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SENTENCING

Sentencing of convicted offenders is often in the news and judges and magistrates are sometimes criticised because a particular sentence is said to be too lenient. We would like you to read the sentencing information in this booklet so that you can give us your informed and considered view about the sentence in your case.



This booklet was produced in 2014 for the National Jury Sentencing Project and all facts and figures are accurate as at 2014.

This is the Victorian version of the booklet



Sentencing: who is responsible?

While it may appear that judges and magistrates are solely responsible for sentencing, what they do is guided by laws made by parliament and principles laid down by appeal courts. A judge cannot simply choose a sentence as a matter of personal preference. Sentencing is a matter for parliaments, courts and the executive.

- **Parliaments** create offences, specify maximum penalties, specify purposes for which sentences can be imposed and create the sentencing options available to the courts.
- **Courts** decide specific sentences within the legislative framework, taking into account sentencing principles laid down by higher courts and sentencing practice.
- The **Executive** (the government, through government agencies) make sure sentences imposed by judicial officers are carried out by running prisons and community options and by determining release through agencies such as the Parole Board.

However, the judicial role is central to sentencing. Judges make decisions within the limits fixed by parliament and in accordance with principles laid down by appeal courts.

The sentencing hearing

In some jurisdictions, the sentencing hearing usually occurs immediately after the verdict of guilty is given. In other jurisdictions, including Victoria, the judge will usually adjourn the case after the verdict of guilty and the sentencing hearing will be held some time later. At the sentencing hearing the prosecution will address the judge, detail the impact of the offence on any victims, and draw the judge's attention to any prior record of the offender. The prosecution may or may not

have made a submission as to what sentences have been imposed in other comparable cases. Defence counsel will then address the judge about the offender's background and circumstances (this is called the plea in mitigation). Occasionally, if any of the facts alleged by the prosecution or the defence are contested, the court will hear evidence to resolve the dispute.

The main issues

The main issues that a judge must consider in imposing sentence are:

- The **purposes** of sentencing and sentencing **principles**;
- Relevant sentencing **factors**;
- The range of sentencing **options**;
- The **maximum penalty** for the offence; and
- Current sentencing **practices**.

The purposes of sentencing

The main purposes of sentencing are:

- **Retribution:** imposing a sentence that is deserved and just in all the circumstances of the case.
- **Denunciation:** expressing the community's disapproval of the offender's behaviour.
- **Rehabilitation:** treating/helping the offender to change their behaviour so that they do not reoffend.
- **Deterrence:** deterring (discouraging) the offender (specific deterrence) and/or others (general deterrence) from committing the same or similar crimes.
- **Community protection:** protecting the community from the offender.

Other purposes are to make the offender accountable for his or her actions and to recognise the harm to the victim and the community.

Sentencing and crime levels

The impact of sentences on crime rates is limited by the small proportion of offenders who come before the courts for sentence. Not all crime is reported to the police and as demonstrated in Figure 1, not all recorded crime results in the detection and prosecution of the person/s responsible. Furthermore, even when prosecuted, not all offenders are convicted. So, when courts come to sentence convicted offenders, they are dealing with only a small proportion of those who have actually committed offences.

Figure 1: How many criminals are caught and convicted?



[Figure 1 source: Data relates to the New South Wales criminal justice system and was produced by the NSW Bureau of Crime Statistics and Research]

The numbers in Figure 1 are estimates only based on the New South Wales criminal justice system but are similar to the numbers estimated in other Australian States/Territories. It should also be noted that the fact that police initiate proceedings against 628 people for each 1000 offences does not mean that 372 (1000

minus 628) offenders get off. It is likely that some of the 628 people police initiate proceedings against have committed multiple offences rather than a single offence each.

What is the position for sex offences?

For sex offences the rate of reporting is particularly low – victim surveys suggest that fewer than one in five adult victims report the offence to the police – and many cases are filtered out between reporting and charge and between charge and conviction¹.

Some statistics about sex offenders and their victims

Victims of sex offences

Most sexual offences are committed by people who know their victim. A Personal Safety Survey conducted by the Australian Bureau of Statistics² in 2012 indicated that of those adults who reported they had been sexually assaulted since the age of 15, less than a third were sexually assaulted by a stranger, whereas over two-thirds were sexually assaulted by someone they knew such as a partner, a date, neighbour or acquaintance. Also, official crime data recorded by police in 2012³ indicated that of those children aged 14 years or younger who had been sexually assaulted, 82% were assaulted by someone they knew, and 11% were assaulted by a stranger; in 6% of cases the relationship of the offender to the victim was unknown.

