

Legal Studies

Sentencing and Punishment – Lesson 1

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Syllabus Dot Points:

- Statutory and judicial guidelines
- The purposes of punishment: deterrence (specific and general), retribution, rehabilitation, incapacitation
- Factors affecting a sentencing decision: aggravating and mitigating circumstances

Learn about/learn to:

You will **learn about**:

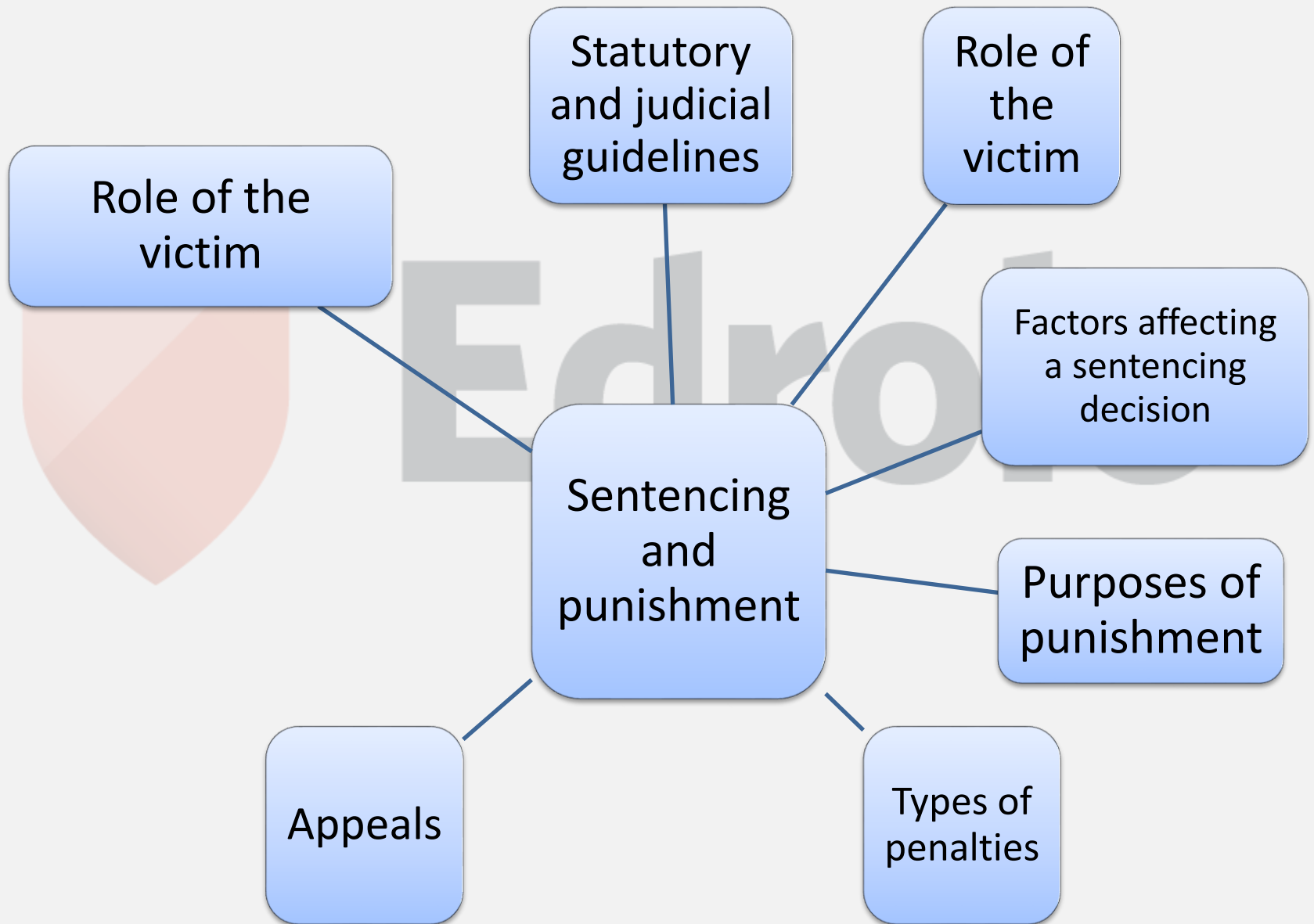
- statutory and judicial guidelines
- the purposes of punishment: deterrence (specific and general), retribution, rehabilitation, incapacitation
- factors affecting a sentencing decision: aggravating and mitigating circumstances

