

REINFORCING THE NSW GOVERNMENT'S COMMITMENT TO  
VICTIMS OF CRIME WITH THE VICTIMS RIGHTS ACT 1996.

# Sentencing

## INFORMATION PACKAGE



**Victims Services**  
**Attorney General's**  
department of nsw



NSW Sentencing Council



**Attorney General's**  
department of nsw

This information package is jointly produced by  
Victims of Crime Bureau and Criminal Law Review Division,  
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## INFORMATION PACKAGE

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## INTRODUCTION

This booklet is provided to assist victims of crime in understanding the sentencing process. The purpose of the booklet is to explain the purposes of sentencing, the basic elements of sentencing procedure and the terminology used by a sentencing court. The information contained within this booklet is largely based on sentencing legislation in New South Wales set out in the *Crimes (Sentencing Procedure) Act 1999*. Victims of crime and other interested parties are encouraged to contact the Victims of Crime Bureau or the prosecuting authority to discuss the information or to ask any questions.

## WHEN IS AN OFFENDER SENTENCED?

An offender is sentenced after he or she:

- has pleaded guilty to an offence; or
- has been found guilty of the offence after a summary hearing in the Local Court; or
- following a trial by judge alone or trial by jury in the District or Supreme Court.

## THE SENTENCING HEARING

Sentencing often takes place on a separate day to the trial or summary hearing and is conducted before the judicial officer (the judge or magistrate). A victim, like all members of the community, has the right to be present at the sentencing hearing. At the sentencing hearing, the defence has the opportunity to put forward evidence and arguments about what the sentence should be. The prosecution assists the court by providing information about applicable law and relevant sentencing statistics.

Oral and written arguments can be made by both the defence and the prosecution, and evidence in support can be called by both sides. The prosecution may challenge evidence put forward by the defence at the sentencing hearing, and may challenge or cross-examine defence witnesses. The prosecution will normally provide information concerning any prior criminal convictions of the offender.

Evidence presented by the defence may include:

- evidence of the offender's previous good character, usually in the form of statements from family members, friends, employers or other associates;
- documents such as psychiatric or psychological reports.

The court often obtains a pre-sentence report from the Community and Offender Services, which will detail the offender's background and any appropriate or available sentencing options. In the case of a juvenile offender, a background report must be provided by Juvenile Justice, detailing this information.

An offender can only be sentenced for the charge of which he or she has been found guilty. The judicial officer can only take into account factors that are relevant to that charge.

Sometimes an offender will ask that other outstanding offences for which he or she has been charged but not convicted, be taken into account. This is recorded on a form called Form One, when being sentenced for the offence before the court. This means that the offender admits his or her guilt in relation to those additional offences, without being formally convicted of them. The additional offences may not relate to the victim.

The sentencing judge is then free to take those additional offences into account, when setting the appropriate sentence for the offence before the court. As a result of the additional offences, this will normally result in a larger sentence being imposed than would otherwise have been the case.

## PURPOSES OF SENTENCING

Under New South Wales law the purposes for which a court can sentence an offender are:

- to protect the community from the offender;
- to ensure that the offender is adequately punished for the offence;
- to prevent crime by preventing (detering) the offender and other persons from committing similar offences;
- to promote the rehabilitation of the offender;
- to make the offender responsible (accountable) for his or her actions;
- to condemn (denounce) the conduct of the offender; and
- to recognise the harm done to the victim of the crime and the community.

## RELEVANT FACTORS DETERMINING A SENTENCE

In determining the sentence, the judicial officer must take into account a number of factors, such as:

- the facts of the offence;
- the circumstances of the offence;
- subjective factors about the offender; and
- relevant sentencing legislation and case law.

The judicial officer may also consider the general pattern of sentencing by criminal courts for the offence in question.

### Maximum penalty

The maximum penalty that a judicial officer can impose for each criminal offence is set out in legislation. The maximum penalty for individual offences differs according to its seriousness. When maximum penalties are set by Parliament, it is intended that such penalties will be given only when the case falls within the “worst” category of cases for which the penalty is prescribed. Examples of maximum penalties are life imprisonment for murder and two years imprisonment for common assault.

### Aggravating and mitigating factors

In determining the appropriate sentence for an offence, the court must first identify the “objective seriousness” of the offence, by reference to the actual conduct of the offender giving rise to that offence.

