PRESENTATION ON SENTENCING TO THE MAGISTRATES COURT CONFERENCE 16th May 2019

By Judge P.E. Smith[1]

Introduction

[1] I have been asked to present a paper on the topic of sentencing to you as each of you is a sentencing magistrate.

[2] The presentation is due to take some 20 minutes – so much for the complexities of sentencing!

[3] As we all know and perhaps the public does not, sentencing is a complex process, requiring the weighing up of various factors.

[4] Given the constraints of time I thought I would briefly discuss important sentencing issues that have arisen from time to time with reference to relatively recent cases.

General approach to sentencing

[5] The High Court has told us in *Markarian v R*[2] that in general a sentencing court should weigh all relevant factors and reach a conclusion that a particular penalty is one that should be imposed. The court rejected a mathematical approach but did allow in some simple cases involving a small number of sentencing considerations indulgence in arithmetical deduction as achieving transparent and accessible reasoning[3].

Section 9(1) of the *Penalties and Sentences Act* 1991 (Q)("PSA")

[6] The starting point with an examination of this topic in Queensland is section 9 of the PSA. As we all know, section 9(1) of the PSA sets out the relevant principles of sentencing.

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1 Judge Administrator, District Court of Queensland.
2 (2005) 228 CLR 357; [2005] HCA 25 at [39].
3 An example of this may be considered to be drink driving offences.

[7] It is important to remember these when approaching any matter. This sub-section provides:

> "(1) The only purposes for which sentences may be imposed on an offender are—
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> (a) to punish the offender to an extent or in a way that is just in all the circumstances; or
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> (b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
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> (c) to deter the offender or other persons from committing the same or a similar offence; or
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> (d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
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> (e) to protect the Queensland community from the offender; or
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> (f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e)."

Section 9(2) (a) of the PSA

[8] Section 9(2) of the PSA of course sets out the principles to which the court must have regard in determining the sentence.

[9] Crucially, section 9(2)(a) of the PSA provides that a sentence of imprisonment should only be imposed as a last resort and one which allows the offender to stay in the community is preferable.

[10] As to this section, in *Skorka v Hartley*[4] it was held at [43] that reasonable judicial minds may differ in determining whether a sentence of imprisonment is required as a last resort and in borderline cases the range may be from non-custodial to custodial options. It was held "if the custodial sentence imposed is within the sentencing range, and the judicial officer has considered section 9(2) and determined that, as a last resort, a sentence of imprisonment

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4 [2011] QCA 116.

should be imposed, there has been no error. For these reasons, the applicants' contention is without merit."

[11] The message to take away from this decision is to make sure you have considered this sub-section prior to imposing imprisonment.

[12] Section 9(2) of the PSA sets out particular matters to which the court must have regard. We will discuss some of these.

Mental Health

[13] Section 9(2) (f) of the PSA refers to the intellectual capacity of the offender.

[14] In this regard an adverse mental health condition may be a mitigating factor.

[15] In *R v Goodger*[5] the Queensland Court of Appeal applied the principles set out in *R v Verdins*[6].

[16] It was noted that psychiatric illness not amounting to insanity may reduce the moral culpability of the offender. The condition may have a bearing on the type of sentence imposed and the conditions in which it should be served. Whether general and specific deterrence should be moderated depends upon the nature and severity of the condition and the effect of it on the mental capacity of the offender at the time of sentence, at the time of offending or both. Where there is a serious risk of imprisonment having an adverse effect this will mitigate punishment.

Ill health of offender

[17] The ill health of an offender is a relevant sentencing consideration particularly where his or her time in custody will be more difficult than for the average prisoner[7].

[18] However the proper standards of punishment should remain.[8]

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5 [2009] QCA 377.
6 (2007) 16 VR 269.
7 *R v Pope ex parte Attorney General (Q)* [1996] QCA 318; *R v NJ* (2008) 189 A Crim R 402 at [19]; [2008] QCA 331.
8 *R v Ogden* [2014] QCA 89 at [11].

