Sentencing Advisory Council

A QUICK GUIDE TO SENTENCING

SENTENCING ADVISORY COUNCIL 2019

VICTORIA State Government

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ABOUT THE QUICK GUIDE

A Quick Guide to Sentencing describes how Victorian courts (judges and magistrates) sentence offenders – people who have been found guilty of an offence.

When sentencing, a court decides the consequences that offenders face for what they have done.

The focus of this guide is on Victorian courts. While some of what is described applies generally in other Australian states and territories, there are significant differences in the detail.

WHO IS RESPONSIBLE FOR SENTENCING?

In Victoria, responsibility for sentencing is shared between parliament, the courts and government departments and agencies. This shared responsibility means that no one group has complete control over sentencing outcomes.

Parliament makes laws about sentencing.

Courts interpret these laws and decide the actual sentence to be imposed on each offender. Sentencing decisions made by the courts form part of the law.

Government departments and agencies administer sentences that have been imposed, for example, by managing offenders in prison or by supervising offenders on community correction orders.

WHERE IS SENTENCING LAW MADE?

There are two sources of sentencing law in Victoria:

- **Statute law** – law in legislation made by parliament. Statute laws define crimes, establish penalties, list the available sentences and set out the rules and considerations that courts must apply when sentencing.
- **Case law** – decisions made by courts when sentencing, and decisions about how statutes should be interpreted or applied. This is also known as **common law**.

Statute law and case law together create a framework that courts must follow when sentencing offenders.

Parliament of Victoria

The Victorian Parliament makes laws about offences and sentencing specific to Victoria. Parliament sets these laws out in legislation (Acts of Parliament). A draft Act is called a Bill. Bills are introduced into parliament for discussion, debate and possible amendment (change). Both the Legislative Assembly (lower house) and the Legislative Council (upper house) must vote on and pass a Bill before it can become an Act and part of statute law.

Common Victorian offences and their maximum penalties are found in the following Victorian Acts:

- the *Crimes Act 1958* (Vic)
- the *Summary Offences Act 1966* (Vic)
- the *Drugs, Poisons and Controlled Substances Act 1981* (Vic)
- the *Road Safety Act 1986* (Vic).

These Acts define what behaviour is against the law. They set out the highest sentence (known as the **maximum penalty**) that courts can impose on a person found guilty of an offence.

Victorian sentencing rules and considerations are set out in:

- the *Sentencing Act 1991* (Vic)
- the *Children, Youth and Families Act 2005* (Vic).

These Acts describe the types of sentencing orders (for example, a fine or imprisonment) available to the courts, and the purposes, principles and factors that courts must consider when deciding on a sentence.

The *Sentencing Act 1991* (Vic) sets some limits on the flexibility that courts have when choosing a sentence for particular offences, for example, by setting a minimum penalty for **one punch** manslaughter and for serious injury offences in circumstances of **gross violence.**

Parliament has changed laws about crimes and sentencing many times. These changes are often in response to community concerns expressed by individuals, organisations and the media. Victoria has laws that protect the rights of citizens to participate in public debate and to lawfully campaign to change the law. Citizens influence sentencing law by voting for the candidates and parties that reflect their individual views.

Parliament changes laws by introducing Bills that, when passed:

- amend (change) existing Acts or
- replace existing Acts.

Parliament has passed over 150 Acts that have amended the *Sentencing Act 1991* (Vic) since the Act was introduced.

An example of one Act replacing another is the *Jury Directions Act 2015* (Vic). This Act replaced the *Jury Directions Act 2013* (Vic), preserving most of the principles from the 2013 Act and introducing new directions for juries in criminal trials.

Parliament of Australia

In addition to hearing cases and passing sentence for Victorian offences, Victorian courts hear cases and pass sentence for some Commonwealth (federal) offences, such as terrorism and drug importation.

There are differences between sentencing law for Commonwealth offences and sentencing law for Victorian offences. For Commonwealth offences, national laws define the offence, the applicable maximum penalty and the available sentencing options.

Commonwealth offences are set out in Commonwealth legislation, which are Acts passed by the Parliament of Australia (also known as the Commonwealth Parliament or federal parliament). Such Acts include the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth).

Courts

Case law (or **common law**) is law made by the courts. Case law includes past decisions on sentencing and on how to interpret or apply legislation. These past decisions are relevant to current or future cases.

When sentencing an offender for an offence, the court must consider other sentences that have been given for that offence in other cases.

In Victorian courts, prosecutors and defence lawyers can make submissions to the court about what they think a sentence should be. However, the judge or magistrate makes the decision.

Some cases become law that courts must apply when sentencing in similar cases, or when applying particular sentencing laws.

For example, in a case called *R v Verdins* from 2007, the Victorian Court of Appeal reviewed a case originally sentenced in the County Court of Victoria. The Court of Appeal decided that mental impairment is relevant (as a **mitigating factor**) in sentencing in at least six ways. In the decision, the Court of Appeal outlined in detail the principles (now known as **Verdins principles**) that all Victorian courts should apply when considering mental impairment in sentencing.

WHERE DOES SENTENCING HAPPEN?

Victoria has a number of different sentencing courts. Each court deals with different types of offences and offenders.

MAGISTRATES' COURT, COUNTY COURT, SUPREME COURT

Three levels of Victorian courts sentence adults:

- Magistrates' Court
- County Court
- Supreme Court.

The type of offence that a person is charged with and the seriousness of the offence determine the court in which the case is heard and then sentenced. A person can plead guilty or not guilty. If a person pleads not guilty, the case is heard through a **trial** or a **summary hearing** to determine whether the person is guilty or not guilty.

Victorian law classifies most offences as:

- **Indictable offences** (more serious offences), such as murder, rape, sexual offences involving children, intentionally causing serious injury and armed robbery. Indictable offences must be determined and sentenced in a **higher court** (the County Court or the Supreme Court).
- **Summary offences** (less serious offences), such as theft, minor assaults and minor driving offences. Summary offences are determined and sentenced in the Magistrates' Court.
- **Indictable offences triable summarily** (less serious indictable offences), such as recklessly causing serious injury, burglary, robbery and theft of property worth less than $100,000. These are indictable offences that may be determined and sentenced in the Magistrates' Court, rather than in a higher court. A magistrate decides which court should hear an indictable offence that is triable summarily. The magistrate considers factors such as the seriousness of the offence and the adequacy of sentences available to the court. If an indictable offence is heard in the Magistrates' Court, the person who is accused of committing the offence must consent because they will be giving up the option of a trial by jury.

The Magistrates' Court is responsible for the vast majority of sentencing in Victoria (around 94% of all people sentenced). From July 2013 to June 2018, on average 95,687 people were sentenced each year in the Magistrates' Court.

CHILDREN'S COURT

The Children's Court is a specialist court for offenders who are children aged 10 to 17 years at the time of an alleged offence, and under 19 years when court proceedings begin.

The Children's Court can deal with both summary and indictable offences, except for seven fatal offences (including murder, manslaughter and culpable driving causing death). These fatal offences must be dealt with in the higher courts.

There are special sentencing options for children and young offenders who are sentenced in the Children's Court or the higher courts (see **'Sentencing young people'**).

SPECIALIST COURTS

Victoria has specialist courts for some groups of offenders who have special sentencing needs. These courts have developed a specialised approach to sentencing these types of offenders. To qualify for specialist courts, offenders must meet certain criteria.

Koori Courts

In 1991, the Royal Commission into Aboriginal Deaths in Custody found that Indigenous people in Victoria (Kooris) were over-represented in the criminal justice system. As part of its response, and in an effort to reduce Indigenous imprisonment rates, the Victorian Government created a pilot Koori Court in 2002 as a specialist court of the Magistrates' Court.

Koori courts aim to increase Koori engagement with, participation in and ownership of the law. Koori courts intend to improve the effectiveness of sentencing Indigenous offenders.

Sentencing hearings in Koori courts have less formal settings and processes than in other courts. Elders and Respected Persons from the Koori community participate. They do not make sentencing decisions but they do talk with the offender about the offence and the effect it has had on family and the community. This provides a more culturally relevant and inclusive sentencing process for Indigenous people charged with certain offences. A Koori Court Officer, employed by the court, assists these courts.

The pilot Magistrates' Koori Court was evaluated as a success. Sentences imposed were more or less the same as in other courts, but offenders much more frequently completed orders (such as community orders) when these were imposed in the Koori Court than when the same types of orders were imposed by other courts. The evaluation also reported reductions in reoffending rates for people sentenced in the Koori Court.

There are now three Koori Courts in Victoria:

- **Magistrates' Koori Court** – a division of the Magistrates' Court in Bairnsdale, Broadmeadows, Geelong, Latrobe Valley, Melbourne, Mildura, Shepparton, Swan Hill and Warrnambool.
- **Children's Koori Court** – a specialist court for Indigenous children who are charged with offences. It operates at the Children's Court in Melbourne and the Magistrates' Court in Bairnsdale, Dandenong, Geelong, Hamilton, Mildura, Morwell, Portland, Shepparton, Swan Hill and Warrnambool.
- **County Koori Court** – a specialist court for adult Indigenous offenders charged with more serious offences. It operates in the County Court in Bairnsdale, Melbourne, Mildura, Morwell and Shepparton.

Koori courts do not hear cases involving some types of offences, such as family violence or sexual offences.

Drug Court

The Drug Court is a specialist court currently operating in the Magistrates' Court in Dandenong and Melbourne.

The Drug Court uses a special sentencing order called a **drug treatment order**. This order is aimed at rehabilitation – breaking the cycle of addiction and offending, and supporting offenders to reintegrate into the community. The drug treatment order is a prison sentence that is **suspended** (stopped for a time) while the offender participates in intensive rehabilitation programs under supervision in the community. This assists the offender to maintain employment and preserve relationships that imprisonment might damage or destroy.

To be eligible for a drug treatment order, offenders must meet a number of criteria. The main criteria are that offenders must plead guilty to the offence, and they must have a drug or alcohol dependency that contributed to the offending.

Offenders who **breach** (fail to obey) the terms of their drug treatment order return to the Drug Court. They may have more restrictive conditions imposed on them, or they may be resentenced with another type of sentence, such as imprisonment.

The Drug Court does not hear cases involving sexual offences or offending leading to actual bodily harm.

Family Violence Court Division

The Family Violence Court Division operates in the Magistrates' Court in Ballarat and Heidelberg. The government has announced the expansion of the Family Violence Court Division to the Magistrates' Court in Frankston, Moorabbin and Shepparton. This Division aims to promote safety for people who have experienced family violence, and to increase accountability for people who have used violence against family members.

The Family Violence Court Division hears cases involving family violence intervention orders, as well as other matters related to family violence, such as matters involving a family law parenting order. The Division has specially assigned magistrates and staff with training in family violence, and there are specialised support services on site.

In certain circumstances, the magistrate at the Family Violence Court Division can make an order that someone who has engaged in family violence must attend counselling.

Neighbourhood Justice Centre

The Neighbourhood Justice Centre is a court in the inner Melbourne suburb of Collingwood. It is located alongside a range of treatment and support services, such as mental health services, counselling, employment support, housing support and legal advice. The Neighbourhood Justice Centre is involved in a range of community education and outreach initiatives that aim to reduce crime and other harmful behaviour, and increase community confidence in the justice system (especially among young people and newly arrived communities).

The magistrate at the Neighbourhood Justice Centre can hear criminal cases (except for sexual offences and committals – where a magistrate decides how to proceed with an indictable offence) and can sentence offenders when the court is sitting as a Magistrates' Court or as a Children's Court. The court uses a problem-solving approach that helps people to address the issues that have contributed to their offending, and links people with services as part of the sentencing process.

SPECIALIST COURT LISTS AND SERVICES

A court list is a way of grouping and managing certain types of cases. Court lists provide specialist services to meet the needs of certain types of victims, witnesses and people charged with offences.

Personal circumstances, such as homelessness and mental illness, often contribute to certain types of offending. Specialist services help to address these circumstances. Court lists allow better access to specialist services for people involved in certain types of offences, such as sexual offences.

Lists are not specialist courts. Lists operate in Victorian courts at specified times. Some services accessed in the Magistrates' Court may be continued for people whose cases move to a higher court.

