worse, still pleads not guilty and only changes the plea after a short adjournment.

[148] Similarly the defendant should be forewarned about the allocutus. It often confuses defendants.

Remember your audience

[149] It is important from the outset of your in court presentation that you watch the Judge. Be considerate of his or her needs.

[150] Do not rush through as if the Judge is as familiar with the case as you are. Give the judge time to finish making a note. Give the judge time to finish reading the document you tender. Clearly identify the passage in the document you are taking the Judge to.

[151] Remember the elementary requirement that you must be understood. Speak loudly, clearly and at a moderate tempo. When seated or standing ensure you do not slouch about or engage in other distracting physical behaviours. When addressing, if you do not know where to put your hands, put them on the lectern in front of you.

[152] If you are defending, keep an eye on the defendant. Ensure the defendant is also sitting up straight and respectfully.

Structure, headlining and indexing

[153] In advancing your submissions strive for coherence. It is fundamental that the Judge not only hears and understands the words you are using but also grasps their meaning, relevance and significance in the broader context of the case.

[154] Understanding will be enhanced by logical structure and the use of indexing and headlining. At or near the outset tell the judge the key issues you intend to address. As you progress your submissions and move to a new topic "headline" that moment by indicating that you are moving to a new issue and saying what it is.

Prosecutor's opening few paragraphs

[155] How should the prosecutor begin the submissions on sentence? Should the prosecutor launch straight into the facts or should some other information be given first? *[…Discussion…]*

[156] There is no right answer to this question. My preference as a Judge is to be told some brief basic information about the defendant at the outset. For instance to be

told, "The defendant was born on … . He is 19 years old and was 18 years and one month old at the time the offence. He is an apprentice electrician and has no previous convictions." This provides a convenient contextual snapshot of who I am dealing with, which I can then bear in mind as I hear about what has happened.

[157] The difficulty with this approach is that it may not be so brief if the defendant does have a criminal history and if it contains like offences. Tendering the criminal history at this stage may lead to some diverting delay in informing the court of the facts of any like matters in the criminal history.

[158] My usual preference as a prosecutor was to embark directly upon informing the court of the facts of the offence to which the defendant had pleaded guilty before then filling in the details known to the prosecution about the defendant's broader circumstances. Generally in informing the court about the facts I preferred to try and capture the basic essence of what had occurred in the first few sentences. For instance, "If it please the court, the defendant broke the complainant's jaw when he walked up and punched him without provocation or warning in a local hotel. The reason for this cowardly attack? Vengeful, alcohol fuelled jealousy – the complainant was going out with the defendant's ex-girlfriend. Your honour let me say something of the past association of these young people before describing the events in a little more detail."

Presenting the facts

[159] In some states sentence proceedings take hours and even days, with oral evidence being given. Oral evidence is rare in Queensland sentence proceedings and generally only occurs in the context of a contest about a critical fact.

[160] Section 15(1) of the *Penalties and Sentences Act 1992* (Qld) provides the sentencing court may receive any information that it considers appropriate to enable it to impose the proper sentence.

[161] This section is complemented by a provision about fact finding on sentence, s 132C of the *Evidence Act 1977* (Qld), which relevantly provides :

> "(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."

[162] The impact in practice of these provisions is that the parties conventionally inform the court about the facts of the case from the bar table orally and through the tendering of illustrative exhibits such as photographs, transcripts of recorded conversations and expert reports. Sometimes one of the parties, typically the prosecution, will reduce the information they may otherwise have submitted orally

about the case to a summary or schedule of the facts, particularly in lengthy cases, and the schedule or summary is tendered for convenience. Some Judges prefer this to occur, hence the importance of knowing your Judge.

[163] Such a schedule might be the subject of agreement as to the whole of its content however there can often be some divergence between the parties on the accuracy of some factual detail. That does not automatically mean the case must descend into a contested sentence with evidence having to be given. Save for the need as to common ground about the facts establishing the elements of the offence, there is no need for parties to agree on all factual minutiae. It is only when the matters of factual divergence are important enough to make a material difference to penalty and thus need to be resolved to a high degree of satisfaction that a contested sentence will be warranted.