You will **learn to**:

- discuss factors that affect sentencing decisions, including the purposes of punishment and the role of the victim

Overview

- Criminal justice system:
 - Process of enforcing criminal **laws**
 - Investigating, trying and punishing offences
 - Only if both investigation and trial processes **effective** (guilty verdict), will final stage of sentencing and punishment apply
- ‘The **main aims** of the **criminal justice system** are to **punish** and **prevent crime**. Sentencing, along with other elements of the criminal justice system such as policing practices and crime prevention strategies all play a part in achieving these aims’
LIAC Hot Topics, Sentencing, 2005.



Sentencing Aims

- The **judge**, not the jury, **determines** the **sentence**
- **Dual functions** - punish the offender and deter others
- Sentencing – 2 step sequential process to determine:
 1. **purpose** of punishment
 2. **type** of punishment
- Relevant **Themes and Challenges** - *discretion, moral & ethics, law reform, balancing rights & effectiveness*



Source:

https://commons.wikimedia.org/wiki/File:Brass_scales_with_cupped_trays.png

Purposes of Sentencing

Section 3A *Crimes (Sentencing Procedure) Act 1999* describes the purpose of sentencing as:

1. To ensure that the offender is adequately punished for the offence
2. To prevent crime by deterring the offender and other persons from committing similar offences
3. To protect the community from the offender
4. To promote the rehabilitation of the offender
5. To make the offender accountable for their actions
6. To denounce the conduct of the offender
7. To recognise the harm done to the victim of the crime and the community

Relevant NSW Sentencing Legislation

1. *The Crimes (Sentencing Procedure) Act 1999* – gives courts:
 - Range of sentencing options
 - Empowers them to impose sentences
2. *The Crimes (Administration of Sentences) Act 1999*
 - Empowers Department of Corrective Services to manage sentences imposed
3. *The Mental Health (Criminal Procedure) Act 1990*
 - Specifically for accused with mental illness/conditions

NSW Prison Population all time high

NSW Bureau of Crime Statistics and Research (BOSCAR) Report 2015 – prison populations at an all time high

Don Weatherburn, BOSCAR Director, said *'the state was suffering from the "double whammy" of a steadily increasing number of sentenced prisoners and a temporary spike in the remand population'*



Source

<https://pixabay.com/en/prison-slammer-caught-sit-407714/>

(Source: SMH NSW prison population hits record high forcing police to 'babysit' inmates, February 2015)

Statutory & Judicial Guidelines

Two types of guidelines, both:

- a. Inform **judicial discretion**; and
- b. Aim to achieve **consistency**.

Give public confidence in the **integrity** of the sentencing process

Tension between:

1. achieving consistency in sentencing and individualised justice; and
2. the statutory force of a guideline judgment (by virtue of *The Crimes (Sentencing Procedure) Act 1999* and limiting the discretion of judges.

a. Judicial Guidelines

- Issued by NSW Court of Criminal Appeal
- Not binding but help structure discretion
- Purpose
 - reduce inconsistency; injustice to convicted if don't treat similar cases in the same way (safeguard protecting rights of offender)
 - Guide judges by indicating the usual sentence imposed for certain offences
- 7 guideline judgments exist = dangerous driving causing death or grievous bodily harm, armed robbery, drug importation, break enter & steal, guilty pleas and high range prescribed concentration of alcohol

R v Jurisic (1998) NSW

- First published sentencing guideline
- Jurisic **plead guilty** 3 charges of dangerous driving occasioning grievous bodily harm, under influence of cocaine, sentenced 18 months' home detention
- Public outcry = leniency; DPP appeal upheld; sentence quashed and replaced = two years' imprisonment
- Chief Justice Spigelman said:
 - A *system of guidelines would increase public confidence in sentencing and whilst they were not intended to be rules binding the decisions of judges they were to 'structure discretion'*;
 - *'It has long been accepted that denunciation of criminal conduct is a relevant factor in sentencing process. In the course of such denunciation, courts do and should have regard to the moral sense of the community and to community expectations of appropriate punishment'*
- The Court of Criminal Appeal then set guidelines = any non-custodial sentence for culpable driving should be exceptional.

