

# SENTENCING PRINCIPLES

*“Sentencing does not fall exclusively within the province of the criminal courts... Sentencing authority is distributed between the legislature, the judiciary and the executive. Legislative policy and executive practice have an equally profound impact on the form of the sanction and the manner in which it is discharged.”*

*Sentencing State and Federal Law in Victoria, 2<sup>nd</sup> ed, Richard G Fox and Arie Freiberg, Oxford University Press, 1999 at p 10*

## **The role of the legislature**

In the Northern Territory, the legislature (the Legislative Assembly) has prescribed the penalties which may (or must) be imposed and the guiding principles which courts must apply in determining what sentencing order is appropriate. The statute creating the crime or offence will usually indicate the maximum penalty which may be imposed and sometimes may also prescribe a minimum penalty. There are numerous Acts which create offences, but the most common ones dealt with by the courts are the *Criminal Code*, the *Misuse of Drugs Act*, the *Summary Offences Act* and the *Traffic Act*. In some cases an Act may provide that only one sentence or sentencing option is available. The sentencing guidelines and sentencing options (and minimum penalties for particular classes of offences) are to be found principally in the *Sentencing Act* (as amended from time to time), or, in the case of youths, in the *Youth Justice Act*.

The subject of parole is dealt with principally in two Acts. First, the *Sentencing Act* contains certain provisions which –

- require a non-parole period to be set by the courts in most cases;
- preclude a non-parole period from being set by the court in minor cases;
- confer a discretion on the court not to set a non-parole period, where the Judge does not consider it appropriate for a non-parole period to be set.

Secondly, the *Parole of Prisoners Act* deals with the process of parole once the court has passed sentence. It provides for the establishment of a Parole Board and for parole officers

and for the circumstances under which parole may be granted or revoked. The Parole Board's functions are –

- to decide whether or not to grant parole once the non-parole period set by the court has expired;
- to determine the conditions of parole in the case of individual prisoners;
- to determine whether any and if so, what action is to be taken if the parolee breaches the conditions of his parole;
- through the parole officers, to supervise parolees with a view to having them returned to the community as useful law-abiding citizens.

The legislature has also provided laws dealing with the subject of prisons, home detention and community service: see the *Sentencing Act*, the *Prisons (Correctional Services) Act* and the *Prisons (Correctional Services) Regulations*.

Territory courts also deal with persons charged with offences against the laws of the Commonwealth. The various Commonwealth laws also provide for the maximum penalties (and in some cases mandatory minimum penalties) which may or must be imposed for each particular offence. In addition Commonwealth laws prescribe the guiding principles which must be considered by a sentencing court in arriving at an appropriate sentence and the range of sentencing options available. These are to be found principally in the *Crimes Act 1914* (Cth) as amended from time to time. Whilst there are many similarities in the relevant provisions of the *Crimes Act* to that of the *Sentencing Act* (NT) there are also considerable differences.

### **The role of the executive**

The principal function of the executive is to provide the resources in terms of manpower and facilities to carry into effect the laws relating to prisoners held on remand, sentenced prisoners, prisons and the supervision of prisoners on home detention or who are released on suspended sentences or on parole; the carrying into effect of community service orders, perpetrator's program orders and diversionary programs; the preparation of pre-sentence reports for the use of the courts; and the preparation of reports for consideration by the Parole

Board. The executive is thus involved in both the pre-sentence and post-sentence stages of sentencing.

In addition the executive has power under the *Sentencing Act* to remit sentencing orders imposed by the courts and to release prisoners at any time (irrespective of whether or not a prisoner is eligible for parole). A power to pardon persons convicted by the courts is preserved by s 431 of the *Criminal Code*.

### **The role of the courts**

The courts' functions are principally as follows:

- to grant or refuse bail to persons charged with offences in accordance with the provisions of the *Bail Act*;
- to try persons accused of offences. Only a court may decide whether or not a person is guilty of a particular offence;
- to impose whatever sentencing disposition is appropriate in accordance with the laws of the legislature and relevant sentencing principles;
- to interpret the laws to ascertain the intention of the legislature if the law is not clear;
- to hear appeals from a finding of guilt or from a sentencing order.

In the case of an appeal against sentence, either the prosecution or the defence may appeal to a higher court against the sentence imposed.

### **The purposes of sentencing**

These are set out in s 5(1) of the *Sentencing Act* which provides that the only purposes for which a sentence may be imposed are:

- to impose retribution – to punish to an extent or in a way which is just in all the circumstances;
- to provide for the rehabilitation of offenders;
- to deter the offender from offending again (special or personal deterrence);

- to deter others from committing the same or a similar offence (general deterrence);
- to show the community that the impugned conduct is to be condemned;
- for the protection of the community.