Family hardship

[19] In *R v Hannan ex parte Attorney-General (Q)*[9] it was held that hardship to family members should not overwhelm considerations of denunciation, deterrence and punishment but it still may be relevant.

[20] As Davis J said in *R v ABE*[10] family hardship cannot overwhelm other sentencing considerations but there will be cases where family hardship results in a substantial reduction of the sentence, even where the offence is serious.

Good Character

[21] Section 9(2)(f) also refers to the offender's character. Good character is a matter to be considered and is a mitigating factor. Bear in mind though the weight to be given to it varies. For example in *Ryan v R*[11] the offender was a priest who pleaded guilty to sexual offences against twelve young boys committed over 20 years. The trial judge gave no weight to the good character evidence. The High Court allowed the appeal by majority. McHugh J as part of the majority at [35] noted the accused was not entitled to significant leniency because of his otherwise good character but he was still entitled to some.

Youth

[22] The age of an offender is an important sentencing consideration.

[23] In *R v Dullroy and Yates; ex parte Attorney-Attorney*[12] and R v *Kuzmanovski ex parte Attorney-General*[13] the Court of Appeal accepted the following principle:

> "The courts have recognised that imprisonment is likely to expose a youth to corrupting influences and to confirm him in criminal ways, thus defeating the very purpose of the punishment imposed. There has accordingly been a universal

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9 [2018] QCA 201 at [50].
10 [2019] QCA 83 at [52].
11 (2001) 206 CLR 267; [2001] HCA 21.
12 [2005] QCA 219.
13 [2012] QCA 19.

> acceptance by the courts in England, Australia and elsewhere of the view that in the case of a youthful offender his reformation is always an important consideration and, in the ordinary run of crime, the dominant consideration in determining the appropriate punishment to be imposed. It has been said by Lord Goddard, the former Lord Chief Justice of England, that a judge or magistrate who sends a young man to prison for the first time takes upon himself a grave responsibility. With that I respectfully agree."

Compensation

[24] Section 9(2)(e) of the PSA requires the court to take into account any damage, injury or loss caused by the offender. A court should take into account as a mitigating factor the repayment of compensation. In *R v Allen*[14] the offender had made full restitution by selling the family home. Jerrard JA held "restitution in full is a means of demonstrating that crime need not pay and sometimes does not pay and restitution can also be evidence of remorse quite independently from the benefit that it gives to the victim."

Co-operation

[25] Section 9(2)(i) relates to the assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences. In *AB v R*[15] the High Court noted that a significant discount is to be given to a person who confesses to a crime without which there would be no case.

Indigenous Offenders

[26] Section 9(2)(p) refers to indigenous offenders. The court should have regard to the principles expressed by the High Court in *Bugmy v R*[16].

[27] In that case it was held that an aboriginal offender's deprived background may mitigate the sentence otherwise appropriate for an offence in the same way as the deprived background as a non-aboriginal offender. Also where an

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14 [2005] QCA 73.
15 (1999) 198 CLR 111; [1999] HCA 46.
16 (2013) 249 CLR 571; [2013] HCA 37.

offender's abuse of alcohol is a reflection of the environment in which he or she was raised as is the case for some offenders raised in aboriginal communities characterised by alcohol abuse and alcohol related violence, this should be taken into account as a mitigating factor.

Delay

[28] Although delay is not specifically mentioned in section 9(2) of the PSA it is a relevant sentencing factor.

[29] In *R v Law ex parte Attorney General*[17] the Queensland Court of Appeal noted that there are two obvious cases where delay may mitigate the sentence. First is where there has been a state of apprehension/uncertainty caused by the delay of the authorities between the date of apprehension and sentence. The second is where the time which has passed shows the court the offender has become rehabilitated or rehabilitation has made good progress.

Totality

[30] Although not specifically mentioned in section 9 of the PSA, the principle of "totality" has relevance.

