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SENTENCING

Sentencing is a topic that interests many people. As a juror you have been involved in a criminal trial and you will probably know more about the criminal justice process than most members of the public.

But how much do you know about 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. Rarely are they criticised because sentences are too tough. 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 the case you decided.

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 superior courts and sentencing practice.
- The **Executive** (the government, through government agencies) makes 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 superior courts (i.e. appeal courts).

The sentencing hearing

In most cases the judge will adjourn the case after the verdict on guilt is delivered and the sentencing hearing will be held about two weeks after the verdict. At this 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 suggested an appropriate sentence for the offender. 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;
- 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:

- **Punishment:** imposing a sentence that is deserved and just in all the circumstances of the case.
- **Denunciation:** to express 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 others (general deterrence) from committing the same or similar crimes.



- **Community protection:** to protect the community from the offender.

Sentencing purposes 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. As demonstrated in Figure 1, not all crime is reported to the police and not all recorded crime results in the detection and prosecution of offenders 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?

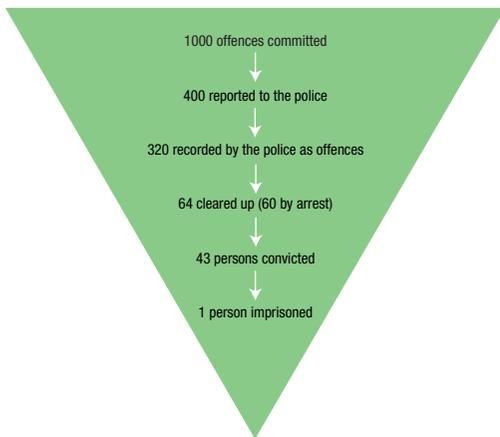


Figure 1 source: Mukherjee et al. (1987), *The Size of the Crime Problem in Australia*, AIC

The numbers in Figure 1 are estimates only. It should also be noted that the fact that 60 people are arrested for each 1000 offences does not mean that 940 (1000 minus 60) get off. It is likely that the 60 arrested offenders committed many more offences than one each.

Limiting principles: parsimony and proportionality

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. So, for example, 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 above purposes of sentencing 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 punishment. 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.

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 **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**; 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.

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, including **prior convictions**;
- **Cultural and social background**;
- **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
- Only in cases of **exceptional hardship** can the judge take into account the effect of imprisonment on an offender's family.

Response to the charges and post-offence factors

The behaviour of the offender and other matters occurring after the offence may be relevant as some of these factors may mitigate the severity of the sentence.

These factors include:

- **Remorse**: this factor reduces (mitigates) the severity of the sentence and it 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.
- **Co-operation with the authorities** is a mitigating factor: 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** is a mitigating factor.
- **Parity**: any sentence imposed on a co-offender will be taken into account to avoid any injustice.

The range of sentencing options

The range of sentencing options for adult offenders is set out by the *Sentencing Act 1991* (Victoria) in section 7. The data included in this section are from 2011-12.

In the Higher Courts (i.e. Supreme and County Courts), just over half (53%) of all convicted offenders are sentenced to immediate imprisonment. However, in the Magistrates' Court, about 1 in 20 (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 will have to consider parole and may have to set a 'non-parole period'.

Parole: 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 of between one and two years imprisonment, the court may fix a non-parole period. If the term is more than two years, a non-parole period must be fixed unless the court considers it is inappropriate because of the nature of the offence or the history of the offender. The non-parole period must be at least 6 months less than the term of imprisonment.

In the Higher Courts (i.e. Supreme and County Courts) almost one in five (17%) of all convicted offenders are sentenced to wholly suspended sentences.

Suspended sentence of imprisonment: is a sentence of imprisonment that is withheld or not activated for a specified period. The maximum sentence of imprisonment that can be wholly or partly suspended is three years. 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. A suspended sentence cannot be given for 'serious or significant' offences committed after 1 May 2011. These include:

- murder and manslaughter
- rape and other serious sexual offences
- intentionally/recklessly causing serious injury
- armed robbery
- aggravated burglary
- arson and arson causing death
- commercial drug trafficking.

This order is not often imposed, as it can only be used in a single court location.

Drug treatment order: a DTO combines a term of suspended imprisonment with treatment. The DTO can only be imposed in the Drug Court division of the Magistrates' Court, and not for violent or sexual crimes. This sentencing option would not be available to the judge in the case you decided.



In the Higher Courts (i.e. Supreme and County Courts) about 1 in 10 (10%) of all convicted offenders are given community correction orders. In the Magistrates' Court, about 1 in 15 (7%) of offenders found guilty are given community correction orders.

