

## Sentencing and punishment

After a person has been found guilty by a jury or if they have pleaded guilty for an indictable offence, then later a sentencing hearing is held. Sentencing in NSW is regulated by the following law: *Crimes (Sentencing Procedure) Act 1999* (NSW). For children (those under the age of 18-years, additional considerations arise under the *Children (Criminal Proceedings) Act 1987* (NSW).

Penalties are usually articulated in legislation. The penalties are normally detailed after the offence has been described. The legislation usually indicates the maximum penalty, but sometimes, for some offences there is prescribed minimum penalties.

The maximum penalty for any offence in NSW is life imprisonment (s19 *Crimes Act*). This penalty can be imposed for murder, murder of a police officer and the most serious drug offences. Whilst the law prescribes the maximum penalty it often does not prescribe a minimum penalty. This is because there may be factors that explain the conduct of the offender and which should be taken into account for a sentence to reflect those factors and therefore to be just.

When sentencing, a judge must consider a wide range of matters, as summarised in the diagram below.

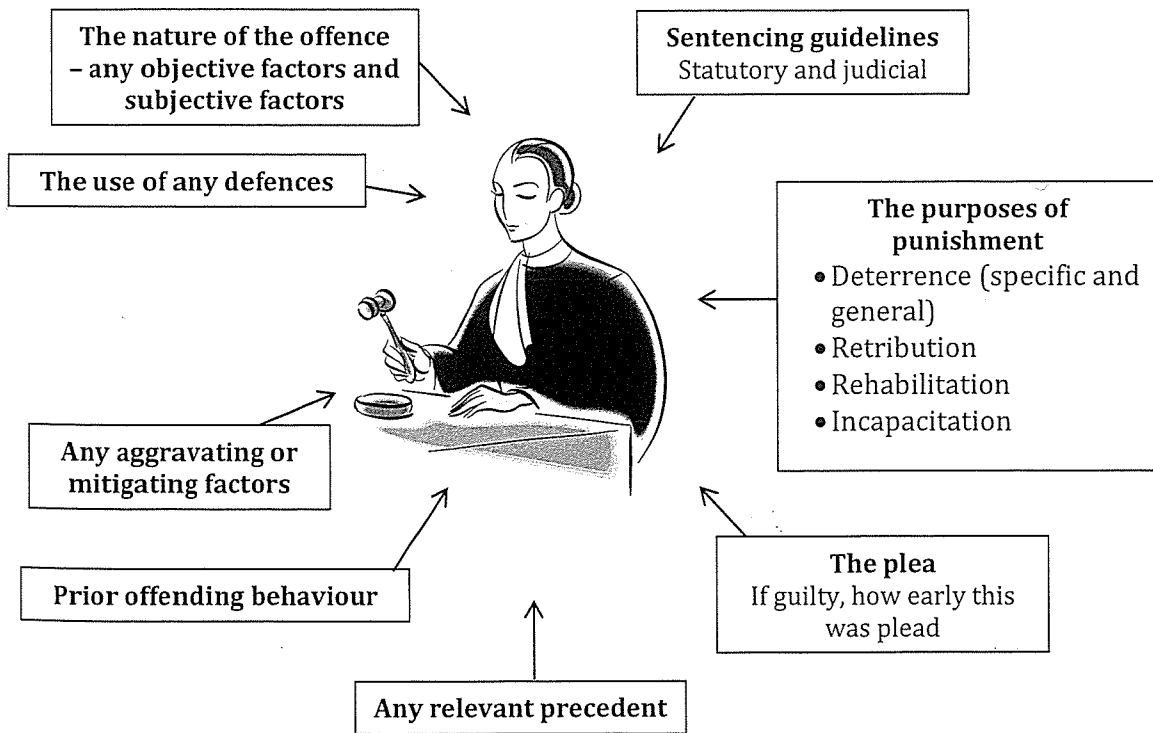


Figure 9 – A summary of the factors affecting the judge during a sentencing hearing

