

Legal Studies

Sentencing and Punishment – Lesson 2

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Syllabus Dot Points:

- The role of the victim in sentencing
- Appeals
- Types of penalties

Learn about/learn to:

You will **learn about**:

- the role of the victim in sentencing
- appeals
- types of penalties including: no conviction recorded, caution, fine, bond, suspended sentence, probation, criminal infringement notice, penalty units, community service order, home detention, periodic detention, forfeiture of assets, imprisonment, diversionary programs

You will **learn to**:

- discuss factors that affect sentencing decisions, including the purposes of punishment and the role of the victim
- evaluate the effectiveness of different types of penalties, including diversionary programs

The role of the victim in sentencing

- Relevant themes and challenges = law reform, balancing rights & effectiveness
- Impact of crime on victim (including indirect ones) has always been a factor in sentencing = aggravating circumstance
- Studies = victim wants greater involvement in the sentencing process; feels disengaged due to state/crown control of case
- Law reform - *Victim's Rights Act 1996 (NSW)*
 - Introduced provision of victim impact statements (VIS) in sentencing process to give victim an opportunity to be heard
 - Established the Charter of Victim Rights, the Victims of Crime Bureau and the Victims Advisory Board
- Until recently, judicial discretion determined weight, if any, judge gave VIS = fairness argument '*is one life worth more than another?*'
- Further reform 2014 for VIS in homicide cases following Thomas Kelly case
- Frequently, sentences given do not placate families left behind = not meeting community standards? e.g. Thomas Kelly, Jill Meagher, Terrance Leary

VIS – 2014 Reform

- Reform triggered by *R v Loveridge (2014)* case – community pressure
- The *Crimes (Sentencing Procedure) Amendment (Family Victim Impact Statement) Act 2014* amends *The Crimes (Sentencing Procedure) Act 1999*



Source
<http://media.uow.edu.au/opinions/UOW161593.html>

- If offender guilty of murder, judges can (but don't have to) take a family VIS into account when sentencing
- Purpose to establish a clear and consistent structure for the consideration of VIS;
- Minister's Second Reading speech when introducing the Bill into Parliament '*judges will have no choice but to take into account a VIS when considering what is an appropriate sentence*'; '*The laws in NSW Fail to meet community expectations If we allow such a decision to be repeated we risk permanent erosion of public faith in our judicial system*'
- Reform criticised – what if a homicide victim doesn't have a family member?
- Demonstrates the effective use of non-legal mechanisms (media, lobby groups) to achieve justice

Case study – Thomas Kelly Sentencing Hearing

- 8 Victim Impact Statements
- First time court heard about Loveridge's background e.g. intelligence, mental state, remorse (father was imprisoned, physically abused as a child and has expressed some remorse)
- Court required to balance the competing interests of the victims, accused and society = tension
- Community outraged at light sentence; DPP appealed
- Prompted government to introducing mandatory sentencing for victims of 'King Hit' violence (impacts judge's sentencing discretion)



Source <http://www.smh.com.au/nsw/thomas-kellys-mother-decries-senseless-act-at-sentence-hearing-20131025-2w5zb.html>



Source <http://www.dailytelegraph.com.au/news/nsw/ryan-kieran-loveridge-weak-need-justice-system-for-kinghit-killer-kieran-loveridges-four-year-jail-term/story-fni0cx12-1226756012412>

Case Study – Jill Meagher Sentencing Hearing



Jill Meagher's father VIS:

'I think of her every second of every day and I think of the pain of never being able to laugh with her again.'