Tendering a summary of facts

[164] The facts of the present case are not particularly complicated. If you were prosecuting would you tender a written summary of facts or just summarise the facts orally? *[…Discussion….]*

[165] Bear in mind that because sentence proceedings are held in open court it is highly desirable that there is at least some oral articulation of the facts. The real benefit of a written summary therefore lies in the assistance it provides in cases where the facts are complicated and the Judge is likely to better understand the narration of the facts if a written version is available to assist understanding. Here the facts are not so complicated as to inevitably warrant a written summary being tendered.

[166] Assume the prosecutor does tender a written summary of facts. Those facts are as revealed by the prosecution's three witness statements and what was said by the defendant when interviewed. You are appearing for the defence and the Judge asks whether you agree with the accuracy of the facts. What will you say? *[…Discussion…]*

[167] The defendant does not actually agree with the prosecution facts because they fail to mention the broader exchange he claims occurred between him and Melvin. But is that something which is in Harley's interests to advance? You should have discussed this with Harley in preparing for sentence. What should your advice have been? *[…Discussion…]*

[168] Advancing his claims at sentence is more likely to hurt than help his prospects of a favourable sentence. He failed to tell the police of these claims, so in raising them you would almost certainly need to explain why and thus have to advance allegations against the police that may very well be disbelieved by the court. Moreover the content of Melvin's supposed comment implying the defendant had been violent to his girlfriend raises an issue unfavourable to the defendant and might wrongly plant the seed in the Judge's mind that Harley was violent to his girlfriend. If this unravels into a contested sentence and Harley gives evidence, it appears he would acknowledge that he and his former girlfriend did have an argument in which she suffered a black eye. Surely this is a diversion that is

unlikely to help Harley. On the prosecution's version of events there exists a reasonably favourable and believable explanation in the interview for why he did what he did. His added allegations of fact are unlikely to improve his position and are better left alone.

Written submissions?

[169] Written submissions or outlines of submissions are commonly advanced in appeals, applications and closing submissions in civil cases. Would you prepare and submit them in this case? Is there any place for them in a criminal sentence? *[…Discussion…]*

[170] There is a place for them in complicated matters, particularly those in which the legal issues are difficult or involve areas with which the court is not particularly familiar. For instance it is helpful to have written submissions in Commonwealth matters because the sentencing regime has some complications and courts do not deal with federal sentencing principles regularly.

Tendering photographs

[171] Returning then to the presentation of the prosecution case, assume your brief includes photographs of Melvin lying in a hospital bed with his jaw bandaged. Will you tender them? *[…Discussion…]*

[172] Of course! A picture is worth a thousand words. This image will linger in the Judge's mind longer than an oral or written reference to the fact that Melvin was hospitalised and treated. It is a more persuasive mode of ensuring the court grasps the level of suffering and inconvenience the defendant inflicted on another.

Tendering the transcript of the police interview

[173] Your prosecution brief includes a transcript of the interview with police. Will you tender the transcript of the interview or just summarise what the defendant said in it? *[…Discussion…]*

[174] My preference when a prosecutor was, and my preference when a Judge is, that in other than simple cases the interview transcript should be tendered with the relevant passages highlighted and tabbed for ready reference. The prosecutor can show the defence in advance so they know what passages will be highlighted and can make their own choices as to what, if any, other passages they want to highlight in the exhibit when making submissions. The defence might ask the prosecutor to highlight a couple of additional passages before tendering the transcript, a request the prosecutor should ordinarily honour. The actual words of the defendant can convey more subtle and informative impressions about the defendant and his attitude to the offending than a mere summary. They give the court more evidentiary fuel to acquire a proper feel for the reality of the case. They are a more informative and persuasive device than a summary of them.

Victim impact

[175] As earlier discussed, a victim impact statement has been procured in this case. So too has a doctor's statement explaining why the injury constitutes grievous bodily harm. Do you tender both documents? *[…Discussion…]*

[176] Yes. Each document will inevitably carry greater persuasive force in the hands and under the eye of the Judge than it will by merely being summarised in sentence submissions.