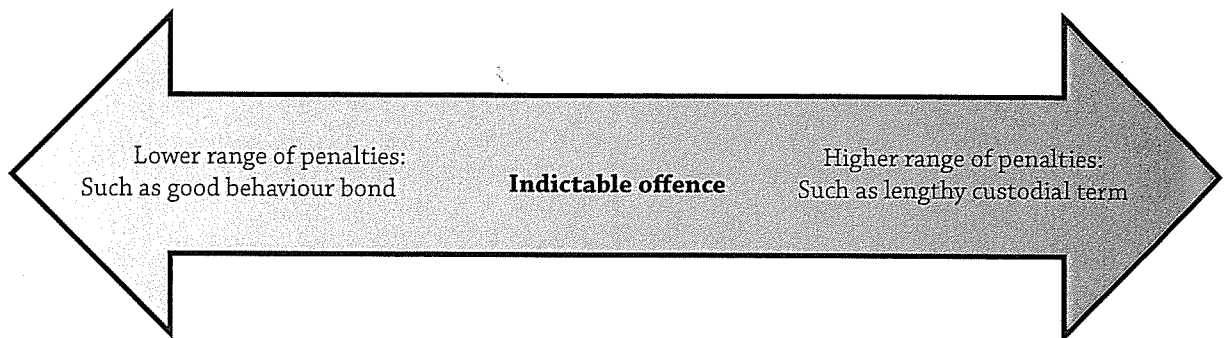
## Statutory and judicial guidelines

Statutory guidelines are those detailed in statutory law. This means that the penalties will be written into the law. Laws such as the *Crimes Act*, the *Summary Offences Act* and the *Crimes (Sentencing Procedures) Act* all indicate a range of statutory penalties available for different offences. Statutory guidelines always set maximum penalties, but sometimes also set minimum penalties. Minimum penalties are most common for strict liability offences.

## Judicial discretion

When a judge decides on a sentence there are a huge number of factors to consider. They need to give weight to the various factors and in so doing are exercising their discretion. This use of discretion can lead to variations in sentencing between judges, even for very similar offences.

The purpose of law, particularly when it is classified as 'common law' is arguably to ensure that common penalties are imposed for like offences. In this way the law creates certainty, predictability, equality and just outcomes. However, an observation of the sentencing patterns of judges reveals that some judges err on the side of lenience and other judges tend to be more punitive. This means that discretion is used by some judges to impose sentences for some offences that are consistently at the lower end of the range of penalties. Other judges tend to have a pattern of consistently sentencing at the higher range and closer to the maximum penalty allowable. This is shown in the figure below.



The inconsistent sentencing patterns of judges imposed on people convicted of similar offences creates a problem for the law. The impetus for judicial guidelines arises from inconsistent sentencing. The criminal justice system is seen to be failing people when there is a lack of consistency, certainty and predictability.

Under such circumstances the Attorney General under the advice of the Director of Public Prosecutions can appeal a decision. It can then apply to the court to create a guideline judgement. If the court agrees to this then it be have that appeal heard by a 5-judge Court of Appeal. An example of this process can be seen in the case of Thomas Kelly killer, Kieran Loveridge.

### ***Loveridge case to be appealed***

NSW Attorney-General Greg Smith is seeking a special guideline judgment in the appeal case of convicted one-punch killer Kieran Loveridge, which could be heard before a panel of five judges. In a rare move, Mr Smith and the Director of Public Prosecutions are seeking a special judgment from the Court of Criminal Appeal, which would advise judges on how they should deal with other manslaughter cases.

Early in November 2013, Loveridge was sentenced to at least four years for the manslaughter of 18-year-old Thomas Kelly in an unprovoked one punch attack in Kings Cross in 2012.

The DPP is appealing Loveridge's sentence on the grounds that it was manifestly inadequate.

Registrar Michael Crompton was told both the DPP and the Attorney-General wished to be heard before a five-judge panel as they seek to apply for a guideline judgment. Guideline judgments give guidance to judges in relation to how they should sentence offenders, with the aim of reducing inconsistency in sentencing.

Jeremy Styles, representing Loveridge, told the court there hadn't been a guideline judgment handed down for 'some time'. There was only one other known guideline judgment which had involved a single party, he added.

*'We say there is a significant argument about the DPP's capacity to bring a guideline judgment into their crown appeal for this single person,' he said.*

The court heard that if the application went ahead, senior public defender, Mark Ierace SC, would also wish to oppose it.

Loveridge's sentence sparked community outrage, with Mr Kelly's parents expressing their grief and horror at its length. Within days, the state government announced the introduction of a new 'one-punch' offence, which will carry a maximum 20 year sentence.

The 19-year-old was originally charged with murder but he pleaded guilty to the alternative charge of manslaughter, a plea that was accepted by the DPP. He was also sentenced for four assaults he committed on the same night he punched Mr Kelly, receiving an overall minimum sentence of five years, two months. Setting a maximum seven year, two month jail term, Justice Stephen Campbell took into account Loveridge's remorse and his good prospects of rehabilitation. As it currently stands, he will be eligible for release in November 2017.

The court heard the guideline judgment application might be heard separately from Loveridge's appeal hearing. The Crown is expected to lodge its application in December 2013, with the matter set down for a mention in December.

