



# Judge for yourself

A Guide to  
Sentencing  
in Australia



PUBLISHED BY THE JUDICIAL CONFERENCE OF AUSTRALIA

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## About this booklet

This booklet is published by the Judicial Conference of Australia as a free resource to members of the public who wish to gain a better understanding of the system of sentencing offenders in Australia.

The JCA is the national representative body for Australian judicial officers. It has a membership of some 600 judges and magistrates, and is a non-profit organisation largely funded by its members.

A number of courts, government departments and other organisations in each state have very kindly provided photographs for use in this booklet. They are acknowledged in the captions below each image.

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The JCA is extremely grateful for the assistance provided by these organisations.





Stories involving court cases are constantly in the news *Image: JCA*

News reporting of sensational crime cases and “cops and robbers” shows on television, particularly from overseas, can give an inaccurate impression of the way the justice system really operates in Australia.



American courtroom drama *Image: JCA*

## Public perception of crime

Reports and feature stories of crime and punishment are constantly in the news. Criminal law, law enforcement, criminal prosecutions and sentencing of offenders generate a great deal of public interest.

Television, newspapers and radio, thrive on reporting serious or emotive criminal cases, especially if well-known people are involved, whether as offender or victim, or even both.

Matters of crime and punishment fascinate the public because criminal behaviour is often raw, startling and - for many people in the community - extremely unsettling and disturbing.

Crime, and the way it is reported, can affect the psychological well-being of people and indeed influence their everyday lives.

The high level of interest may also partly reflect the community's experience with the fictional treatment of crime and punishment through television, cinema, books and magazines. Australian television is saturated with “cops and robbers” shows – Australian, American, British and sometimes even European ones.

For many people these programmes are pure entertainment, but they may also affect people's views about crime and punishment in the real world. Many people are surprised to discover that the Australian judicial system does not mirror the one they see on television and the movies. They have watched American legal dramas on television and understandably think our courts operate just like American ones. In fact, they are very different in many respects.

Sentencing seems to attract more interest than any other aspect of the criminal justice system. When a person has broken the law and has caused harm or distress to others, the community expects that the sentencing process will punish that person appropriately - that “something will be done”.



The Chain Gang - early historical drawing of Australian convicts

*Image: Allport Library and Museum of Fine Arts, State Library of Tasmania*

## Our brutal past

Australia used to torture prisoners with some of the harshest punishments imaginable. We subjected convicts to hangings, brutal floggings, or solitary confinement in chains and iron masks. One aim was to reform criminals so they would never offend again. But we slowly learned the inescapable truth; brutal punishment creates angrier and more violent people.

Today, sentencing laws are designed to be much more effective as well as humane. They allow courts to impose financial penalties or loss of freedom ranging from life imprisonment to having to complete unpaid community work several hours a week. They may also provide for offenders to be diverted to treatment or other programs designed to prevent them from re-offending.



Melbourne Magistrates Court

*Image: Vic Dept of Justice*

## The facts behind sentencing

This booklet attempts to provide answers to some of the many questions people have about how sentencing occurs in Australia.

What factors does the court take into account? How much discretion does the judicial officer have?

To what extent is the discretion limited? Why is a particular penalty chosen? Why a non-custodial sentence rather than imprisonment? Why a minimum sentence of three years for a bashing rather than, say, ten years? Is the sentence going to be effective? How will we know?

These questions will be considered from the point of view of judges and magistrates who daily impose sentences in the courts. We try to explain in broad terms what courts do in the sentencing process and why they do it. We also respond to some common criticisms that are made about sentencing.

The sentencing process is at the very core of the criminal justice system. Every community needs to devote a good deal of time and energy to producing a justice system that is as logical, rational, sensible and effective as possible.

This task is not simple and it is never finished. That is because the nature and amount of crime changes over time, community attitudes shift and new approaches to the legal system are always being suggested. A constant process of monitoring and up-dating the system is necessary.

Changes in sentencing laws and procedures can sometimes be influenced by criticisms of courts from the public, lawyers, police or those working in corrections, as well as the media.

Some criticisms of the system are well-founded and persuasive, while others reflect a lack of understanding about what the system can achieve - or disagreements about what it should be trying to achieve.



Victorian State Parliament

*Image: JCA*

## How everyone is involved

Sentencing reflects our sense of right and wrong and the kind of society we want to live in. Every adult Australian bears some responsibility for it.

We decide what law and order policies to vote for, and by letting politicians know our attitude we help shape the sentencing laws that governments pass.



Melbourne Magistrates' Court

*Image: Vic Dept of Justice*

## The who's who of sentencing

Before considering what a judicial officer does in sentencing, we first need to look at the full picture of how a person gets to be sentenced.

While it may appear that judicial officers are solely responsible for sentencing, much of what they do is guided by laws set by governments. In Australia sentencing is a shared responsibility between three groups:

### Parliaments:

- Create offences
- Specify maximum penalties
- Specify principles for the courts to apply
- Create the tools/sanctions available to the courts

### Courts:

- Apply the law within the framework set by parliaments
- Set specific sentences for individual offenders
- Higher courts also specify principles for lower courts, as well as hear appeals against leniency or severity of sentences
- Have no control over an offender once sentence passed

### Executive:

- Correctional authorities – run community corrections programs and the prisons
- Controls movements of offenders in prison
- Parole boards - supervise offenders while on parole



New South Wales Parliament

Photo Andrew Taylor - courtesy: The Age

## The crucial role of parliaments

Parliaments at federal, state and territory levels:

- Decide what kind of behaviour will be treated as a criminal offence by passing new laws and changing old ones.
- Decide the nature and range of penalties that courts can use when sentencing offenders convicted of various offences.
- Decide what kinds of cases will be handled at different levels within the court system.

Parliaments usually limit themselves to specifying the maximum sentence that can be imposed for particular offences. The main purpose of a maximum penalty is to indicate the appropriate penalty for cases falling within the worst category of cases of that nature, for example in Victoria 25 years' imprisonment is the maximum penalty that can be imposed for armed robbery - or 10 years' imprisonment for theft.

For some offences, parliaments have created mandatory penalties. Examples are fixed fines for speeding offences and prescribed penalties for a driver who exceeds a certain blood alcohol level. The Commonwealth and Western Australian parliaments have set mandatory minimum prison terms for certain serious or repeat offences. (See pages 33-35 for a discussion on mandatory sentencing).

Parliaments also have a major role in creating and funding the infrastructure and services that are necessary to implement the various kinds of sentences available to the courts.

For example the prison system, probation arrangements, hospital orders, intensive supervision orders, drug treatment orders and home detention all require laws to be passed as well as substantial funding to implement the measures. Ultimately, it is the government (through parliament) that allocates funding for the operation of the entire criminal justice system – including the courts.



The High Court, Canberra Photo: Steve Wray - Dept. of Environment & Heritage

## Australia's court system

Australia is a federation, with a Federal Government, as well as state and territory governments. Generally speaking, each jurisdiction has its own court system.

State and territory criminal cases are heard in their respective state and territory courts. Prosecutions for alleged breaches of federal criminal law are also heard in state and territory courts.

Therefore, if a crime is committed in New South Wales, the case will be heard in a New South Wales court.

### Each state and territory has its own:

- Criminal laws and procedures
- Court systems
- Sentencing laws
- Prisons and community corrections systems.