[177] Assume though that the improper editorial in the victim impact statement has not been tended to by the gathering of a fresh statement. How should you approach the tender of the document with such inappropriate content still being present? *[…Discussion…]*

[178] The preferable course is to simply strike through or obscure the offending material and explain to the court in tendering the document that you have done so because it was content that was not relevant. If you just tender the document and hope no-one will complain about the offending document you are failing to grasp the significance of the problem. It may very well be that no-one comments on it at all, but that does not mean it will have passed un-noticed. It will displease the court and your opponent and reduce their impression of your professional standards, a price you may pay beyond this individual case. It will also divert the Judge and detract from the persuasive force of your other submissions.

Objecting to Victim Impact Statements

[179] Let us assume that in this case the prosecution did not give the defence the victim statement until the parties were at the bar table shortly before court commenced. Let us also assume the statement includes not only the offending editorial mentioned earlier, but also includes an assertion that the complainant still has discomfort in his jaw when eating and drinking and since the assault has been withdrawn and fearful of going out in public.

[180] You are the defence lawyer. You have barely finished reading this statement before the Judge walks into court. Assume that when the prosecutor tenders the statement, nothing has been struck out or obscured. Will you object? Will you say anything at this point? *[…Discussion…]*

[181] There is no right answer. Generally it is preferable to avoid arguing about the admissibility of content in a victim impact statement that the Judge will disregard in any event. Where the content involves new evidentiary assertions there is a risk that the Judge may accept them as accurate if they are not contradicted. If they cannot be contradicted it may be preferable not to object but to note at the time of tender that the statement contains an allegation not supported by the disclosed medical evidence. In this particular case it is probably preferable for the defence lawyer to say nothing at all at the time of tender and address the new allegations of fact in the course of defence submissions.

Submissions addressing defence materials to be tendered

[182] Assume you as prosecutor have been given copies of the defence references in advance. What if anything will you say in anticipation of them and their potential significance? *[…Discussion…]*

[183] It is good advocacy to anticipate your opponent's arguments and blunt their effect in advance through your submissions. Sometimes that may warrant directly addressing materials you know will be tendered. Other times it may be sufficient to ensure your submissions blunt the impact those materials will have. Here there is probably little to be said by the prosecution about the references. They will inevitably have the effect of giving the court the impression that this offending was very situation specific and not part of a broader pattern or disposition of dangerousness to the community. However even on the prosecution case that was always so.

[184] The better approach is not to specifically address the references in advance but more generally to make submissions in advance that guard against excessive weight being given to the references. This might involve emphasising the point that behaviour like this is dangerous and unfortunately common and requires a deterrent sentence which will ensure other young men know the importance of keeping their tempers under control and their hands to themselves.

Identifying relevant sentencing principles

[185] Assume the prosecutor has copies of two leading cases which affirm the importance of deterrence in sentencing for public violence. Should the prosecutor hand those cases up or merely cite them in passing support for that principle when reminding the court of it? *[…Discussion…]*

[186] It is not uncommon to be in doubt about passing up copies of judgments in support of principles you know the court is or should be well aware of. If in doubt the safer course is to err on the side of caution and hand up the authority. Preferably highlight and tab the key statement of principle so as to take the Judge to it easily. Experience suggests that when key passages of principle support the course the sentencing Judge ultimately takes, the Judge will find it helpful to quote the principle from the case in giving reasons for the sentence.

Referring the court to comparable cases

[187] Assume the prosecutor has copies of three largely comparable cases only one of which supports the sentencing range the prosecutor seeks. Should the prosecutor hand any of them up? If so, which? *[…Discussion…]*

[188] They should all be handed up. Lawyers on both sides must not refrain from informing the court of a case known to be on point but unfavourable to a lawyer's argument.

[189] The position might be different if the prosecutor had copies of a dozen comparable sentences. Handing up a dozen cases in a simple case like this is likely to try the court's patience. It is likely that some of the dozen are more on point than others. The selection should be edited to focus on those cases only.

Clearly articulate the sentence range contended for

[190] It is has long been appropriate for the prosecution to identify the sentence range it is contending for in order to protect the prosecution's position on appeal. However it is also good advocacy to clearly inform your audience what you are seeking to persuade it of. Curiously many prosecutors express themselves ambiguously in submitting on the appropriate range, perhaps reflecting a lack of confidence. Ambiguity or misunderstanding on a matter so important is extremely irritating to your opponent and the sentencing judge. It will not pass un-noticed and it will detract from the force of your submissions generally. Be clear and unambiguous in identifying what you are advocating for.