Source: <http://www.skynews.com.au/topstories/article.aspx?id=926665&vld=4237324&cl=Top%20Stories>, 21.11.13

### **Judicial guidelines**

Gleeson CJ explained the concept and purpose of guidelines in *Wong v The Queen* (2001):

#### **“The idea of guidelines**

The expressions ‘guidelines’ and ‘guidelines judgments’ have no precise connotation. They cover a variety of methods adopted by appellate courts for the purpose of giving guidance to primary judges charged with the exercise of judicial discretion. Those methods range from statements of general principle, to more specific indications of particular factors to be taken into account or given particular weight, and sometimes to indications of the kind of outcome that might be expected in a certain kind of case, other than in exceptional circumstances.

One of the legitimate objectives of such guidance is to reduce the incidence of unnecessary and inappropriate inconsistency. All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.”

#### **The statutory scheme**

The *Criminal Procedure Amendment (Sentencing Guidelines) Act 1998* was passed in response to the first guideline judgment of *R v Jurisic* (1998) and gave statutory recognition to the issuing of guideline judgments in NSW. Section 36 provides definitions, which include the following:

“*Guideline judgment*’ means a judgment that is expressed to contain guidelines to be taken into account by courts sentencing offenders, being:

- a. guidelines that apply generally, or
- b. guidelines that apply to particular courts or classes of courts, to particular offences or classes of offences, to particular penalties or classes of penalties or to particular classes of offenders (but not to particular offenders).”

Section 37 provides:

#### **Guideline judgments on application of Attorney General**

1. The Court may give a guideline judgment on the application of the Attorney General.

#### **Guideline judgments promulgated**

The Court of Criminal Appeal has delivered the following guideline judgments:

- High Range PCA - *Road Transport (Safety and Traffic Management) Act 1999, s9(4)*
- Guilty plea - *Crimes (Sentencing Procedure) Act 1999, s22: R v Thomson & Houlton (2000)*
- Break, enter and steal - *Crimes Act 1900, s112(1): R v Ponfield (1999) 48*
- Armed robbery - *Crimes Act 1900, s97: R v Henry (1999)*
- Dangerous driving - *Crimes Act 1900, s52A: R v Jurisic (1998)*

Source: Adapted from Source: <http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/sentencingguidelines.html>

### ***Use of guideline judgments as a “check” or “sounding board”***

*R v Whyte* (2002) is the authoritative statement on the use of guideline judgments. Spigelman CJ said:

*“this court should take particular care when expressing a guideline judgment to ensure that it does not... confine the exercise of discretion. This involves, in my opinion, ensuring that the observations in the original guideline judgment of Jurisic - that a guideline was only an ‘indicator’ - must be emphasised... as a matter to be ‘taken into account’. A guideline is to be taken into account only as a ‘check’ or ‘sounding board’ or ‘guide’ but not as a ‘rule’ or ‘presumption’.*

### ***Reasons required for departure from guideline judgment***

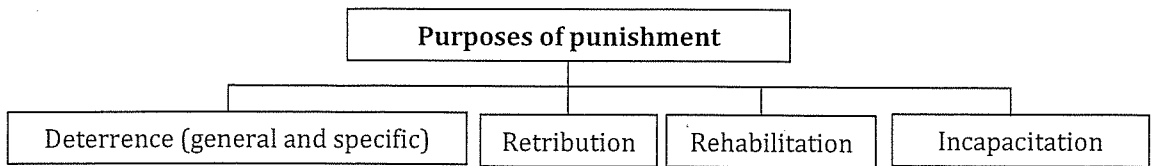
Notwithstanding the fact that guidelines are not binding in a formal sense, where a trial judge does not apply a guideline, the Court of Criminal Appeal will expect the reasons for that decision to be articulated.

Adapted from Source: [http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/sentencing\\_guidelines.html](http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/sentencing_guidelines.html)

## **Review Activities – Statutory and judicial guidelines**

1. Identify the law that regulates the sentencing process.
2. What is the maximum penalty available in NSW?
3. List EIGHT (8) factors that a judge would consider when sentencing.
4. What are statutory guidelines and where do they come from?
5. Define the term ‘discretion’
6. What is the purpose of judicial guidelines or guideline sentences?
7. How many guideline judgements have been created in NSW?
8. What will happen if a trial judge does not apply a guideline?
9. Do guideline judgements reduce judicial discretion to the point of inequity?  
Explain

## Purposes of punishment



The diagram above indicates some of the purposes of punishment. Any punishment imposed on an offender who has been convicted by a court will be detailed in the sentencing hearing. For this reason, the *Crimes (Sentencing Procedure) Act 1999* details the purposes of sentencing (that is, the purpose of imposing a penalty in the process of sentencing).