A sentence may not be imposed which does not serve at least one or more of those purposes and s 5(1) does no more than reflect the common law. For example, preventative detention, i.e. a sentence which is designed to detain a prisoner in custody beyond what is a just punishment merely because there is a risk that the offender may offend again if released, cannot be imposed unless there is a valid law enabling that to be done and the requirements of that law have been met. There is no such law in the Territory, although the Supreme Court has a power in certain limited cases to impose an indefinite sentence upon a violent offender under Subdivision 4 of Division 5 of the *Sentencing Act*. However, the court cannot use that power unless certain formalities (designed to give warning to the offender) have first been complied with and unless the specific criteria spelled out in the Act are established by the prosecution.

The Commonwealth *Crimes Act 1914* does not specify the purposes of sentencing. However s 16A (1) requires a court to impose a sentence or make an order that is of a severity appropriate in all the circumstances of the case.

### **Sentencing Discretion**

*“However, sentencing is not a purely logical exercise and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.”*

*Veen v The Queen* [No 2] (1987-88) 164 CLR 465 at 476 per Mason CJ,  
Brennan, Dawson & Toohey JJ – High Court of Australia

The *Sentencing Act* does not specify what weight the court must give to each of the purposes of sentencing. However there are sentencing principles established by the common law which provide guidance to sentencers. These principles apply not only in the Northern Territory but throughout Australia and in many overseas countries with an advanced legal system such as the United Kingdom, the United States of America, Canada and New Zealand. The failure of the sentencing court to correctly apply these principles could lead to the sentence being quashed on appeal. Some of the more commonly applied principles are:

- a sentence of imprisonment should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances (the proportionality principle);
- rehabilitation is usually given more weight in the case of young offenders;
- general deterrence is usually given less weight in the case of an offender suffering from a mental disorder which reduces the offender's moral culpability for the offending unless there is a strong need for community protection;
- an offence involving a breach of trust is likely to be dealt with more severely than the same offence not involving a breach of trust;
- more weight will be given to rehabilitation if the offender has pleaded guilty, particularly if remorse is shown, or reparation or compensation has been made or is available;
- whilst a sentence may not be increased so as to punish an offender again for past offending which has already been dealt with, prior convictions for the same offence or for an offence of the same general class is likely to result in more weight being given to punishment, deterrence and the protection of the community;
- informers are likely to be dealt with more leniently if the assistance given to the authorities in bringing other offenders to justice is of any value to the prosecuting authorities;
- leniency may be afforded to a sole parent or to a person of advanced years;
- the maximum penalty is reserved for offending which falls into the worst category of offending for that offence;

- persons who commit like offences should, all things being equal, receive like sentences;
- the more severe the consequences of the offending, the more likely it is that a heavy sentence will be imposed;
- the weight to be given to the purposes of sentencing depends upon the moral culpability of the offender. For example, an offender who steals because of need would normally be treated more leniently than an offender who steals because of greed;
- similarly, an offence which is planned in advance may be more heinous than one committed on the spur of the moment.

These and other sentencing principles are subject to considerable refinement which are discussed in decided cases not only from this jurisdiction but from around the world as well as in the leading text books on sentencing.

### **Tariff sentences and guideline judgments**

A “tariff” presupposes that there is a normal range of sentences for a particular offence. Where such a tariff exists, sentences to be imposed by different Judges or Magistrates should fall within that range, unless the circumstances of the offence or of the offender are exceptional. Tariffs are most likely to be found in respect of offences which are dealt with on a regular basis – e.g. driving offences – but could also exist in respect of more serious offences, such as armed robbery.

Some offences, by their nature, cover such a broad range of prohibited conduct or occur in circumstances where the level of criminality is exceptionally variable that a tariff is not possible – for example, manslaughter, sexual assaults and dangerous acts. In non-tariff cases, references to sentences imposed by other Judges or Magistrates are not likely to be particularly helpful as providing any reliable guide. Although Judges and Magistrates will sometimes be assisted in this fashion, usually they are already aware of the broad sentencing range normally used.

In England, dating from the 1970s, the Court of Appeal developed the concept of the “guideline judgment” which suggests a sentencing scale for certain common offences and identifies the main aggravating and mitigating factors likely to be present. Guideline judgments have now become more common in Australia, particularly in New South Wales.

The Court of Criminal Appeal of the Northern Territory has also on occasions delivered guideline judgments. Guideline judgments operate in a similar way to tariff sentencing.