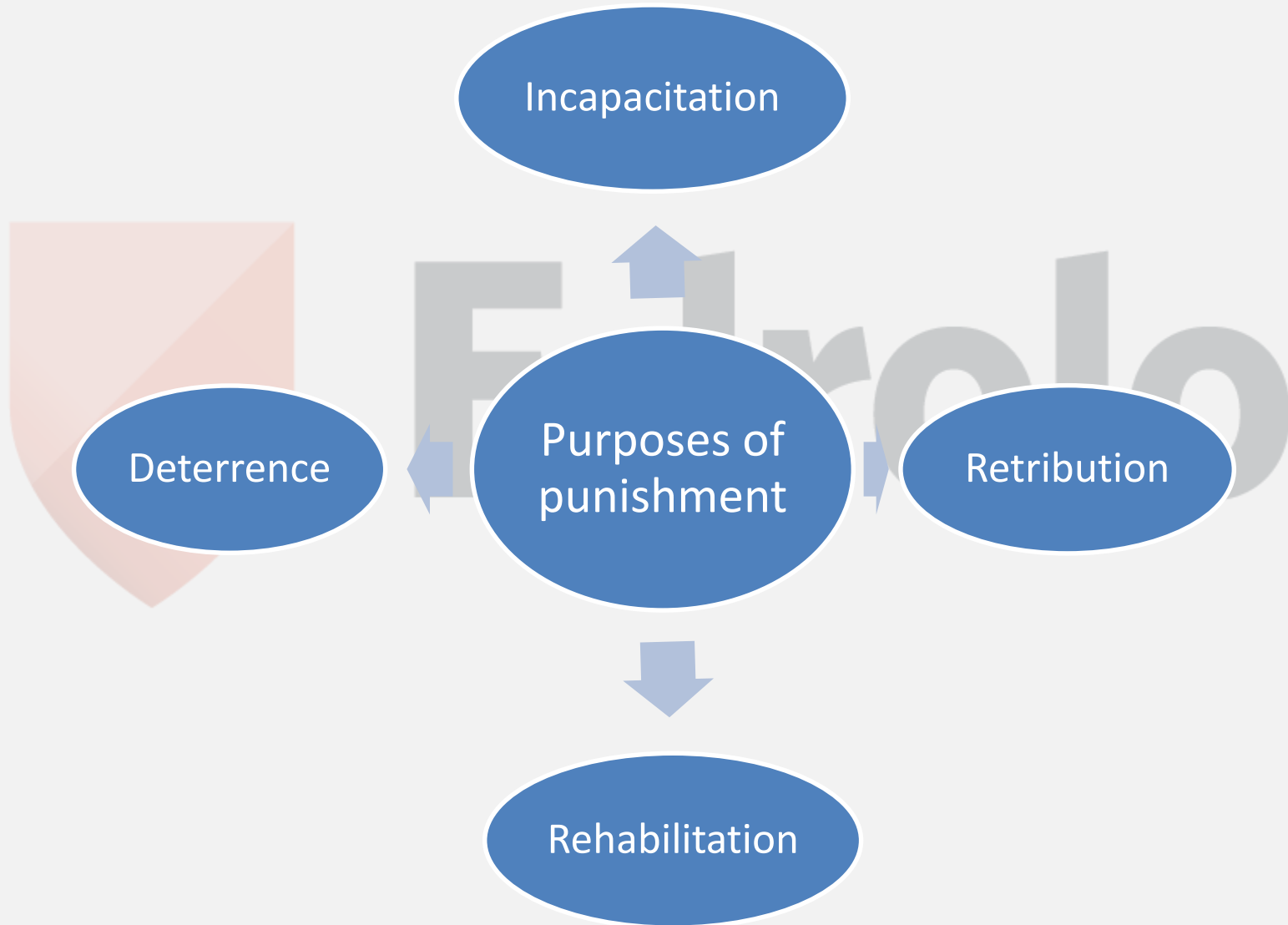
b. Statutory Guidelines

- Issued by parliament clarifying how judges are to sentence
- Acts guiding exercise of judicial discretion:
 - *The Crimes Act 1900 NSW*
 - Prescribes maximum penalties for different offences
e.g. murder = life imprisonment; manslaughter = 25 years imprisonment
 - The *Crimes (Sentencing Procedure) Act 1999 NSW*
 - Identifies both purpose of punishment and mitigating or aggravating circumstances of offence; left to judicial discretion to determine
 - The *Crimes (Sentencing Procedure) Act 1999 NSW*
 - Prescribes minimum sentences for certain offences
e.g. aggravated sexual assault in company = 15 years

The purposes of punishment

- Different punishment objectives inform the sentencing process
 - Can often be more than one relevant
 - Can be in conflict e.g. retribution and rehabilitation = intensive correction order
 - Can change over time and offences
- When sentencing, judge/magistrate first determines the **purpose** of punishment, then the **type** of punishment
- 4 key purposes:
 1. Deterrence – specific and general
 2. Retribution
 3. Rehabilitation
 4. Incapacitation

Cases – R v Silva (2015) = deterrence and rehabilitation



1. Deterrence (specific and general)

- Aim = discourage re-offending/recidivism
- 2 types:
 1. **Specific** – to accused
 - Must choose least harsh option
 - e.g. custodial sentence
 2. **General** – to public
 - raises awareness of penalties for committing offences (via media);
 - enhances compliance as sends message to society about unacceptability of criminal conduct e.g. judge says the offender '*needs to be made an example of*'

Does deterrence work?

- Perhaps for minor offences (shoplifting) but for serious crimes, involves tackling the underlying causes e.g. mental illness
- BOSCAR Report 2010 = prison terms **do not** act as a specific deterrent to offenders of many crimes



Source

https://upload.wikimedia.org/wikipedia/commons/b/b8/Standard_legirons_taiwan01.jpg

2. Retribution

