
SENTENCING IN WESTERN AUSTRALIA – ADVANCED RESOURCE TEACHER RESOURCE

Part A: Principles of Sentencing

The Sentencing Act WA (1995) states that “A sentence imposed on an offender must be commensurate with the seriousness of the offence.”¹ In other words, the punishment must be proportional to the offending act.

There are a number of principles in sentencing:

- To punish for the offence;
- Rehabilitation: To try and persuade the offender to stop their bad behaviour;
- Personal and General Deterrents: To show the offender and others what will happen if they do the same;
- Denunciation: To condemn the offence;
- To protect the community; and
- Restorative Justice: To provide an opportunity to repair the damage.

“The seriousness of an offence must be determined by taking into account —

- a) the statutory penalty for the offence; and
- b) the circumstances of the commission of the offence, including the vulnerability of any victim of the offence; and
- c) any aggravating factors; and
- d) any mitigating factors.”²

‘Aggravating’ and ‘mitigating’ factors are factors that affect the culpability of the offender. Aggravating factors make the offence more serious. Mitigating factors reduce the culpability of the offender.

Task 1

Click on the following link to learn more about [aggravating and mitigating](#) factors.

Why do you think a judge needs to consider these factors?

With aggravating factors, the judge needs to look at the circumstances of the offence, factors particular to the victim and factors particular to the offender. These factors determine how culpable the offender is when committing the offence.

For example,

a) Circumstances of the offence – was the offender in the company of others, did the offender deliberately inflict severe pain, was the offender in a position of authority over the victim, did the offender use a weapon? Any of these circumstances add to the seriousness of the offence.

b) Factors particular to the victim – was the victim a child or over 60 years of age, was the victim a spouse or in an intimate relationship with the offender, was the victim

¹ Sentencing Act 1995 (WA) s6(1).

² Ibid. s6(2).

physically or mentally at a disadvantage, was the victim particularly vulnerable due to their employment? Any of these factors increase the vulnerability of the victim which adds to the seriousness of the offence.

c) Factors particular to the offender – was the offender in breach of an injunction or court order (for example, a violence restraining order), was the offender driving dangerously without a licence or under the influence of alcohol or drugs?

Though a judge cannot increase a sentence because of these aggravating factors, the judge can justify why the sentence is not reduced based on the maximum penalty as a result of the aggravating factors.

With mitigating factors, the judge may reduce the sentence if there is reason to give merit for particular circumstances that make the offender less culpable: For example, the offender has been fully co-operative with the investigation of the offence. The age of the offender can also be a mitigating factor as a younger person may be seen as less culpable than an older person. The family background of a person can make them less culpable as they may have been subject to abuse which would affect their own sense of right and wrong. If an offender actively engages in programmes to overcome their offending behaviour, such as drug rehabilitation, this may be seen as a mitigating factor as it shows remorse and a willingness to change their behaviour. Another mitigating factor is if the offender is of good character and this is a first time offence. The misfortunes of the offender leading up to the offence may also be taken into consideration.

The judge needs to consider all these factors to ensure that the punishment fits the crime and the offender is given a penalty that is both fair and reasonable.

Reduction in sentence for plea of guilty

If a person pleads guilty to a charge for an offence, the court may reduce the head sentence³ for the offence in order to recognise the benefits to the State, and to any victim of or witness to the offence, resulting from the plea.⁴

According to section 9AA of the Sentencing Act WA (1995), if an immediate term of imprisonment is to be imposed, a plea of guilty at the earliest opportunity can mean the judge can give up to a 25% discount on the sentence. An early plea of guilty indicates the offender is taking responsibility for their offending, shows remorse and is willing to assist in the course of justice. It means that there does not have to be a trial thereby saving time, costs and further trauma to the victims.⁵

Part B: What Happens Prior to Sentencing?

Before sentencing, the judge seeks as much information about the offender as necessary to ensure an appropriate sentence is given. Once a conviction is recorded, it may take time before the judge gives a sentence in order for all the information to be collected. However,

³ According to s9AA(1) "a head sentence for an offence, means the sentence that a court would have imposed for the offence if — (a) the offender had been found guilty after a plea of not guilty; and (b) there were no mitigating factors.