Source: *The Age 'Jill Meagher murder: the victim impact statements'*
June 2013

Adrian Bayley plead guilty to rape and murder of Meagher; in sentencing, details of 16 previous rape convictions; was released on parole, only to reoffend; widespread community outrage at failure of justice; sentenced to life imprisonment with 35 year non-parole period



NSW law reform:

- Bayley case prompted NSW government to review how it handles serious sex offenders; review widened after Leary's attack to take in serious offenders
- Law Reform Commission examining NSW parole system to identify areas for improvement

Source

<http://www.smh.com.au/nsw/justice-for-whom-20130621-2oo7r.html>

Case Study – Terrance Leary

- Leary on parole after serving non-parole period of sentence for murdering Vanessa Hoson; within 10 months, attempted rape and murder of girl at bus stop
- Case focused attention on the effectiveness of the NSW's criminal justice system (role of the media) = is it meeting the needs of victims and the community?
- SMH 'Justice for Whom?' 2013 – outlines a series of high-profile violent cases has shaken confidence in the legal system e.g. Thomas Kelly, Jill Meagher
- SMH 'Shock Jocks play a part in keeping sentences real' 2012 - McClland J acknowledges importance of sentencing judges being aware of community expectations



The role of victims – law reform

- Nicholas Cowdery 'Forgotten Victims: Criminal Justice Remembers' speech

'failure to enforce the rights of victims does not have consequences for the criminal process itself, unlike failure to enforce the rights of the accused However, a failure to enforce victims' rights is nevertheless a failure of the system'
- The Charter of Victims Rights is contained in the Victims Rights and Support Act 2013, replacing the Victims Rights Act 996 (NSW)
 - Applies to all NSW government agencies and non-government support services who work with victims of crime;
 - Treat victims with compassion, respect
 - Told about charges against offender/dropped charges and consulted before this happens if serious sex crime or crime has caused physical or mental harm
 - New right to make complaints about breaching Charter

2013 Changes – Victims Support Scheme

- May 2013 major changes to victims rights and support
- Victims Support Scheme replaces Victims Compensation Fund
- Victims Support Scheme has 4 pillars:
 - Counseling
 - Immediate assistance, including relocation, medical and funeral costs
 - Financial assistance including loss of earnings
 - Recognition payment in recognition of the violence and trauma experienced
- New Commissioner of Victims' Rights - involves advancing rights of victims of crime and assisting them in dealing with government and non-government organisations.
- No need for victims to have legal representation (\$17m saved)
- Law = responsive to changing values of community?

Fact Check

Which of the following is a feature of victim impact statements in NSW?

- A. They are required by the court.
- B. They are presented at sentencing.
- C. They are used in determining guilt.
- D. They are part of the prosecution case.

Appeals

- Mechanism for correcting errors = ensuring justice is achieved; helps to get correct balance of competing rights
- Appeals usually made by:
 1. Defendants
 - Error made in conviction/verdict e.g. misleading evidence relied on
 - Severity of sentence
 2. Prosecution
 - Leniency of sentence/manifestly inadequate
- Defendants can appeal both conviction and sentence
- Victims = no right to appeal conviction or sentence because it is the prosecution (on behalf of society) which is the party to the criminal



Source
<http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/3547856/Gordon-Wood-sentenced-to-17-years-in-prison-for-throwing-model-girlfriend-off-a-cliff.html>

Appeals against conviction



Source
<http://www.theaustralian.com.au/news/nation/jeffrey-gilham-cleared-of-parents-murder/story-e6frg6nf-1226407867784>

Accused argues the basis for conviction was wrong e.g.:

- unreliable evidence
- was an error in law in the way the judge directed the jury when they were about to deliberate upon the verdict.