[31] In *Mill v R*[18] the High Court noted the totality principle as requiring a sentencing judge to calculate the correct individual sentences for each offence and to mitigate the effects of accumulation when necessary to achieve a total effect of sentence according to the total criminality of the offending. It has also been noted that any such sentence should not be too crushing.[19]

[32] When it comes to whether sentences should be concurrent or cumulative the guiding principle is that the total effect of sentence must accurately reflect the total criminality.[20] The courts tend to favour concurrent sentences for a series of similar offences.[21] In *R v Nagy*[22] it was held it is permissible to reflect total

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17 [1996] 2 Qd R 63.
18 (1988) 166 CLR 59; [1988] HCA 70.
19 *R v Clements* (1993) 68 A Crim R 167; *R v Kiripatea* [1991] 2 Qd R 686 at 702.45.
20 *Nguyen v R* (2016) 331 ALR 30 at [64]; [2016] HCA 17.
21 *R v Gilles ex parte Attorney General (*2000) 117 A Crim R 339 at [19].
22 [2004] 1 Qd.R.63 at [39].

criminality by uplifting the sentence which would otherwise be imposed for the most serious offence.

[33] It is of note that sentences of imprisonment are automatically concurrent unless ordered otherwise.[23]

[34] However, it is also to be noted that in some circumstances terms of imprisonment must be served cumulatively.[24]

Parity

[35] Again it is not specifically mentioned but there is also the principle of parity to be considered. This requires a sentencing judge to take into account sentences being served by co-offenders. In *Postiglione v R*[25] the High Court held that the parity principle recognises equal justice as between co-offenders and there should not be a marked disparity in sentence which gives rise to a "justifiable sense of grievance" or that there is an appearance that justice has not been done.

Deportation

[36] Another factor which is not specifically mentioned but which is a relevant sentencing consideration is the issue of immigration detention and deportation. In the present day it is common place for offenders who are not Australian citizens to be deported and/or detained in immigration detention after being sentenced and the sentence is completed. This is a relevant sentencing consideration[26].

[37] However in *R v MAO*[27] it was held that a sentence should not be mitigated for the purpose of defeating or avoiding or circumscribing the deportation process.

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23 Section 155 of the PSA.
24 Section 156A of the PSA and e.g. section 33 of the Bail Act.
25 (1997) 189 CLR 295; [1997] HCA 26.
26 *R v UE* [2016] QCA 58; *R v Norris ex parte Attorney-General* [2018] 3 Qd R 420; [2018] QCA 27; *R v GBD* [2018] QCA 340.
27 (2006) 163 A Crim R 63; [2006] QCA 99. Also see *R v Norris ex parte Attorney-General* [2018] 3 Qd R 420; [2018] QCA 27.

Offences of violence

[38] Turning now to section 9(2A) of the PSA, this subsection provides that the principles in section 9(2)(a) of the PSA do not apply when the offence involves violence or resulted in physical harm to another person. In such a situation the court must primarily have regard to the matters mentioned in section 9(3) of the PSA.

[39] This section was recently considered in the case of *R v Oliver.*[28] In this case the Court of Appeal held that section 9(2A) of the PSA did not apply to a charge of stalking where there was no direct threat of violence.

Sexual offences against children

[40] Like section 9(2A) of the PSA section 9(4) of the PSA provides that in sentencing an offender for an offence of a sexual nature committed in relation to a child under 16 years the principles mentioned in section 9(2)(a) of the PSA do not apply and the court must primarily have regard to the matters mentioned in section 9(6) of the PSA.

[41] In *R v McGrath*[29] it was held by the Court of Appeal that s 9(5) & (6) of the PSA did apply to an offence contrary to s 218A of the Code despite the fact that the "victim" was an adult Police Officer.

[42] On the other hand in *R v Finch ex parte Attorney-General*[30] the appellant was charged with knowingly possessing child abuse computer games contrary to the classification of Computer Games and Images Act 1995 (Q). It was held at [19] after referring to McGrath that the provision did not apply as there was no identifiable child.

[43] *Finch* was followed in *R v Plunkett*[31]. In *Plunkett* the offender was charged with knowingly possessing child exploitation material contrary to s 228D of the Code. It was held by the Chief Justice that the sentencing judge's view that s 9(6) applied was wrong in light of that which was stated in R v Finch.