### **Matters to which the courts must have regard**

These are set out in s 5(2) of the *Sentencing Act*, or in relation to Commonwealth offences, in ss 16A and 16B of the *Crimes Act 1914*. There are a number of common provisions in both Acts which by and large reflect common law principles. Some matters specifically mentioned by the sections include the nature and circumstances of the offence, the injury loss, or damage caused by the offender, the harm done to any victims, the defendant's age, character and intellectual capacity, any assistance given to law enforcement agencies and whether or not the defendant has pleaded guilty. The *Sentencing Act* also specifically maintains any aggravating or mitigating circumstances, whilst the *Crimes Act 1914* refers to the defendant's prospects of rehabilitation. The sections require the court to take into account any other relevant matters.

### **Arriving at the sentence**

After considering all of the relevant factors, the sentencer arrives at what he or she considers appropriate by way of the head sentence and the minimum term, if any, or by imposing what he or she considers appropriate if a non-custodial sentencing order is required. There is no formula; and, subject to the power of the court to identify a specific reduction in the sentence by reason of a plea of guilty or for some other reason, the process cannot be dissected into parts.

The sentencer must balance all the relevant factors and the competing considerations and arrive at an appropriate result.

### **The sentencing hearing**

The usual procedure after there has been a finding of guilt or a plea of guilty, is for the prosecutor to outline the facts alleged by the prosecution as constituting the offence, to refer the court to any matters of aggravation relied upon and to tender any records or documents which are to be relied upon, such as photographs of the crime scene, the prisoner's record of interview and past criminal history and any victim impact statements available. The prosecution will also refer the court to the likely sentencing options, to any relevant case law or statutory provisions upon which the prosecutor intends to rely and may refer the court to any other similar cases, or if a tariff is to be relied upon, evidence of the tariff range. There

may also be evidence tendered to show other matters, for example, that the offence is becoming too prevalent, or that the existing sentencing range is inadequate and needs to be adjusted.

The defendant's counsel then puts any submissions he may wish to put to the court in mitigation and calls any evidence which may be relied upon, such as evidence of good character. Counsel for the defendant may also draw to the court's attention any relevant case law and statutory provisions, as well as to any sentences delivered in other similar cases.

If any of the facts or other material relied on by either side is in dispute, it is necessary for evidence to be called in the usual way.

### **Minimum terms and suspended sentences**

Except in special circumstances, when a court decides to impose a sentence of imprisonment, a minimum term or "non-parole period" must be set. The principal exceptions under Northern Territory law are:

- where the sentence to be imposed is for 12 months or less;
- where the court considers that it is inappropriate to fix a minimum term.

If a minimum term is set, it must be:

- not less than 50% of the head sentence;
- in the case of sexual offences, not less than 70% of the head sentence.

(Any period of a mandatory minimum term does not count as part of the head sentence for the purpose of calculating the minimum period of the minimum term).

Where the offence is murder the *Sentencing Act* provides for a minimum non-parole period of 20 years or in some cases, 25 years, although the court may fix a longer non-parole period or even decline to fix a non-parole period.

The purpose of setting a minimum term is to enable the Parole Board to consider whether or not to conditionally release the prisoner under supervision before the head sentence has been fully served. The object of parole is to enable prisoners to be returned to the community

whilst under the supervision of a parole officer. This is designed to ensure that rehabilitation is effected.

Where the head sentence is for less than five years the court may usually suspend the whole or a part of the sentence. (There are some exceptions which prevent the court suspending the whole of a sentence.) If the offence is a Commonwealth offence, a suspended sentence is usually required if the head sentence is for less than three years. The purpose of a suspended sentence is to effect rehabilitation into the community.

Parole orders and suspended sentences are usually subject to conditions requiring supervision by an officer of the Department of Correctional Services, and may also require the prisoner to undergo specific programs designed to reduce or eliminate anti-social behaviour. They may place restrictions on the prisoner relating to residence, employment, or associates, as well as other matters individually tailored to meet the circumstances of the case.

Breaches of parole conditions or the conditions of a suspended sentence, especially by reoffending, usually result in further action being taken, often with the result that the term of imprisonment held in suspense is reactivated. The prisoner may have to serve an additional term for any new offence or offences.

### **Home detention**

This is an alternative to imprisonment in a gaol and is an available option where the term to be served is not lengthy. The maximum period of home detention is 12 months. A home detention order (HDO) can only be made where the court has sentenced a person to imprisonment, but has ordered that the sentence be suspended. Home detention confines a person to his or her house, although the conditions will also permit him or her to leave home to attend employment, or for medical treatment and for other stated purposes included in the order. Home detention saves the State the costs of incarceration in a prison and enables the prisoner to earn a living. He or she can continue to support his or her family, thus relieving the social security system from having to provide benefits. Breaches of the HDO conditions have very serious consequences. In some cases the court has no option but to reactivate the whole of the suspended sentence, even if the breach occurred on the last day of the HDO. It is well recognised that home detention is for many people more difficult than an actual term of imprisonment and only those thought likely to complete the HDO will be offered this opportunity.