### ***Crimes (Sentencing Procedure) Act 1999 - s3A - Purposes of sentencing***

The purposes for which a court may impose a sentence on an offender are as follows:

- a. to ensure that the offender is adequately punished for the offence,
- b. to prevent crime by detering the offender and other persons from committing similar offences,
- c. to protect the community from the offender,
- d. to promote the rehabilitation of the offender,
- e. to make the offender accountable for his or her actions,
- f. to denounce the conduct of the offender,
- g. to recognise the harm done to the victim of the crime and the community

Source: [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/cpa1999278/s3a.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1999278/s3a.html)

### **Deterrence**

Deterrence works by changing, altering or stopping offending behaviour. To deter means to stop. This means that this particular purpose of punishment focuses on stopping the perpetrator from committing similar offences and also warning others against committing the offending acts (or omissions).

Specific deterrence is a penalty imposed on an offender that directly addresses their own offending and aims to stop that person from recommitting the same or similar offences. The penalty is specific to the offender. Specific deterrence may be aimed at stopping a behaviour that has occurred once or it may be applied to target recidivist behaviour. Examples of sentences where specific deterrence was a consideration include the original 55-year penalty imposed on serial rapist Bilal Skaf and the life sentence imposed on Walter Marsh for killing nurse Michelle Beets.

**Recidivism**

A person who offends and reoffends is a recidivist. That is, continually reoffending despite being punished. The habitual relapse into criminally offensive behaviours suggests that the penalties imposed are not effective.

General deterrence refers to the effect a sentence imposed on an individual has on the wider community. The court may decide that a harsher penalty is likely to send a warning to would-be offenders that certain crimes will attract harsh consequences. In this way the penalty sends a message or public statement to others about how the state and the community perceive the offence.

**Increased penalties: lower crime... Right?? Wrong!!!! Huh???**

There are issues associated with harsher penalties as a means of deterring offenders from engaging in criminal activities. This can be seen by considering the most extreme punishments available – the life sentence or death penalty. It could be supposed that if there is a threat of such extreme penalties then people subject to this possible punishment would commit fewer crimes. However, numerous studies have shown that crime rates actually increase when the penalties for crimes increase in severity.

So, the question arises – why would the incidence of serious crime increase if the punishments are harsher? Possible reasons that explain why this is so include:

- Usually the harshest penalties are applied to particular classes of crimes that affect some of the most marginalised groups in society, thus creating a deep sense of mistrust. People in such groups may feel like committing criminal acts as a way of getting even with the state.
- People who commit very serious and violent crimes may be tempted to kill victims in order to destroy evidence and/or minimise the chance of being caught and subsequently convicted.

Lengthening prison terms will do nothing to reduce crime in NSW, one of the most comprehensive reports on the criminal justice system conducted in Australia shows. The study by the NSW Bureau of Crime Statistics and Research (BOCSAR) found that increasing the risk of arrest and imprisonment were much more effective.

*"Increasing the risk of arrest and the likelihood of going to prison produces modest reductions in property and violent crime," Dr Weatherburn said. "But increasing the length of prison sentences exerts no effect at all... The best crime prevention tool in the long run is not tougher penalties or more police or better rehabilitation programs, it's a strong and vibrant economy."*

If governments wanted to spend less on prison without suffering an increase in crime they needed to look for ways of stopping people reoffending and returning to prison.

Source: A Patty, "When it comes to crime, harsher punishment doesn't pay", 14.03.12 <http://www.smh.com.au/nsw/when-it-comes-to-crime-harsher-punishment-doesnt-pay-20120313-1uykb.html#ixzz2ltbazKdP>

### **Retribution**

Retribution is concerned about vengeance and a feeling of 'getting even'. This means that people are so offended or hurt by the offender that they seek revenge. As criminal law is a state matter the state both criminalises and punishes certain behaviours. The victim cannot act for themselves to exact revenge. This means that the state acts on behalf of the victim and the broader community.

Although many would argue that the legal system should not be a vengeful system, many people do question whether the criminal justice system adequately reflects the interests of the victims. The difficulty is that whilst victims (or their families) may be called as witnesses or to provide an impact statement in the sentencing hearing, victims have no say in the length of sentence.

### **Rehabilitation (reform)**

A notable purpose of punishment is that of rehabilitation. Rehabilitation means to restore a person that is sick to goodness and productivity. The assumption here is that criminally offending behaviours occur because people who were once good have 'fallen'. Thus, rehabilitation seeks to restore a person to their good and socially productive self.