1 Tarczon, C. & Quadara, A. (2012). *The nature and extent of sexual assault and abuse in Australia* (Australian Centre for the Study of Sexual Assault Fact Sheet, December 2012). Melbourne, Victoria: Australian Institute of Family Studies. Available at: <http://www.aifs.gov.au/acssa/pubs>

2 Australian Bureau of Statistics (2013). Personal Safety, Australia, 2012 (Catalogue No. 4906.0). Canberra, Australia: Australian Bureau of Statistics. Available at: <http://www.abs.gov.au/> See Table 5 in data cube titled 'Perpetrators of violence: Tables 3 to 6'.

3 Australian Bureau of Statistics (2013). Recorded Crime – Victims, Australia, 2012 (Catalogue No. 4510.0). Canberra, Australian Bureau of Statistics. Available at: <http://www.abs.gov.au/> See data cube titled 'Victims of Sexual assault, Relationship of offender to victim by age group–Selected states and territories'.



Re-offending rates

Recidivism/reoffending rates are typically lower for sex offenders compared with non-sexual violent offenders or property offenders. A large study⁴ based on findings from 118 unique offender samples with a combined sample of 45,398 sex offenders from 16 different countries (including Australia although most offenders were from the United States or Canada) revealed that the recidivism rate for sexual offences was 12%. However, sexual recidivism rates vary depending on the type of sex offender, for example, rapists and those who have assaulted children unrelated to them tend to have higher sexual re-offending rates than those who have assaulted children who are related to them.⁵

Treatment of sex offenders

There is sufficient evidence to suggest that sex offender treatment programs are effective at reducing re-offending rates. A large study⁶ based on 80 independent comparison studies with a combined sample of 22,181 sex offenders (mostly from North-America) found that on average 11% of treated offenders and 18% of untreated offenders committed a new sex offence. The level of effectiveness of the sex offender treatment programs reviewed in this study is similar to the observed levels of effectiveness of treatment programs for other groups of offenders.

Some sentencing principles

A court must not impose a sentence that is more severe than necessary to achieve the purpose or purposes for which the sentence is imposed. It follows that a

court must not impose a prison term if a non-custodial sentence would be appropriate. This is the **principle of parsimony**.

The **principle of proportionality** states that the sentence must match the seriousness of the offence. This means that none of the sentencing purposes listed on p.3 can justify the imposition of a sentence that is disproportionate to the seriousness of the offence. So, once the judge has determined the nature and seriousness of the offence, this determines the upper limit of the sentence.

The **principle of totality** requires that, where an offender is at risk of serving more than one sentence, the overall effect of the sentences must be just, proportionate and appropriate to the total criminal behaviour involved.

Balancing the purposes

Often the purposes of sentencing overlap and a sentence may reflect a balance of more than one purpose, for example: general deterrence, specific deterrence and retribution. In these circumstances the judge imposes a sentence that balances the various purposes. However, sometimes two purposes that seem to be appropriate may suggest sentencing options that are incompatible with each other – for example rehabilitation may suggest a non-custodial option with a treatment condition, but punishment for the crime and denunciation may suggest an immediate prison sentence. The judge has to try to find the right balance between competing purposes.

4 Hanson, K.R. & Morton-Bourgon, K.E. (2009). The accuracy of recidivism risk assessments for sex offenders: A Meta-Analysis of 118 Prediction Studies. *Psychological Assessment*, 21(2), 1-21.

5 Hanson, K.R. (2002). Recidivism and Age: Follow-Up Data from 4,673 Sexual Offenders. *Journal of Interpersonal Violence*, 17(10), 1046-1062.

6 Schmucker, M. & Lösel, F. (2008). Does sexual offender treatment work? A systematic review of outcome evaluations. *Psicothema*, 20(1), 10-19.