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28 [2018] QCA 348.
29 [2006] 2 Qd R 58; [2005] QCA 463.
30 [2006] QCA 60.
31 [2006] QCA 182.

[44] Also section 9(4(b) of the PSA provides that unless there are exceptional circumstances actual imprisonment must be imposed.

[45] In *R v Tootell ex parte Attorney-General*[32] it was said:

> "What emerges, then, is there is no one clear prescription for what circumstances are capable of being regarded as exceptional. Consideration must be given not only to the unusualness of individual factors but to their weight; and factors which taken alone may not be out of the ordinary may in combination constitute an exceptional case.
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> … the court, in the sentencing process, must consider whether there are exceptional circumstances which, in the light of all the other aspects of the case including those described in s 9(6), warrant the imposition of a sentence which does not involve actual custody. The mitigating circumstances must be considered against a background of matters such as the egregiousness of the offending and the need for deterrence in determining whether they can be said to amount to exceptional circumstances of that kind."

Intoxication

[46] Section 9(9A) of the PSA provides that voluntary intoxication is not a mitigating factor. This reflects the common law principle stated in *R v Rosenberger; ex parte Attorney General*[33] namely that voluntary intoxication may explain why the offence occurred but does not excuse it.

[47] However in *R v Bowley*[34] the Queensland Court of Appeal held that where an offender was both intoxicated by drugs at the time of the commission of the offence and he or she was suffering from psychosis, then the mental state was not to be excluded from consideration as a mitigating factor.

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32 [2012] QCA 273. Also see *R v GAW* [2015] QCA 166.
33 [1995] 1 Qd.R.677.
34 (2016) 262 A Crim R 93; [2016] QCA 254.

Domestic violence

[48] Finally on section 9 of the PSA one should have regard to section 9(10A) of the PSA which provides:

> "(10A) In determining the appropriate sentence for an offender convicted of a domestic violence offence, the court must treat the fact that it is a domestic violence offence as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case.
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> *Examples of exceptional circumstances—*
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> 1 the victim of the offence has previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender
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> 2 the offence is manslaughter under the Criminal Code, section 304B."

[49] Again this reflects the common law principle.[35]

Recording of conviction

[50] I next want to turn to the issue of the recording of a conviction. Section 12 of the PSA sets out the relevant factors to be considered.

[51] In the case of *R v Rogers*[36] the offender was convicted of two offences of using electronic communications with intent to expose indecent matter to a child under 16. The Court of Appeal held that whilst the offences were serious, the applicant was 20 years of age with no previous convictions. It was accepted that his social wellbeing would be adversely impacted by the recording of a conviction by reason of section 5(2)(a) of the *Child Protection (Offender Reporting) Act* 2004 (Queensland). It was held in the circumstances that convictions ought not to have been recorded.

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35 *See R v Mallie Ex parte Attorney General* [2009] QCA 109 at [32].

36 (2013) 231 A Crim R 290; [2013] QCA 192.

Plea of guilty

[52] Turning then to section 13 of the PSA, this sections requires a sentencing court to take the guilty plea into account and the court may reduce the sentence it would have imposed had the offender not pleaded guilty.

[53] Sub-section 5 provides:

> "A sentence is not invalid merely because of the failure of the court to make the statement mentioned in subsection (4), but its failure to do so may be considered by an appeal court if an appeal against sentence is made."

[54] However if a court fails to specifically take the plea into account then is an error and often leads to a resentence[37].

[55] The importance of a plea of guilty was discussed in *Cameron v R*[38] at [66] Kirby J noted that the main features relevant to the discount for a plea of guilty are purely utilitarian which include the fact the plea saves the community of the cost and inconvenience of a trial. Further at [67] his Honour held that it is in the public interest to facilitate pleas of guilty and to conserve the trial process substantially to the cases where there is a real contest about guilt. Pleas of guilty encourage the clear up rate for crime and vindicate public confidence. It also helps victims of crime put their experience behind them.