Specialist court lists and services include (but are not limited to):

- **Sexual Offences List** – a specialist list for cases involving a charge of a sexual offence. The list recognises the difficult nature of such cases, especially for victims. The Sexual Offences List operates in the County Court in Melbourne and in the Magistrates' Court in Ballarat, Bendigo, Geelong, Latrobe Valley, Melbourne, Mildura and Shepparton.
- **Assessment and Referral Court List** – a specialist court list designed to meet the needs of people who have a mental illness and/or a cognitive impairment (such as an intellectual disability) and have been charged with an offence (excluding offences involving serious violence or serious sexual assault). The list provides treatment, support and case management for a period before the charge is heard and sentenced. The list operates in the Magistrates' Court in Melbourne and works in conjunction with the **Court Integrated Services Program**.
- **Court Integrated Services Program** – a specialist program for people who have health and social needs that may have contributed to their offending. The program provides services, support and treatment to offenders before they are sentenced and aims to reduce the chances that they will reoffend. The Court Integrated Services Program operates in the Magistrates' Court in Latrobe Valley, Melbourne, Mildura and Sunshine.

- **Mental Health Court Liaison Service** – a court-based assessment and advice service for people with a mental illness who have been charged with an offence. This service aims to reduce reoffending by diverting people from the criminal justice system and providing access to mental health treatment. This service conducts mental health and psychiatric assessments and provides relevant information to the court. It operates in the Magistrates' Court in Ballarat, Bendigo, Broadmeadows, Dandenong, Frankston, Geelong, Heidelberg, Latrobe Valley, Melbourne, Ringwood, Shepparton and Sunshine.

GOVERNMENT DEPARTMENTS AND AGENCIES

Government agencies, such as Corrections Victoria and Fines Victoria, administer sentences imposed by the courts. These departments and agencies are independent of the courts and police.

For example, when a court imposes a fine and the offender does not pay, Fines Victoria is responsible for locating the offender and enforcing payment. In certain circumstances, the Director of Fines Victoria can authorise sheriff's officers to detain and immobilise an offender's vehicle, or to confiscate and sell an offender's property to the value of the outstanding fine. Sherriff's officers may have the power to arrest an offender, which could lead to a sentence of imprisonment.

When a court imposes a community correction order, Corrections Victoria administers the sentence. Offenders are under the supervision of a community corrections officer who monitors compliance with the conditions of the community correction order (courts can order conditions such as regular reporting, drug and alcohol testing or participation in treatment and rehabilitation programs).

PAROLE BOARDS

The Adult Parole Board, the Youth Parole Board and the Youth Residential Board decide whether an offender serving a custodial sentence (in prison or youth detention) can be released on parole (under certain conditions) and supervised in the community.

WHEN IS A SENTENCE IMPOSED?

A sentence can only be imposed when a court finds a person guilty of an offence (a crime).

THE PROCESS LEADING TO A SENTENCE

Investigation

Normally, an offence is reported to (or detected by) the police, who then gather evidence. Other agencies can also investigate offences (for example, the Environment Protection Authority). The evidence collected influences which offence (if any) the police charge a person with.

Police gather evidence by conducting an investigation and interviewing victims and witnesses. Once police identify a suspect, they may attempt to locate and then question this person.

Arrest and the charge

When police have enough evidence, they arrest the alleged offender (take the person into custody) and charge them with an offence. In doing this, the police are enforcing laws made by parliament. Legislation such as the *Crimes Act 1958* (Vic) and the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) lists the different types of offences that the police can charge people with.

The type of offence (or offences) that a person is charged with determines which court deals with the offence (the Magistrates' Court or a higher court). The type of offence also influences what kind of sentence the person might get if they are found guilty of the offence.

Police sometimes consult the Office of Public Prosecutions when deciding whether to charge a person with a serious offence and selecting the type of offence(s) to be charged.

A person charged with an offence can choose whether to admit to the charge (**plead guilty**) or not admit to the charge (**plead not guilty**).

A person who has been charged with an offence but who has not (yet) been found guilty or not guilty is called an accused.

Sometimes the prosecution may accept a plea of guilty to a less serious charge (for example, **recklessly** causing serious injury) if there is not enough evidence to prove a more serious charge (for example, **intentionally** causing serious injury).

Prosecution

Police prosecutors normally prosecute less serious offences. The Office of Public Prosecutions normally prosecutes more serious offences on behalf of the Director of Public Prosecutions.

Bail and remand

A person who has been arrested and charged with an offence may be held in custody by police (held on remand) or released into the community (released on bail) until the matter comes to court. A person charged with an offence (an accused) can apply for bail either to the police or to a court at a hearing.

If granted bail, the accused must comply with bail conditions, such as reporting regularly to police and appearing in court for all hearings. If the accused breaches bail conditions, they may be taken into custody and may face additional charges of breaching bail.

Mention hearing

Normally, an adult charged with an offence has their first court hearing in the Magistrates' Court. At this hearing (known as a **mention**), charges are formally filed with the court, and a person who is still in custody may apply for bail.

At the mention, the parties (the prosecution and the defence) discuss the status of the case with the magistrate. The defence may indicate whether the accused intends to plead guilty or not guilty, and the parties may discuss whether the matter involves serious or minor criminal behaviour. The magistrate then decides whether the offence is to be heard in the Magistrates' Court or in a higher court.

Children charged with an offence usually have their mention in the Children's Court. They may then be transferred to a higher court.

Sentence indication

Sentence indication is when the court gives a person a general idea of the sentence they could face if they plead guilty to the offence (or offences).

A sentence indication outlines whether or not the court would be likely to impose:

- a sentence of imprisonment
- another type of sentence (for example, a community correction order).

In the higher courts, an accused can apply for a sentence indication at any point in the proceedings after the filing of an **indictment** (written charges).

In the Magistrates' Court, a sentence indication may be given at any time during proceedings.

Guilty plea

The accused can choose to plead guilty or not guilty to a charge at any time after being charged with an offence.

A person is presumed innocent until they plead guilty or are found guilty by a magistrate or a jury.

When an accused pleads guilty, the court usually finds the charges proven. The case then goes to a sentencing hearing, either before a magistrate in the Magistrates' Court or before a judge in a higher court (County Court or Supreme Court).

When an accused pleads not guilty, the court determines (decides) criminal responsibility for the charge (whether the accused is guilty or not guilty). This is decided by a magistrate in a summary hearing, or by a jury in a trial. A separate finding of guilt is required for each charge against an accused. As a result, a magistrate or a jury may find the accused guilty of some charges and not guilty of others.

Summary hearing

Cases involving **summary offences** (and some **indictable offences triable summarily**) are heard in the Magistrates' Court. In a summary hearing, the magistrate hears the case, determines whether the accused is guilty or not guilty and imposes a sentence. If the magistrate decides that the accused is not guilty, the accused is released. A finding of not guilty is called an **acquittal**.

Committal hearing

Cases involving **indictable offences** must generally be heard in a higher court, and go through a process known as **committal**. In this process, a magistrate reviews the evidence and decides whether it is strong enough for the person to be tried.

Trial

If the magistrate decides that the evidence is strong enough, the accused is **committed for trial** in a higher court. This means that the case is moved to a higher court, either the County Court or the Supreme Court, for trial of the offences charged.

A trial is a hearing to determine whether the accused is guilty or not guilty. A judge oversees the trial, while a jury listens to the evidence and decides whether the accused is guilty or not guilty. Having made this decision, the jury's job is finished. If the jury finds the accused guilty, the judge decides the sentence. If the jury finds the accused not guilty, there is an acquittal and the accused is free to go.

Witnesses may be required to come to a trial or hearing to give evidence.

With or without conviction

After an accused has pleaded guilty or has been found guilty, it is then the responsibility of the magistrate or the judge to decide the sentence that is imposed and choose whether a conviction is recorded.

Courts must record a conviction when imposing certain types of sentence, such as:

- imprisonment
- a drug treatment order
- detention in a youth justice centre or youth residential centre.

The court may choose not to record a conviction when imposing other types of sentence, such as:

- a community correction order
- a fine
- an adjourned undertaking
- dismissal.

A conviction forms part of a person's criminal record. A person with relevant prior recorded convictions is normally sentenced more severely than someone without any relevant prior criminal history.

When deciding whether or not to record a conviction, the judge or the magistrate considers factors like the nature of the offence, the character and history of the offender, and the impact that a conviction would have on the offender's wellbeing and employment prospects.

A finding of guilt also forms part of an offender's criminal record. Even if no conviction is recorded, a criminal record can have negative effects on an offender's future prospects, even after an offender has completed a sentence. A conviction or a previous finding of guilt can be:

- looked at by the police when investigating other crimes
- relied on in any future criminal case against the offender
- included in police record checks, limiting an offender's eligibility for:
  - international travel
  - certain jobs (for example, as a teacher) or volunteer roles
  - insurance policies
  - various types of licence (for example, a taxi driver licence).

Deferral of sentencing

In the Magistrates' Court and the County Court, sentencing may be deferred (postponed) for up to 12 months. This allows a longer period for offenders to demonstrate that they can be rehabilitated, for example, by participating in programs that address the underlying causes of offending. For a sentence to be deferred, the offender must agree to the deferral.

Pre-sentence reports

After finding an accused guilty of an offence, but before passing sentence, the court may order a pre-sentence report about the person. The court will then adjourn (postpone) the court hearing to allow the report to be prepared.

A court must order a pre-sentence report if it is considering making a:

- community correction order
- youth justice centre order
- youth residential centre order.

Pre-sentence reports provide vital information to judges and magistrates, so that they have as broad a picture of the offender as possible. A pre-sentence report may contain information about the offender's:

- age
- social history and background
- medical and psychiatric history
- alcohol, drug or other substance use history
- education
- employment history
- prior offences
- degree of compliance with any sentence currently in force
- financial circumstances and ability to pay a bond
- special needs
- need for other services to address the risk of **reoffending** (recidivism)
- need for courses, programs, treatment, therapy or other assistance
- capacity to perform unpaid community work (for example, as part of a community correction order).

The pre-sentence report may include information about:

- the suitability of any proposed condition of a community correction order
- the recommended length of any **intensive compliance** period for a community correction order (this is a set period of time that conditions must be completed within)
- the suitability of electronic monitoring, including whether resources are available, and whether it is appropriate for the offender
- whether it is appropriate to confirm an existing order that applies to the offender
- any other information that the report's author believes is relevant and appropriate.

A pre-sentence report may also include a Victim Impact Statement – a statement prepared by any victim of the offence.

Sentencing hearing

When the accused pleads guilty or is found guilty, the court conducts a sentencing hearing (sometimes called a **plea in mitigation** or a **plea hearing**).

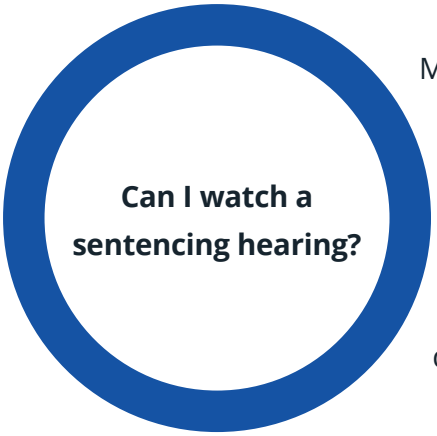
At the sentencing hearing, the Crown (a police or public prosecutor) represents the state, and a defence lawyer represents the offender. The Crown and the defence give information to the court about:

- the facts of the case
- the circumstances of the offender (for example, the prosecution could point out the offender's criminal history, and the defence could point out that the offender has shown remorse)
- relevant **sentencing principles**
- the type of sentence the offender deserves (for example, imprisonment or a community correction order)
- examples of sentences in similar cases.

The judge or magistrate can ask questions to seek information and clarify issues.

A **Victim Impact Statement** may be read out at a sentencing hearing, either by the victim or by the prosecution on the victim's behalf.

The information given in a sentencing hearing helps the judge or the magistrate to decide the sentence to impose.



Most hearings are open to the public. Anyone can sit in court and listen to what is said. However, sometimes hearings are closed to the public. This can happen for a range of reasons, for example, if the offender's identity is protected because they have cooperated with law enforcement agencies. A judge or a magistrate may also ask a person to leave the court if they are disruptive, or if requested by the prosecution or defence.