Relevant sentencing factors

There are a number of matters that the courts must take into account when imposing a sentence. These include: the nature and circumstances of the offence, the circumstances of the offender, the offender's response to the charges and other post-offence factors. Some of these factors may aggravate or mitigate the severity of the sentence. An aggravating factor is one that increases the severity of the sentence. A mitigating factor is one that reduces the severity of the sentence.

The nature and circumstances of the offence

Different offence types vary in seriousness – for example, most murders are more serious than most assaults. The seriousness of a particular offence will depend upon the way it was committed and the impact of the crime. Aggravating factors (those which add to the seriousness of the crime) include whether:

- the crime was motivated (wholly or partly) by **hatred for or prejudice against** a group of people with which the victim was associated;
- the crime was **planned or premeditated**, rather than committed on the spur of the moment;
- the crime was committed by a **gang or group**;
- the offender was the **ring-leader**, rather than having a minor role;
- the crime involved a **breach of trust**; and/or
- a **weapon** was used.

To assess the seriousness of the crime, the judge must weigh up the degree of loss or the extent of injury to the victim. Some victims may be very young or very old or more vulnerable for other reasons. Such factors may be treated as aggravating factors and warrant a more severe sentence. It is common in violent offences, particularly in sexual offences cases, for a

victim impact statement (VIS) to be submitted to the sentencing court. The role of a VIS is to inform the court of the consequences of the offence for the victim. This gives victims the opportunity to draw the court's attention to the real significance of what has occurred in their life as a result of the offence or offences.

The circumstances of the offender

The personal circumstances of the offender will be taken into account and some of these factors may mitigate the seriousness of the offending when taken in context. Personal circumstances that will be taken into consideration include:

- **Character and criminal record:** good character and an absence of prior convictions are mitigating; however prior convictions, particularly for similar offences, are aggravating;
- **Cultural and social background:** for example, if the offender grew up in an abusive household this may be mitigating;
- **Age:** a youthful offender (up to 21 or so), particularly a first-time offender, may be considered as having better prospects of being rehabilitated;
- **Mental disorder or disability** may reduce the offender's degree of responsibility and hence the severity of sentence;
- **Alcohol or drug abuse** is not an excuse for committing a crime but may be relevant to show the offence is out of character; and
- **The effect of imprisonment on an offender's family:** this can only be taken into account in exceptional circumstances.

Response to the charges and post-offence factors

The behaviour of the offender and other matters occurring after the offence may be relevant and may mitigate the severity of the sentence. These factors include:



- **Remorse:** this may be evidenced by any actions taken by the offender prior to sentencing to make amends for the loss or damage caused by the offence (for example, by writing an apology letter to the victim);
- **Co-operation with the authorities:** the offender may have assisted the police in the investigation of the offence or assisted the prosecution (for example, by giving evidence against any co-offenders);
- **A plea of guilty:** the weight given to a guilty plea will depend upon the circumstances including the degree to which psychological trauma to witnesses is avoided, the length of the trial, the strength of the prosecution case (it may be given little weight if the case is very strong) and the timing of the plea (any early plea will be given more weight);
- **Delay:** if there has been a considerable delay in hearing an offender's case or in any stage of the court process, the severity of the sentence may be reduced on the grounds of fairness if the delay is not due to any fault on part of the offender. Any rehabilitation the offender may have undergone in the meantime is also in the offender's favour because of the reluctance of courts to destroy "progress towards decent citizenship"; and
- **Parity:** any sentence imposed on a co-offender will be taken into account to avoid any feelings of injustice.

The range of sentencing options

The range of sentencing options for adult offenders is set out in the *Sentencing Act 1991* (Victoria). The data provided below were taken from the Australian Bureau of Statistics' (ABS) 2014 publication titled Criminal Courts, Australia, 2012-2013 (Catalogue no. 4513.0) and is available at: <http://www.abs.gov.au>

In the Higher Courts (i.e. Supreme and County Courts), 73% of all convicted offenders are sentenced to immediate imprisonment. However, in the Magistrates Court, about 5% of offenders are sentenced to immediate imprisonment.

Imprisonment this is the most severe sentencing option available. In Victoria, if the sentence is at least one year, the judge must consider parole and may have to set a non-parole period.