There are close similarities in the laws and procedures of most states and territories, but penalty types and penalty ranges vary.

In this booklet we discuss the practices generally adopted by courts.

### Which court is which?

The High Court of Australia is the ultimate court of appeal for the whole country. It guides state and territory courts in interpreting and applying sentencing principles. Larger states have three levels of courts:

- (1) Supreme Courts – which hear the most serious cases such as murder and manslaughter.
- (2) District or County Courts – which hear serious cases, such as rape, armed robbery and culpable driving.
- (3) Magistrates or Local Courts – which hear the vast majority of prosecutions for less serious offences.

Smaller states and territories like Tasmania, the ACT and the NT have only two levels of courts – Supreme and Magistrates' Courts.



Three judges of the SA Supreme Court

Image: SA Supreme Court

## What makes a judicial officer?

Judicial officers are appointed by the Attorney-General of the Commonwealth, or of the state or territory concerned. Judicial officers not only must be actually unbiased, courts also see it as very important to be perceived as unbiased.

In sentencing offenders, Australian judicial officers are part of a strong tradition of professionalism, independence and impartiality. They must adhere to principles of fairness, justice and the rule of law.

The lawyers who are appointed to judicial office are knowledgeable about legal principles. They usually have extensive practical legal experience and are familiar with the workings of the courts.

Most have practised in the courts for many years as barristers or solicitors. They are, in other words, accomplished professionals.

## An independent judiciary

The judicial officers who perform the sentencing function in our courts are part of the judicial branch of government, which is separate from the legislative and executive branches.

The importance of separating the different branches of government in a modern democracy is that it provides a series of checks and balances for the protection of the community.

As a key part of this, the judicial system is independent of the legislative and executive branches of government, to ensure that criminal and civil cases are heard and decided independently, impartially and fairly.

Another crucial element of judicial independence is that judges and magistrates have security of tenure, which means that they can't be "sacked" or removed from their position by the government.

In most courts, judicial officers are appointed until they are 70 years old, unless they decide to take earlier retirement.

While different arrangements operate for different levels of courts and jurisdictions, elaborate procedures exist to ensure that judges and magistrates can be removed from office only in very limited circumstances.

These procedures are deliberately intended to protect the community by preventing governments from getting rid of judicial officers for political reasons, or because they decide cases against the interests of the government of the day.

Judicial officers are independent, not only from government, but also from each other. This means that individual judges and magistrates are able to hear and decide cases entirely on their merits and free from any inappropriate interference - even from within their own court.



State Government department offices.

*Photo: Ivan Herman*



Offenders cleaning a park under a community sentence order *Image: Vic Dept of Justice*

## The executive branch of government

The executive branch – state and federal departments and statutory authorities created by governments and usually headed by senior public servants – has key roles to perform in the sentencing system.

Members of the executive branch of government advise the relevant minister (usually the Attorney-General) on sentencing policy. They also assist the government of the day by proposing amendments to the criminal law and to legislation governing sentencing.

In some states, the executive employs court administrators who facilitate the day to day operations of the courts. However, some courts are self-governing and engage their own staff.

While they perform important functions, the administrative staff of courts do not play any direct role in the sentencing process.

The main sentencing responsibility of the executive is to implement sentences imposed by the courts, such as:

- A term of imprisonment
- Community-based sanctions, for example, community work or drug treatment
- Home detention
- Probation
- A fine.



An offender removes graffiti under a community sentence order. *Image: Vic Dept of Justice*

## Who decides how a sentence will be served?

To know how Australia's criminal justice system operates, it is important to understand the different functions and separate powers of the various branches of government involved in its administration.

Under the Australian criminal justice system, judicial officers who impose a sentence have very little - if any - control over the way the sentence is actually implemented.

The executive branch determines, for instance, how many prisons there are, how they operate and what programmes and services they offer. It is these authorities, and not the courts, that decide whether offenders will be in a maximum, medium or low security prison.

Similarly, government departments in each state are responsible for the kind of work an offender must perform under a community sentence or the conditions they will experience during a prison sentence.

Judicial officers cannot "order" treatment in prison: they can only recommend it.



Construction of the new Wellington Correction Centre.

*Image: NSWDC*

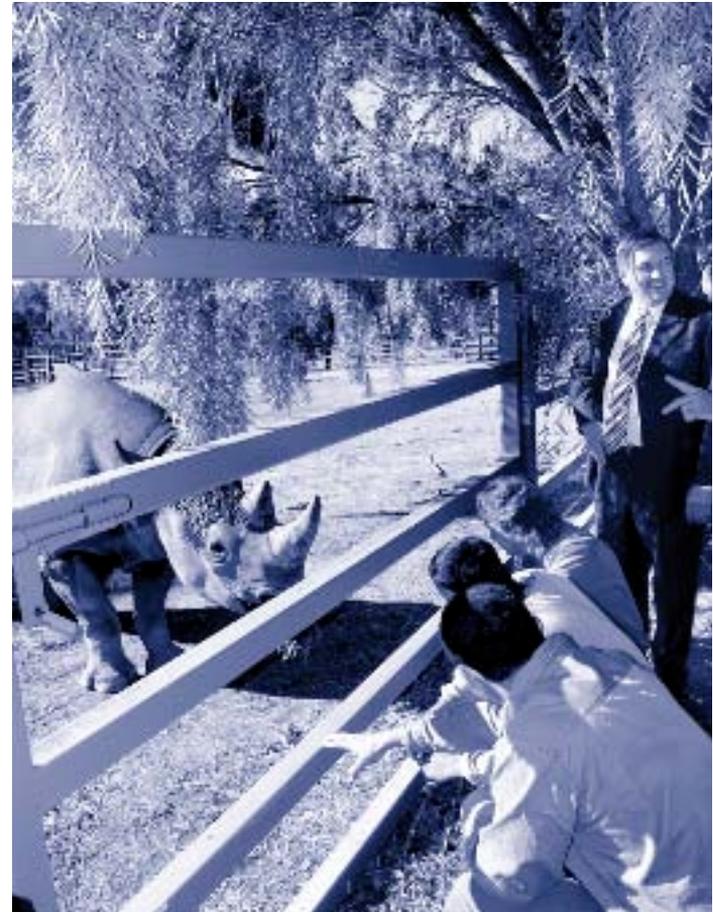
## Parole Boards

The Parole Board, whether Adult or Youth, decides on the release of prisoners at the expiration of their minimum or "non-parole" periods. Parole is a conditional release before the end of a sentence of imprisonment.