Appeals against convictions successful due to unreliability of evidence:

- Gilham v R (2012)
- Wood v R (2012)

Appeals against sentence



Source
<http://www.theage.com.au/victoria/appeal-points-to-judges-law-errors-20130724-2qjr6.html>

- Can be made by:
 - Defendant = too harsh but runs risk court may increase sentence
 - Prosecution = too lenient = requires a balancing of the public interest and the further expenditure of public money e.g. Thomas Kelly case
- The appeal court (District Court for a Local Court decision or the Court of Criminal Appeal for a District Court or Supreme Court decision), will consider:
 - If court had power to impose that sentence
 - If error of fact or law in imposing that sentence = consider common law and statutory sentencing principles, and
 - Whether sentence is generally of the range appropriate for a particular offence or particular offender.
- Only if has been a clear error will the appeal court interfere with the sentence e.g. judge considered irrelevant facts, ignored relevant facts, incorrectly directed the jury or being mistaken about the facts

Sentencing appeals

1. *R v Loveridge (2014)* = DPP appealed following community outcry at perceived leniency of sentence; successful and NSW Court of Criminal Appeal increased non-parole period from 4 years to 7 years
2. *Bayley v The Queen (2013)* – offender appealed on the basis that the judge was wrong at law to rank the killing ‘among the worst kinds conceivable’ and sentence him to non parole period of 35 years; appeal rejected by Victorian Court of Criminal Appeal
3. *R v Skaf & Skaf (2008)* – sentences reduced from 55 years to 35 years for Bilal Skaf and from 18 years to 12 years for Mohammed Skaf.



Source

<http://www.theage.com.au/news/national/pack-rape-brothers-jailed/2006/07/28/1153816359599.html>

Appeal against both sentence and conviction – SW v R (2013); Ebony



Source

<http://www.news.com.au/national/children-of-the-damned-kristi-anne-abrahams-and-the-mothers-who-kill-their-kids/story-fncynjr2-1226681444193>

- Offender found guilty of murder of 7 year old autistic daughter as a result of starvation and neglect; sentenced to life imprisonment
- Conviction appeal denied, sentence appeal granted = resentenced from life to non-parole of 30 years
- Sentence appeal focused on question of whether there was an appreciable difference in culpability between an intention to kill and reckless indifference to human life and was it in the worst category? Trial judge found offence at worst case category but appeal judges did not agree.

Types of penalties

- *Crimes (Sentencing Procedure) Act 1999 (NSW)* – outlines types of penalties that can be imposed by magistrate or judge
- Penalties vary:
 - Severity of the crime
 - Aggravating/mitigating circumstances
 - Important to have different types so they can fit the purpose of punishment (rehabilitation, retribution)
- Balance = to ensure penalty achieves fairness, justice and equality? Do some penalties designed to achieve economic efficiencies rather than justice?
- Importance of discretion = judge needs to ensure that the penalty fits the purpose of punishment
- Guilty plea benefit = before committal 25%; after 12.5%

Types of penalties

1. No conviction recorded
2. Caution
3. Fine
4. Bond
5. Suspended sentence
6. Probation
7. Criminal infringement notice
8. Community service order
9. Home detention
10. Intensive Correction Order
11. Forfeiture of assets
12. Imprisonment
13. Diversionary programs

1. No conviction recorded & 2. Caution

No conviction recorded:

- Found guilty but judge/magistrate does not record a conviction/no criminal record
- Usually for summary offences and first time offenders = encourages rehabilitation
- Judge has discretion to consider factors relevant to offender:
 1. character, criminal history, age, health and mental condition
 2. the trivial nature of the offence
 3. extenuating circumstances of the offence committed
 4. any other matter the court thinks proper to consider.

Caution:

- For minor drug offences and children
- E.g. *Cannabis Caution Scheme* –
 - for marijuana use less than 15 grams
 - no more than two cautions issued before
- Informally recorded on offender's record

3. Fine



- Most common penalty; payable to state
- Set as a penalty unit; currently \$170 = 1 penalty unit
- Used alone or with other penalty e.g. good behavior bond, community service order
- *The Fines Act 1996 (NSW)* = court may set fine at less than maximum/consider defendant's capacity to pay
- Inherent unfairness as penalty could unduly impact low socio-economic people
- Following *Sentencing Council Report - Effectiveness of Fines as a Sentencing Option* = 2010 introduced Work Development Orders as alternative to paying fines
- Good example law's responsiveness to inequities using fines as penalties can cause