The court must also take into account any aggravating factors concerning the commission of the offence, as well as any mitigating factors relevant to the offence, or to the personal circumstances of the offender. An aggravating factor can increase the potential sentence, whereas a mitigating factor can reduce it.

Not every aggravating and mitigating factor present in a particular case will automatically lead to an increase or reduction of a sentence. The relative importance of each factor will vary, depending on the circumstances of the case. In the case of young offenders, for example, promoting a young offender’s rehabilitation will be considered more important than the principles of general deterrence and public condemnation. This principle will be considered less important, however, if the crime committed by the youth is very serious or if the young offender is approaching adulthood.

Both aggravating and mitigating factors are set down in legislation and in case law, and may change over time.

### ***Relevant aggravating factors include:***

- a) The victim:
  - was, for example, a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official and the offence arose from their occupation.
  - was vulnerable (for example, because the victim was very young or very old or had a disability), or because of the victim's occupation (such as a taxi driver, bank teller or service station attendant).
- b) The offence involved:
  - the actual or threatened use of violence; the actual use or threatened use of a weapon;
  - needless (gratuitous) cruelty;
  - multiple victims or a series of criminal acts.
- c) The offence was:
  - committed in company; committed without regard for public safety;
  - committed while the offender was on conditional liberty in relation to an offence (for example, if the offender was on bail or on parole);
  - motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability);
  - part of a planned or organised criminal activity;
  - an offence that caused substantial injury, emotional harm, loss or damage.
- d) If the offender:
  - has a record of previous convictions;
  - abused a position of trust or authority in relation to the victim (such as a school teacher and the victim is a pupil of the offender, or a health professional and the victim is a patient of the health professional, and similar positions where the offender has responsibility/authority over the victim).

### ***Relevant mitigating factors include:***

- a) The injury, emotional harm, loss or damage caused by the offence was not substantial.
- b) The offence was not part of a planned or organised criminal activity.
- c) The offender:
  - was provoked by the victim;
  - was acting under duress; does not have any record (or significant record) of previous convictions;
  - was a person of good character;
  - is unlikely to re-offend;
  - has good prospects of rehabilitation;
  - has shown remorse (for example, by making compensation (reparation) for any injury, loss or damage or in any other manner;
  - was not fully aware of the consequences of his or her actions because of his or her age or any disability;
  - provided assistance to law enforcement authorities;
  - pleaded guilty.

### **Cumulative and concurrent sentences**

If an offender is to be sentenced for more than one offence, then he or she will be given a separate sentence for each offence. In such a case, the court can order that the sentences be served concurrently or cumulatively, or a combination of both.

Concurrent sentences commence at the same time as each other and run at the same time. Cumulative sentences run consecutively, that is, one after another. A sentence may be partly concurrent and partly cumulative upon an earlier sentence.

If the offences have features in common, or if they happened at around the same time and are connected (for example, if all the offences arose in a single course of criminal conduct) a court may decide that the sentences should be served concurrently or at least partly concurrently. This means that if an offender is given a two-year sentence for one offence and a five-year sentence for a related offence, and those sentences are directed to be served concurrently, the total period of imprisonment will be five years.

## **Totality**

Where a court sentences an offender for a number of offences of which the offender has been convicted, then at the end of considering the appropriate sentence for each offence the judge must look back at the total sentence to ensure that the result is appropriate. The sentence to be served by the offender must reflect the total criminality of the crimes committed.

## **Victim Impact Statements**

A victim impact statement is a written statement that describes the impact of a crime upon a victim or a victim's family member. It is given to the court after a person has been convicted and before the person is sentenced.

A statement can be made in the Supreme Court or the District Court if the court considers it appropriate to do so, and the statement is in relation to an offence that involves:

- actual or threatened violence (including sexual assault); or
- the death of, or any actual physical bodily harm, to any person.

A statement can be made:

- by a victim (or their representative, such as a family member or counsellor) who has suffered personal harm as a direct result of an offence (the primary victim); or
- a family member of a primary victim (or their representative) who has died as a direct result of the offence.

A victim impact statement can be read by the victim or their representative in open court or handed up in written form. The maker of the statement can be cross examined or questioned in relation to the statement.

A victim impact statement may also be made in the Local Court in some circumstances. A statement is not permitted to be made in the Children's Court.

For more information on victim impact statements, see the *Victim Impact Statements Information Package*, jointly produced by the Office of the Director of Public Prosecutions, NSW Police Force and Victims of Crime Bureau.