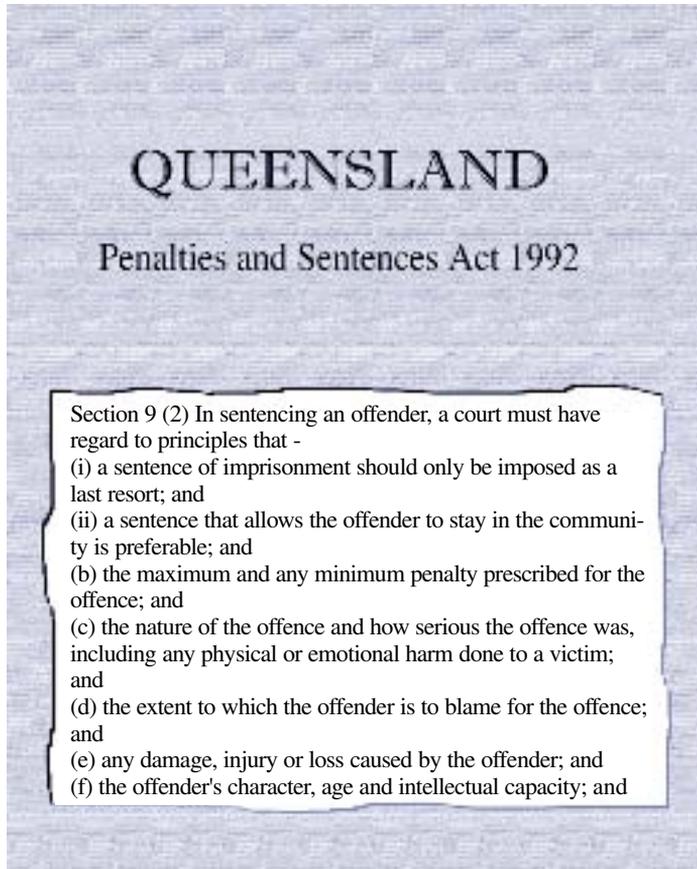
These boards are usually made up of serving or retired judges, victims' representatives, behavioural experts of various kinds and members of the general community.

It is the task of these boards to decide whether a prisoner is ready to be released into the community under supervision. Parole is a means by which part of a sentence can be served in the community.

The parole system allows the prisoner's suitability for freedom to be tested. Breach of parole conditions can result in the prisoner being required to serve the balance of his or her term in prison.



Minimum security prisoners help refurbish the Rhino enclosure at the Western Plains Zoo in Dubbo .  
*Image courtesy of NSW Department of Corrective Services*



An example of the guidelines set by sentencing laws that judicial officers must operate within. The above shows a few of a long list of principles set by just one sub-section of the Queensland Penalties and Sentences Act. Similar legislation exists in each state. *Image: JCA*

## How does sentencing happen?

Laws govern the sentencing of offenders. Judicial officers cannot simply choose a particular sentence because they think it is “a good idea” at the time.

They must operate within the sentencing limits set by legislation and the principles laid down by the superior courts. There are two main types of legislation that have to be considered.

The first is an Act of Parliament that contains guidelines about the sentences courts should impose. A list of the sentencing laws in each state is shown below. Generally such legislation contains things like:

- The purposes for which sentences can be imposed
- Factors a judge must take into account when sentencing
- The types of sentences (for example imprisonment or community orders) that can be imposed.

## Sentencing legislation across Australia

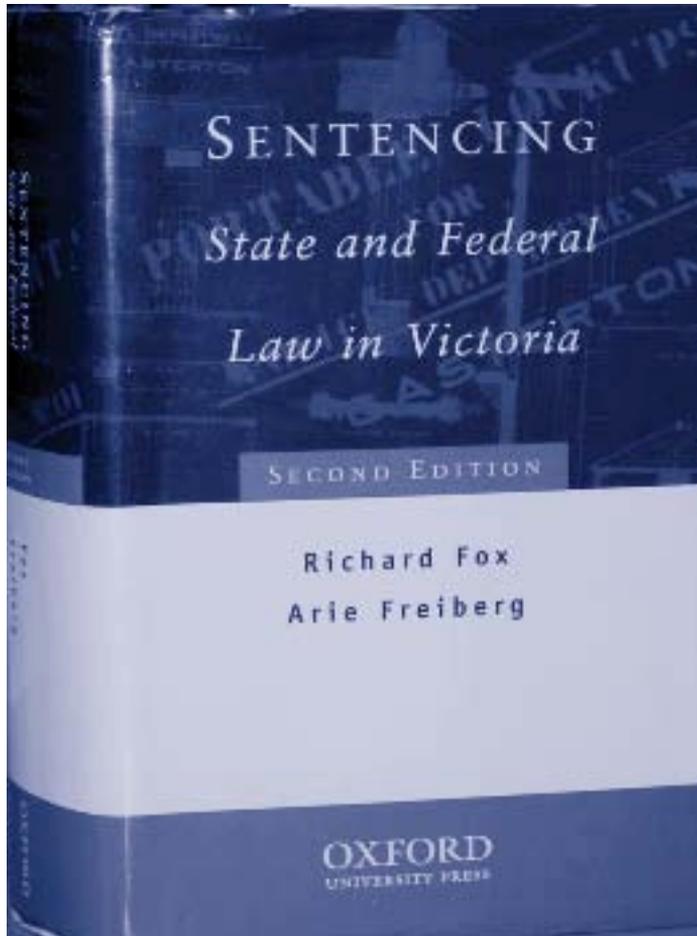
<b>Australian Capital Territory</b>	Crimes (Sentencing) Act 2005
<b>New South Wales</b>	Crimes (Sentencing Procedure) Act 1999
<b>Northern Territory</b>	Sentencing Act 1995
<b>Queensland</b>	Penalties And Sentences Act 1992
<b>South Australia</b>	Criminal Law (Sentencing) Act 1988
<b>Tasmania</b>	Sentencing Act 1997
<b>Victoria</b>	Sentencing Act 1991
<b>Western Australia</b>	Sentencing Act 1995

## Laws that define the crime

The other type of legislation that controls how judicial officers sentence offenders are laws that define the specific offences of which the offender has been convicted.

Such laws are often contained in the Crimes Acts of various states, and they usually stipulate the available penalty options - including the maximum penalties - that judicial officers can impose.

Laws of this kind and the sentencing laws create boundaries within which a sentencing court must operate. But they still allow the judicial officer to exercise a discretion by imposing a penalty less than the maximum - if he or she believes it appropriately reflects the nature of the offence and the circumstances of the offender.



One of many books dealing with the complexities of Australian sentencing Image: JCA



EXAMPLE: In the Australian Capital Territory the crime of 'Culpable driving of a motor vehicle' which is contained in the Crimes Act 1900 (ACT) specifies a maximum penalty of seven years imprisonment. A convicted person must also automatically be disqualified from holding or obtaining a driver licence.



A jury sitting in the South Australian Supreme Court Image: Ben Searcy Photography

## Jury trials are rare events

In 2003-2004, 95.9 per cent of all prosecutions in the Australian criminal courts were initiated in the Magistrates Courts, 3.5 per cent in District or County courts and 0.6 per cent in Supreme Courts (AIC, *Australian Crime: Facts and Figures 2005*).

These figures exclude the millions of cases dealt with as infringement or penalty notices, such as minor traffic offences.

In the magistrates courts, 85 per cent were found guilty, and 4 per cent were acquitted. (The rest were disposed of in some other way.) Of those found guilty, about 80 per cent had pleaded guilty.

In the higher courts, 73 per cent pleaded guilty, 6 per cent were acquitted and 8 per cent were found guilty by a jury. Jury trials take place in only about 0.3 per cent of all criminal prosecutions.

## When does sentencing happen?

Sentencing comes at the end of a long and complex criminal justice process. In the majority of cases, the process may go a bit like this:

Firstly some apparently criminal behaviour is reported to the police. For the behaviour to be considered a crime, it must be defined as such in a statute or in "common law". The police then investigate the complaint, and decide whether to charge someone with the crime.