⁴ Ibid. s9AA (2)

⁵ Ibid. s9AA (4)

the sentencing should not be adjourned for more than six months.⁶ The Supreme Court aims to sentence within twelve weeks.⁷ Fifteen weeks was the average time in the District Court in 2011.⁸

The judge may order a [Pre-Sentence Report](#) (PSR) to be prepared. The PSR provides information about the offender that is relevant to sentencing. A PSR usually takes four weeks to prepare.

Task 2

Click on the link for a pre-sentence report. What sort of questions might an offender be asked for a pre-sentence report?

An offender may be asked details about their upbringing, in particular family circumstances as well as the current family situation. They may also be asked questions about employment and ambitions including whether there are any goals to pursue education or self-development. The offender may be asked for the names of family, friends or employers who can provide information in support.

In addition to the PSR, the judge may order that more information be collected about the offender including

- A Psychological Report
- A Psychiatric Report
- A Medical Report.

Psychiatric reports usually take six weeks to prepare.

Task 3

What do you think would be the benefit of having a psychological, psychiatric or medical report on an offender when sentencing?

To be able to give an appropriate sentence, a judge needs to know as much about the offender as possible. Any medical, psychological or psychiatric information can provide understanding as to the offender's behaviour and may affect the culpability of the offender. If the judge is aware of what sort of treatment an offender may need, this can be included as part of the conditions in the sentencing to assist the offender to function as a positive member of society and avoid re-offending.

Role of the victim in sentencing: Using the following links, describe in your own words what role the victim/s has/have in sentencing.

[Victim Impact Statement](#)

[Mediation](#)

⁶ Ibid, s16 (2)

⁷ Supreme Court of Western Australia. Annual Review 2011
<http://www.supremecourt.wa.gov.au/_files/Annual_Review_2011.pdf>. 16.

⁸ District Court of Western Australia. 2011 Annual Review.
<http://www.districtcourt.wa.gov.au/_files/DC%20Annual%20Review%202011.pdf>. 10.

The victim can play an important role in the process of sentencing. By providing the court with information about the impact of the offence, the victim reinforces the seriousness of the offence which the judge can take into account in the sentencing remarks. By engaging in mediation, the victim is given an opportunity to have what happened to them acknowledged by the offender which may help in the healing process. If the offender shows remorse and recognises the seriousness of their actions, this may be a mitigating factor that the judge may consider when deciding on an appropriate sentence.

Pre Sentence Order (PSO)

A PSO is an order made by the court before sentencing that would allow an offender to complete a programme to address their behaviour, for example, a drug rehabilitation programme. Sentencing can be adjourned for up to two years in order for the offender to complete the PSO. This gives the offender the chance to fix their behaviour to help them not re-offend. If they are successful, the judge may decide not to sentence them to prison.

Sentencing Submissions

Prior to sentencing, both the State Prosecutor and Defence Counsel may provide a written submission to the judge. Both the State and Defence Counsel are given the opportunity to speak to the judge at the time of sentencing to emphasise the important factors in their submissions. Click on the link below and read the information under the headings of 'The role of the prosecutor' and 'The role of the defence lawyer' then complete Task 4.

[Counsel submissions](#)

Task 4:

Using the following scenario, imagine you are either a State Counsel or a Defence Counsel and prepare a written submission for the judge. Ensure your submission reflects the characteristics of a State or Defence submission.

George is a 24 year old university student. He has a drug addiction but in the last four months has been seeking counselling to overcome his addiction. When he was 9 years old, his parents divorced and he has been living with his alcoholic father ever since. Twelve months ago, George broke into his neighbour's house and stole some money so he could buy more drugs. He chose to break into the house at a time during the day, when he knew no-one would be home. Another neighbour across the road saw George enter the house.

The day after the offence, George was questioned by police and later charged with burglary. He denied the offence to the police but pleaded guilty in court.

George's neighbour no longer feels comfortable living next door and sold his home quickly for much less than what it was worth.