4. Bond

- If imprisonment inappropriate, section 9 *The Crimes (Sentencing Procedures) Act (1999)* permits court to order offender to enter into a good behaviour bond for a specified term (not exceeding 5 years)
- Limits imposed on offender's behaviour for a specified time period:
 - be of good behaviour (no reoffending)
 - attend drug and alcohol counseling
- May or may not be supervised
- If breaches bond, court will reconsider sentencing options e.g. may revoke bond and impose a more serious penalty; may also receive an additional sentence for breaching the bond (new offence)
- Might apply where court needs to impose a penalty as message of deterrence to others e.g. euthanasia cases, *R v Dawes (2004)*

5. Suspended sentence

- Section 5 *NSW Crimes (Sentencing Procedure) Act (1999)*, a court can impose a custodial sentence if it is satisfied *'having considered all possible alternatives, that no penalty other than imprisonment is appropriate'*
- Court must then determine
 - length of the custodial sentence and
 - how custodial sentence should be served
- If imprisonment term <2 years, section 12 Act allows the court to suspend the prison sentence and place the offender on a bond when released from custody. If offender breaks the conditions of the bond during its term, bond may be revoked and the offender may need to serve the balance of the prison term
- This penalty option serves to purposes = rehabilitation and deterrence; gives offenders at the 'cross-roads' a chance to refrain from future offending
- Allows offender to maintain family and community ties, including employment; also cost-effective
- Discretion is relevant

Case Study – *R v Silva* (2015)

- Convicted of manslaughter by virtue of excessive self-defence; 2 year suspended sentence and bond
- Relevant sentencing factors:
 - Aggravating = use of a weapon
 - Mitigating
 - Contrite and remorseful
 - Not planned
 - Element of provocation
 - Strong element of self defence
 - Good character, no previous record
 - Solid and stable family support
 - Mother of young child = incentive for rehabilitation
 - No risk of reoffending
- Judge said:
 - ‘act of violence was the outcome of her disturbed state of mind at the time’
 - ‘Is now well established that when a human life is taken even within the context of domestic violence the courts will not deal leniently with the offender unless the case is exceptional. It is only in the most exceptional case that a non-custodial sentence will be imposed’
 - Specific deterrence purpose was irrelevant; general deterrence given less weight due to exceptional circumstances of case



Source <http://www.dailytelegraph.com.au/news/nsw/jessica-silva-was-recorded-telling-brother-she-thought-james-polkinghorne-was-going-to-kill-her/story-fni0cx12-1227125757223>

6. Probation & 7. Criminal infringement notice

Probation

- A bond but with a supervision order attached:
 - supervised by NSW Probation Service
 - requires compliance with certain conditions and agreement of good behaviour
 - usually 12 months but can be 24 months
- Enables offender to rehabilitate but in a supervised manner
- If offender breaches order, could receive a custodial sentence

Criminal infringement notice

- On the spot fine issued by police for some offences = resource efficient as allows matter to be dealt with easily and quickly
- No conviction recorded unless unpaid
- Issued for **seven different crimes:**
 - stealing less than \$300
 - unlawful entry into a car
 - offensive language
 - obstructing traffic
 - offensive behaviour
 - obtaining benefit by deception
 - unlawful entry into a boat

8. Community service order & 9. Home detention

Community Service Order

- Order to carry out a period of work in the community instead of serving a term of imprisonment
- Can't > 500 hours at the one time
- Offender's consent to order required and must be assessed as suitable by NSW Probation Service
- Can apply to matters where offender has defaulted on/unable to pay a fine
- More cost efficient than imprisonment and allow the convicted person to maintain community and family ties