The prosecution agency (either the police or an independent prosecution authority) will then decide whether the case will proceed to court. Not all cases go to court - sometimes there is not enough evidence to support a prosecution.

If the case proceeds, there will be a court hearing to decide if the person is guilty or not guilty. This can happen in two ways:

- The person charged with the crime pleads "guilty". Therefore the court finds them guilty and proceeds to the sentencing process; or
- The person charged with the crime pleads "not guilty". There will then be a hearing, usually in front of a judge and jury (in a higher court) or a magistrate in a lower court.

The court will take into account all of the evidence presented by the defence and prosecution and decide whether the person's guilt has been established "beyond reasonable doubt". If so, the court proceeds to the sentencing of the offender.



Supreme Court building, Darwin

*Image: NT Dept. of Justice*

## The sentencing hearing

During a sentencing hearing, much information is presented to the court to assist it in deciding the most appropriate sentence in the circumstances.

When there has been a trial, the judge or magistrate will have already heard evidence about the offence and, generally, evidence at the sentencing hearing will be about the offender's background and circumstances.

The court may also receive evidence about the effect on the victim(s) at the sentencing hearing. When a person has pleaded guilty, the judicial officer is usually given a statement setting out the facts constituting the offence.

All of the issues that must be considered by the judicial officer are set out in the sentencing legislation of the Commonwealth, state or territory (depending on the particular offence).

### Three main issues:

Put in very simple terms, there are three main issues that a judge or magistrate must consider. They are:

- The purpose or purposes to be achieved by the sentence.
- Any mitigating factors - generally these are matters that decrease the culpability of the offender and therefore usually have the effect of reducing the severity of the sentence.
- Any aggravating factors – these are matters that increase the culpability of the offender, and therefore usually have the effect of increasing the severity of the sentence.



Brisbane Magistrates Court.

Image: Qld Magistrates Court

## The purposes of sentencing

All sentencing legislation in Australia outlines the purposes that may be considered when imposing a sentence. The main purposes are:

### **Punishment**

- usually means imposing a sentence that inflicts some kind of pain or loss on the offender.

### **Rehabilitation**

- means imposing a sentence that will help to change the offender's behaviour into that of a responsible citizen.

### **Specific deterrence**

- means discouraging the particular offender from committing more crimes.

### **General deterrence**

- refers to the idea that potential offenders in the community will be discouraged from committing a particular crime when they see the penalty imposed for that kind of offence.

### **Denunciation**

- is a formal public expression that the behaviour is unacceptable to the community.

### **Community Protection**

- means both protecting the community from the offender and from crime generally.

### **Restorative justice**

- means promoting the restoration of relations between the community, the offender and the victim.



Statue at the Supreme Court building, Melbourne.

Image: Vic. Dept of Justice

## Balancing the reasons for a sentence

Often the purposes of sentencing overlap, and it is very rare for a sentence to be imposed for only one purpose.

For example, a prison sentence could be imposed for "specific" and "general" deterrence, as well as for rehabilitative purposes. The court might think that the convicted person should receive psychiatric treatment or be placed in a drug or alcohol management program while in prison.

Of course, a prison sentence might simply be imposed to punish the offender by depriving him or her of freedom for a period.

### Different crimes

The purposes of sentencing may differ for different crimes, depending on their seriousness. For crimes like murder or armed robbery, the major purposes are likely to be punishment and general deterrence. For less serious crimes such as graffiti or malicious damage, the judicial officer might view rehabilitation as the major consideration when imposing the sentence.

### Different offenders

If the offender is a young person, the judicial officer might see it as more desirable to attempt to rehabilitate the offender, rather than punish him or her. On the other hand, an older offender with a long list of prior convictions might be considered suitable for a punitive or community protection sentence.

### Different purposes – similar result

A young offender might be sentenced to a juvenile detention centre by one judicial officer for deterrent purposes, while another might do the same in the hope of rehabilitating the offender.



District Court with jury - Western Australia.

*Image: WA District Court*



Minimum security inmates doing forestry work.

Image: NSWDC

## What sentencing laws require

Sentencing legislation specifies the matters that courts must take into account when passing sentence. These include:

### The nature and circumstances of the offence

Offences vary greatly in the way they are committed. Some crimes are planned, others occur on the spur of the moment; some cause great harm to the victim, others very little; some are committed alone, others by gangs.

### The degree of criminality

The number of offences and their seriousness are relevant to the degree of criminality.

### The victim's circumstances

Some victims may be young or very old, or more vulnerable to crime because they are physically or mentally incapacitated or for other reasons. Such factors may warrant a more severe sentence.

### Any injury, loss or damage

A judicial officer must weigh up the degree of loss or the extent of injury to the victim in order to determine how serious the particular is to be regarded.

### Any mitigating factors

These could include whether the offender has shown contrition for the offence; whether he or she has pleaded guilty; whether the offender has attempted any form of restitution; and the extent to which the offender has co-operated with law enforcement agencies investigating the particular offence or other offences.

*Continued next page:*

### The offender's personal circumstances

The character, previous behaviour (including any criminal record), cultural background, age, means and physical or mental condition of the offender are also likely to be considered.

An older offender with many prior convictions who has failed to respond to previous court orders will generally be treated more severely than a young first time offender who, if given a chance, might turn away from a criminal career.

### The offender's family or dependants

The judicial officer may consider the effect that any sentence might have on the offender's family or dependants.

However only in cases of exceptional hardship does the court take into account the effect of imprisonment on an offender's family.

### Avoiding unnecessary punishment

As a general rule, a judicial officer should not impose a sentence that is more severe than is necessary to achieve the purpose for which the sentence is imposed.

If being ordered to do work in the community rather than being imprisoned can adequately punish an offender, then the judicial officer should require the offender to perform community service.



Court cells, Adelaide.

Image: Ben Searcy Photography



Furniture workshop, maximum security.

Image: NSWDC

## The sentencing options

### Imprisonment

Imprisonment is the most severe sentence available to the courts in Australia, as capital punishment has long been abolished. Prisons are classified as high, medium or low security, but a judge cannot direct the prison authorities where to hold a person sentenced to imprisonment.

Most longer sentences of imprisonment will include a period of parole. Conditions of release on parole include supervision. Offenders can be returned to prison if they breach the conditions of their release.

### Community based sanctions

These orders may require an offender to perform unpaid work in the community, attend educational or rehabilitative programs, be supervised by a correctional officer or undergo assessment or treatment.

### Home detention

Home detention requires an offender to remain in his or her house for a certain period of time. The person may be allowed outside the house at times during the day or at times in the week, and may be subject to supervision and electronic monitoring. Home detention may also be a condition of bail, or a condition of release from prison on parole.

### A fine

A fine can be imposed as an alternative or addition to a prison or community sentence. Judicial officers take into account the financial circumstances of an offender when imposing a fine. Courts are aware that a fine of \$1,000 may be less punitive to a wealthy person than a fine of \$100 would be to a person on a low income.



Image: Vic. Dept. of Justice

## Putting it all together

The judicial officer's task is to determine the appropriate sentence after taking into account all the relevant circumstances.

The sentence may not fully satisfy anyone – the victim, the offender or the public – but that does not necessarily mean there is anything wrong with it. On the contrary, it may well indicate that the judicial officer has appropriately balanced all the competing considerations (see Purposes of sentencing - page 17).