## **SENTENCING OPTIONS**

A court can sentence an offender to any of the following types of sentences:

### **Rising of the court**

The court orders the defendant to "remain in court until the next adjournment", (that is, until the next break in the sittings of the court that day). This is a symbolic way of saying that an offender is convicted but no formal sentence is imposed. This order is reserved for the least serious of offences.

### **Dismissal**

The court finds the offender guilty but dismisses the charge without recording a conviction.

## Conditional discharge

The court can discharge the offender on a condition that he or she enter into a good behaviour bond (commonly called a section 10 and previously known as a section 556A order), or enter into an agreement to participate in and comply with an intervention program designed to promote the offender's treatment or rehabilitation.

In determining whether or not to make any such order the court must take into account:

- the offender's character, previous criminal history, age, health and mental condition;
- the extenuating (mitigating) circumstances in which the offence was committed;
- any other matter that the court thinks proper to consider.

If an offender breaches the condition to be of good behaviour he or she can be convicted and sentenced for the original offence.

## Good Behaviour Bond (section 9 bond)

The court can also record a conviction and instead of imposing a sentence of imprisonment make an order directing the offender to enter into a good behaviour bond.

A good behaviour bond always contains the condition that the person under the bond must be of good behaviour during the term (i.e. the duration) of the bond. An offender under a bond must appear before the court if called on to do so at any time during the term of the bond for any alleged breach of it. An offender who has breached a good behaviour bond may be re-sentenced by the court for the original offence. A good behaviour bond cannot exceed five years.

## Probation attached to a bond

When a court decides to attach a condition of probation to a bond, the offender is subject to the supervision and control of the Community Offender Services for a specific period of time.

## Non-association and place-restriction orders

For an offence that has a penalty of six months imprisonment or more, a court may, in addition to any other sentence, make a non-association order, a place-restriction order or both in respect of the offender if it is satisfied that it is reasonably necessary to do so to ensure that the offender does not commit any further offences.

A non-association order can prohibit the offender from mixing with or associating with a specified person for a specified term.

A place restriction order can prohibit the offender from frequenting or visiting a specified place or district for a specified term. The order can be for a period of up to 12 months.

## Fines

A fine is a monetary penalty and is the most frequently used sentencing option in Australia. The amount of the fine is expressed in penalty units and one penalty unit is currently \$110. The maximum penalty units available for an offence is set out in the legislation.

## Community Service Orders

Instead of imposing a sentence of imprisonment on an offender, a court can impose a Community Service Order of up to 500 hours, depending on the class of offence (for some offences the maximum number of hours may be less).

When a Community Service Order is imposed, the offender is required to perform supervised work for the community, for which he or she is assessed to be suitable. The Community Offender Services are responsible for supervising the offender.

## **Imprisonment**

A sentence of imprisonment is the most serious sentence that can be imposed and must only be imposed when no other sentence would be appropriate. It is seen as a sentence of 'last resort'. It can take the form of full-time imprisonment served at a correctional centre, periodic detention or home detention.

## **Periodic detention**

If a court has decided to sentence an offender to imprisonment for less than three years, the court may order that the offender serves the sentence by way of periodic detention. This means that the offender will spend a certain period of time each week or month in prison, but not the whole time. For example, an offender can be sentenced to weekend detention, which means he or she spends the weekend in gaol, but is free to work or attend education in the remaining period.

Sentences for certain offences, for example some sexual offences, cannot be served this way.

## **Home detention**

Where a total sentence (that is, the non-parole period and additional term) of 18 months or less is imposed, the offender might apply to serve the sentence by way of home detention.

Sentences for certain offences involving violence, such as murder, attempted murder, manslaughter, sexual assault, armed robbery, firearms offences, assault occasioning actual bodily harm, stalking or certain serious drug offences cannot be served this way.

A sentence of home detention cannot be imposed if the offender:

- has a record for any of the above offences; or
- has been convicted of a domestic violence offence in the past five years; or
- has had an Apprehended Violence Order made against them in the past five years, where the victim of that order lives at the proposed home detention address.

Home detention is regarded as a lesser sentence than full-time imprisonment. Conditions can be imposed, which permit the offender to leave home for certain approved periods, for example, for the purpose of employment or receiving medical treatment. Compliance with the order is supervised by way of electronic monitoring and random visits by a Probation and Parole Officer.