Parole is conditional early release. A non-parole period is the time an offender must remain in prison before being considered for release on parole. For sentences of less than one year, courts cannot set a non-parole period. For sentences between one and two years, the court may fix a non-parole period. If the term of imprisonment is longer than two years, a non-parole period must be fixed unless the court thinks it inappropriate to do so due to the nature of the offence or the past history of the offender. The non-parole period must be at least six months less than the term of imprisonment.



In the Higher Courts about 11% of all sentences in 2012-13 were wholly suspended. In the Magistrates Court about 5% of all sentences were wholly suspended

Suspended sentence of imprisonment: is a sentence of imprisonment that is withheld or not activated for a specified period. If the offender breaches the conditions of the suspended sentence by committing another offence, they must serve this time in prison and possibly further prison time for the new offence. Suspended sentences have been progressively phased out in Victoria since May 2011. From 1 September 2014, suspended sentences will not be able to be given for any offence committed after that date, regardless of the court in which the offence is heard.

Community based orders were used as the principal sentence in 13% of cases in the Higher Courts in 2012-13 and in Magistrates Courts they were used in 7% of cases.

Community correction order: this order is a flexible order served in the community. The maximum period for a community correction order varies according to different types of offences and cannot be longer than whichever is greater of two years or the maximum period of imprisonment for a given offence. In addition, the community correction order must contain at least one other condition, such as unpaid community work, supervision by a corrections officer, treatment and rehabilitation, non-association, residence restriction or exclusion, place or area exclusion, curfew, alcohol exclusion and judicial monitoring. It can also be combined with a prison sentence of not more than 3 years.

Fines are only used as the principal sentence in 2% of cases in the Higher Courts but they are the most common sentence imposed in the Magistrates Court, given to almost 6 out of 10 (57%) offenders found guilty.

Fine: this requires the payment of a sum of money. A fine can be issued as a stand-alone penalty or in conjunction with another sentencing order.

Other non-custodial orders' such as dismissals and discharges as well as conditional release orders are rarely used in the Higher Courts but they are used in 24% of cases in the Magistrates Court.

Dismissal and discharge: A dismissal is when the court finds the offender guilty of an offence but does not record a conviction. A discharge is when the court finds the offender guilty but does not impose a sentence. The difference between a dismissal and a discharge is the recording of a conviction.

Release on adjournment (with or without conviction): This is an order for the release of the offender and may or may not include a conviction. The latter is the most lenient sentencing option available. The offender is released into the community unsupervised for up to 5 years on the condition that no offence is committed. There may also be a requirement to appear before the court at a specified time or when called upon.

The *Sentencing Act 1991 (Victoria)* also authorises a court to make other orders in addition to the sentence imposed on the offender. This can include **compensation** for personal injury (pain and suffering and for medical or other costs incurred as a result of the injury) or for property loss or damage.

Sex Offender Registration

When an offender is convicted of a child sex offence, the offender automatically becomes subject to a **sex offender registration order**. This means that the name of the offender is put on a register and the offender must comply with certain reporting obligations. Judges also have the discretion to make a sex offender registration order if an offender commits certain sexual offences against adult victims and the court is satisfied that the offender poses a risk to the sexual safety of a person or persons generally. **Reporting obligations** include a requirement to notify change of personal details within 7 days which includes change of address, name, employment details, car registration, internet

service provider and so on. There is also an annual reporting obligation in relation to these details. **The reporting period** for sex offences such as one charge of indecent assault against a child or adult is 8 years; the reporting period for offences such as one charge of sexual intercourse with a child or rape of an adult victim is 15 years. Where the offender commits two offences, including an offence that would normally attract a reporting period of up to 15 years, or three or more offences that would normally attract a reporting period of up to 8 years, the reporting period is for life.

The maximum penalty

Most jurisdictions (including Victoria) have a separate maximum penalty for each offence. This penalty is intended for cases falling within the worst category of instances of that offence and it provides a yardstick or guide for the sentence in a particular case.

Current sentencing practices

The High Court has held that *“Like cases should be treated alike.”*

Consistency in punishment is regarded as an important principle of fairness in the administration of criminal justice. For this reason, when judges impose sentence they do so in light of the range of sentences that are usually imposed for a particular offence, and they use this range as a yardstick or guide.