## **Alternatives to imprisonment**

Apart from suspended sentences and home detention orders, the legislation provides for a wide range of sentencing options including community service orders, fines and bonds. Very minor breaches of the law may result in the court ordering the defendant to be released with or without recording a conviction, or even in the charge being dismissed if the offence is trivial. These options are usually only available if there is no mandatory minimum term applicable. The courts have the power to combine one or more of these options, e.g. imprisonment and a fine or a fine and community service. Failure to pay a fine or to perform community service or to be of good behaviour will result in enforcement proceedings which often results in imprisonment.

Sometimes legislation allows for other sanctions such as forfeiture, reparation orders, restitution, or license disqualification.

## **Appeals**

An appeal against a sentence imposed by a magistrate lies to a single Judge of the Supreme Court. There is a further right of appeal from a single Judge to the Court of Appeal constituted by three Judges. Both the prosecution and the defence may appeal.

An appeal against a sentence imposed by a Judge exercising the Supreme Court's criminal jurisdiction lies to the Court of Criminal Appeal constituted by three judges. The defendant may only appeal by leave of the court, but the prosecution has an absolute right of appeal.

Appeals by the prosecution (which are called Crown Appeals) are, in practice, far less common than appeals by defendants and are subject to special considerations:

- usually an appeal will not be allowed to correct an error made by the sentencer if the error was caused by the conduct of the prosecutor, or if the prosecutor failed to give the sentencer adequate information or assistance;
- appeals by the prosecutor are not encouraged unless there is a matter of principle involved or unless the sentence is well below what is a proper sentence.

Regardless of who appeals, an appellate court is not permitted to allow an appeal unless sentencing error is shown. This means that the appellant must show that the sentencer applied

a wrong principle, or misapplied a relevant principle, or took into account an irrelevant circumstance. If no specific error can be shown, an appellate court will infer that an error was made if the sentence imposed was manifestly excessive or manifestly inadequate, but not otherwise.

A further appeal to the High Court of Australia is available only by special leave of the High Court, which is rarely granted and then only because some important principle is involved, or in order to correct a manifest injustice.

### **Public Opinion and Community Expectations**

*“The media pastime of criticising the judicial role in sentencing usually focuses upon the courts’ alleged leniency and disassociation from public opinion”.*

*Sentencing State and Federal Law in Victoria*, 2<sup>nd</sup> ed, Richard G.Fox and Arie Freiberg, Oxford University Press, 1999, at p 29

There are several competing principles involved in the extent to which sentences should be influenced by public opinion. On the one hand it has been said by the Victorian Court of Criminal Appeal that, drawing on the experience of the Criminal Courts in Victoria, there had been a significant increase in recent times of a certain type of offence and that

*“...in recent times there has been evidence of a rising tide of public indignation. The courts are bound to respond to legitimate community concern with the response placing emphasis on the need to give effect to both specific and general deterrence”.*

*Wayland*, 14 September 1992

This type of problem usually arises when it is suggested that an offence is “prevalent” or “becoming increasingly prevalent”. Usually sentencers may act on their own knowledge of prevalence if that fact is notorious in the community, but otherwise prevalence and especially increased prevalence ought to be proved by the prosecution by the calling of evidence and it has been said that the judicial response needs to be a controlled and measured one, “particularly so at times when well-organised and well orchestrated campaigns for heavier

sentences are being conducted in the community” (*Bateman*, Supreme Court of Victoria 28 June 1977 per McGarvie, J.)

Where it is appropriate to take action, the response usually taken is not to increase the general level of sentencing but to give less weight to mitigating factors that may then result in a “firming up” of the sentence for such an offence.

Nevertheless, there still remains discretion in sentencers in individual cases to extend mercy in appropriate circumstances. As was said by King CJ in the leading South Australian case of *Yardley v Betts* (1979) 22 SASR 108 at 112-113:

*“To say that the criminal law exists for the protection of the community is not to say that severity is to be regarded as the sentencing norm. Times and conditions change and the approach of judges to their task must be influenced by contemporary conditions and attitudes. But public concern about crime, however, understandable and soundly based, must never be allowed to bring about departure by the courts from those fundamental concepts of justice and mercy which should animate the criminal tribunals of civilized nations... The protection of the public must remain our first concern, but if, consistently with that, we can, in our compassion, assist another human being to avoid making ruin of his life, we ought surely to do so.”*

### **Backdating sentences**

When an offender has been held in custody on remand, the courts are empowered to ante-date the commencement date of the sentence to take into account the time that the prisoner has already been held in custody.