[56] It has also been observed by the Court of Appeal that the usual discount on sentence for a plea of guilty where a person must serve a custodial sentence is 1/3rd on the bottom although this may be adjusted up or down depending on the circumstances.[39]

[57] Bear in mind though it may be an error to impose more than the ½ way point as a parole date certainly without notice to the parties and without adequate reasons.[40]

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37 *R v Woods* [2004] QCA 204 at [11].
38 (2002) 209 CLR 339; [2002] HCA 6.
39 *R v Ungvari* [2010] QCA 134 at [30].
40 *R v Kitson* [2008] QCA 86.

Section 13A

[58] Section 13A of the PSA relates to cooperation with law enforcement authorities and undertakings to cooperate.

[59] In *R v Gladkowski*[41] it was noted by the Queensland Court of Appeal that cooperation under the section particularly when society benefits from it and which places the informer in a position of danger calls for a very substantial discount to be given. It was noted that some decisions recognise the possibility of discount exceeding 50 per cent (see page 448).

Fines

[60] It is to be noted that section 48(1) of the PSA requires the sentencing court in imposing a fine to as far as practicable to take into account the financial circumstances of the offender and the nature of the burden of the fine will be on the offender. Section 48(3) of the PSA also requires the court to have regard to any order it proposes to make as to confiscation, restitution or compensation. Of course the fine may be imposed even though it cannot find out about the matters mentioned in subsection (1).

[61] The District Court has overturned some Magistrates' decisions where subsection (1) has not been complied with.[42]

Prison

[62] Unlike fines[43] and community based orders[44] when sentencing an offender to imprisonment a separate term must be imposed on each offence. It is an error if this is not done[45] and the sentence is liable to be set aside on appeal.

[63] When sentencing an offender to imprisonment for a number of offences it is permissible to attach the global sentence to the most serious charge to reflect all of the criminality (which is higher than it would be if it stood alone) and then

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41 (2000) 115 A Crim R 446. Also see *R v Ikin* [2007] QCA 224.
42 See e.g. *Steward v MacPlant Pty Ltd* [2018] QDC 20 at [82]-[84].
43 Section 49 of the PSA.
44 Section 97 of the PSA (probation), section 107 of the PSA (Community Service), section 110F of the PSA (Graffiti Removal orders) and section 118 of PSA (Intensive Correction Orders).
45 See *R v Crofts* [1999] 1 Qd R 386.

to impose lesser concurrent sentences[46], but that approach should not be adopted if the offender would be doubly punished for one act or he or she would be required to serve longer in custody than otherwise would be the case, in which case cumulative terms may be appropriate.

[64] Bear in mind the provisions of section 156A of the PSA which requires cumulative terms to be imposed for offences mentioned in schedule 1 when the offender was serving a term of imprisonment, was on parole, leave of absence or at large because of an escape.

Parole or suspension

[65] We now turn to the issue of whether suspended sentences should be given as compared to parole.

[66] This is often a ground of appeal in sentence applications to the Court of Appeal and indeed to the District Court.

[67] In *R v SCZ*[47] one of the grounds of appeal was whether a suspended sentence should have been imposed as distinct from release on parole.

[68] At [43] Davis J noted that the major distinction was the power of supervision vested in the executive when an offender is on parole. Desirability of supervision was a relevant matter to be considered.

Parole release or parole eligibility

[69] The relevant provisions are in Part 9 Division 3 of the PSA.

[70] Generally speaking where a sentence is 3 years or less and is not a sexual offence then a parole release date may be ordered.[48] If however an offender had a court ordered parole date cancelled during the period of imprisonment then the court must fix an eligibility date[49].

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46 See *R v Nagy* [2004] 1 Qd R 63 at [39].
47 [2018] QCA 81.
48 Section 160B of the PSA
49 Section 160B(2) of the PSA.

[71] In *R v Smith*[50] the appellant was sentenced to 15 months imprisonment. She was released on parole and committed further offences during the parole order. The Court of Appeal held in the circumstances of that case that the sentencing judge was right to fix a parole eligibility date rather than a parole release date. This was because section 209 of the Corrective Services Act 2006 had the effect that her parole was automatically cancelled because she was sentenced to another term of imprisonment during the parole order.

