

# How Courts Sentence Adult Offenders

This brochure outlines what the court (a magistrate or a judge) must consider when deciding what sentence (punishment) to give an offender (someone who has been found guilty of breaking the law).

There are limits to the kinds of sentence courts can give. Courts are guided by laws made by parliament, and by decisions made by other courts.

## Who decides what offences people are charged with?

For most criminal offences, the police, or sometimes the Director of Public Prosecutions, decide what offences a person is charged with, based on the evidence. Local government, VicRoads and agencies such as the RSPCA can also charge people with offences that are sentenced in court.

## Who decides the sentence? When?

In Victoria, most people charged with offences plead guilty. If someone pleads not guilty, there is a trial or a hearing to decide if they are guilty. If a person pleads guilty, or is found guilty after a trial or a hearing, the court decides their sentence.

In the **Magistrates' Court**, sentencing usually happens on the same day that the person is found guilty. At that time, the prosecutor (a member of Victoria Police) and the defence lawyer (or the offender if they are representing themselves) will provide information to the magistrate about what the sentence should be.

In the **County or Supreme Court**, after a person is found guilty, it may be weeks (or even months) before a separate hearing (called a plea hearing) is held to decide the sentence. During this time, a pre-sentence report may be prepared, containing information about the offender that the court needs to consider when sentencing.

At the plea hearing, the prosecution (a lawyer acting for the State) and the defence (a lawyer acting for the offender) will provide information to the judge about what the sentence should be.

## The role of victims

When sentencing, the court must consider the circumstances of any victims, and the injury, loss, or damage they suffered because of the offence, regardless of whether a Victim Impact Statement has been made.

Victims have the right to make a Victim Impact Statement for the court to consider at the time of sentencing. A Victim Impact Statement is a legal statement by the victim about how the crime has affected them. It should only be made after the offender has been found guilty.

It is a good idea for victims to get help and support when making a Victim Impact Statement (for example from the Victims Assistance Program). A Victim Impact Statement must only contain admissible (relevant) details about how the crimes being sentenced in the case have affected the victim. The court is not allowed to consider inadmissible (irrelevant) details in the Statement, such as the victim's opinion of the offender, or what the victim thinks the sentence should be.

A Victim Impact Statement can be made in different ways: in writing, as a video or audio recording, or even as a drawing. Victims can read out their Statement in court or by video link, they can ask the prosecutor to read it out, or they can ask that it not be read out in court.

## The purposes of sentencing

Courts must try to achieve one or more of five purposes when sentencing:

- **Just punishment** – the sentence punishes the offender in a manner that the community considers fair in all the circumstances.
- **Deterrence** – the sentence will discourage the offender (and others) from doing it again.
- **Rehabilitation** – the sentence helps the offender recover from personal circumstances (like drugs or alcohol) that contributed to the offending.
- **Denunciation** – the sentence sends a message to the community that what the offender did is unacceptable.
- **Community protection** – the sentence will protect the community from the offender.

By law, a court cannot sentence for any other purpose (such as revenge, or retribution).

## Considering other cases

Equal justice means that offenders who commit the same type of offence in similar circumstances should receive a similar sentence. When sentencing, courts often consider similar (comparable) cases, and may refer to sentencing statistics. The Sentencing Advisory Council website has detailed statistics on sentencing in Victoria.

## Aggravating and mitigating factors

No two offenders and no two offences are exactly the same. So, to achieve one or more of the purposes of sentencing (described above), courts must consider details about the offender and what they did.

- **Aggravating factors** are things about the offender or what they did that make the offending more serious (for example if the offender has a history of similar offences, or if the offence was planned).
- **Mitigating factors** are things about the offender or what they did that make the offending less serious (for example if it is their first offence, if they plead guilty, or if they are doing well in rehabilitation and are unlikely to offend again).

Two offenders found guilty of the same kind of offence may get different sentences if each offender has different aggravating and mitigating circumstances.

## The offender's background

When sentencing, courts must think about the offender's life history. For example, an offender who has a mental illness might be found less responsible for the offence.

An offender's mental illness or mental impairment may be relevant to sentencing because it might:

- mean the offender is less able to control their actions, or foresee the harm they caused
- make some types of sentence less likely to stop them from offending again
- make the experience of prison unusually difficult for them.

Some types of sentence are only available for offenders with mental impairment.

An offender who uses drugs or alcohol is normally still responsible for their actions, but the court might consider rehabilitation as a purpose for sentencing them.

## Sentencing for more than one offence

Offenders are often sentenced for more than one offence at the same hearing. If two or more of the same type of sentence are imposed (for example, two prison sentences, or two community correction orders), the court must decide whether these sentences will be cumulative (added up), or concurrent (served at the same time), or a mixture (partly cumulative and partly concurrent). Multiple sentences are usually served concurrently or partly concurrently.