Imposing sentence and making sentencing remarks

At the end of the sentencing hearing, the judge or the magistrate summarises the case, imposes a sentence and (especially for cases in the higher courts) outlines the reasons for giving the sentence. The judge or the magistrate makes their **sentencing remarks** in open court for anyone in the court (including media) to hear, unless a **closed court order** has been made.

In the Magistrates' Court, sentencing remarks are recorded to audio but are not published as written remarks. A request for a recording can be made to the Magistrates' Court. In some circumstances, the Chief Magistrate's approval is necessary for the recording to be released.

In the higher courts, judges normally write down their sentencing remarks. County Court sentencing remarks are sometimes (but not always) made available on the County Court website. Supreme Court sentencing remarks are usually published as judgments on the Supreme Court website (after a short delay for editing and formatting). Sentencing remarks for the County and Supreme Courts are also published on the Australasian Legal Information Institute (AustLII) website.

For some high-profile cases, the higher courts live stream sentencing remarks through the court's website. This is so that media and interested members of the community can hear the sentencing remarks as the judge delivers them in court, or listen to the remarks later on demand.

After the sentencing hearing

An offender who is sentenced to imprisonment is taken into custody immediately after the sentencing hearing.

For other sentences, the offender is released into the community according to the terms of the sentence. When a community correction order is imposed, the offender must report within two working days to the nearest **community corrections centre** to make arrangements for their supervision and for any other conditions imposed by the court.

When the court imposes a fine, the offender is given a deadline for paying the fine. Offenders can request to pay fines by instalments.

THE ROLE OF VICTIMS IN SENTENCING

When sentencing an offender, the court must consider the impact of the crime on any victims. The *Sentencing Act 1991* (Vic) states that the courts must consider:

- the impact of the offence on any victim of the offence
- the personal circumstances of any victim of the offence
- any injury, loss or damage resulting directly from the offence.

One way a court can determine the impact of a crime on any victim is through a **Victim Impact Statement**.

When a court finds a person guilty of an offence, any victim of the crime can make a Victim Impact Statement to the court. The statement may assist the court in deciding the sentence. The right to make a Victim Impact Statement is outlined in the *Victims' Charter Act 2006* (Vic). Victims have the right to:

- prepare a Victim Impact Statement, which the court may consider in sentencing the offender
- be assisted in preparing a Victim Impact Statement
- request the court to order the offender to pay compensation to the victim
- apply to be included on the Victims Register (if they are the victim of a violent crime and the offender has been imprisoned).

Once included on the Victims Register, a person can find out certain information about the offender, such as the length of the sentence and the likely date of release. If the **Adult Parole Board** is considering releasing an offender who is in prison for a violent offence, a person on the Victims Register can ask the parole board to consider the effect of the offender's potential release on them. If the offender is released, the parole board must give prior notice to the person on the Victims Register.

WHAT SENTENCES CAN BE IMPOSED?

The different kinds of sentences available in Victoria are in a hierarchy ranging from less severe sentences (like fines) to more severe sentences (like imprisonment). Different sentencing options are available for adults and young people (aged 10 to 21 at the time of the alleged offence).

SENTENCING ADULT OFFENDERS

Adults are sentenced under the *Sentencing Act 1991* (Vic). The main types of sentences available for adults include fines, community correction orders and imprisonment.

Non-custodial orders

Low-end orders

Orders for dismissal or discharge are at the lowest end of the sentencing hierarchy.

Dismissal means that a person is found guilty, but a conviction is not recorded. No other sentence is ordered.

Discharge means that the court records a conviction, but no other sentence is ordered. The person is released without any conditions.

Adjourned undertaking

An adjourned undertaking involves postponing the court proceedings and releasing a person on an undertaking (agreement). The time that the court proceedings are postponed is known as the **adjournment period**. During this time, the person undertakes to behave in a particular way. An adjourned undertaking may last for up to five years.

During the adjournment period, the offender must be of good behaviour (not reoffend) and must meet any special conditions set by the court. For example, a person may have to complete a drug and alcohol treatment program or donate to a charity.

At the end of the adjournment period, the offender returns to court and the court decides whether to **discharge** the offender – release the person without any further sentence. In making this decision, the court looks at whether the person has been of good behaviour and has met special conditions.

The court can order an adjourned undertaking with or without recording a conviction.

Fine

Fines are at the low end of the sentencing hierarchy. They are the most common sentence imposed by Victorian courts.

When people are fined, they must pay a financial penalty (money) to the State of Victoria. Fine amounts are described in **penalty units**. For the financial year 1 July 2018 to 30 June 2019, one penalty unit is $161.19. The amount of a penalty unit is adjusted each financial year in line with inflation.

Fines imposed by the courts differ from fines (infringement penalties) issued by bodies like local governments or Victoria Police. For example, a court may order a fine for offences such as theft or vandalism, while a person can be fined (receive an infringement penalty) for travelling on public transport without a ticket or for minor driving offences. Courts decide the amount of a court-imposed fine, but infringement penalty amounts are set automatically. Court fines are collected and enforced in a different way to infringement penalties.

In deciding the amount of the fine, the court considers the financial circumstances of the offender (that is, how much the offender can afford to pay) and the maximum penalty for the offence (given as penalty units in legislation). The court can combine fines with other sentences such as imprisonment and community correction orders (except for **Category 1** or **Category 2** offences).

Fines are the most common sentence in Victorian courts. Across the courts, 51% of cases sentenced in Victoria received a fine as the **total effective sentence** in the twelve-month period ending 30 June 2018. The Magistrates' Court imposes most of the fines because it deals with less serious offending than the higher courts, and fines are at the low end of the sentencing hierarchy.

Offenders can apply to the court to have a **court-imposed** fine converted to an order to perform unpaid community work. When an offender fails to pay a court-imposed fine, they may be arrested. The court can then order the offender to perform unpaid community work, or serve a prison sentence.

A vulnerable and disadvantaged person who cannot pay their infringement fine can apply to the Secretary to the Department of Justice and Community Safety for a work and development permit. This permit allows the person to 'work off' their infringement fine debts by participating in certain activities under the supervision of an approved sponsor.

Community correction order

A community correction order (CCO) is a flexible order that is in the middle of the sentencing hierarchy. Community correction orders are less severe than imprisonment or drug treatment orders, but more severe than fines. Community correction orders replaced previous community orders, including community-based orders, home detention, combined custody and treatment orders and intensive correction orders. All these orders were abolished in January 2012.

As the name suggests, a community correction order is served in the community. A community correction order may be imposed in addition to a fine or a prison term.

In the Magistrates' Court, a community correction order can last for up to two years for a single charge, four years for two charges and five years for three or more charges.

In the higher courts, a community correction order can last for up to five years.

All offenders sentenced to a community correction order must abide by standard (core) terms, including:

- not committing another offence punishable by imprisonment
- notifying Corrections Victoria of any change of address or employment
- not leaving Victoria without permission
- reporting to a community corrections centre
- complying with directions from the Secretary to the Department of Justice and Community Safety (delegated through Corrections Victoria).

The court must choose at least one additional condition. Any additional conditions are chosen to reflect the circumstances of the offender, the nature of the offence, the **principle of proportionality** and the purposes that the court is trying to achieve in the sentence (for example, rehabilitation or deterrence).

Additional conditions can be attached to a community correction order. These conditions can be for all or part of its duration. Additional conditions can require the offender to:

- undertake medical treatment or other rehabilitation
- stay away from licensed premises (such as hotels, clubs or restaurants) or refrain from consuming alcohol in such premises
- complete unpaid community work (up to a total of 600 hours)
- be supervised by a corrections worker
- not contact or associate with particular people (for example, co-offenders) or a particular type of person (for example, club members)
- live (or not live) at a specified address
- stay away from nominated places or areas
- abide by a curfew, remaining at a specified place for between two and 12 hours each day
- be monitored by the court to ensure compliance with the order
- pay a **bond** – a sum of money (the offender may not get some or all of the bond back if they fail to comply with any condition of the community correction order)
- be monitored electronically (if the community correction order is imposed in a higher court).

The offender or the **Crown** (a police or public prosecutor) can ask the court to make changes to a community correction order. The court may vary a community correction order for a range of reasons, for example, if the offender no longer consents to the order, or cannot comply with its conditions because of a change of circumstances.

Offenders who breach a condition of their community correction order may be returned to court. The court may vary the community correction order and its conditions, or the offender may be resentenced for the original offence. Breaching the conditions of a community correction order is a separate offence. This offence has a maximum penalty of three months' imprisonment.

Custodial orders

Changes to sentencing law, introduced in 2016, limit the courts' use of **non-custodial orders** (for example, fines or community correction orders) for two categories of serious offences.

Category 1 offences include murder, rape and trafficking in a large commercial quantity of a drug of dependence. Victorian courts must impose a custodial order (imprisonment or another form of custody) with few exceptions when sentencing an adult for a Category 1 offence, if the offence was committed on or after 20 March 2017 or on or after 28 October 2018 (depending on the specific offence). The court is not allowed to impose an order of imprisonment combined with a community correction order for a Category 1 offence.

Category 2 offences are other serious offences, including manslaughter, kidnapping and arson causing death. Victorian courts must impose a custodial order (other than imprisonment combined with a community correction order) when sentencing an adult for a Category 2 offence committed on or after 20 March 2017 or on or after 28 October 2018 (depending on the specific offence) – unless special reasons exist. Special reasons include the offender assisting police in the investigation of an offence, or the offender proving that they have a mental impairment.

Imprisonment

Imprisonment is detention in a prison. It is the most severe sentence in Victoria. Victorian law treats imprisonment as the sentence of **last resort**, meaning imprisonment is only imposed if no other type of sentence is appropriate. However, in 2016 parliament passed legislation making prison (or another form of custody) the only sentence allowed for two classes of serious offences (see 'Non-custodial orders').

Imprisonment is far more common as a sentencing outcome in Victoria's higher courts (the County Court and the Supreme Court) than it is in the Magistrates' Court. Imprisonment was ordered in over half (60%) of cases sentenced in Victoria's higher courts in the ten-year period ending June 2018, compared with just 6% of cases sentenced in the Magistrates' Court in the same period.

When imposing a sentence of imprisonment, the court usually sets a **non-parole period**. There are rules about when a court must set a non-parole period, depending on the length of the sentence of imprisonment. The non-parole period is the minimum period that the offender must spend in custody before they can apply for release on **parole**.

Release on parole is not automatic. Offenders can only be released on parole if they have completed the non-parole period in prison, and a parole board has considered their case and granted parole (see **'Parole'**).

Court secure treatment order

A court can order a **court secure treatment order** for an offender with a serious mental illness. The offender is detained and treated at a secure mental health facility instead of being detained in a prison. This order is imposed on offenders whose mental illness requires treatment to prevent serious deterioration in their health, or to prevent them from harming themselves or others.

This type of order can only be made where the court would otherwise have imposed a sentence of imprisonment. The order cannot be any longer than the term of imprisonment that would have been imposed. The court must be satisfied that no other sentence (for example, a community correction order) would allow the offender to get the required treatment.

A non-parole period must be set for a court secure treatment order, in the same way as for a term of imprisonment.

Drug treatment order

A drug treatment order falls below imprisonment in the sentencing hierarchy. Technically, it is a custodial sentence – it is a prison sentence that is suspended (held back) so offenders can have treatment in the community for their addiction.

Only the **Drug Court** (a specialised part of the Magistrates' Court) can make a drug treatment order. People are eligible for a drug treatment order if they are dependent on alcohol or other drugs, and that dependency contributed to their offending. Drug treatment orders are not available for offenders who are convicted of sexual offences, or violent offences leading to actual bodily harm.

A drug treatment order has two parts:

- **The custodial part** is a sentence of imprisonment imposed for up to two years. This time in prison is not served by the offender unless the Drug Court **activates** the custodial part (orders the offender to spend the time in prison).
- **The treatment and supervision part** consists of core conditions that are imposed for up to two years. This part includes conditions such as participation in treatment programs, reporting to court or corrections staff and attending the Drug Court.

A range of consequences and rewards encourage offenders to successfully complete their drug treatment order. Offenders who breach the conditions of their drug treatment order (for example, by resuming drug use, reoffending or failing to attend treatment) may have longer or additional conditions imposed, or they may be imprisoned.

Offenders may be rewarded for successfully complying with the conditions of their drug treatment order, and demonstrating progress towards their treatment objectives (for example, through reduced supervision or early completion of the order).