Combined orders

[72] Often to provide certainty of release a combined order of a suspended sentence of some charges and probation on others is imposed. This often occurs for example where a person is charged with sexual offences and a parole eligibility date only may be imposed.

[73] In *R v Hood*[51] the Court of Appeal held that a sentencing court was authorised to impose a suspended term of imprisonment of any length on some counts and a prison probation order on others.

Pre-sentence custody

[74] Section 159A of the PSA provides for the declaration of pre-sentence custody. In order for the declaration to be made the pre-sentence custody must solely relate to the offences before the court.

[75] Often the sentencing court is confronted with a situation where the time is not declarable because of other unresolved offences or because by reason of the present offending an existing parole order has been cancelled.

[76] In *R v Fabre*[52] it was held that in the former case such time should be taken into account at the first opportunity.

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50 [2015] 1 Qd R 323; [2013] QCA 397.
51 [2005] 2 Qd R 54; [2005] QCA 159.
52 [2008] QCA 386 at [14].

[77] In the second case in *R v Leighton*[53] and in *R v Baxter*[54] the Court of Appeal said that custody served because parole had been cancelled or suspended should be taken into account in determining the overall length of the sentence.

Children

[78] Of course the provisions of the *Youth Justice Act* 1992 (Q) ("YJA") apply.

[79] In *R v SCU*[55] the Court of Appeal held it was essential that a sentencing court take into account the provisions of sections 149, 150 and 208 of the YJA (where detention is being considered) and the charter of Youth Justice Principles in schedule 1.

[80] Also specific regard must be had to sections 183 and 184 of the YJA when deciding whether or not to record convictions.

[81] The recent case of *R v PBD*[56] is authority for the proposition that when sentencing children that under section 162 of the YJA the sentencing court must give consideration to referring the matter to the Chief executive for a restorative justice process instead of sentencing the child. This is mandatory.

Commonwealth sentencing

[82] Finally I thought I should briefly deal with some issues arising in the sentencing of Commonwealth offenders.

[83] Of course state courts exercising Federal jurisdiction apply Commonwealth sentencing options except those picked up by section 20AB of the Crimes Act 1914 (Cth)("CA").

[84] Importantly section 17A of the CA provides:

> "**Restriction on imposing sentences**
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> (1) A court shall not pass a sentence of imprisonment on any person for a federal offence, or for an offence against the law of an external Territory that is prescribed for the

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53 [2014] QCA 169.
54 [2010] QCA 235.
55 [2017] QCA 198.
56 [2019] QCA 59 at [29].

purposes of this section, unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case.

(2) Where a court passes a sentence of imprisonment on a person for a federal offence, or for an offence against the law of an external Territory that is prescribed for the purposes of this section, the court:

(a) shall state the reasons for its decision that no other sentence is appropriate; and

(b) shall cause those reasons to be entered in the records of the court.

(3) The failure of a court to comply with the provisions of this section does not invalidate any sentence.

(4) This section applies subject to any contrary intention in the law creating the offence."

[85] It is an error not to have regard to section 17A of the CA if imprisonment is imposed and may lead to the sentence being set aside.57

[86] Also the sentencing court is required to have regard to the provisions of section 16A of the CA in reaching the decision.

[87] It is also important to bear in mind that under section 16F of the CA the sentencing court must explain the sentence to the offender in readily understandable terms.

[88] Finally the High Court in *Hili v R*[58] highlighted the importance of consistency in the sentencing of Federal offenders across Australia.

Conclusion

[89] In conclusion sentencing is not as straight forward as might first be thought.

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57 *R v Verburgt* [2009] QCA 33 at p 3.

58 (2010) 242 CLR 520; [2010] HCA 45. Also see *Pham v R* (2015) 256 CLR 550; [2015] HCA 39.

[90] I hope this discussion has brought important sentencing issues to your attention.