- Unfair for offender to gain from their criminal conduct
- Prevents victims taking law into their own hands but can lead to victims feeling marginalised by process
- E.g. lengthy custodial sentence; Cronulla Riots - teenager who burnt the Australian flag, part of his punishment was to spend time with RSL members



Source:
https://pixabay.com/p-308858/?no_redirect

3. Rehabilitation/reform

- Aim = reduce or eliminate future offending/recidivism;
e.g.
 - Drug addiction program for drug related offences; might assist in reducing sentence imposed
 - Anger management counseling for assault
 - Community service orders
- If offender fails to fulfill rehabilitation program Court can apply other punishment
- Primary focus for young offenders
- Aim not always achieved = jails make people angry/hothouses of new skills; should spend money on preventing crime rather than reacting to it

4. Incapacitation



Source
<https://www.flickr.com/photos/86530412@N02/82654847>
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Imprisoning offenders:

- prevents them from reoffending
- protects the community
- required if crime is very serious or repeated offending demonstrates a failure of convicted to be rehabilitated

Case: R v Bayley (2013)
(Jill Meagher case)

Fact Check

Which of the following is the most likely reason for a court to require an offender to forfeit assets?

- A. Caution
- B. Discretion
- C. Retribution
- D. Rehabilitation

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(BOSTES 2013 Exam Q12 Multiple choice)

Factors Affecting a Sentencing Decision



Source
<http://www.news.com.au/national/crime/priest-slammed-for-disgusting-jill-meagher-comments/story-fns0kb1g-1227284273679>

- When sentencing, judge/magistrate considers relevant factors, can be either:
 1. **Aggravating** - lead to a heavier sentence
 2. **Mitigating** - lead to a reduction in the sentence
- Outlined in *The Crimes (Sentencing Procedure) Act NSW 1999*
- Circumstances of offence most important when determining which factors are relevant