## Appeals

If the offender or the prosecution thinks a judicial officer has made a mistake in sentencing – for instance if they believe a sentence is too harsh or too lenient – they can appeal to a higher court. Sometimes sentencing appeals go all the way to the High Court in Canberra.

Usually, an appeal court cannot just substitute its own opinion on what is an appropriate sentence. It can only change the sentence if it believes the lower court has made a legal mistake in exercising its discretion.

Although many cases go through the courts each year, relatively few cases are appealed.

For example, in New South Wales in 2005, 120,565 persons were found guilty in the Local Courts. There was an appeal against the severity of sentence in 4.2% of cases, and against the inadequacy of sentence in only 0.03% of cases.



## Newsworthiness

The fact that a criminal case is newsworthy does not mean that most people consider the sentence imposed on the offender to be inappropriate. But media interest in a trial often leads to the sentence receiving very close public scrutiny.

The media may be interested in a criminal case for many reasons. The alleged offender may be very well known, as with high profile business people involved in corporate failures or sporting identities who fall foul of the law.

The circumstances of the offence may be particularly horrifying or disturbing, as with gruesome murders, "gang" rapes or sexual abuse of children.

Sometimes ordinary things we do – like driving cars – produce tragic consequences that can attract widespread attention.

Left: Barrister John Doris is surrounded by media during a high profile murder trial at Sydney District Court. *Photo Adam McLean - courtesy: The Age*

## Common criticisms of sentencing

Criticisms are frequently made of particular sentences and of the sentencing process generally. Usually the critics argue that sentences are too lenient and that judicial officers are "out of touch" with community opinion.

The cases that attract this kind of criticism tend to involve particularly brutal conduct by the offender, particularly tragic consequences for innocent victims, or both.

Because the media concentrates on the more sensational cases, most people have very little information about the much more typical cases that are dealt with by the courts.

Of the more than 740,000 sentences imposed by Australian courts each year, the vast majority follow a standard pattern for the particular offence.

More than 95% of these cases are dealt with in the Magistrates or Local Courts. These decisions are usually unreported and uncontroversial and generate little or no public debate.

For the most part, prosecutors, victims and offenders accept the outcomes as reasonable and do not appeal. Because these cases form the majority of sentencing decisions in Australia, it is fair to say that the system is working effectively and consistently.

### Appeals against sentencing NSW 1996 - 2000

**Defence appeals against sentence severity 1,314**

**Appeals against inadequacy of sentence**

**269**



Victorian Chief Justice Marilyn Warren (pictured above) said in a paper in April 2005:

*"Of the thousands of cases dealt with in higher courts each year, most appeals against sentence complain that they are too severe.*

*"Those cases are rarely reported in the media. It is not surprising, therefore, that the public may gain a distorted impression of sentencing practices in Victoria".*

## The “soft on crime” perception

One of the by-products of media coverage of newsworthy court cases is an impression that judicial officers are “soft on crime”.

Many victims of criminal offences take an objective view of the sentencing process and are satisfied with the outcome. However the views of satisfied crime victims are not usually considered to be newsworthy.

Victims who are not satisfied that a sentence reflects their suffering and pain are much more likely to be quoted – and their views are more newsworthy because they generate controversy and conflict.

In other words, the public hears about the few disappointed victims rather than many satisfied ones.



Police escort a prisoner charged with a violent crime into the Mildura Magistrates Court.  
*Photo courtesy: The Age*

### No jail for killing his best mate

By Katie Laphorne

A MAN who killed his best friend with a drunken punch walked free in court yesterday on a wholly suspended sentence.

The devastated family of Benjamin Francis, 19, say justice has not been done and the sentence is a kick in the guts.

Dan Henry Leatham, 20, pleaded guilty to the manslaughter of his life-long friend after a night of drinking and card games at his Benwick home on September 3, 2004.

He was sentenced in the Supreme Court to three years' jail with a minimum of two but left court with his family when the term was suspended for three years.

Mr Francis' parents said their lives had been ruined. "We feel we have been betrayed... by the justice system, totally abandoned, and our son's life meant nothing," mother Laura Francis said.

"He'd have to answer to God and to me."

Peter Francis said he was angry Mr Leatham would do no time in jail.

"He spent three hours in the police cells at Narre Warren for this offence and that is all he can ever do," Mr Francis said.

"A suspended sentence is not making him accountable for what he's done. Everyone knows they are a waste of time."

The court heard Mr Francis and Mr Leatham drank spirits until Mr Francis tried to go to bed around midnight.

Mr Leatham bargained him to stay up, but Mr Francis said he would walk home and left.

Mr Leatham later told police he followed Mr Francis, tagging on his pocket to stop him.

He said Mr Francis said he was to "piss off" and gave him a shove. Mr Leatham said he punched Mr Francis in the face because he feared getting a "slight" hit when his friend spun around quickly in response to a tap on the shoulder.

Mr Francis fell and hit his head on the road, fracturing his skull. He died in hospital hours later.

The court heard Mr Leatham, who cares for a disabled mother, was extremely remorseful and muddled with guilt.

Justice Barron Bergin said Mr Francis' death was unintended but was no accident.

It was a "product of aggression fuelled by a really excessive amount of alcohol," he said.

He said Mr Leatham's case was exceptional and prosecutors conceded a suspended term was within guidelines.

Image created from news article posted on the Melbourne Herald-Sun's website at: [www.news.com.au](http://www.news.com.au). Story published on 29 August 2006.

## A case in point

Comparing the impression given by the newspaper story on the left with the reasons for the sentence given by Justice Bernard Bongiorno in the Supreme Court of Victoria is an interesting exercise.

The story concentrates on the outrage of a victim's family over a "soft sentence". However the reasons given by Justice Bongiorno when delivering the sentence provide a much deeper insight into the case.

The following are short extracts taken from the detailed reasons provided by Justice Bongiorno when handing down the sentence:

7. ...Ben swung around quickly such that you thought he was going to give you a "slight punch". You reacted by punching Ben in the face on the left hand side. This punch proved to be fatal.

8. As a result of the punch Ben fell, landing heavily on the bitumen road and striking the back of his head. This impact fractured his skull. It was this event, caused by your punch, which caused Ben Francis' death. It was then about 1.00 am on 4 September.

9. At the time you punched Ben Francis you and he were both extremely drunk. You had both been drinking whisky for some hours. Analysis of a blood sample taken from him at 2.20 am, after he had been admitted to hospital, showed a blood/alcohol concentration of 0.14 gram/100 ml. There can be little doubt that your blood/alcohol concentration, had it been measured, would have been at least as high.

10. Perhaps because of your intoxicated state, after Ben fell to the roadway at first you did not realise what had occurred. When you did appreciate the seriousness of the situation, you attempted to seek help. This resulted in the attendance of an ambulance and police but only after some confusion as to where you both were was allayed.

11. After treatment at the scene Ben Francis was taken by ambulance to the Dandenong Hospital and subsequently to the Monash Hospital at Clayton where he died at 6.40 pm that evening.

30. The Crown has properly conceded that, in this case, a sentence capable of suspension is within the range of sentencing options open.