Changing options

Suspended sentence

One significant change to Victorian sentencing law over the last decade has been the abolition of suspended sentences.

A suspended sentence was a prison term that was suspended (held back) wholly or in part for a specified period. Where the prison term was partially suspended, the offender spent some time in prison and some time in the community.

Where the prison term was wholly suspended, the offender did not go to prison and was released into the community with no supervision or court-imposed conditions. However, the threat of prison hung over the offender. If the offender committed a further offence that had imprisonment as the maximum penalty, they could be ordered to serve part or all of the suspended sentence in prison.

Suspended sentences were phased out gradually in Victoria between November 2006 and September 2014. This started with **serious offences** sentenced in the higher courts, and then extended to all offences, including offences sentenced in the Magistrates' Court.

Suspended sentences are not available:

- in the higher courts for any offence committed on or after 1 September 2013
- in the Magistrates' Court for any offence committed on or after 1 September 2014.

Courts may still impose a suspended sentence for offences that were committed before these cut-off dates.

Home detention

Home detention orders were abolished in January 2012. These orders allowed people to serve a prison term of up to one year in their home subject to certain conditions and restrictions (for example, limits to people they could contact and to visitors).

SENTENCING YOUNG PEOPLE

The justice system in Victoria distinguishes between children and young offenders:

- A **child** is aged 10 years or older but is under 18 years at the time of an offence, and is aged under 19 years when court proceedings begin. A child is usually sentenced in the Children's Court under the *Children, Youth and Families Act 2005* (Vic).
- A **young offender** is aged under 21 years at the time of sentencing. A young offender is generally sentenced in an adult court under the *Sentencing Act 1991* (Vic).
- A **youthful offender** is aged over 21 years at the time of sentencing, but is still relatively young (usually under 25). The person is not a 'young offender' under the *Sentencing Act 1991* (Vic), but a court often takes a person's relative youth into account when sentencing.

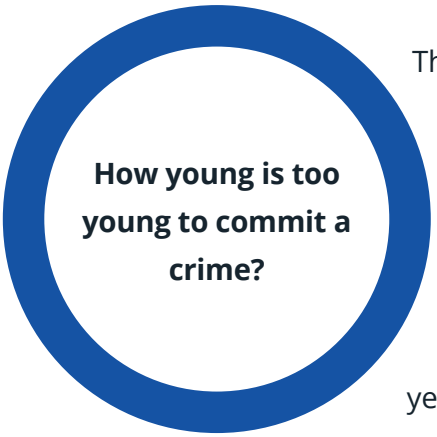
Children and young offenders are together referred to as **young people**.

A person may be sentenced in the Children's Court under the *Children, Youth and Families Act 2005* (Vic) if they are a **child** (aged under 18 years) when their case first comes to court. If the person turns 19 years before the case is finalised, they may still be sentenced in the Children's Court. If the person turns 19 years by the time their case comes to court, the matter is heard in the Magistrates' Court.

The law says that young people should not generally be punished as harshly as adults.

This recognises that young people are still developing, are generally less mature than adults, and are less able to make moral judgments. Young people are generally less aware than adults of the consequences of their actions.

Young people have unique treatment and rehabilitation needs. Young people in custody are especially vulnerable to physical, sexual and emotional abuse.



The age of criminal responsibility in Victoria is 10 years. A child under 10 years of age is legally considered unable to commit an offence. A child aged between 10 and 14 years is presumed to be unable to commit an offence, unless the prosecution can prove that the child is capable of forming a criminal intention. The age of criminal responsibility varies from country to country – for example, it is 6 years of age in some American states, and 15 years of age in Sweden.

The *Children, Youth and Families Act 2005* (Vic) puts the child's rehabilitation as the core purpose (but not the only purpose) of sentencing children. The Children's Court must consider this when sentencing children aged 10 to 17 years.

The sentencing options for young people in the *Children, Youth and Families Act 2005* (Vic) are different from sentencing options for adults in the *Sentencing Act 1991* (Vic). Orders for young people include youth detention orders (youth residential centre orders and youth justice centre orders), supervision orders and probation.

Orders served in the community

Dismissal

Dismissal is the least severe sentencing option for children and young offenders sentenced under the *Children, Youth and Families Act 2005* (Vic). Dismissal means that a child is found guilty but the charge is dismissed and no other sentence is ordered.

Undertakings

An undertaking is an agreement by a child to do, or not do, some particular thing. Undertakings may last for up to one year. There are two types of undertakings:

- **accountable undertakings** – a child may have to return to court if they breach the undertaking (that is, if the child does not do everything that they agreed to)
- **non-accountable undertakings** – a child does not have to return to court if they breach the undertaking.

At the conclusion of an accountable undertaking or a non-accountable undertaking, the court dismisses the charge.

Good behaviour bond

For a good behaviour bond, the court postpones sentencing for a nominated period. During this time, the child must be of good behaviour and must meet any special conditions (like seeing a counsellor). The child must pay some money to the court.

A good behaviour bond may last for up to one year if the child is aged under 15 years, or up to 18 months if the child is aged 15 years or older.

If the child does everything required under the good behaviour bond, the court dismisses the charge, returns the bond money to the child and does not record a conviction. This means that the case ends.

If the child does not do everything required under the good behaviour bond, the court may keep the bond money and impose a new order.

Fine

A fine is a less severe sentence than detention or a supervision order. When imposing a fine, the Children's Court looks at how much the child can afford to pay, and the maximum fine amount for the child's age.

Fine amounts are described in **penalty units**. For the financial year 1 July 2018 to 30 June 2019, one penalty unit is $161.19. The amount of a penalty unit is adjusted each year in line with inflation.

For children aged under 15 years, the maximum fine is one penalty unit if they are sentenced for one offence, and two penalty units if they are sentenced for more than one offence.

For children aged 15 or over, the maximum fine is five penalty units if the child is sentenced for one offence, and 10 penalty units if they are sentenced for more than one offence.

Probation order

Probation is the least intensive kind of community supervision for children who are sentenced under the *Children, Youth and Families Act 2005* (Vic). Children on probation orders must report to youth justice workers, but not as frequently as children on youth supervision orders. A child on probation may have to participate in counselling or treatment programs. Probation orders must not last for more than one year. Probation cannot extend beyond a young person's 21st birthday.

Youth supervision order

A youth supervision order is less intensive than a youth attendance order. It can be imposed on a child of any age sentenced under the *Children, Youth and Families Act 2005* (Vic).

Under a youth supervision order, a child must report to a youth justice unit, obey the instructions of a youth justice worker and not reoffend during the order. The court can impose additional conditions as part of the order.

Youth supervision orders generally are for less than one year. In some cases, the order can last for up to 18 months, for example, if the child has been found guilty of more than one offence. The order cannot extend beyond the young person's 21st birthday.

Youth attendance order

A youth attendance order is an intensive kind of community supervision for children sentenced under the *Children, Youth and Families Act 2005* (Vic). This order is available for offenders aged 15 to 20 years at the time of sentencing. It is an alternative to detention.

Under a youth attendance order, a child must attend a youth justice unit and comply with intensive reporting and attendance requirements. The court can attach special conditions, such as education, counselling or treatment.

The child must not reoffend during the order. The child may be directed to do community service.

A youth attendance order may last for up to one year, but it may not extend beyond the child's 21st birthday.

A child who breaches a youth attendance order may have to go into detention.

Youth control order

A youth control order is the most intensive kind of community supervision for children sentenced under the *Children, Youth and Families Act 2005* (Vic).

A youth control order can last for up to 12 months, but it cannot extend longer than the offender's 21st birthday. The youth control order operates as an alternative to detention. The order is served in the community with intensive requirements for supervision, support and court monitoring.

Youth control orders include strict mandatory requirements, such as participation in education, training or work. These orders may also include requirements for treatment, counselling or curfews, social media bans or restrictions on where the child can go.

The offender must consent to the youth control order.

An offender on a youth control order must attend the Children's Court for a monitoring or reporting hearing at least once a month during the first half of the order. The court can vary the requirements of the order by making the order more or less restrictive, depending on whether the child has been complying with the requirements and conditions of their order.

Breach of a youth control order results in detention, unless there are exceptional circumstances.

Orders served in detention

Children cannot be sent to prison. However, they can be kept in detention and lose their freedom. Detention is the most severe sentence that can be imposed on a child. Detention is a sentence of **last resort** – it can only be used if no other sentence is appropriate.

Two types of detention orders are available for young people in Victoria: youth justice centre orders and youth residential centre orders. The type of detention order that a young person receives depends on their age.

Sentences for Category A and B serious youth offences

Category A serious youth offences include offences such as murder or manslaughter. The court must order imprisonment for a young offender (aged 18 to 21 years) convicted of a Category A serious youth offence unless satisfied that exceptional circumstances exist. **Category B serious youth offences** include offences such as rape, home invasion or carjacking. The court must order imprisonment for a young offender convicted of a Category B serious youth offence if the young offender is to be sentenced under the *Sentencing Act 1991* (Vic) and has previously been convicted of another offence that is a Category A or B serious youth offence, unless there are exceptional circumstances. If there are exceptional circumstances, the court may impose a youth justice centre order or a youth residential centre order.

The court is required to consider the need to protect the community, or any person, from the violent or other wrongful acts of the child, particularly when the case involves a Category A or B serious youth offence, but also where it is appropriate to do so.

Youth residential centre order

A youth residential centre order can be imposed on offenders aged under 15 years at the time of sentencing. For offenders in this age group, the maximum length of detention is one year if they are sentenced for a single offence or two years if they are sentenced for more than one offence.

While detained in a youth residential centre, young people attend education classes and may be able to participate in programs that address their offending behaviour.

A youth residential centre order is also available for offenders aged under 15 at the time of sentencing in an adult court under the *Sentencing Act 1991* (Vic). This order may be made instead of imprisonment. For young offenders, the maximum length of detention in a youth residential centre is two years if they are sentenced in the Magistrates' Court or four years if they are sentenced in a higher court.

Youth justice centre order

A youth justice centre order can be imposed on an offender aged 15 to 20 years at the time of sentencing. This order involves a period of detention in a youth justice centre. For offenders in this age group, the maximum length of detention is three years if they are sentenced for a single offence, or four years if they are sentenced for more than one offence.

While detained under a youth justice centre order, young people participate in education and programs that address the offending behaviour. Temporary leave may be granted during the sentence, allowing the young person to leave the youth justice centre to engage in employment, attend training or visit family and friends.

A youth justice centre order is also available for offenders aged 15 to 20 years at the time of sentencing in an adult court (either the Magistrates' Court or a higher court) under the *Sentencing Act 1991* (Vic). Such offenders may be sentenced to this order as an alternative to prison. For these offenders, the maximum length of detention is two years if they are sentenced in the Magistrates' Court or four years if they are sentenced in a higher court.

Parole for young people?

Non-parole periods cannot be set for youth justice centre orders or youth residential centre orders. However, the Youth Parole Board or the Youth Residential Board may consider releasing a child or a young offender on parole.

The Youth Parole Board is required to impose certain conditions when granting parole to an offender aged 16 or over who has been detained for a **Category A serious youth offence.** This is unless the Board considers that the offender has demonstrated a history of good behaviour and engagement with rehabilitation programs. This also applies to young offenders sentenced for a **Category B serious youth offence** if they have previously been convicted of a Category A or B serious youth offence.

Which serious offences cannot be heard by the Children's Court?

The Children's Court cannot hear serious offences involving death, including murder, manslaughter and child homicide. In addition, charges of **Category A serious youth offences**, committed by a child aged 16 years or over, are usually heard in the higher courts. Category A serious youth offences include intentionally causing serious injury in circumstances of gross violence, aggravated home invasion, aggravated carjacking and some Commonwealth terrorism offences.

The Children's Court must consider referring any case involving a **Category B serious youth offence**, committed by a child aged 16 years or over, to the higher courts. Category B serious youth offences are recklessly causing injury in circumstances of gross violence, rape, rape by compelling sexual penetration, home invasion and carjacking.

HOW DO COURTS CHOOSE A SENTENCE?

The popular phrase 'do the crime, do the time' is misleading. There is no single, correct or automatic sentence that courts impose for any type of offence in Victoria.