## **YOUTH OFFENDERS**

### **Definition**

A “youth” is any person who, at the time of the commission of the offence, has not attained the age of 18 years.

## **Special provisions for youths**

It is universally accepted throughout the world that youths should not be dealt with by the courts on the same basis as adults. Much more emphasis is placed on the rehabilitative aspects of sentencing and usually general deterrence is given less significance. In the Northern Territory, as in other places, this is achieved by:

- the establishment of a special court for youths, the Youth Justice Court;
- special sentencing provisions which apply only to youths;
- lower punishment than would be the case for adults.

The Act which provides for this special regime is presently the *Youth Justice Act*, but the Supreme Court retains its jurisdiction to deal with serious offences committed by youths.

## **Jurisdiction of the Youth Justice Court**

All offences in the Northern Territory fall into two broad categories; those which are indictable and those which are not. Indictable offences are those which are regarded as being particularly serious and usually they carry heavy maximum penalties. Indictable offences fall into two classes; those which are called ‘minor indictable offences’ and those which are not. Sections 121 and 121A of the *Youth Justice Act* define those offences which are classified as minor indictable offences. In some cases, a magistrate may deal with a minor indictable offence summarily, although the more serious minor indictable offences can only be dealt with summarily with the consent of both the prosecution and the youth. The Youth Justice Court has the power to deal with minor indictable offences summarily, although the more serious minor indictable offences can only be dealt with summarily with the youth’s consent.

If the Youth Justice Court has jurisdiction to deal with a matter summarily, the Court may nevertheless decline jurisdiction if it feels that the case should be dealt with by the Supreme Court.

If the Youth Justice Court has jurisdiction and deals with the matter summarily, its sentencing powers and sentencing options are dealt with by s 83 of the *Youth Justice Act*. That section provides for an ascending order of dispositions ranging from discharging the youth without conviction to imposing a sentence of detention or imprisonment.

## **Jurisdiction of the Supreme Court**

Section 57 of the *Youth Justice Act* provides that the Youth Justice Court may refer the youth to the Supreme Court for sentencing. In the case of murder committed by a youth, the Supreme Court may impose a sentence of imprisonment for life or such shorter period of imprisonment as it thinks fit.

In addition to its original jurisdiction, the Supreme Court constituted by a single judge hears appeals against conviction or sentence by the Youth Justice Court. Further appeals lie to the Court of Appeal and ultimately to the High Court of Australia (by special leave only).

## **Sentencing options**

The options available under s 83 of the *Youth Justice Act* include, besides imprisonment or detention:

- periodical imprisonment or detention;
- partly suspended imprisonment or detention;
- wholly suspended imprisonment or detention;
- approved project participation which, if successfully completed, may result in the charge being dismissed;
- community work in an approved project;
- good behaviour bonds (subject to conditions);
- a fine;
- discharge without penalty.

The Youth Justice Court has the power to impose these options with or without recording a conviction.

Under s82 of the *Youth Justice Act*, the Supreme Court may impose any sentence which it is open to impose on an adult.

## **Sentencing Principles which apply to youths**

Section 4 of the *Youth Justice Act* does not specifically provides guidance as to the principles to be applied when sentencing youths. The relevant principles are also derived from decisions of the courts which are based on an interpretation of the purposes and objects of the legislation. The most frequently applied principles are:

- youths, because of their immaturity, are less able to form moral judgments, less capable of controlling impulses, less aware of the consequences of their acts and less responsible and less blameworthy than adults and therefore deserve less punishment than adults;
- detention or gaol is a sentence of last resort to be avoided unless all other options have been excluded;
- even in the case of repeat offenders, detention or imprisonment is not usually imposed unless all other options have been tried unsuccessfully;
- very serious offending may still warrant a sentence of detention or imprisonment even for a first offence in order to protect the community;
- the extent of the offender's culpability depends not only on the offender's age, but also on his level of maturity;
- in the case of minor offending, the court should tailor its sentence to strengthen and preserve the child's relationship with its family, to ensure that the child's education or employment is not unduly interfered with, to minimise the stigma to the child as a result of a court appearance, but as well to ensure that the child is made aware that its behaviour is unacceptable and must be modified in the interests of the community;
- the main focus is on promoting the young offender's development as a law abiding member of the community rather than special or general deterrence.

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The Court (2009)