## **Suspended sentence**

Sentences of imprisonment for two years or less may be suspended on the condition that an offender enters into a good behaviour bond. If the conditions of the bond are breached the court may revoke the bond, and the offender can be required to serve the sentence that was suspended in addition to being sentenced on the breach of the bond.

## **Deferred sentence**

The court can postpone passing sentence on an offender for a period of up to 12 months from the date of conviction to allow the offender:

- to be assessed for rehabilitation; or
- to demonstrate that rehabilitation has taken place; or
- for any other purpose.

At the end of the period the court will sentence the offender after considering any additional information or developments that have occurred.

## **Alternatives to sentencing**

In some instances the court may convict the offender and order that no sentence be imposed. This is a section 10a order - in effect a conviction without sentence.

The court may find the offence proved and unconditionally dismiss the charge. This is a section 10 (1) (a) order - in effect a finding of culpability with no conviction or penalty (sentence) conditional or otherwise.

## **Proceeds of crime**

Money or property that offenders have obtained through criminal activities can be recovered from offenders in many cases under proceeds of crime legislation. This confiscation action may occur in addition to other consequences such as a fine or imprisonment.

## **UNDERSTANDING THE SENTENCE**

When sentencing an offender to imprisonment, a judicial officer will announce the term (that is, the total period in the sentence), and then will set a non-parole period.

### **Non-parole periods**

A non-parole period is the minimum amount of time that an offender will be kept imprisoned before being eligible to be released on parole.

The judicial officer must fix a non-parole period that is at least three-quarters of the term of the sentence. This rule applies unless there are “special circumstances” for setting a non-parole period that is less than three-quarters of the term of the sentence.

The court must consider whether there are special circumstances when setting non-parole periods. Factors such as the age, state of health, prospects of rehabilitation or the personal circumstances of the offender may constitute a finding of “special circumstances” so as to allow for a longer potential period and release on parole.

The earliest release date is the end of the non-parole period.

Where the sentence is of three years or less in total, the judicial officer must make an order directing the offender’s release at the end of the non-parole period. Whether or not the offender is then released on parole, subject to the supervision of the Community Offender Services depends upon the decision of the NSW Parole Authority. Where an offender fails to comply with his or her conditions of parole the NSW Parole Authority may revoke the parole.

Where the sentence imposed is more than three years, the offender becomes eligible to apply for parole at the end of the non-parole period. In this situation, parole is not an automatic right and the NSW Parole Authority will determine whether the offender will be released from custody or remain there until the end of the parole period.

A judicial officer may decline to set a non-parole period for a sentence in particular circumstances, (such as the nature of the offence, or the criminal history of the offender) and must give reasons for any such decision.

### **Standard non-parole periods**

Certain specified serious offences have “standard non-parole periods” set in legislation.

The standard non-parole period is regarded as a reference point for the judge and aggravating and mitigating circumstances may be taken into account.

## APPEALS

An offender (known as the appellant or applicant) may appeal against the conviction, the severity of the sentence, or both.

Victims of crime are an important part of the prosecution's case but are not a legal party in criminal proceedings and therefore have no right to appeal a conviction or sentence of an offender. Such appeals are proceedings between the Crown (DPP) and the offender or vice versa.

### Appeals against convictions

An appeal against conviction means that the appellant is arguing that he or she did not commit the offence for which he/she was found guilty.

### Sentence appeals

The Crown (the DPP) can appeal against a sentence on the grounds that it is inadequate or too lenient. An offender may appeal as of right to the District Court against a sentence imposed in the Local Court. An offender can appeal directly to the Supreme Court against such a sentence only on a question of law. An offender sentenced in the District or Supreme Court may seek leave (permission) to appeal to the Court of Criminal Appeal to have the sentence reduced.

A sentence appeal to the District Court from the Local Court is a rehearing of the case. This means that the judicial officer hearing the sentencing appeal will reconsider all of the evidence presented in the initial sentencing hearing. The judicial officer will usually undertake this task by reading all documents tendered at the Local Court hearing. The defence might also call witnesses to provide further evidence as to why the sentence is too harsh. The defence and prosecution will then make (usually oral) submissions.

An appeal to the Court of Criminal Appeal from a sentence imposed in the District Court or the Supreme Court will only be successful if the sentencing judge is found to have committed a legal error, including imposing a sentence that was manifestly lenient or excessive.