When choosing a sentence for an offender, the court must consider **factors** about the offender and the details of the offence. However, it is not a mathematical exercise. Instead, judges and magistrates look at all the features of the case and the offender and decide the appropriate sentence. The sentences given by other judges and magistrates in similar cases involving the same offence may help in deciding the appropriate sentence. Ultimately, each sentence is based on the facts of the particular case and the particular offender.

The process of reaching a sentence is known as **instinctive synthesis**.

THE FIVE PURPOSES OF SENTENCING

Sentencing purposes for adults

In Victoria, a sentence can only be imposed on an adult in order to achieve one or more of the following purposes. These are known as the **five purposes of sentencing**:

- **Just punishment** – to punish the offender in a way that is just in all the circumstances.
- **Deterrence** – to discourage the offender (known as **specific deterrence**) or other people (known as **general deterrence**) from committing the same or similar offences.
- **Rehabilitation** – to create conditions that help the offender to lead a law-abiding life.
- **Denunciation** – to denounce, condemn or censure the offender's behaviour (that is, make it clear to the community that the behaviour is wrong).
- **Community protection** – to protect the community from the offender.

No one purpose is the main or dominant purpose of sentencing for all cases. For each case, the court looks at the features of the offending and the offender, and decides on the purpose or combination of purposes that apply.

These five purposes are the **only** purposes for sentencing an adult in Victoria.

Each state and territory in Australia has different sentencing purposes, although there are common themes among them. Sentencing purposes are also different in other countries.

Sentencing purposes for children

The *Children, Youth and Families Act 2005* (Vic) gives the purposes for sentencing children in the Children's Court.

Rehabilitation is generally the core purpose of sentencing children. Purposes such as community protection and specific deterrence are reflected in the factors that are to be taken into account in sentencing children. **General deterrence** is not considered a legitimate purpose for the Children's Court to consider when sentencing children.

SENTENCING FACTORS

Sentencing factors for adults

In choosing a sentence, a court is required to consider the following factors:

- the maximum penalty for the offence – set in legislation, this is the maximum term of imprisonment and/or a maximum fine amount that a court can impose for a particular type of offence
- the standard sentence for the offence (if one applies) – set in legislation, this is a guidepost to be considered when sentencing 12 serious offences, representing the middle of the range of seriousness when just considering the offending, and no other factors (see '**Standard sentences**')
- the current sentencing practices for the offence type (the sentences that have been given for similar cases)
- the nature and seriousness of the offence
- the offender's blameworthiness (culpability) and the degree to which the offender should be held accountable for the offence (for example, a mental impairment might make a person less blameworthy for an offence but not reduce their legal responsibility)
- whether the offence was motivated by hatred or prejudice (for example, racism)
- the impact of the offence on any victim, including any injury, loss or damage caused by the offence
- the personal circumstances of any victim
- whether the offender pleaded guilty or had an intention to plead guilty, and the stage in the proceedings that this occurred (for example, immediately after being arrested compared with just prior to the trial)
- whether the offender cooperated with law enforcement agencies (for example, by providing information to authorities on co-offenders or other criminal activity)
- the offender's previous character (including prior criminal history, general reputation and any contributions to the community)
- whether there has been a significant delay in hearing the case, and the effect that such a delay might have had on the offender, witnesses or victims
- any mitigating or aggravating factors (see **'Mitigating and aggravating factors'**).

The *Sentencing Act 1991* (Vic) outlines five purposes of sentencing: just punishment, deterrence, rehabilitation, denunciation and community protection. The court must try to achieve at least one of these purposes when sentencing. So a 'good sentence' may be described as one that achieves one or more of these purposes, and is consistent with fundamental sentencing principles. Sentences vary according to the circumstances of the person being sentenced and the details of their offence.

A good sentence for a young, first-time offender who intentionally injures someone might be a community correction order, with conditions aimed at the young person's rehabilitation (for example, participation in an anger management course). A good sentence for an adult offender with a long and violent past who commits a violent offence might be a lengthy term of imprisonment, in order to protect the community.

Sentencing factors for children

The *Children, Youth and Families Act 2005* (Vic) requires the court to take the following factors into account (where practicable) when sentencing a child:

- the need to strengthen and preserve the relationship between the child and their family
- how desirable it is to allow the child to live at home
- how desirable it is to allow the child's education, training or employment to continue without interruption or disturbance
- the need to minimise the stigma (damage to reputation and opportunity) resulting from a court finding
- how suitable the sentence is to the child
- if appropriate, the need to ensure that the child knows that they are responsible for their unlawful actions
- the need for community protection (in particular from the violent acts of children involved in Category A serious youth offences or Category B serious youth offences), or to protect any person from the child's future offending
- if appropriate, the need to deter the child from committing further offences in remand centres, youth residential centres or youth justice centres.

WHAT IS CULPABILITY?

Culpability is the extent to which an offender is held accountable for the offences they commit. Culpability means how much blame the offender has for the offence, and for the harm they cause. A court may find that an offender has a high degree of culpability for an offence. More culpable offenders tend to get more severe sentences.

In assessing an offender's culpability, judges and magistrates consider the offender's intention, awareness and motivation for committing the offence. For example, the court considers factors such as whether an offence is:

- committed by someone in complete control of their own actions (or, for example, suffering from mental impairment)
- committed with the offender's knowledge of its consequences (or likely consequences), or only in negligent (careless) disregard of the possible consequences
- provoked or unprovoked
- planned or opportunistic (spontaneous)
- carried out while the offender is in possession of a weapon
- incited, encouraged or paid for by another person
- motivated by hatred for the victim, based on the victim's gender, race or other personal characteristic.

Why do different offenders get different sentences for the same type of offence?

Sentencing law requires judges and magistrates to consider the circumstances of each offender and their offence when deciding on a sentence. Sentences vary because no two offenders or offences are the same. There is no mathematical formula for deciding on a sentence. The weight (importance) a judge or magistrate places on different sentencing purposes, principles and factors varies from case to case, according to its circumstances.

Culpability is often relevant for police. Before deciding on the type of offence to charge a person with, the police may consider such things as whether an offence has been committed intentionally, recklessly, negligently or dangerously:

- **Intentionally** – the person has the intention to cause a particular outcome, not just the intention to do the act that caused the outcome.
- **Recklessly** – the person foresees the consequences (or likely consequences) but is indifferent to whether or not the consequences come about.
- **Negligently** – the person falls short of the standard of care that a reasonable person would have in the circumstances. The risk of serious injury is so great that the negligent act or omission warrants punishment under the law.
- **Dangerously** – the person behaves in a way that is dangerous to the public.

The difference between murder and manslaughter is an example of how culpability affects offence selection:

- If there is evidence that a person killed someone by stabbing them with the intention to kill them, this would support a charge of **murder**.
- If there is evidence that a person killed someone by stabbing them not caring that this would likely kill them (but the person does not actually intend for the victim to die), this would support a charge of **manslaughter**.

MITIGATING AND AGGRAVATING FACTORS

Mitigating factors are details about the offender and their offence that tend to reduce the severity of their sentence. Aggravating factors are the reverse – they are details about the offence and the offender that tend to increase their culpability and the sentence they receive.

In sentencing, mitigating and aggravating factors can act a bit like a tug of war: mitigating factors tend to pull towards a lighter sentence, and aggravating factors tend to pull towards a heavier sentence. Some factors can be either aggravating or mitigating, depending on the particular circumstances of the offence and the offender.

The following factors can **mitigate** a sentence:

- the age of the offender (for example, some sentences, like imprisonment, may not be appropriate for young or elderly offenders)
- the background of the offender (for example, a person who grows up surrounded by alcohol abuse and violence may think this behaviour is ‘normal’)
- the previous good character of the offender
- the effect of prison on the offender (for example, whether going to prison would be particularly hard on the offender or whether a person has a medical condition that would be hard to manage in prison).

The following factors can **aggravate** a sentence:

- pre-planning the crime (premeditation)
- committing the crime as part of a group against an outnumbered victim
- use of a weapon, including a pretend weapon
- a breach of trust by the offender towards the victim (for example, where a teacher commits a crime against a student).

PRINCIPLES OF SENTENCING

Judges and magistrates must abide by certain principles when sentencing. These principles serve as guideposts that help judges and magistrates reach a decision on the sentence to impose.

Parsimony

To be **parsimonious** is to do no more than is necessary to achieve an intended purpose. The principle of parsimony means that the sentence imposed must be no more severe than is necessary to achieve the purposes of sentencing.

When choosing the sentence to impose, judges and magistrates must start at the bottom of the **sentencing hierarchy** and work their way up towards the most severe sentence (imprisonment), rather than starting with the most severe sentence type and working down.

For example, a court cannot order imprisonment if the sentencing purposes (for that offender and for that offence) can be met by a community correction order.

Proportionality

Proportionality means that the severity of the sentence must fit the seriousness of the crime and there should be no excessive punishment without justification. For example, a very long community correction order cannot be imposed for a relatively minor offence, even if the court believes that the offender needs a long period of rehabilitation.

Parity

Parity means that co-offenders who are jointly involved in the same criminal behaviour usually receive similar sentences.

The principle of parity requires sentences for co-offenders to be generally consistent. However, it does not require the sentences to be the same. Co-offenders who are found guilty of the same offence can receive different sentences. This is because the courts take account of each co-offender's different circumstances and level of culpability.

Totality

When an offender faces more than one sentence, the total sentence must be just and appropriate to the offender's overall criminal behaviour. This is known as the principle of **totality**.

For example, the principle of totality would apply if an offender was being sentenced to:

- multiple individual sentences of imprisonment for three armed robberies committed on the same day
- imprisonment for an offence but was already in prison for previous offending.

Crushing sentences

A separate principle, related to totality, requires courts to avoid imposing a **crushing sentence**.

Courts must avoid imposing a sentence that is so severe that it crushes any hope of the offender leading a useful life after release from custody. However, in some circumstances, such a sentence may still be imposed if it is just and appropriate.

Cumulation and concurrency

When sentencing an offender for multiple sentences, the court makes an order for concurrency or cumulation of the sentences. In doing so, the court applies the principle of totality and avoids a crushing sentence.

If the court decides that an offender will receive the right amount of punishment by serving several sentences **at the same time**, these are known as **concurrent** sentences.

> **Concurrency example:** Matt has been given a ten-month prison sentence for one offence and a five-month prison sentence for another offence. The judge decides that Matt must serve these sentences concurrently (at the same time), so Matt goes to prison for 10 months.

In some cases, the court may decide that the offender will receive the right amount of punishment by serving several sentences **one after the other**. These are known as **cumulative** sentences.

> **Cumulation example:** Emily has been given a one-year prison sentence for one offence and a two-year prison sentence for another offence. The judge decides that Emily must serve these sentences cumulatively (one after the other), so Emily goes to prison for three years.

The courts have the option of **partial cumulation**.

> **Partial cumulation example:** Nick has been given a ten-month prison sentence for one offence and a seven-month prison sentence for another offence. The judge decides that two months of the second sentence should be served cumulatively and five months should be served concurrently, so Nick goes to prison for 12 months.

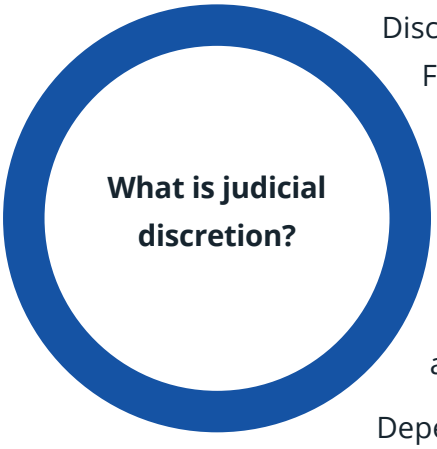
MAXIMUM PENALTIES

A maximum penalty is the penalty set by parliament as the most severe possible sentence that a court can impose for an offence. Maximum penalties are sometimes referred to as **statutory maximums** because they are set out in statutes – legislation such as the *Crimes Act 1958* (Vic).

Maximum penalties have four important purposes in the sentencing system. The maximum penalty:

1. sets out the most severe consequences for an offender convicted of an offence
2. sets a clear limit on the power that courts have in achieving one or more of the five purposes of sentencing (see **'The five purposes of sentencing'**)
3. expresses parliament's views (on behalf of the community) about the seriousness of each type of offence
4. allows for the most severe punishment to be imposed on the worst example of an offence.