The maximum penalty for the offence is determined by the particular burglary offence committed and in this case is 18 years imprisonment:

*“(1) A person who enters or is in the place of another person, without that other person’s consent, with intent to commit an offence in that place is guilty of a crime and is liable —
(b) if the place is ordinarily used for human habitation but the offence is not committed in circumstances of aggravation, to imprisonment for 18 years.”⁹*

Defence Counsel submission points

- * Acknowledge the seriousness of the offence
- * George is a young man of 24 years
- * George has been undergoing treatment for drug addiction for four months
- * Family background – parents divorced when George was 9 and living with alcoholic father ever since
- * Break in was due to drug addiction which is now being addressed
- * Break in was during the day at a time when no one was home
- * Plea of guilty, though not at the earliest opportunity, was before trial.
- * Recommend the type of offence that might be appropriate, e.g. A Community Based Order, an Intensive Supervision order, a Pre Sentence Order that includes the Drug Court.

State Counsel submission points

- * Provide the material facts – what George did.
- * Burglary is a serious offence which is indicated by the maximum penalty of 18 years
- * George has a drug addiction which may put him at risk of re-offending
- * The break-in was a neighbour’s house – a breach of trust
- * George did not plead guilty at the earliest opportunity and denied the offence to the police
- * The neighbour no longer felt safe to live in his home
- * The neighbour had to sell his home
- * Recommend the type of offence that might be appropriate, e.g. Imprisonment - range 1-3 years, an Intensive supervision order or a Pre Sentence Order.

Part C: The Sentencing Process

The offender is required to be present during sentencing either in person or by video link. The judge is required to explain the sentencing to the offender in words s/he can understand.

*A court sentencing an offender must, if the offender is personally present in court or appearing before the court by video link under section 14A, explain to the offender, in language likely to be understood —
(a) the effect of; and*

(b) the obligations of the offender and the consequences of not complying with them that result from, the sentence and any order in addition to the sentence.¹⁰

⁹ Criminal Code Act Compilation (1913) s401(1)(b).

¹⁰ Ibid. above n 1, s34(1).

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If sentencing the offender to imprisonment for 12 months or less, the judge is also required to explain to the offender why no other type of sentence was appropriate. The judge's sentencing remarks are very detailed and explain all aspects of the sentence. (Did you know that the [Supreme Court website](#) publishes sentencing remarks?)

Extra resources available online:

[District Court Sentencing Guide WA](#)

['Judges Sentencing Remarks Available Online' Statement](#)

[Comparative Sentencing Tables](#) The Office of the Department of Public Prosecutions WA.

Part D: Sentencing Options

Templates for a 'mix-n-match' activity are in the student resource.

CARD TEMPLATE ANSWERS

<p>SPENT CONVICTION This conviction does not show up on a person's Police Clearance Certificate.</p>	<p>SUSPENDED IMPRISONMENT An imprisonment sentence where the offender does not have to serve time in prison if s/he does not re-offend within the time specified by the judge.</p>
<p>RELEASE WITHOUT SENTENCE A court sentencing an offender may impose no sentence because the circumstances of the offence are trivial or technical; and it would be unjust to do so.</p>	<p>CONDITIONAL SUSPENDED IMPRISONMENT Suspension of imprisonment on the condition of at least one of the following: a programme requirement; a supervision requirement; and/or a curfew requirement.</p>
<p>CONDITIONAL RELEASE ORDER A court may release an offender on the condition s/he does not re-offend and complies with the conditions imposed by the court. <i>This used to be called a Good Behaviour Bond.</i></p>	<p>IMPRISONMENT A sentence of imprisonment for a fixed term that is not less than six months.</p>
<p>FINE An offender may be fined as a penalty. The court will take into consideration how much the offender can afford to pay.</p>	<p>LIFE IMPRISONMENT A sentence of imprisonment for life with a minimum period of at least 10 years for murder or at least 7 years for an offence that is not murder.</p>
<p>COMMUNITY BASED ORDER The court may impose an order where the offender is to complete at least one of a supervision, programme or community service requirement. <i>This used to be called Community Service.</i></p>	<p>INDEFINITE IMPRISONMENT A sentence of imprisonment where the offender may not be released because they are considered a threat to the community.</p>
<p>INTENSIVE SUPERVISION ORDER A court order that includes supervision and at least one of the following conditions: a programme requirement; a community service requirement; and/or a curfew requirement.</p>	<p>ELIGIBILITY FOR PAROLE If the court makes an offender eligible for parole, s/he may be released before the full term of imprisonment has been served provided s/he complies with specific conditions.</p>