What's the prosecutor's sell?

[191] So if you were the prosecutor what is the sentence or sentence range you will ultimately submit for? What will you identify about the case as justifying that ultimate submission? *[…Discussion…]*

[192] Minds will inevitably differ as to what the comparable cases suggest the appropriate sentence range would be for a case such as this, but most will probably regard the head sentence as falling in the two and a half to three year range. There is nothing so remarkable about the case as to suggest that the just result ought be higher than that range or even towards the top end of it. It is however a case in which there are some powerful mitigating circumstances and there may exist a risk that the sentencing Judge may give excessive weight to those considerations and lose sight of the objective seriousness of the event and the need to maintain an appropriate degree of comparability with the ordinary pattern of sentence for such a matter.

[193] The best persuasive means of guarding against such an occurrence is to clearly articulate the risk of it. That is, the prosecutor should acknowledge that the youth of the offender and the provocative circumstances in which he over reacted are relevant in mitigation but that sight must not be lost of the gravity of what he actually did.

What's the defence lawyer's sell?

[194] As we transition to the defence presentation, let us consider the end question first. If you were the defence lawyer what would your angle be on this sentence? What sentence will you ultimately submit for? What will you sell as the determinative aspects of the case in support of that eventual sentence? *[…Discussion…]*

[195] The determinative aspects of the case from the defence point of view are undoubtedly the two significant mitigating considerations already identified, namely

the youth of the defendant and the unplanned (from his point of view) provocative circumstances that caused his overreaction.

[196] Anticipating a good prosecutor's argument that those circumstances ought not overwhelm the sentence, the defence advocate should be framing the ultimate penalty sought not as a controversial departure from the established sentence patterns but as an example of a sentence towards the lower end established by other sentences. That is an easier "sell". The task would be simpler if the defence advocate can also justify a conclusion by reference to authority that the appropriate sentence range for a matter of this kind is broader than and extends lower than that contended for by the prosecution. Once the sentencing judge is persuaded the range is not so rigidly high, the task of securing a more lenient sentence on account of youth and the spontaneous provocative circumstances of the offence will be made simpler.

You do not need to use all the information you have

[197] Preparing and presenting a case as an advocate is sometimes reminiscent of preparing for and sitting an exam as a law student. Just as the student never uses all that has been learnt when finally sitting the exam, nor does the advocate use all of the information gathered when eventually presenting the case.

[198] It is imperative that the advocate be discerning in selecting from the wide range of information made available through proper preparation. The information ultimately used on sentence should only be advanced because there is a purpose in doing so, not merely because it has been gathered.

[199] The two most common examples of failures to be properly discerning in this context relate to antecedents and reports. It is not necessary when dealing with antecedents to inform the court of every detail of a defendant's life story. Many components of the defendant's antecedents may be of such peripheral relevance that they ought be left out or only briefly summarised so as not to rob the more relevant features of the defendant's antecedents of their persuasive impact.

[200] As to reports, the mere fact that a psychologist report has been obtained does not mean it must be used. If it does no more than marshal the defendant's antecedents together in writing and provides no particular expert insight into the psychology of the defendant, particularly as it relates to the offending behaviour, then it is more likely to distract rather than assist the sentencing Judge if it is tendered.

[201] Also be wary about whether the expert's report is based upon an understanding of the facts of the offending that matches or at least closely matches the facts actually placed before the court on sentence. The greater the divergence the less valuable the report and the higher the risk that it may be counterproductive if tendered.

If the court indicates an intention to impose your desired sentence, stop.

[202] There will be occasions where at the outset of or during the defence lawyer's submissions the sentencing Judge indicates a clearly held view that the appropriate

sentence to impose is the very sentence the defence are seeking. If so then in most cases the appropriate response is to stop your submissions and sit down.

[203] Obviously there may be cases where the sentence being foreshadowed by the learned sentencing Judge might be rendered even more justifiable, particularly in the eyes of an appellate court, if reference material or other critical information were placed before the court. If so then tender the relevant documents and provide the other relevant information briefly, perhaps prefacing that action with a submission such as, "In that case, your Honour, I will not delay the court with my planned submissions but will at least ensure some of the other information I was going to rely on in support of the sentence you favour has been placed before the court. To that end I tender five references …etc".