The maximum penalty for murder is life imprisonment. This is because the community considers that taking someone else's life to be one of the most serious offences, causing the most serious level of harm, and that intentionally doing so to be in the worst category of culpability. In contrast, the maximum penalty for dangerous driving is two years' imprisonment or a fine of 240 penalty units or both. This reflects the community's view that dangerous driving is less serious than murder.



Discretion means choice. It is a key feature of sentencing in Victoria. For most offences heard in Victorian courts, sentencing decisions are not automatic. This ensures that courts can impose the sentence that is most appropriate in each case. The court must choose the type of sentence (for example, a community correction order) and the length or amount of the sentence (for example, the length of a community correction order or the amount of a fine).

Depending on the charges in the case, the court may choose to impose additional orders (such as an alcohol exclusion order, which bans a person from premises that sell alcohol). Some offence provisions in **statute law** require the court to impose other types of additional orders, such as suspending the driver licence of an offender convicted of a serious driving offence. When imposing a community correction order, the court chooses conditions such as unpaid community work, curfew or alcohol bans.

A number of offenders do receive the maximum penalty. For example, in the five-year period to 30 June 2018, 13 offenders convicted of murder in Victoria received the maximum penalty of life imprisonment.

The maximum penalty does not mean that courts must impose that penalty on offenders convicted of the offence. It means that courts may not impose a penalty *greater* than the maximum penalty set for the offence.

For example, the maximum penalty for rape is 25 years' imprisonment. This means that the court cannot sentence an offender to more than 25 years in prison for a single charge of rape. By comparison, the maximum penalty for indecent assault is 10 years' imprisonment. This means that the court cannot sentence an offender to more than 10 years in prison for a single charge of indecent assault.

The court has scope to impose the maximum penalty in the worst cases committed by the worst offenders. The worst example of an offence is one that is especially cruel, carefully planned or motivated by prejudice and hatred. The worst example of an offender is a repeat offender with no remorse who poses an ongoing threat to the community.

Some people argue that maximum penalties have a fifth purpose: people are deterred (stopped) from committing an offence because it has a high maximum penalty. However, research shows that, for most offence types and most offenders, increasing the severity of punishment does not deter more people from offending.

Imprisoning people prevents them from offending against the community for the period that they are in prison (see **'Community protection'**).

The maximum penalty can assist the court as a guide in determining sentence. However, the maximum penalty is only one of the many factors that a court must consider when sentencing.

Maximum penalties for many offences have changed over time as parliament amends legislation. For example, when the offence of culpable driving causing death was added to the *Crimes Act 1958* (Vic) in 1966, parliament set the maximum penalty as five years' imprisonment (or a fine of not more than $1,000, or both imprisonment and a fine). Since then, the maximum imprisonment sentence has increased a number of times: to seven years in 1967, to 10 years in 1991, to 15 years in 1992 and to 20 years in 1997 (its current maximum penalty).

The maximum penalty that a court can impose is the maximum penalty for the offence on the date it was committed. For example, a person may be arrested and sentenced for an offence committed 20 years ago. This person may receive a lesser sentence than someone who committed the same offence more recently, because the maximum penalty was lower 20 years ago.

Sometimes, an offender is sentenced for an offence that happened many years ago. This is common, for example, in cases involving sexual offences against children. The maximum penalty available to a court depends on the date that the offence was committed. For example, if the offence was committed 20 years ago, the maximum penalty that a court could impose today is whatever the maximum penalty was for that offence 20 years ago.

STATUTORY MINIMUM SENTENCES

Statutory minimum sentences are penalties set by parliament in legislation. They describe the minimum type of sentence, and/or length of sentence, that courts must impose for particular offences.

Statutory minimum sentences are different from automatic set penalties, such as licence suspension for some driving offences.

Statutory minimum sentences are not the same as mandatory minimum penalties, as the law allows for some exceptions (special reasons). The court can impose a lower sentence than the statutory minimum.

Statutory minimum imprisonment terms and non-parole periods

A statutory minimum sentence means that the court must order a particular length of imprisonment on someone convicted of certain offences, unless there are **special reasons**. Only a few offences attract a statutory minimum term of imprisonment in Victoria.

The gross violence serious injury offences are an example. These are the offences of intentionally causing serious injury in circumstances of gross violence and recklessly causing serious injury in circumstances of gross violence. Unless there are special reasons, an adult who commits a gross violence offence must be sentenced to imprisonment with a minimum non-parole period of four years.

Other examples include some forms of manslaughter. Unless a special reason exists, a person who commits manslaughter by a **single punch or strike** must be sentenced to imprisonment with a minimum non-parole period of 10 years (see '**one punch manslaughter**'). Likewise, unless a special reason exists, a person who commits manslaughter in circumstances of **gross violence** must be sentenced to imprisonment with a minimum non-parole period of 10 years.

STANDARD SENTENCES

Standard sentences commenced in Victoria on 1 February 2018.

Victoria's standard sentences are **guideposts** for sentencing 12 serious offences, including murder, rape and sexual offences involving children.

The standard sentence for most of these offences is set at 40% of the maximum penalty. For example, the maximum sentence for rape is 25 years' imprisonment, making the standard sentence for that offence 10 years' imprisonment (40% of 25 years). The standard sentence represents the midpoint of **objective seriousness** for the offence. The midpoint of objective seriousness means the middle of the range of seriousness when just considering the offending, and no other factors (such as the offender's circumstances, prior offending history or plea).

The **maximum penalty** is one guidepost for a court when sentencing, representing the worst type of offending, by the worst type of offender. The **standard sentence** is another guidepost, representing the middle of the range of offending, before considering the offender.

Courts are required to consider the standard sentence alongside all other relevant sentencing principles and factors. The standard sentence is not to take a predominant role in the sentencing exercise. Instead, the standard sentence is just one factor for a court to take into account. Courts need to provide reasons explaining how the sentence imposed in a case relates to the relevant standard sentence. For example, there may be cases where the offending behaviour is judged to be less serious than the midpoint of seriousness for other instances of that offence. The judge or magistrate may then decide to impose a sentence less than the standard sentence after taking all other sentencing considerations into account. Alternatively, a judge or magistrate may impose a sentence greater than the standard sentence where the case involves a more serious example of the offending.

In taking **current sentencing practices** into account, a court can only consider other sentences imposed for that offence under the standard sentence scheme.

In any case that includes a standard sentence offence, the court must fix a **non-parole period** of at least a particular length, unless the court considers that it is in the interests of justice not to do so. For example, if the **total effective sentence** is 20 years' imprisonment or more, the non-parole period must be at least 70% of the total effective sentence.

ORDERS IN ADDITION TO SENTENCE

Courts may make orders in addition to the sentence imposed on the offender. They may do this under Part 4 of the *Sentencing Act 1991* (Vic) and some other Acts shown here.

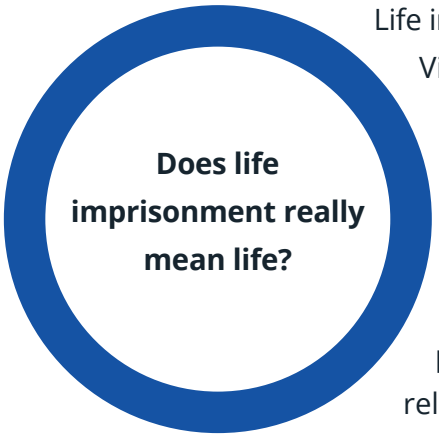
A **restitution order** may require the offender to return stolen property to its owner, or pay the owner an amount of money up to the value of the stolen property.

A **compensation order for property loss or damage** requires an offender to pay compensation for any property that was lost, destroyed or damaged as a result of the offence.

A **compensation order for pain and suffering** requires an offender to pay an amount for:

- pain and suffering experienced by a victim as a direct result of the offence
- some or all of a victim's counselling, medical or other costs that come about because of the offence (this does not include costs arising from property loss or damage).

Proceedings **for recovery of assistance** involve the state (the government) taking legal action to make an offender reimburse (pay back) the state for any financial assistance that it has made to a victim under the *Victims of Crime Assistance Act 1996* (Vic).



Life imprisonment is the maximum penalty available for four offences in Victoria: murder, trafficking in a large commercial quantity of drugs, cultivating a large commercial quantity of narcotic plants and treason. A term of life imprisonment means that the offender will be under sentence for the rest of their life. A non-parole period is usually (but not always) set for sentences of life imprisonment. This means that the offender can apply for parole when the non-parole period has been served. If parole is granted, the offender is released from prison to spend the rest of their life in the community under conditions (such as reporting requirements) set by the parole board.

As for anyone else on parole, if such an offender breaches the conditions of their parole, they may be returned to prison.

Offenders who are sentenced to life in prison without parole stay in prison until they die.

Driving-related orders include orders available under the *Road Safety Act 1986* (Vic). Such orders may result in:

- a person having their driver licence cancelled or suspended
- a person being disqualified from obtaining a licence for a period of time
- a person having to install an alcohol interlock device
- a person's motor vehicle being seized temporarily or permanently.

Forfeiture orders are made under the *Confiscation Act 1997* (Vic). A court can make a **restraining order**, preventing the offender from dealing with the restrained property. Restraining orders can be placed on the proceeds of crime (assets acquired through committing a crime) and instruments of crime (assets used to commit a crime), or any of the offender's property that is connected to the offending. A court can order the **confiscation** or **forfeiture** of this property in certain circumstances.

For some offences, confiscation or forfeiture is automatic once an offender is convicted of an offence. For example, the state may confiscate a house purchased with money gained from drug trafficking.

It is possible for the offender (or other people, such as family members of the offender) to apply to the court to keep money or property that is subject to a restraining or forfeiture order. They must demonstrate that they lawfully acquired the money or the property and it is not connected to the offending.

A **forensic sample order** can be made following a finding of guilt. The prosecution may apply for a forensic sample to be taken from the offender (usually a mouth swab). If the court agrees to make the order, there will be certain procedural requirements. For example, the court must inform the offender that a police officer may use reasonable force to take the sample. Sometimes a forensic sample is taken prior to the matter being heard in court. In this case, the court can order that the sample is kept. Such samples are retained on a database of offender DNA profiles. This assists police by allowing them to match DNA samples with known offenders.

An **alcohol exclusion order** must be made where an offender has been convicted of certain offences (mostly violent or sexual offences). The court must be satisfied that the offender was intoxicated at the time of the offence and that the intoxication contributed to the offence. The order restricts the offender from attending or being near premises that are licensed to sell alcohol.

Sex offender registration requires an offender to be included on a register of sex offenders. Offenders who are convicted of certain types of sexual offences are automatically registered as sex offenders. For example, adults who are found guilty of a sexual offence against a child are automatically registered as soon as they are sentenced.

The court can decide whether to order sex offender registration for:

- adult offenders found guilty of a sexual offence against another adult
- children who commit any sexual offence.

Registered sex offenders must comply with various reporting requirements under the *Sex Offenders Registration Act 2004* (Vic).

PAROLE

Parole is the conditional release of prisoners from prison after they complete their **non-parole period** but before the end of their prison sentence. The aim of parole is to supervise and support prisoners as they return to the community, and to reduce the chance that they will reoffend.

While living in the community, **parolees** (offenders on parole) must abide by conditions set by the parole board (such as participating in treatment programs, being supervised and not reoffending). Parolees are still serving their sentence. If they do not abide by the conditions of their parole, they may be returned to prison.

NON-PAROLE PERIOD

When courts impose a sentence of imprisonment, they must generally set a **non-parole period**. This is the minimum time that offenders must serve in prison before they may be considered for release on parole.

There are rules about when courts must set a non-parole period, depending on the length of the prison sentence:

- For sentences of more than two years, the court must set a non-parole period, unless it would not be appropriate because of the kind of offences that were committed, or because of the offender's criminal history.
- For sentences of between one and two years, the court can choose whether to set a non-parole period.
- For sentences of less than one year, the court cannot set a non-parole period. The offender must serve the entire sentence in prison.

Some offences have minimum non-parole periods that the court must impose in certain circumstances (see '**Statutory minimum imprisonment terms and non-parole periods'** and '**Standard sentences**').

PAROLE BOARDS

Release on parole is not automatic. When offenders have served their non-parole period, they can apply for release on parole. The application for parole will be considered by the parole board. Parole boards include judges, magistrates and community members.