This concession does not, of course, bind this court to impose any particular sentence. But it necessarily implies that the Crown regards a custodial sentence of three years imprisonment as being within the range of available sentences in this case.

31. Unless there were very significant mitigating factors present in a manslaughter case a sentence of three years imprisonment would normally be regarded as very lenient, perhaps too lenient. However, I am constrained to agree with your counsel that this case is exceptional and that justice can be served by the imposition of a gaol sentence which is capable of being suspended.

32. The law requires a court to impose an immediate custodial sentence only if no other sentencing option can properly fulfil the objects for which the sentence is to be imposed.

This sentencing principle applies with particular force to young offenders with no prior criminal history and the probability of effective rehabilitation. You fall into this category of offender. The evidence is very strong that you will not offend again.

33. I propose to sentence you to three years imprisonment and to order further that you serve a minimum of two years before being eligible for parole. That sentence will be suspended for three years.

However, before making this sentencing order I must ensure that you understand that the imposition of a suspended sentence carries with it the virtual certainty that you will have to serve that sentence in prison if you commit a criminal offence within the period of suspension.

It is only in exceptional circumstances that a court could relieve you from serving the whole of that sentence, subject to its minimum term, should you commit another offence within three years.

Do you understand that?

## Apparent inconsistencies in sentencing

A common criticism is that there are disparities in the sentences imposed by courts – that similar offences and offenders receive quite different penalties from different courts or different judicial officers.

The reality is that, even within the same category of offences, circumstances can vary immensely - leading to different sentences being appropriate for individual circumstances.

### One crime – different circumstances

Part of the problem is that the law places criminal behaviour into categories that are easy to recognise. Virtually everyone would agree that murder is a most serious offence.

But the circumstances involved in murder can be vastly different. For example, most people would regard a contract killer who kills another person for money as being very different from someone who kills to relieve suffering (euthanasia).

The sentences will rightly differ - even though both cases involve the one offence of murder.

### One crime – different offenders

There may also be great differences between offenders who appear to commit precisely the same crime. For example two men may commit an armed robbery of a service station.

On the face of it, the offences are identical, suggesting that their sentences should also be identical or, at least, very similar. But the offenders may have very different backgrounds. One may be an older man with a long criminal record, including offences of violence.

The other may be much younger with no criminal record. The older man may have been the ringleader; the younger a follower.



Supreme Court, Western Australia

Image: WA Supreme Court

The younger man may have confessed and assisted the police to apprehend the older offender. It is likely in this situation that the older man will receive a more severe penalty for the same crime.

These examples illustrate that what might seem to be judicial inconsistency can usually be explained by the very different circumstances of each offender.

The available evidence suggests that, despite the discretion built into the sentencing process, the courts do generally achieve consistency and balance in sentencing.



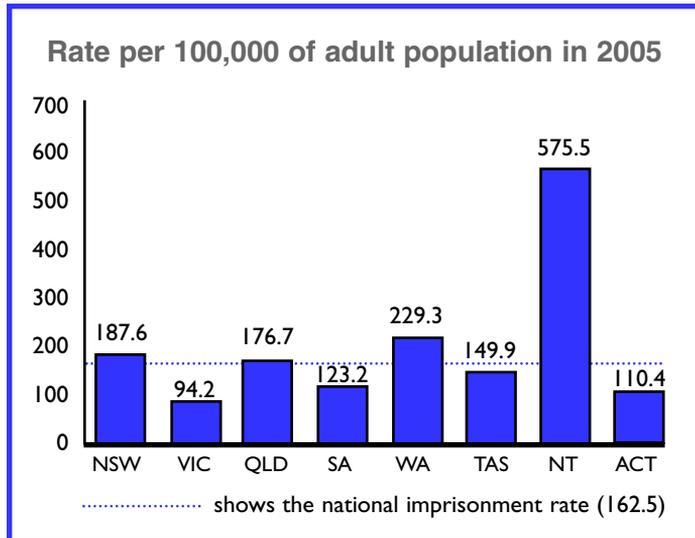
The dock - South Australian Supreme Court, Adelaide.

Photo: Ben Searcy Photography



## Imprisonment rates in Australia

Imprisonment rates vary widely across Australia, reflecting both different rates of crime and different judicial and community attitudes as to how we should respond to crime.



## Specialist Courts

The purpose of specialist courts is to improve outcomes for those coming before the courts and for the community as a whole. People brought before these courts generally present with one or more underlying issues - such as social or cultural disadvantages, mental ill health, a disability or substance abuse.

Specialist courts are an example of judicial officers and policy makers responding to the special needs of people who have been identified as being marginalised and whose problems leading up to an offence being committed have been overlooked.

Specialist courts are also a response to the “revolving door” nature of crime and punishment - that is, they are seen as an attempt to address the issues that lead to anti-social behaviour.

Current thinking is that problem-solving rather than conventional sentencing may be a better approach in these types of cases.

Specialist courts are generally less formal and more flexible than traditional courts, and are designed to make the participants more comfortable - and hence more compliant and responsive to the court’s decisions.

This approach is more individual, personal, welfare and service focused - rather than following the traditional procedures of the criminal courts.

The types of courts that have been established include:

- **Neighbourhood justice courts**
- **Drug courts**
- **Indigenous courts**



A Community Justice Court in North Liverpool, England. *Image: UK - CJC*

## Neighbourhood justice courts

The Victorian Department of Justice will open Australia's first community justice centre in Collingwood, an inner suburb of Melbourne, in January 2007.

Called the Neighbourhood Justice Centre (NJC), it will work closely with the local community to reduce the impact and incidence of crime, and will provide on-site support services for victims, witnesses, defendants and local residents.

The NJC approach recognises that members of the local community are best placed to understand the impact and incidence of crime in their own community.

The NJC will work closely with residents, traders, police and support agencies to improve safety in the local community, and to address the underlying causes of offending.

It will aim to provide opportunity, education and support for victims, witnesses, defendants and residents; assist in preventing crime and to increase community involvement in the justice system.

## Drug courts

A drug court is a court, or a division of a court, responsible for sentencing and supervising the treatment of offenders with drug or alcohol dependency who have committed an offence under the influence of drugs or alcohol or to support a drug or alcohol habit.

Drug courts or drug court programs operate in all states and territories except Tasmania and the ACT. There are also youth drug courts in New South Wales and Western Australia.

## Indigenous courts

Indigenous courts aim to reduce perceptions of cultural alienation, and tailor sentences to the cultural needs or special circumstances of Aboriginal offenders.

There are two kinds of indigenous courts in Australia: those in urban centres that sit a few days each month and those in more remote Aboriginal communities where judicial officers travel on circuit.

Such courts currently operate in Western Australia (Aboriginal Community Courts), Victoria (Koori Courts), South Australia (Nunga Courts), Queensland (Murri Courts) and New South Wales (Circle Sentencing Courts).

In each case Aboriginal Elders assist magistrates in the sentencing process as community cultural advisers. This contributes to an informal atmosphere and enhances understanding by all participants as well as a greater commitment to outcomes.



Queensland Drug Court in session.

Source: Qld Drug Court

## Mandatory sentencing

Some people expect sentencing to be an automatic process, free of any exercise of discretion or judgment by the court.

It is not impossible to imagine a system in which judicial officers mechanically apply penalties set out in a statute, regardless of the facts of the case or the circumstances of the offender.