The potential importance of sequence

[204] In the normal course the prosecution's sequence of submissions will leave submissions on the appropriate sentence range to the latter phase of submissions. That is because reference to sentence range is likely to be largely meaningless unless the court first understands the facts of the case it is dealing with.

[205] What of the defence? Assume you are the defence lawyer. At what stage of your submissions will you make submissions about the sentence range in this case? *[…Discussion…]*

[206] If you want to leave your submissions about comparatives to the end, should you at least tell the Judge at the outset what sentence you will be eventually submitting for? *[…Discussion…]*

[207] There is no right answer to these questions. Much depends on impressions as to how the case has unfolded in court so far. Remember there is a difference between making submissions about comparable sentences and submitting what the actual sentence in this case should be. There may be cases where it is helpful for the defence to address one or the other of these from the jump and leave the other to later. My own experience has been it is helpful to identify the sentence you are seeking at the outset if you already sense it is not far removed from what the court would regard as an uncontroversial outcome. On the other hand where the sentence you seek is likely to be seen as exceptional the preferable course is generally to refrain from identifying it until the judge is better informed by you of the features of the case that support such an exceptional outcome. Then, when you do you move to identify the sentence sought, it will have a more persuasive impact, less likely to provoke automatic resistance in the Judge's mind.

[208] As to when the defence should deal with the comparative sentences it will often be convenient to deal with them at the outset while they are still fresh in the judge's memory and probably still sitting in front of the judge from when the prosecution recently addressed them. That will be particularly prudent if you do not need to develop submissions about the facts in order to forthwith be able to distinguish the more unfavourable comparables. If the more damaging comparables just referred to by the prosecution can be dispensed with promptly then by doing so you will blunt

any lingering impact they may have in the judge's mind. You will thereby guard against the judge hearing your submissions with a pre-conceived mindset about range and make the judge more receptive to your arguments.

[209] On the other hand if the comparatives you rely on will not be regarded as comparable by the Judge until the judge knows more about your case then obviously they are better left until later.

The defence should not wallow in the facts any longer than is absolutely necessary

[210] Some defence lawyers dwell upon the facts relating to the commission of the offence for a surprisingly long time. Given the facts of what occurred are why the defendant is in trouble with the law they will rarely be a particularly rewarding field to wallow in on the defendants' behalf.

[211] It may sometimes be necessary to provide additional information about the facts or to clarify or correct some aspects of the facts as put by the prosecution. However it is of critical importance to be discerning in this process. It is one thing to provide some additional information about the facts, which is not inconsistent with the facts as advanced by the prosecution. It is quite another thing to put forward facts contradicting the factual information advanced by the prosecution. Where the latter occurs there is an ever present risk that a dispute about the facts may develop to such an extent that it is necessary to go into evidence on the subject.

[212] If this is to occur it is better it occurs in a way that it has been discussed between the parties and planned prior to the commencement of the proceedings. More often than not where, in advance of the sentence, prosecution and defence can discuss any matters of fact that the defence take particular issue with, agreement can be reached as to how the topical fact might be put so as to avoid the need for the sentence Judge to make a finding between competing versions. However if there is to be a contest before the sentencing Judge it is better that it be identified and planned for in advance of the sentence commencing, indeed that the sentence can be listed on the understanding that it may potentially involve time for some evidence to be given. Where the need for a contest emerges unheralded in the course of an ordinary sentence proceeding it will often be necessary for the matter to be adjourned to another date, whereas had it been planned for in advance the entire matter could have been dealt with on the one appearance.

Responding to the victim impact statement

[213] You are defending. You will recall you were only given the victim impact statement shortly before the Judge walked into court. It contains some new assertions about the victim's ongoing problems with drinking and not wanting to go out in public. Do you propose to say anything about that? If so, what will you do? *[…Discussion…]*

[214] Your materials include the Facebook printouts of Melvin having a fun night out drinking and dancing on New Years Eve. This is material that tends to contradict

the victim's claims of ongoing physical and emotional problems. Will you use it? If so when will you disclose it? How will you use it? *[…Discussion…]*

[215] Of course you should use it! This changes the entire momentum of the sentence. It suggests the victim has overcooked his claims of adverse impact and it indirectly undermines the force of the prosecution's key submissions about the gravity of the offending conduct.