Community correction order: this 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 greater than the maximum allowable period of imprisonment for a given offence. The basic condition is not to re-offend. In addition it must contain at least one 'optional condition' such as:

- unpaid community work (max 600 hours)
- supervision by a corrections officer
- medical treatment or other rehabilitation

Fines are rarely the principal sentence in the Higher Courts (i.e. Supreme and County Courts) where less than 1 in 20 (about 3%) of offenders receive only a fine. Fines are the most common sentence imposed in the Magistrates' Court, given to about 6 out of 10 (61%) of offenders found guilty.

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

Conditional and absolute discharges are rarely imposed in the Higher Courts (i.e. Supreme and County Courts) as less than 1 in 100 offenders found guilty (less than 1%) receive a dismissal or discharge. In contrast, dismissals and discharges are given to more than 1 in 20 (about 6%) of offenders found guilty 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 and records a conviction but does not impose a sentence. The difference between a dismissal and a discharge is the recording of a conviction.

Adjourned undertakings are rare in the higher courts (i.e. Supreme and County Courts), where they are given to about 1 out of every 100 offenders found guilty (1%), compared with about 1 in 8 (13%) offenders found guilty in the Magistrates' Court.

Adjourned undertaking (with or without a conviction): the offender is released into the community unsupervised for up to five years on conditions (including a condition to be of good behaviour and to appear before the court when called upon).

The *Sentencing Act 2001* also authorises a court to make other orders in addition to the sentence imposed on the offender. These 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.
- **Disqualification** from holding a driver's licence.
- **Forfeiture or seizure:** for drug offences in particular the court may order forfeiture of items/materials used in connection with the offence and proceeds of the crime.

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

Current sentencing practices

The *Sentencing Act 1991* (Vic) requires a judge to take into account current sentencing practices.

“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 statistics on the penalties imposed for a selected number of crimes – rape, armed robbery, causing serious injury recklessly and burglary – in the last 5 years (2007-08 to 2011-12).

Figure 2: Sentence types for each offence in the Higher and Magistrates’ Courts, for 2007-08 to 2011-12

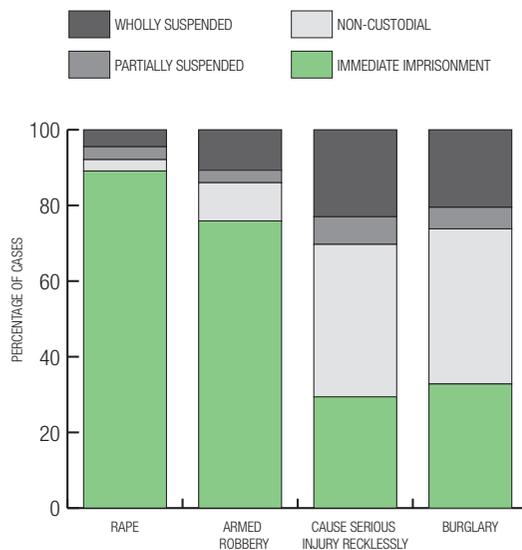


Figure 2 indicates that over the last 5 years, immediate terms of imprisonment were the most common type of sentence for rape (89% of cases) and armed robbery (76% of cases). Non-custodial sentences (e.g.

community corrections orders) were rarely used in cases of rape (3% of cases) and armed robbery (10% of cases). In contrast, immediate terms of imprisonment were used in less than a third of cases for the offences of cause serious injury recklessly (29% of cases) and burglary (33% cases). Non-custodial sentences (e.g. community corrections orders) were more common for cause serious injury recklessly (40% of cases) and burglary (41% of cases).

Figure 3: Median length of imprisonment for each offence in the Higher and Magistrates’ Courts for 2007-08 to 2011-12

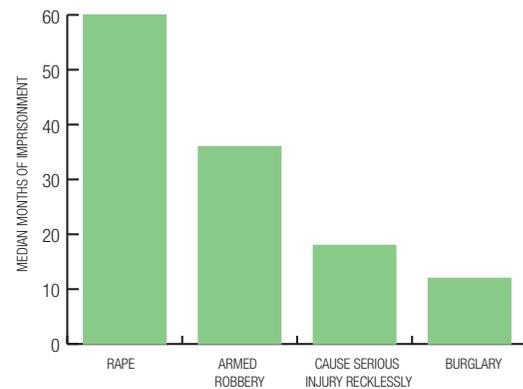


Figure 3 shows that over the last 5 years, on average, the crime of rape attracted the longest terms of imprisonment (median of 60 months), followed by armed robbery (median of 36 months), then cause serious injury recklessly (median of 18 months) and finally burglary (median of 12 months). Individual charges of rape had sentences of imprisonment ranging from 3 months to 16 years. Armed robbery had sentences of imprisonment ranging from 1 month to 14 years. Recklessly cause serious injury had sentences of imprisonment ranging from 11 days to 10 years. Burglary had sentences of imprisonment ranging from 1 day to 5 years and 6 months.



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