In Victoria, the **Adult Parole Board** is responsible for the parole of adult offenders. The **Youth Parole Board** and the **Youth Residential Board** make parole decisions about young people (see **'Parole for young people?'**).

In considering whether to grant parole, the Adult Parole Board considers many factors, including:

- the offender's successful completion of programs in prison
- the behaviour of the offender in prison
- the offender's parole history and criminal record.

A community corrections officer interviews the offender to assess their risk to the community, and prepares a report for the parole board. In making its decision, the Adult Parole Board considers this report. The Adult Parole Board also considers any submission made by a victim of the offence. The community's safety and protection are the main considerations for the Adult Parole Board when granting, denying or cancelling parole.

If a parole board decides that it is too risky to release an offender into the community, parole is denied and the offender stays in prison until the end of their sentence, or until the parole board reconsiders the case.

PAROLE CONDITIONS

If a parole board grants parole, the parolee is released into the community under the supervision of Community Correctional Services. The parolee must follow the conditions set by the parole board and the instructions of community corrections staff. There are 10 standard compulsory conditions for all parolees. These conditions include:

- not reoffending
- reporting to parole officers
- being supervised by parole officers
- following instructions about where to live.

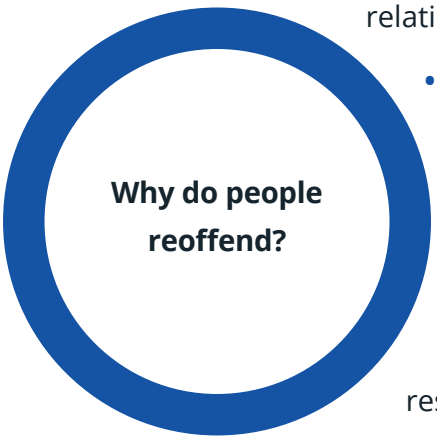
Special parole conditions may also be imposed. For example, such conditions might require parolees to:

- be assessed and treated for medical or psychiatric problems
- complete personal development programs
- follow curfews or other limits on their movements
- have their whereabouts electronically monitored
- stay free of alcohol and drugs and submit to random drug and alcohol testing.

BREACH OF PAROLE

If a parolee breaches the conditions of their parole, the parole board may decide to cancel their parole and return them to prison. The parolee may also be charged with the offence of breach of parole.

There are strict rules around parole cancellation for parolees who breach parole by further offending. For example, a parolee may be on parole while under sentence for a sexual or serious violent offence. If they are convicted of another sexual or violent offence committed while on parole, their parole is automatically cancelled and they are returned to prison.



Research shows that some factors are associated with an increased chance of reoffending:

- **family attachment** – offenders with limited family support or poor family relationships are more likely to reoffend
- **unemployment** – offenders who are unemployed or without stable employment are more likely to reoffend
- **education and schooling** – offenders with lower levels of education are more likely to reoffend
- **where people live** – offenders living in disadvantaged areas, offenders who are homeless or offenders who frequently move residence are more likely to reoffend
- **mental health** – offenders with mental health issues (especially if they have limited medical and social support) are more likely to reoffend
- **drug use** – offenders who use drugs are more likely to reoffend.

CAN A SENTENCE BE CHANGED?

The sentence imposed by a court can sometimes be changed through a process known as an **appeal**. An appeal is a request to a higher court to review the original court's decision.

In Victoria, the defence (on behalf of the person sentenced) may appeal against a conviction, against a sentence or against both a conviction and a sentence. The Director of Public Prosecutions may appeal against a sentence only.

If either the prosecution or the defence believes that a court has made an error in sentencing, they can lodge an **appeal against sentence**, asking for a higher court to:

- review the original decision made by the sentencing court
- consider whether the sentencing court has made an error
- if an error has been made, consider whether the sentence should be changed.

The *Criminal Procedure Act 2009* (Vic) governs the process of appeals against sentences in Victoria.

The process for an appeal depends on the court that has imposed the sentence.

APPEALS FROM THE MAGISTRATES' COURT

Offenders sentenced in the Magistrates' Court may appeal against their sentence to the County Court. The Director of Public Prosecutions may appeal against a sentence imposed in the Magistrates' Court to the County Court, if satisfied that it is in the public interest. In both circumstances, the case is reheard in the County Court.

In some circumstances, the prosecution or the defence can appeal to a single judge of the Supreme Court on a question of law.

APPEALS FROM THE COUNTY AND SUPREME COURTS

Offenders sentenced in the County Court or in the Trial Division of the Supreme Court can apply to the Court of Appeal for leave (permission) to appeal a sentence. Offenders can:

- have their application determined '**on the papers'** (where a single judge considers the written application for leave to appeal, then responds to the applicant in writing)
- appear in court to make the application. A single judge of the Court of Appeal normally hears this application.

The judge may refuse the application if they find that there is no reasonable prospect of the Court of Appeal imposing a less severe sentence than the original sentence.

The Director of Public Prosecutions does not need leave to appeal against a sentence imposed by the County Court or the Supreme Court. The Director of Public Prosecutions can appeal against such a sentence if the Director considers that an error has been made in the original sentence, and that a different sentence should have been imposed. The Director of Public Prosecutions must be satisfied that bringing the appeal is in the public interest.

THE COURT OF APPEAL

The Court of Appeal reviews sentences imposed by judges of the County and Supreme Courts and determines whether an error has been made in the sentencing process. In doing so, the Court of Appeal may also provide guidance to sentencing judges about the correct approach to sentencing.

An appeal in the Court of Appeal is normally heard by two or three judges. In some cases, five judges may hear the appeal.

In determining whether a sentencing error has been made, the Court of Appeal may consider such matters as:

- the maximum sentence available to the original sentencing judge
- how the original sentencing judge exercised their judicial discretion
- other sentences in similar cases
- the seriousness of the offence
- the personal circumstances of the offender.

The Court of Appeal may identify a specific error in the original sentence. For example, the sentencing judge did not have regard to a sentencing factor required by the law. Alternatively, the Court of Appeal may assume an error has been made on the basis that the result is plainly unreasonable or unjust.

The Court of Appeal allows the appeal if it decides that an error has been made, and that the offender should receive a different sentence. The Court of Appeal can then set aside the original sentence and either impose a new sentence or send the matter back to the original sentencing court for the offender to be resentenced.

Under the **instinctive synthesis** approach set out in **common law**, the sentencing judge must identify all the factors that are relevant to the sentence, discuss the significance of each factor and then make a decision as to the appropriate sentence given all the facts of the case. Only at the end of this process does the judge determine the sentence.

The **instinctive synthesis** approach allows for a high level of individual **discretion** for sentencing judges. Under this approach, it is accepted that there is no one correct sentence for any particular case, but a range of sentences may be appropriate. However, this must also be balanced with the fundamental principle of achieving consistency in the approach to sentencing.

If the Court of Appeal imposes a new sentence, it must apply the same sentencing law that the original sentencing judge was required to consider, including sentencing principles, purposes and factors. Because the Court of Appeal sometimes considers aspects of sentencing law in great detail, the court's decisions (and sentencing remarks) are important contributions to sentencing law (case law or common law). These decisions affect future, relevant sentencing decisions by other Victorian courts.

If a person is granted leave to appeal against their sentence of imprisonment, they can apply to be released on bail.

WHERE CAN I FIND MORE INFORMATION ABOUT SENTENCING?

You can find more information about sentencing on the Sentencing Advisory Council's website at **www.sentencingcouncil.vic.gov.au**.

You can attend sentencing hearings in most Victorian courts to see how sentencing works in practice. However, some hearings may be closed to the public. This can happen for a range of reasons, including the involvement of vulnerable offenders or victims.

GLOSSARY

Accused: A person who has been charged with an offence but who has not yet been found guilty or not guilty.

Acquittal: A finding that a person is not guilty of a criminal charge.

Adjourned undertaking: An order that a criminal matter is set aside for a specified period and that the person is released on an undertaking.

Adult Parole Board: The body responsible for making decisions about **parole** for adults and young persons in prison.

Affidavit: A written statement, sworn or affirmed, that may be used as a substitute for oral evidence in court.

Aggravating factor: A fact or circumstance about the offender or the offence that may lead to a more severe sentence.

Aggregate sentences: A single sentence imposed for two or more charges in a case, without specifying the individual sentence for each separate charge.

Alcohol exclusion order: An order banning an offender from certain areas or premises that sell alcohol.

Appeal: A request made to a higher court to review another court's decision.

Bail: The release of a person from legal custody into the community on condition that they reappear later for a court hearing to answer the charges.

Breach: A failure to comply with an order.

Case: A collection of one or more charges against a person sentenced at the one hearing.

Case law: Law made by courts, including sentencing decisions and decisions on how to interpret legislation. This is also known as **common law**.

Category 1 offence: A serious offence committed by a person aged 18 years or over that includes murder, rape, trafficking in a large commercial quantity of drugs and causing serious injury recklessly or intentionally in circumstances of gross violence.

Category 2 offence: A serious offence committed by a person aged 18 years or over that includes manslaughter, causing serious injury intentionally, kidnapping, arson causing death and trafficking in a drug of dependence.

Category A serious youth offence: A serious youth offence that includes murder, attempted murder, manslaughter, child homicide, intentionally causing serious injury in circumstances of gross violence, aggravated home invasion, aggravated carjacking, arson causing death, culpable driving causing death and certain terrorism-related offences.

Category B serious youth offence: A serious youth offence that includes rape, rape by compelling sexual penetration, home invasion, carjacking and recklessly causing serious injury in circumstances of gross violence.

Charge: A single count of an offence.

Child: A person who is aged 10 years or over but under 18 years at the time of the offence and aged under 19 years when court proceedings begin. A child is usually sentenced in the Children's Court under the *Children, Youth and Families Act 2005* (Vic).

Children's Court: A court that hears offences committed by children and young people.

Closed court order: An order under the *Open Courts Act 2013* (Vic) allowing a court to close a proceeding to the public.

Committal: A preliminary examination in the Magistrates' Court to assess the strength of the accusation that an accused has committed an indictable offence. This takes place before the accused is **committed for trial** in the County or Supreme Court.

Committed for trial: If the magistrate decides that the evidence is strong enough, the accused is **committed for trial** in a higher court. This means that the case is moved to a higher court, either the County Court or the Supreme Court, for trial of the offences charged.

Common law: Law made by courts, including sentencing decisions and decisions on how to interpret legislation. Also known as **case law**.

Community corrections centres: Offices across Victoria involved in the management and supervision of offenders on community correction orders.

Community correction order: A flexible, non-custodial sentence that sits between imprisonment and fines on the sentencing hierarchy. It is served in the community under conditions that may include unpaid community work, alcohol and drug bans, participation in treatment and rehabilitation programs and/or restrictions on where the offender can go or live, or with whom they can associate.

Community protection: Protection of the community from the offender.

Compensation order: An order made in addition to sentence under the *Sentencing Act 1991* (Vic), requiring payment of money to a victim of crime to compensate for the pain, suffering or property loss or damage caused directly because of the offence.

Concurrent sentences: Individual sentences, imposed for each of the charges in a case, that are to be served at the same time, rather than one after the other. For example, two prison sentences each of five years served wholly concurrently would mean a total of five years in prison.

Confiscation: Taking or seizing the proceeds of crime or property related to an offence through an order under the *Confiscation Act 1997* (Vic).

Conviction: An order made by a court after finding that the accused is guilty of an offence.

County Court: A major trial court in Victoria that sits above the Magistrates' Court and below the Supreme Court. The County Court hears all indictable offences except the most serious offences, such as treason, murder and attempted murder.

Court of Appeal: A division of the Supreme Court. The Court of Appeal hears appeals against conviction, sentence or both.

Court secure treatment order: An order detaining a person in a designated mental health facility. A court secure treatment order is made where the person would have been sentenced to imprisonment but for their mental illness.

Crown: In Victorian sentencing, the Crown refers to either the police prosecutor (in the lower courts) or the public prosecutor (in the higher courts) who represents the State of Victoria in criminal matters.

Crushing sentence: A sentence that creates a feeling of helplessness for the offender and destroys any 'reasonable expectation' of a useful life after their release from prison.

Culpability: Blameworthiness, the extent to which a person is held accountable for an offence.