[216] You should tender the printed photographs, explaining their pedigree, timing and who they are of. You should explain how the photographs contradict the complainant's claims in the victim impact statement of difficulty drinking and fear of going out in public.

[217] Given the disclosure of the victim impact statement, which rendered these photographs relevant, was only shown to you moments before the judge walked into court, there is no difficulty in disclosing the materials at the bar table while the sentence is underway. The prosecutor can hardly complain the disclosure is late in the present context.

How to deal with the criminal history not being lead by the prosecution

[218] Assuming that the prosecution in this case placed no information before the Court about the defendant's prior conviction for assault there would be no obligation whatsoever upon the defence lawyer to inform the Court of it. It is however critical that the defence lawyer not make submissions which are knowingly inconsistent with his or her knowledge that the defendant in fact has a prior conviction for assault.

[219] The simplest way to honour that ethical requirement is to make no specific submissions on the topic at all. It is after all unnecessary to do so in that unless the court is positively informed that the defendant has a previous conviction it will sentence the defendant on the premise that he does not.

Tendering materials collectively or progressively

[220] Assume that the defence lawyer has seven references and a report from the defendants G.P. Should all of those materials be tendered collectively or should the process be broken down? *[…Discussion…]*

[221] Just as the content and pace of oral submissions should be advanced in a way that does not rush or overwhelm the sentencing Judge, so too care should be taken to avoid a sentencing Judge feeling swamped by materials when the materials to be tendered are extensive. The safer course is to break the tender process down, interspersing it with oral submissions dealing with the relevance of each of the items being tendered.

[222] That said there will be instances where a series of documents relate to the same general topic and are more apt for collective tender. Where that is to occur it can

best be done by tendering them as a marked bundle with a covering index. For example the seven references could be tendered with a covering index listing and a submission to the effect, "If it pleases the Court, I tender seven references with a covering index identifying the authors".

[223] The report from the defendant's G.P. would be better left for tender separately from the reference exhibits for it goes to a different issue. By tendering it separately the defence lawyer will heighten the prospect of the sentencing Judge properly absorbing its significance rather than its significance being blunted by its inclusion among the reference material.

[224] In respect of both the references and the report it is important to identify and make specific submissions about the significance of the more important content in the materials. Remember the sentencing Judge might only read these documents once and may miss the significance of some of the content unless it is emphasised.

Remorse overdone

[225] Many defence lawyers submit their client is remorseful in circumstances where their client simply regrets doing what he or she did because they are going to be punished for it. Genuine remorse is not driven by self-pity at the prospect of punishment. It is driven not by concern for self but by concern for others, most particularly for those harmed by the wrongdoing. The mere fact that defendants plead guilty and say they are sorry for and regret what they did does not justify a submission that they are remorseful. Moreover such a submission is unnecessary.

[226] If a defendant has pleaded guilty in a timely way then that will ordinarily be reflected in a significant sentence discount. That discount flows not by reason of a finding that an offender is per se remorseful, but rather from the utility in the guilty being encouraged to acknowledge their guilt and the community and the victim being spared the costs and ordeal of guilt being proved in the normal way. The cases where an offender who is pleading guilty will receive an even greater discount by reason of remorse will be rare. Sentencing courts will ordinarily expect there to be information placed before the Court sufficient to justify a finding that the defendant is genuinely remorseful before they will be inclined to discount a sentence any more than ordinarily would be the case in the event of a timely plea of guilty.

[227] A defence lawyer who invariably submits that his or her clients are remorseful will detract significantly from the force of such submissions in those occasional cases where a client is genuinely remorseful.

CONCLUSION

[228] Ladies and gentlemen this concludes tonight's session.

[229] Our discussion has demonstrated there exists no single right way to approach a sentence. If there exists a constant it is that effective preparation is critical to effective presentation. Proper thought and reflection about what you want to

achieve on sentence and how you can achieve it is vital to successfully advocating for a sentence that does justice to the interest you represent.

ANNEXURE A

R v HARLEY DAVIDSON

Harley Davidson was committed for trial to the District Court on a charge of assault occasioning bodily harm to Melvin Star on Valentines Day last year. He turned 18 years old a month before the alleged offence. Harley had a solicitor at the committal but now has a different lawyer.