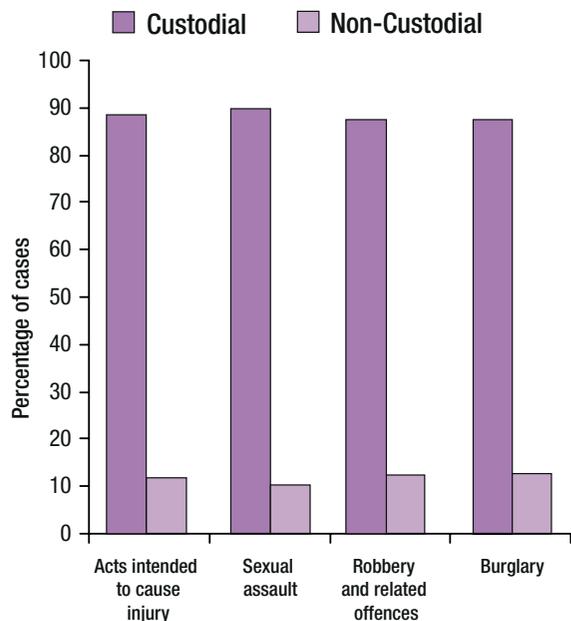
Displayed below are some recent statistics on the penalties imposed for the following broad categories of crimes in Victoria:

- (1) *Acts intended to cause injury* (this includes serious assaults such as causing serious injury intentionally or recklessly, common assault and stalking offences);
- (2) *Sexual assault and related offences* (this includes contact sexual offences against adults and children such as rape and child pornography offences);

- (3) *Robbery and related offences* (this includes armed robbery, extortion and blackmail); and

(4) Burglary

Figure 2: Sentences imposed (custodial versus non-custodial) for select offence categories based on Victoria’s Higher Court data for the 2008/09 to 2012/13 financial years.



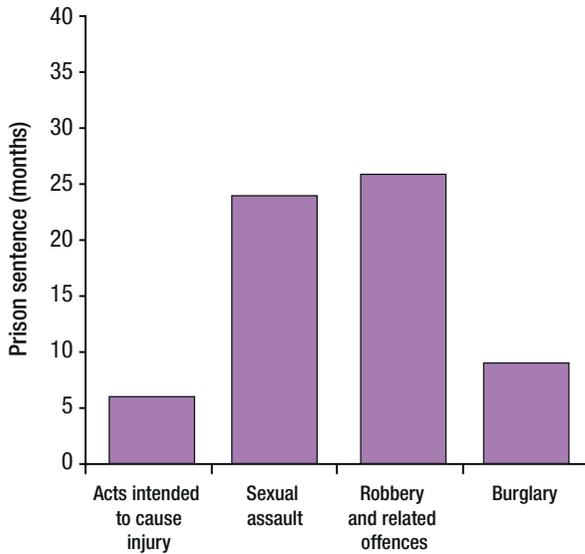
[Figure 2 source: Figures based on analysis of data provided in the Australian Bureau of Statistics Criminal Courts, Australia for the years 2008/09 to 2012/13 (Catalogue no. 4513.0).

Figure 2 indicates that over the last 5 years in Victoria, custodial sentences (e.g. immediate terms of imprisonment and suspended sentences) were the most common type of sentence for all offence categories. The offence category with the highest proportion of custodial orders was sexual assault and related offences (90% of cases), followed by acts intended to cause injury (88% of cases), robbery and related offences and (88% of cases) and finally burglary (87% of cases). Non-custodial options such as community supervision, work orders, treatment orders and fines were used in 13% of cases for burglary, in 12% of cases for acts intended to cause injury and robbery and related offences, and in 10% of



cases for sexual assault and related offences.

Figure 3: Median length of prison sentence for each select offence category based on Victoria's Court data for the 2010/11 to 2012/13 financial years.



[Figure 3 source: Figures based on analysis of data provided in the Australian Bureau of Statistic Criminal Courts, Australia for the years 2010/11 to 2012/13 (Catalogue no. 4513.0).

Figure 3 shows that over the last three years, on average, the offence categories of robbery and related offences (median of 26 months) as well as sexual assault and related offences (median of 24 months) attracted the longest terms of imprisonment, followed by burglary (median of 9 months) and finally acts intended to cause injury (median of 6 months).



You will find additional sentencing data in relation to the principal crime the defendant was convicted of in your case on the loose pages inside this booklet.



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