Home detention

- Allows a person sentenced to a custodial sentence, 18 months to serve their sentence under house arrest - *The Home Detention Act 1996 (NSW)*
- Not available for serious offences e.g. murder, sex assault
- Bond imposed setting out strict conditions:
 - Must stay at an approved residence for specified times for the period of their sentence
 - Must either work from home or participate in an educational program
 - Strictly supervised and monitored via an electronic device on their leg
 - Banned from drug and alcohol use and random tests conducted
- If offender breaches bond, can be imprisoned
- Benefits = resource efficient; offender maintain links with community and focuses on rehabilitation

10. Intensive correction order (ICO)

- Until October 2010, periodic/weekend detention existed
 - offender went into detention from 7.00 p.m. on Friday and finished on 4.00 p.m. on Sunday
 - performed community service during the weekend
- Replaced by ICO
 - order for imprisonment < 2 years
 - directs imprisonment sentence served by way of intensive correction in the community
 - mandatory conditions = where reside, drug/alcohol testing/curfews, electronic monitoring, restrictions on who they see/where they can go
- Strictly supervised by Corrective Services NSW – alternative to full time jail
- Allows offender to maintain employment and links with families and communities = focus on rehabilitation
- Resource efficient

Case Study – R v Perry (2011)

- Perry 18 year old on P plates; intoxicated and tired; car crossed over to wrong side of road; injured another driver, leaving him with significant permanent injuries and hardship; plead guilty to dangerous driving occasioning grievous bodily harm = maximum penalty 7 years imprisonment
- **Key sentencing factors:**
 - Off ADD Medication = judge said *'increased impulsivity which comes with untreated ADD. That is an important factor in determining the moral culpability of the offender.'*
 - Genuine remorse
 - Subsequently changed drinking habits
 - Early guilty plea
 - Extensive injuries to victim, having long term consequences
 - Guideline judgment exists = judge said *'That guideline judgement was a response to a succession of Crown appeals, usually successful, against sentences imposed for dangerous driving offences in the District Court. To put matters bluntly both Parliament and the appellate courts were of the view that sentences for this type of offence were too low.'*
- **Sentence:** two years imprisonment but to be served by way of ICO, with strict supervision and behaviour conditions. Judge said *"I am satisfied that that is the appropriate punishment that I should impose upon her but I want to make it clear to the offender just how close she was to spending time in prison. She was but a hairs breadth away from a sentence that would see her in gaol."*

11. Forfeiture of assets

- Under *The Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010*, the state can confiscate assets derived from criminal activity e.g. drugs, cash



13. Imprisonment

- Harshest possible penalty; can only be imposed as a last resort
- *The Sentencing Act 1989 (NSW)* generally requires imprisonment sentence must state a minimum (non-parole period) and additional term (maximum) but not for life sentences
- The *Crimes Act 1900 (NSW)* and other relevant legislation such as the *Drug Misuse and Trafficking Act 1985 (NSW)* sets maximum penalties for offences
- Maximum penalty for murder in NSW is life but judge/magistrate has discretion to give less
- Parole
 - allows well-behaved prisoners to be released earlier than their maximum term
 - strictly supervised
- Under s. 44(2) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* a parole period may reduce the period of imprisonment by up to, but no more than, one-third of the maximum term = offender can't be eligible for parole until served 2/3's of custodial sentence

Case study – R v Dean (2013)

- Nurse deliberately lit fire in nursing home; 11 people died and 8 seriously injured; plead guilty to 11 counts of murder
- Sentenced = life imprisonment; judge said *"The number of deaths alone is sufficient to elevate these offences into the worst-case category."*



Source <http://www.smh.com.au/nsw/roger-dean-gets-life-in-prison-for-nursing-home-fire-20130801-2r0i2.html>

Case Study – R v BW & SW (Ebony's Case)

- Starvation of child
- Mother's life sentence for murder reduced on appeal to the Court of Criminal Appeal to at least 30 years, max 40 years.
- Judges said "*In our opinion it cannot be said that the present case is within the worst case category, nor that the level of culpability was so extreme that the community interest can only be met by the imposition of a life sentence.*"