Cumulative sentences: Individual sentences, imposed for each of the charges in a case, that are to be served one after the other, rather than at the same time. For example, two prison sentences each of five years served wholly cumulatively would mean a total of 10 years in prison.

Current sentencing practices: Sentences that have been given for similar cases.

Custodial order: An order that involves a term of imprisonment (for adults), or a period of detention (for children and young offenders).

Dangerous: Behaviour that is dangerous to the public (for example, dangerous driving causing death or serious injury).

Defence: The accused, and the accused's legal advisors.

Deferral: A postponement of sentencing for up to 12 months to allow an offender to demonstrate their rehabilitation.

Deterrence: Reducing crime by the threat of a criminal sanction or by someone experiencing a criminal sanction.

Diversion program: A program designed for first-time or low-risk offenders who have pleaded guilty, to prevent them from entering the criminal justice system. Diversion programs include conditions such as attending counselling, treatment or defensive driving training.

Director of Public Prosecutions: The Director of Public Prosecutions makes decisions about whether to prosecute – as well as prosecutes – serious offences in the higher courts on behalf of the State of Victoria. The Director of Public Prosecutions is independent of government.

Discharge: An order recording a conviction but also releasing the offender without any conditions.

Discretion: Discretion means choice. For most offences heard in Victorian courts, sentencing decisions are not automatic. This ensures that courts can impose the sentence that is most appropriate in each case.

Dismissal: An order releasing an offender without recording a conviction or ordering any other sentence.

Drug treatment order: A prison sentence that is suspended (held back) so offenders can have treatment in the community for their addiction. Only the Drug Court (a specialised part of the Magistrates' Court) can impose a drug treatment order.

Electronic monitoring: A court may order an offender to wear an electronic tag that monitors their movements, and sends an alarm to a monitoring unit if the offender breaks any restrictions on movement that have been imposed by the courts.

Fine: A sum of money payable by an offender to the State of Victoria on the order of a court.

Forensic sample order: An order for a forensic sample to be taken from an offender after being found guilty or from an accused before a matter is heard in court.

Forfeiture order: An order under the *Confiscation Act 1997* (Vic) confiscating the proceeds of crime or forfeiting property related to an offence.

Good behaviour bond: An order for sentencing to be postponed for a period of up to one year for children aged under 15 years and up to 18 months for children aged 15 years and over. The child is required to pay bond money to the court.

Gross violence: Circumstances that increase the seriousness of an offence of manslaughter or causing serious injury, and that result in mandatory minimum sentences under the *Sentencing Act 1991* (Vic). Circumstances of gross violence include where the offender plans the offence in advance, commits the offence with a group of two or more other people, plans in advance to use a weapon or continues to attack the victim after the victim is incapacitated.

Head sentence: See **'Total effective sentence'**.

Higher courts: In Victoria, the County Court and the Supreme Court.

Human rights: The basic rights and freedoms that all human beings are entitled to, including rights to life and liberty, freedom of thought and expression, and equality before the law.

Imprisonment: Detention in a prison. The most severe sentence in Victoria.

Indictable offences: Serious crimes, such as murder and rape, usually tried before a judge and jury in the higher courts.

Indictable offence triable summarily: A less serious indictable offence that is dealt with summarily, typically in the Magistrates' Court.

Indictment: A written statement of the indictable offence or offences charged. Indictable offences are commenced by indictment in the higher courts.

Infringement: An offence that is dealt with by a notice alleging the offence (an infringement notice) and a fixed financial penalty (for example, a parking fine).

Instinctive synthesis: A sentencing method where the judge or magistrate identifies all the factors that are relevant to the case, assesses their significance and makes a judgment as to the appropriate sentence, given all the circumstances of the case.

Intentional: The intention to cause a particular outcome, not just the intention to do the act that caused the outcome (for example, intentionally causing serious injury rather than recklessly causing serious injury).

Judge: The person who hears the case and decides the sentence in the County Court or the Supreme Court.

Jury: A group of people (usually 12) without legal experience, chosen at random from the general community. A jury is responsible for determining questions of fact based on the evidence presented in a criminal trial for an indictable offence in the County Court or the Supreme Court, and deciding whether the accused is guilty or not guilty.

Magistrate: The person who hears the case and decides the sentence in the Magistrates' Court or the Children's Court.

Mandatory sentence: A sentence set by parliament in legislation, allowing no discretion for the court to impose a different sentence.

Manslaughter: The unlawful killing of another person without premeditation (pre-planning) of the crime.

Maximum penalty: The most severe sentence set in legislation that a court can impose for a particular type of offence. Also known as the **statutory maximum**.

Mention: The first court hearing for an accused, during which charges are formally filed with the court.

Mitigating factor: A fact or circumstance about the offender or the offence that may lead to a less severe sentence.

Murder: The unlawful premeditated killing of one human being by another.

Negligent: The person falls short of the standard of care that a reasonable person would have in the circumstances. The risk of serious injury is so great that the negligent act or omission warrants punishment under the law (for example, *negligently* causing serious injury rather than *intentionally* causing serious injury).

Non-custodial order: A sentencing order that is not served in custody.

Non-parole period: The period of imprisonment set by the court that the offender must serve in prison before being eligible for release on parole.

Objective seriousness: The seriousness of the offending without considering anything personal about the offender.

Offender: A person who has been found guilty of an offence, or who has pleaded guilty to an offence (has admitted the facts of an offence).

Office of Public Prosecutions: An independent statutory authority that commences, prepares and conducts criminal prosecutions on behalf of the Director of Public Prosecutions.

One punch manslaughter: Manslaughter arising from a single punch or strike to the victim's head or neck.

Parity (principle of parity): Consistency of punishment for co-offenders in a case.

Parole: Supervised and conditional release of an offender from prison before the end of a prison sentence. While on parole, the offender is still serving their sentence, and is subject to conditions designed to help with their rehabilitation and reintegration into the community, and to reduce the chance of their reoffending.

Parolee: An offender who has been released on parole.

Parsimony (principle of parsimony): To be parsimonious is to do no more than is necessary to achieve an intended purpose. The principle of parsimony means that the sentence imposed must be no more severe than is necessary to meet the purpose or purposes of sentencing the offender.

Penalty unit: Fine amounts are based on penalty units rather than specific dollar amounts. Penalty units are adjusted annually to keep pace with inflation. For the financial year 2018–19, a penalty unit is $161.19.

Plea: The response by the accused to a criminal charge – 'guilty' or 'not guilty'.

Plea in mitigation: When the accused pleads guilty or is found guilty, the court conducts a sentencing hearing, sometimes called a **sentencing hearing** or a **plea hearing**. The aim is to explain the accused's personal circumstances and provide an explanation for the offending.

Precedent: A decision that sets down a legal principle to be followed in similar cases in the future.

Probation order: An order for a child to be supervised in the community. Probation is the least intensive supervision order available for children.

Proportionality (principle of proportionality): A sentencing principle that prohibits a court from ordering a punishment that is more severe than is appropriate for the gravity of the offence.

Prosecution: A legal proceeding against an accused for a criminal offence. Prosecutions are brought by the Crown (through the Director of Public Prosecutions or police prosecutors), not the victim.

Reckless: The person foresees the consequences (or likely consequences) but is indifferent to whether or not the consequences come about (for example, *recklessly* causing serious injury rather than *intentionally* causing serious injury).

Rehabilitation: The reintegration into society of someone who has been convicted of a crime, in order to avoid **reoffending**.

Remand: To place an accused in custody pending further court hearings dealing with the charges laid against them.

Remorse: Regret for past actions.

Reoffending: Returning to or repeating criminal behaviour. Also known as **recidivism**.

Restitution: An order made in addition to sentence under the *Sentencing Act 1991* (Vic) requiring an offender (or any other person in possession or control of stolen property) to return the stolen property, return the proceeds of the sale of stolen property, or to make payment of a sum of money up to the value of the stolen property.

Sanction: A penalty or sentence.

Sentence: The penalty that the court imposes on a person who has been found guilty of an offence.

Sentence indication: An indication from a magistrate hearing proceedings for a summary offence, or an indictable offence triable summarily, of the type of sentence that will be imposed if the accused pleads guilty, or an indication from a judge hearing proceedings for an indictable offence of whether the accused would be likely to receive a sentence of imprisonment if they plead guilty.

Sentencing factors: The factors that the court must take into account when sentencing.

Sentencing hearing: When the accused pleads guilty or is found guilty, the court conducts a sentencing hearing, sometimes called a **plea in mitigation** or a **plea hearing**.

Sentencing hierarchy: All possible sentences available to courts arranged in order from the most severe to the least severe.

Sentencing principles: The principles that form the basis of sentencing decisions, including parity, parsimony, proportionality and totality.

Sentencing purposes: The reasons for sentencing an offender. There are only five purposes of sentencing for adult offenders in Victoria: just punishment, deterrence, rehabilitation, denunciation and community protection.

Sentencing remarks: The comments that a judge or magistrate makes at the end of a sentencing hearing. Sentencing remarks include a summary of the case, the sentence and reasons for the sentence.

Special reasons: Unusual circumstances that allow a court to impose a sentence that is less severe than the statutory minimum sentence.

Standard sentence: A guidepost to be considered by courts when sentencing 12 serious offences, including rape and murder. The standard sentence represents the middle of the range of seriousness when just considering the offending, and no other factors (such as the offender's circumstances, prior offending history or plea). The standard sentence for most of these offences is set at 40% of the maximum penalty.

Statute law: Law made by parliament and set out in legislation (statutes) called Acts of Parliament.

Statutory maximum: The maximum penalty for an offence as given in legislation (statutes).

Statutory minimum: The minimum penalty for an offence as given in legislation (statutes).

Summary hearing: A hearing in the Magistrates' Court or Children's Court to determine whether the accused is guilty or not guilty.

Summary offences: Offences that are less serious than indictable offences (for example, minor traffic offences and offensive behaviour). Generally, summary offences are heard in the Magistrates' Court.

Supreme Court: Victoria's highest court. The Supreme Court hears the most serious indictable offences, including treason, murder and attempted murder.

Suspended sentence: A now-abolished sentence of imprisonment that the court held back, wholly or partially, for a period. If the offender reoffended during this period, they could be imprisoned for the total duration of the sentence. Suspended sentences are no longer available in the higher courts for offences committed on or after 1 September 2013, or in the Magistrates' Court for offences committed on or after 1 September 2014.

Total effective sentence: In a case with a single charge, the total effective sentence is the sentence imposed for that charge before the non-parole period is set. In a case with multiple charges, the total effective sentence is the total of the sentences imposed for all charges, taking into account whether the sentences are to be served cumulatively or concurrently, before the non-parole period is set. Also known as the **head sentence**.

Totality (principle of totality): Where an offender is sentenced on more than one charge, the principle of totality requires the court to ensure that the total sentence is 'just and appropriate' for the total offending behaviour.

Trial: A hearing in the higher courts to determine whether the accused is guilty or not guilty.

Undertaking: Unsupervised release of an offender, with or without conviction, for a set period with or without conditions.

Verdins principles: The considerations that apply when sentencing an offender who has a mental impairment.

Victim: A person who has been injured directly because of a criminal offence, or a family member of a person who has died because of a criminal offence. **Injury** includes physical harm, grief, psychological trauma, financial loss and damage to property.

Victim Impact Statement: A statement by a victim, presented to the court at the time of sentencing, explaining how the crime has affected them.

Young person/young offender: Under the *Sentencing Act 1991* (Vic), a person who is under the age of 21 years at the time of being sentenced.

Youth attendance order: An order for intensive community-based supervision for children aged 15 years or older.

Youth control order: A sentencing option available for offenders aged between 10 and 18 years. Youth control orders operate as an alternative to detention by imposing intensive requirements for supervision, support and court monitoring for up to 12 months.

Youth justice centre order: An order for an offender aged between 15 and 20 to serve a period of detention in a youth justice centre.

Youth parole board: The body responsible for making decisions about parole for young people sentenced to a period of detention in a youth justice centre, or young people transferred by the Adult Parole Board from imprisonment in adult prison to serve their sentence in a youth justice centre.

Youth residential centre order: An order for a child aged under 15 to serve a period of detention in a youth residential centre.

Youth supervision order: An order for a child to be supervised in the community. The level of supervision is higher than that for a probation order.

Youthful offender: A person who is over the age of 21 years at the time of sentencing, but who is still considered relatively young.

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