The *total effective sentence* is the total of the sentences imposed for all offences, after factoring in whether these will be served cumulatively or concurrently, but before the non-parole period has been set (see 'Parole and non-parole period' below). The total effective sentence is also known as the *head sentence*.

## Principles

Parliament and the courts have set rules (known as *principles*) that guide how a court must sentence. These principles include:

- **Proportionality** – the punishment must fit the crime. This means that a more serious example of an offence gets a more serious sentence than a less serious example of that offence. It also means that there should be no excessive punishment without a good reason.
- **Parsimony** – the sentence must not be more severe than is needed to achieve the purposes of sentencing the offender.
- **Totally** – the sentence must reflect the overall seriousness of the offences, and not be so severe that the offender has no chance of rehabilitation.
- **Parity** – if two or more offenders were involved in an offence, their sentences should be similar, unless there is a good reason that the offenders' sentences should be different.

## What types of sentence are there?

The main types of sentence for adult offenders are:

- **Adjourned undertaking** – sentencing is held off for up to five years. During this time the offender has to obey certain conditions set by the court (for example pay a bond, or attend a behaviour-change program).
- **Fine** – a financial penalty (money) payable to the State.
- **Community correction order** - the offender is released into the community under conditions set by the court. Conditions may include unpaid community work, drug testing and treatment, or restrictions on where the offender can go, where they live, or who they can spend time with.
- **Imprisonment** – the offender is held in a prison. There are three types of prison: high, medium, and low security. Corrections Victoria (not the court) decides what type of prison an offender is sent to, based on the risks they might face in prison, and the risks they might pose to other people.

Courts must impose imprisonment, or some other form of custody, for 11 serious offences (including rape, murder or commercial-scale drug offences). Courts must impose imprisonment, or some other form of custody, for nine other serious offences (including manslaughter and intentionally causing serious injury) unless special reasons exist (like the offender has impaired mental functioning).

## Maximum and minimum sentences

The maximum possible sentence a court can impose for an offence is set by parliament in laws like the *Crimes Act 1958* (Vic). Courts rarely impose the maximum penalty.

The maximum penalty for an offence also reflects how serious it is compared to other offences.

Very few offences have a set minimum penalty in Victoria, although some traffic offences have fixed penalties.

## Standard sentences

For offending on or after 1 February 2018, judges must consider the *standard sentence* for 12 serious offences (including murder, rape, culpable driving, and child sex offences). Set by parliament, the standard sentence is a guidepost (like the maximum penalty) that the judge must consider alongside all the other sentencing purposes, principles and factors.

The standard sentence represents the sentence for the offence in the mid-range of seriousness, before considering factors about the offender. For most offences, it is set at 40% of the maximum penalty. For example, the maximum penalty for culpable driving is 20 years' imprisonment, so the standard sentence for culpable driving is eight years.

Judges must explain why they gave more or less than the standard sentence.

## Parole and non-parole period

Parole is the release of an offender from prison to serve some of their sentence under supervision in the community. Parole is not automatic. The Adult Parole Board decides whether to grant parole.

Offenders on parole are still serving their sentence. They must report to their parole officer, and follow the conditions set by the Adult Parole Board (for example training, unpaid community work, staying free of alcohol and drugs). If they break these conditions or reoffend, they may be sent back to prison.

When an offender is sentenced to prison, the court usually sets the minimum time they must spend in prison before they can apply for parole. This is called the non-parole period. A non-parole period will usually be set for any prison sentence of two years or longer.

## Can a sentence be changed?

If the prosecution or the defence believes the court made a mistake in sentencing, they can ask a higher court to review and change the sentence. This is called a sentence appeal. If the appeal is successful, the higher court may impose a different sentence.

## Victims Register

Victims of some serious crimes can apply to be included on the Victims Register. Victims on the Register are given information about the offender, such as if the offender has died, escaped custody, or is being considered for parole. Victims on the Register can also make a submission to the Adult Parole Board about whether the offender should get parole, or what conditions the parole should include.

## Further Information

**Victims of Crime Helpline** provides information for victims of crime, and refers people to support services. Freecall: 1800 819 817. Open 8 a.m. to 11 p.m., seven days a week.

**Sentencing Advisory Council.** This brochure is a short version of the Council's *A Quick Guide to Sentencing*, available at [www.sentencingcouncil.vic.gov.au](http://www.sentencingcouncil.vic.gov.au) along with information and statistics on sentencing. The Sentencing Advisory Council does not provide advice on individual cases.