The **police form QP9** states that Melvin was standing near a bar at a local hotel at about 8.30pm when Harley walked up to him and punched him in the face, breaking Melvin's jaw. The QP9 alleges Harley left the hotel and when approached by police the following day was cooperative and admitted the offence.

The **police brief** contains statements from the complainant Melvin, a barmaid from the hotel and the arresting officer.

Melvin Star's statement provides the following information additional to the account provided in the QP9:

- Melvin has known Harley for 10 years and they used to be friends.
- As a result of the punch Melvin suffered two breaks to his jaw, he spent four days in hospital, his jaw was operated on and wired shut for a week.
- His jaw still hurts when he eats.
- When he was punched he dropped a mobile phone he was holding, it smashed and he had to buy a new one.

The **barmaid, Grace Goodes, states** Harley had been at the hotel for about an hour and a half when he walked to and entered the male toilets of the bar. While he was gone Melvin walked in with a local girl, Aphelia Bingle, and ordered a drink for them both. While waiting for their drinks Melvin and Aphelia were hugging and kissing each other and Melvin appeared to be using his mobile phone to take a "selfie" of he and Aphelia kissing. At that point Harley came out of the toilets, appeared to look at Melvin and Aphelia and then walked rapidly towards them with an upset look on his face. Grace Goodes states that Aphelia walked away and Harley walked straight up to Melvin saying, "You low fucking dog", and punched Melvin in the face once. Melvin crumpled to the floor holding his jaw. Harley turned to Grace Goodes, said "Sorry Grace I'll leave" and walked out.

The **arresting officer, Constable Ian Smart, states** police attended upon Melvin at the hospital on the morning after the alleged assault and took his complaint. The following Saturday morning they attended Harley's address and Harley accompanied police to the police station where he entered into a recorded interview with police. He was then arrested.

In the **recorded interview** with police Harley gave the following information:

- "Aphelia Bingle was my girlfriend for about two years until about a month ago when she broke up with me unexpectedly."

- "Melvin Star is, well was, one of my best friends. I confided in him about the break up with Aphelia and told him I suspected she broke up with me because she was interested in somebody else."
- "On the night I had about four or five schooners of Fourex heavy with some acquaintances at the hotel. I would have been affected but I certainly wasn't drunk. I was taking my first trip to the toilet when Melvin and Aphelia must have arrived."
- "I was not excepting to see them. When I came back from the toilet I could not believe my eyes seeing the mate I confided in kissing my girlfriend, well my former girlfriend."
- "I just saw red. I completely lost control and hit out in anger at Melvin. It was just a spur of the moment thing. I was just so shocked and angry at seeing them like that."

The only defence materials gathered to date are Harley's solicitor's notes of **Harley's instructions** taken prior to the committal proceedings. They record that Harley agrees with the facts asserted in the prosecution witness statements except some of what was said between the protagonists has been left out.

Harley's instructions are that when he approached Melvin and Aphelia, Melvin said, "Fuck off Harley, you know she doesn't want to be anywhere near you", to which Harley responded, "You fucking low dog". Harley instructs Melvin then said, "Yeah well at least I don't bash my girlfriend". Harley instructs it was the comment about him supposedly bashing his girlfriend that made him finally snap and then punch Melvin.

Harley instructs he did not tell the police about what Melvin had said to him because when he had mentioned it to the police in the car on the way to the police station the arresting officer had suggested he would be better off not mentioning that in the interview because he would get a lighter punishment in court if he did not look like he blamed Melvin for what happened. Harley also instructs the police told him if he did not participate in an interview with them the police would not let him have bail and if he admitted he was guilty he would not be sent to jail. He instructs that even though he made admissions in the interview the police charged him and would not give him watch-house bail. He spent Saturday and Sunday night in the watch-house before a Magistrate gave him bail when he was taken to court on the Monday morning. It was and remains a condition of his bail that he have no contact with Melvin Star.

Harley's instructions are also that notwithstanding the QP9 says he has no previous convictions he in fact pleaded guilty and was fined $100 for a common assault committed about a fortnight before his alleged assault of Melvin. He cannot remember whether a conviction was recorded.