For example, for a very long time in Australia a murder conviction attracted a mandatory death sentence. The court had no discretion, even in cases where mercy was clearly called for.

If the ability to use discretion is removed, courts lose the flexibility which is the key to achieving justice. It was for that reason that even in the days of the mandatory death penalty, the government could commute the death sentence in what were thought to be deserving cases.

The difference between that system and the modern sentencing process is that the Government made the ultimate decision, rather than the courts.



Image: Vic. Dept. of Justice

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Ronald Ryan, the last person to receive the death penalty in Australia, was hanged at Melbourne's Pentridge Prison in 1967.

Widespread public protests against his execution led to the abandonment of capital punishment in Australia.

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Pentridge Prison

Image: JCA



Photo: Ben Rushton - courtesy The Age

## Problems with mandatory sentencing

Critics of sentencing often claim that there is a need to limit judicial discretion – and the most common proposal is to introduce or extend mandatory sentencing.

Mandatory sentencing schemes fall into two broad categories. One is where the penalty is literally mandatory, in the sense that the court has absolutely no choice but to impose the specified penalties.

An example is a law that demands a specific penalty for trafficking in more than a prescribed quantity of an illicit drug. It was a law of this kind that recently led to the execution of a 25 year-old Australian who was arrested in Singapore carrying 14 ounces of heroin - an amount that automatically attracted the death penalty under Singapore law.

The second category is “mandatory minimum sentencing”. For example, a conviction for armed robbery might require the court to impose a minimum term of, say, 10 years’ imprisonment. This means that the court would have no choice but to impose at least the minimum term of imprisonment. This form of mandatory sentencing retains some element of judicial discretion, in the sense that judges can impose sentences above the minimum.

However such a system does not allow a judge to take into account the nature of the offence or the background of the offender, in order to impose a more lenient penalty than the minimum.

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**Left:** Thousands of candles were lit in an “Amnesty vigil” held in Martin Place, Sydney, in November 2005, as part of a national vigil for Nguyen Tuong Van, who received a mandatory death sentence after being arrested with 14 ounces of heroin at Singapore’s Changi Airport.



A cell in Katingal Prison NSW.

*Photo courtesy The Age*

## The “blunt instrument” approach

Professional studies of mandatory sentencing regimes have identified serious problems of injustice, which include:

Offenders whose culpability is very different can receive the same sentence.

Discretion in sentencing is not eliminated, but is transferred to other people in the system, such as police and prosecutors, who are far less publicly accountable than the courts.

The schemes are biased against the poor and the marginalised including, in Australia, indigenous people. Some offenders receive lengthy terms of imprisonment for relatively trivial offences, thereby undermining public confidence in the justice system.

The regimes overlook the nuances of situation, responsibility and social harm that should properly determine the penalty for criminal conduct (the “blunt instrument” phenomenon).

Mandatory sentencing is very expensive for the community and diverts resources away from more effective programs, such as better education, health and social services.



West Australian Supreme Court in Perth, built in 1903. *Image: Supreme Court, WA*

## A vital independence

Governments are nearly always looking at sentencing policy to see what refinements or adjustments might be needed to ensure the system is effective and meets the needs of the community.

Politicians sometimes respond to sentencing issues as they arise, and try to persuade the community, especially at election times, that they have the right answers to the problems of crime and punishment.

This response usually involves claims that their particular political party will be tougher on crime than their political opponents, and that they will provide the community with higher levels of protection from crime.

In these political debates it is common for one side to accuse the other of operating policies and practices which are "soft on crime".

One of the great advantages of our legal system is that the courts remain free of political interference from any government or political party.

The courts can continue to make decisions about guilt or innocence, and to hand down appropriate sentences in accordance with the guidelines set out in legislation.

But it is fundamental to Australia's justice system that judicial officers are independent of government and cannot be subjected to political interference.



## Sentencing advisory councils

There are some promising moves to improve mutual understanding about sentencing between the community and the justice system.

These include the establishment in New South Wales and Victoria of Sentencing Advisory Councils that include members of the general public, lawyers and academics.

The stated purpose of the Victorian Council, for example, is to bridge the gap between the community, the courts and governments in relation to sentencing – by informing, advising and educating.

The work of sentencing councils is the latest in a series of initiatives designed to make the sentencing process increasingly transparent and accessible to the community.

Sentencing Advisory Councils act as a link between the community on the one hand, and government and courts on the other. Members of the public are appointed to these bodies to reflect community views, as well as bring different kinds of expertise to the discussions.

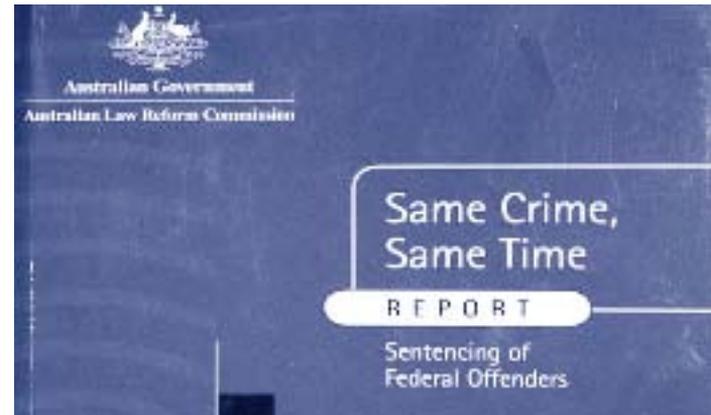
## How you can become involved

In our legal system the public is not directly involved in the sentencing process. There is scope, though, for interested members of the community to influence sentencing policy at the political level.

The most obvious way of doing this is for people to contact their local member of parliament or the responsible minister (usually an Attorney-General). In this way, people can make their views known about sentencing policy and practice.

Another avenue is to take advantage of the work of Parliamentary Law Reform Committees or Law Reform Commissions, which are quite often asked to look at various aspects of sentencing.

Members of the public can get involved in these kinds of inquiries by making submissions or attending the public hearings which are often part of the operational procedures of such bodies these days.





## The human face of sentencing...

In the following pages, we ask selected judicial officers - who face decisions involving crime and punishment as part of their daily working lives - to give some information about their background and to express their thoughts on the difficult task of sentencing.

### Judge Roger Dive Senior Judge of the NSW Drug Court

“Before my appointment as a judge I worked in city, country and children’s courts as a magistrate for 15 years. In earlier years I had been involved in the administration of courts, and also law reform issues, such as developing new tenancy and credit laws.

*My life experiences have highlighted how many in our community, especially children, have chaotic, even dreadful, lives before becoming involved in drugs and crime.*

*As the Senior Judge of the Drug Court, I lead a team with members from both justice and health agencies, who together manage and enforce long-term change in the lives of drug addicted offenders.*

*This is a new and effective way of protecting the public from crime. As the judge, my role is to lead that team effort, develop a positive supportive relationship with each participant, and impose prison sentences if participants are unable to rehabilitate with our help.”*



**Judge Julie Dick**  
Queensland District Court

“ I have been a judge of the District Court of Queensland since 2000, and before that appointment I was Parliamentary Criminal Justice Commissioner for three years. At the bar, I practised largely in the criminal jurisdiction as both prosecutor and defence counsel.