Mandatory Sentencing

- Compulsory minimum sentences imposed by statute for particular offences e.g. homicide;
- Use for minor traffic offences generally accepted as enables to be efficiently dealt with; controversial for use in serious crimes = *'mandatory sentences of any kind for serious offences are anathema to the doing of criminal justice'* Nicholas Cowdery, Rule of Law 'Mandatory Sentencing' paper 2014
- Support for use:
 - Achieves consistency in sentencing
 - Incapacitation = reduces risk of further offending
 - Deterrence = but arguably no *'ample research has shown that the greatest deterrent effect is in the expectation of being caught and dealt with, not in the punishment'* Nicholas Cowdery, Rule of Law 'Mandatory Sentencing' paper 2014
- Criticised for :
 - For removing sentencing discretion from the courts, who are best placed to determine appropriate sentence given it hears all evidence relevant to offender and offence = breaches separation of powers as legislature is directing judiciary in how to exercise judicial powers
 - Having disproportionately harsh sentences
 - Arguably not achieving greater deterrence of reoffending
 - Focus should be on long term strategies preventing crime e.g. educational employment, social disadvantage and drug/alcohol misuse.

Recent area of reform e.g. death of police on duty, alcohol fueled violence = government wanting to be seen to be *'tough on crime'* and responsive to community concerns.

Case Study – R v Jacobs (2013)

- *Crimes Amendment (Murder of Police Officers) Act 2011 (NSW)* amended the *Crimes Act 1900 (NSW)* by inserting s19B requiring court to impose life imprisonment where a police officer has been murdered in course of his duty
- Reformed after community outcry at perceived lenient sentencing for deaths of David Carty in 1997 and Glenn McEnallay in 2002
- Jacobs charged with murder of police officer David Rixon; found guilty of murder; judge required by law to impose mandatory life sentencing (no parole)



Source

<http://www.dailytelegraph.com.au/news/nsw/family-prepares-to-farewell-shot-policeman-david-rixon/story-e6freuzi-1226292627954>

Case Study: One Punch legislation

- *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014 (NSW)* – in response to community reaction to initial lenient sentence in *R v Loveridge* (2013)
 - Offence:
 - person over 18 years
 - without a cognitive impairment, intoxicated by alcohol or drugs
 - in a public place
 - hits another person with a part of his body or an object that forces that person's body to hit something (including the ground)
 - the other person dies
 - no limit to the number of hits that might be landed so it applies not only to single punches
 - maximum penalty = 25 years (same as manslaughter) and mandatory minimum term that must be imposed is 8 years.
- (Source: Nicholas Cowdery 2014)
- Criticisms:
 - Doesn't apply if not intoxicated/on drugs or not in a public place
 - Could lead to overcrowding prisons; doesn't tackle underlying cause of crime
 - Appeal mechanism corrects errors in sentencing; government reformed the law before this could take place = *R v Loveridge*

Costs of imprisonment

- Tension = what community thinks a fair sentence should be and what is actually imposed by the court
- Removing offenders from society to protect society is expensive
 - \$200/day/inmate
 - Recidivism is high (60% - Aust Institute of Criminology)
- Reoffending behaviour influenced by many factors e.g. poor education and mental/ physical health, lack of skills/employment, drug/alcohol misuse
- DPP Nicholas Cowdrey 'Reforming the Criminal Justice System' - *'sentencing laws have increased the number and length of custodial sentences without any corresponding reduction in crime. Crime rates are steady or falling in almost all major categories, but that is not due to increased imprisonment ...'*
- Is it time for an overhaul of prisons?

Fact Check

What is the aim of a diversionary program?

- A. Imprisonment
- B. Incapacitation
- C. Rehabilitation
- D. Retribution

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Fact Check

Which of the following is true of circle sentencing?

- A. It promotes recidivism.
- B. It involves a magistrate.
- C. It does not have the power of a court.
- D. It allows the victim to determine the penalty.



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