In very special circumstances, an appellant might be able to seek leave (permission) to appeal to the High Court against the severity of a sentence. This is the highest court in Australia.

An appellant may have bail continued or granted while waiting for the appeal even if they were given a prison sentence.

### New South Wales Sentencing Council

The New South Wales Sentencing Council (The Council) advises and consults with the Attorney General in relation to offences suitable for standard non-parole periods. The Council also monitors and reports annually to the Attorney General on sentencing trends and practices, including the operation of standard non-parole periods, and prepares research papers or reports on particular subjects in connection with sentencing.

The Council consists of 13 members appointed by the Attorney General:

- a retired judicial officer;
- one with expertise or experience in law enforcement;
- three with expertise or experience in criminal law or sentencing;
- one with expertise or experience in Aboriginal justice matters;
- one with expertise in corrections;
- one with expertise in juvenile justice;
- one representing the Attorney General's Department; and
- four representing the general community. Two out of these four persons must have expertise or experience in matters associated with victims of crime.

# CHARTER OF VICTIMS RIGHTS (*Victims Rights Act 1996*)

## 1 Courtesy, compassion and respect

A victim should be treated with courtesy, compassion, cultural sensitivity and respect for the victim's rights and dignity.

## 2 Information about services and remedies

A victim should be informed at the earliest practical opportunity, by relevant agencies and officials, of the services and remedies available to the victim.

## 3 Access to services

A victim should have access where necessary to available welfare, health, counselling and legal assistance responsive to the victim's needs.

## 4 Information about investigation of the crime

A victim should, on request, be informed of the progress of the investigation of the crime, unless the disclosure might jeopardise the investigation. In that case, the victim should be informed accordingly.

## 5 Information about prosecution of accused

1. A victim should be informed in a timely manner of the following:

- a) the charges laid against the accused or the reasons for not laying charges,
- b) any decision of the prosecution to modify or not to proceed with charges laid against the accused, including any decision to accept a plea of guilty by the accused to a less serious charge in return for a full discharge with respect to the other charges,
- c) the date and place of hearing of any charge laid against the accused,
- d) the outcome of the criminal proceedings against the accused (including proceedings on appeal) and the sentence (if any) imposed.

2. A victim should be consulted before a decision referred to in paragraph (b) above is taken if the accused has been charged with a serious crime that involves sexual violence or that results in actual bodily harm, or psychological or psychiatric harm to the victim, unless:

- a) the victim has indicated that he or she does not wish to be consulted, or
- b) the whereabouts of the victim cannot be ascertained after reasonable inquiry.

## 6 Information about trial process and role as witness

A victim who is a witness in the trial for the crime should be informed about the trial process and the role of the victim as a witness in the prosecution of the accused.

## 7 Protection from contact with accused

A victim should be protected from unnecessary contact with the accused and defence witnesses during the course of court proceedings.

## 8 Protection of identity of victim

A victim's residential address and telephone number should not be disclosed unless a court otherwise directs.

## 9 Attendance at preliminary hearings

A victim should be relieved from appearing at preliminary hearings or committal hearings unless the court otherwise directs.

## 10 Return of property of victim held by state

If any property of a victim is held by the State for the purpose of investigation or evidence, the inconvenience to the victim should be minimised and the property returned promptly.

## 11 Protection from accused

A victim's need or perceived need for protection should be put before a bail authority by the prosecutor in any bail application by the accused.

## 12 Information about special bail conditions

A victim should be informed about any special bail conditions imposed on the accused that are designed to protect the victim or the victim's family.

## 13 Information about outcome of bail application

A victim should be informed of the outcome of a bail application if the accused has been charged with sexual assault or other serious personal violence.

## 14 Victim impact statement

A relevant victim should have access to information and assistance for the preparation of any victim impact statement authorised by law to ensure that the full effect of the crime on the victim is placed before the court.

## 15 Information about impending release, escape or eligibility for absence from custody

A victim should, on request, be kept informed of the offender's impending release, or escape from custody, or of any change in security classification that results in the offender being eligible for unescorted absence from custody.

## 16 Submissions on parole and eligibility for absence from custody of serious offenders

A victim should, on request, be provided with the opportunity to make submissions concerning the granting of parole to a serious offender or any change in security classification that would result in a serious offender being eligible for unescorted absence from custody.

## 17 Compensation for victims of personal violence

A victim of a crime involving sexual or other serious personal violence should be entitled to make a claim under a statutory scheme for victims compensation.