Judges of my court sentence for a very large range of offences. In addition the facts and circumstances surrounding an offence are infinitely variable. The personal circumstances of the offender and, where applicable, the victim vary from case to case. Maximum penalties for offences differ widely.

Accordingly, the process of sentencing depends on a careful consideration of the law and the facts and a proper exercise of a judge’s discretion. In all cases, this calls for a balancing of the weight to be given to the various factors and for a conscientious effort by the sentencing judge. ”



**George Zdenkowski**  
Magistrate  
Local Courts of NSW

“ I practised as a solicitor and taught for many years in the Faculty of Law at the University of NSW (specialising in criminal justice and sentencing) where I was appointed as Associate Professor.

I served as a commissioner with the Australian Law Reform Commission, and was appointed a Magistrate of the Local Courts of NSW in 2000.

The role of sentencing requires a judicial officer to be independent, impartial and fair in the decision making process, to focus on the objective circumstances of the offence and the subjective circumstances of the offender within the framework of the law, and to communicate effectively with all the participants in the process so that the outcome is understood by all concerned, as well as by the community. ”



## Justice Ann Vanstone South Australian Supreme Court

“ I began my career in private practice, then prosecuted for a number of years, becoming Associate Director of Public Prosecutions and taking silk.

I then spent five years at the independent Bar accepting a much wider range of briefs, and was appointed to the Supreme Court - as its youngest member - in 2003. Outside the law, I study art history and enjoy tennis, golf and Thai cooking.

I see my role in sentencing being to bring to bear an impartial and fair mind to establishing the facts of the crime and understanding its impact, and then imposing a penalty which is both consistent with principle and does justice to all those concerned in the crime. ”



## Judge Margaret Rizkalla County Court of Victoria

“ I graduated in law from Melbourne University in 1975 and was appointed Victoria’s first woman magistrate in 1985. I sat as a Member on the Small Claims and Residential Tenancy Tribunal, and in 1988 was appointed President of the Victorian Equal Opportunity Board and Vice President of the Administrative Appeals Tribunal. I was appointed to the County Court of Victoria in 1994.

Sentencing is one of the most complex tasks a judge undertakes because it requires balancing a number of complex factors, both personal to the offender and particular to the offence, in order to provide a just and appropriate sentence, whilst at the same time providing justice to the offender. It isn’t a mathematical equation – in the final analysis it does require the individual Judge to make a subjective assessment of all the relevant factors and to determine how they will be applied in fixing a sentence. It is never easy. ”



Dr Kathryn Auty (centre foreground) at the Shepparton Koori Court. The parties next to her are Uncle Colin Walker and Auntie Rochelle Patten.

### **Dr Kathryn Auty Magistrate, Western Desert, Goldfields and Esperance region, Western Australia.**

Dr Kathryn Auty has been a solicitor with the Victorian Aboriginal Legal Service, a lecturer at Deakin University and a senior solicitor to the Royal Commission into Aboriginal Deaths in Custody.

She has written and co-edited books and articles on legal issues, and was a Magistrate of the Victorian Koori Court before her appointment as a Magistrate in Western Australia.

“ There have been many structural and procedural modifications in magistrates' courts, including diversion programs and the provision of bail advocacy, intellectual disability and psychological support workers. More recently, magistrates' courts have been employing Aboriginal Justice Workers to assist in Aboriginal Sentencing Courts.

In Aboriginal Community Courts (WA), Koori Courts (Vic), Nunga Courts (SA), Murri Courts (Qld) or Circle Sentencing Courts (NSW), senior Aboriginal people now assume the role of assisting magistrates as community and cultural advisers.

Sitting with magistrates, these senior community advisers provide advice about the accused and his or her family and background and cultural ties, counsel the accused about the impact of their offending and frequently condemn offending behaviour for breaching Aboriginal codes of acceptable conduct and for the impact the conduct has on victims.

The knowledge and authority of these senior Aboriginal people provides enormous assistance to magistrates. They help to gain an understanding about the roots and causes of offending behaviour and also provide Aboriginal people with a voice in the proceedings.

As a magistrate, I have found that this innovation has been the most satisfying and successful of any process in which I have been involved. It is challenging, stimulating and confronting, but it is also has a palpable impact on levels of alienation and anger amongst Aboriginal people exposed to court processes.

These courts do not provide a soft option. In the evaluations that have been conducted (and all of these courts are being evaluated) we have found that recidivism is reduced, levels of alienation from the court process are lessened and that defendants leave court with a greater understanding of the process and sentence and with a more serious commitment to completing sentencing orders. ”

## Acknowledgements:

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The first draft of the text was skilfully prepared by Professor Peter Sallmann, Honorary Professor, Faculty of Law, Monash University and Professorial Associate, Melbourne Law School, The University of Melbourne. Ms Jenni Coady, the Community Engagement Officer of the Sentencing Advisory Council of Victoria, kindly volunteered to edit the draft into a form suitable for presentation in a booklet of this kind. She performed that task most admirably and with considerable flair.

Mr Iain Gillespie, Freelance Editor, selected the photographs included in this booklet, laid out the material and carried out additional editing work. Mr Gillespie contributed to the project in a most professional, thorough and diligent manner.

The project was overseen by a Steering Committee set up by the JCA. The Committee consisted of the following:

- Justice Ronald Sackville: Chair, Federal Court of Australia
- Justice Virginia Bell: Supreme Court of New South Wales
- Justice Kevin Duggan: Supreme Court of South Australia
- Justice Elizabeth Curtain: Supreme Court of Victoria
- Magistrate George Zdenkowski: Local Courts of New South Wales
- Professor Arie Freiberg: Dean, Faculty of Law, Monash University. Chair, Sentencing Advisory Council.
- Mr Ernest Schmitt, PSM: Chief Executive, Judicial Commission of NSW
- Professor Peter Sallmann

The project would not have been possible without the guidance provided by the Steering Committee. Particular mention should be made of the extensive contributions to the project by Professor Freiberg. Not only did he bring his great expertise in the area of sentencing to the project, but he went far beyond the call of duty in ensuring that it remained on track for successful completion.

Justice Sackville has steered this project from the outset. His energy and enthusiasm have been instrumental in bringing this booklet into being.

On behalf of the JCA, I express its deep appreciation to all those who have contributed to the project.

**Bruce Debelle**

*Chairman – Judicial Conference of Australia.*

### Links for more information on sentencing:

The NSW Sentencing Council: [www.lawlink.nsw.gov.au/sentencingcouncil](http://www.lawlink.nsw.gov.au/sentencingcouncil)

The Australian Law Reform Commission:  
[www.austlii.edu.au/au/other/alrc/publications/reports/103](http://www.austlii.edu.au/au/other/alrc/publications/reports/103)

The Sentencing Advisory Council of Victoria:  
[www.sentencingcouncil.vic.gov.au](http://www.sentencingcouncil.vic.gov.au)

The Judicial Commission of NSW: [www.judcom.nsw.gov.au](http://www.judcom.nsw.gov.au)

The Judicial College of Victoria:  
[www.judicialcollege.vic.edu.au](http://www.judicialcollege.vic.edu.au)

The Judicial Conference of Australia:  
[www.jca.asn.au](http://www.jca.asn.au)

Note: The JCA's website offers a much more detailed version of the sentencing information in this booklet.

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