1. Aggravating Circumstances

- Increase offender's criminal culpability
- Likely to result in more severe punishment
- Use of weapon most frequent aggravating circumstance

Include:

1. The victim was carrying out their duties or voluntary work e.g. police, emergency services worker, prison officer, judicial officer, teacher, community worker
2. Offence involved actual or threatened violence e.g. use of a weapon, explosives,
3. The offender has record of previous convictions

1. Aggravating Circumstances

4. The offence involved gratuitous violence – unnecessary violence
5. Substantial emotional harm, loss or damage resulted from the offence.
6. The crime was a hate crime e.g. ethnic or sexual targeting
7. The offender abused a position of trust or authority in relation to the victim e.g. teacher, priest
8. The victim was vulnerable: a child, a person with a disability or an elderly person

Case Study – R v Campbell (2010)

- Des Campbell was found guilty of pushing his wife Janet off a cliff top in the Royal National Park in 2005.
- Cold blooded/calculated manner of committing offence, fact went on holiday with girlfriend rather than attend wife's funeral = 25 years imprisonment



Source <http://www.smh.com.au/nsw/wifekiller-campbell-jailed-for-33-years-20100903-14sx9.html>

Case Study – R v Farmer (2008)

- Farmer was found guilty of grievous bodily harm with intent to murder after binding and gagging victim, dousing in petrol and setting her alight after she disturbed house burglary
- 20 years non-parole imprisonment



Source <http://www.smh.com.au/news/national/huxley-attacked-as-she-phoned-for-help-court-hears/2008/05/05/1209839516711.html>

2. Mitigating Circumstances

- Reduce offender's criminal culpability
- Likely to result in offender receiving a less severe punishment
- Include:
 1. The injury, emotional harm, loss or damage caused by the offence was not substantial.
 2. The offence was not part of planned or organised criminal activity.
 3. The offender provoked by the victim.
 4. The offender acted under duress.
 5. The offender no significant record of a previous offence.
 6. The offender of good character.

2. Mitigating Circumstances

7. The offender unlikely to reoffend
8. The offender good prospects for rehabilitation.
9. The offender shown remorse for the offence.
10. The offender not fully aware of the consequences of what they did, due to age or disability.
11. The offender pleaded guilty.
12. The offender gave assistance to law enforcement authorities.

Case Study – R v Dawes (2004)

- Daniella Dawes guilty manslaughter of her 10 year-old autistic son. Tried to kill herself also. Given 5 year good behaviour bond. DPP appeal against leniency of sentence failed.
- Factors relevant to sentencing decision:
 - Unlikely to reoffend
 - Remorse
 - Suffered severe depression at time of crime due to lack of support services for son



Source http://www.australian-news.net/Daniela_Dawes.htm

Case Study – R v Loveridge (2013)



Source

<http://www.dailytelegraph.com.au/news/nsw/man-who-lied-to-police-about-kieran-loveridges-involvement-in-thomas-kellys-death-jailed-for-six-months/story-fni0cx12-1226758171788>

- Plead guilty to charge of manslaughter; community outcry at perceived lenient sentence; DPP appeal and sentence increased
- Factors relevant to sentencing decision:
 - Age = 18
 - Showed remorse
 - Good prospects for rehabilitation

Other factors relevant when sentencing

1. Availability of any guideline sentences
2. Prescribed maximum and any minimum penalty given under the Act creating the offence
3. Any precedent
4. The plea; if guilty, timing of admission and level of remorse shown
5. Any charge negotiation
6. Any previous convictions
7. Factors particular to the offender e.g. mental illness
8. Community standards

Fact Check

Which of the following may be an aggravating factor when sentencing in a criminal trial?

- A. The offender not being aware of the consequences of their actions
- B. The offender not planning the crime
- C. The age of the offender
- D. The age of the victim

(BOSTES 2011 Exam Q13 Multiple choice)

Fact Check

Which of the following is a mitigating circumstance in a sentencing decision?

- A. The offender is young.
- B. The offender used a weapon.
- C. The offender has a prior conviction.
- D. The offender believed what he or she did was right.

(BOSTES 2013 Exam Q5 Multiple choice)



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