Rehabilitation therefore focuses on education and counselling. These are hoped to improve a person's skills and their personal insight into what motivates their own behaviour. Rehabilitation can also include intervention to overcome addiction (such as drug or alcohol dependence). Diversionary programs discussed later aim to encourage rehabilitation.

Note that the level of remorse or contrition shown by the offenders, and if they plead guilty early are signs that efforts to rehabilitate are more likely to be effective.

### **Incapacitation (gaol)**

There are several alternative terms that mean incapacitation: imprisonment, custody, gaol, incarceration and so forth. These terms indicate that a person has their freedom severely restricted through being locked in a secure facility. Such facilities in Australia are called 'correctional centres'.

There are good reasons for gaoling offenders. They may need to be locked up to protect others from them and they may also be a danger to themselves. A secure, locked facility may be required as a 'circuit-breaker' that helps a person to learn that offending behaviours shall be punished and that people make choices that have certain outcomes. If personal responsibility is not exercised then the state will intervene and impose responsibility upon the offender.

A custodial sentence is considered the most harsh of all sentences, deprives a person of freedom. This has an effect on their family, it disrupts their capacity to work and earn an income and the person will have a criminal record reflecting that they were imprisoned.



### ***Electronic bracelet – incapacitation...?***

An increasing range of options for limiting the movements of offenders has been created through the use of electronic bracelets and anklets. These bracelets are GPS tracked and thus enforcement officials can track the whereabouts of the offender. These types of devices limit the movement of the offender but also allow them to obtain treatment in the community, continue work or be supervised by family.

Thus, the offender is incapacitated but not to the same degree as a full time prison sentence incapacitates.

### **Review Activities – Purposes of punishment**

1. Identify FOUR (4) purposes of punishment.
2. Name the law that details the purposes of sentencing.
3. Define the term deterrence.
4. Distinguish between specific and general deterrence.
5. What is recidivism?
6. Why would the state seek to limit or stop reoffending behaviour?
7. Is there a relationship between harsher penalties and lower crime rates?
8. Define the term retribution.
9. What role do the following parties take with respect to sentencing? Victims and the state.
10. Define the term rehabilitation.
11. Can all offenders be rehabilitated?
12. How can offenders demonstrate that they are likely to have successful rehabilitation?
13. Define the term incapacitation.
14. How can incapacitation be effective?

### **Factors affecting a sentencing decision: aggravating and mitigating circumstances**

The *Crimes (Sentencing Procedure) Act 1999* provides a detailed guide for judges as to the factors that must be considered when sentencing. Section 21A of the Act details the aggravating and mitigating factors that need to be considered.

#### **Aggravating factors**

Aggravating factors are those that increase the level of culpability and make the crime more serious.

#### ***Crimes (Sentencing Procedure) Act 1999 - s21A - Aggravating, mitigating and other factors in sentencing***

1. In determining the appropriate sentence for an offence, the court is to take into account the following matters:
  - a. the aggravating factors referred to in subsection (2) that are relevant and known to the court,
  - b. the mitigating factors referred to in subsection (3) that are relevant and known to the court,
  - c. any other objective or subjective factor that affects the relative seriousness of the offence.
2. **Aggravating factors**

The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

  - a. the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work,
  - b. the offence involved the actual or threatened use of violence,
  - c. the offence involved the actual or threatened use of a weapon,
    - i. the offence involved the actual or threatened use of explosives or a chemical or biological agent,
    - ii. the offence involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance,
  - d. the offender has a record of previous convictions
  - e. the offence was committed in company,
    - i. the offence was committed in the presence of a child under 18 years of age,
    - ii. the offence was committed in the home of the victim or any other person,
  - f. the offence involved gratuitous cruelty,
  - g. the injury, emotional harm, loss or damage caused by the offence was substantial,
  - h. the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability),
  - i. the offence was committed without regard for public safety,
    - i. the offence involved a grave risk of death to another person or persons,
  - j. the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence,
  - k. the offender abused a position of trust or authority in relation to the victim,
  - l. a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant),
  - m. the offence was part of a planned or organised criminal activity,
  - n. the offence was committed for financial gain

Adapted from source: [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/cpa1999278/s21a.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1999278/s21a.html)

A close assessment of the aggravating factors listed under s21A(2) reveals that there are significant considerations that must be taken into account. When a person commits an indictable offence then it is at the more serious end when a weapon is used, there is violence, the victim is a vulnerable person, the offence was planned or the accused had a record of previous convictions. These aggravating factors point to the fact that the accused's behaviour falls well outside of the values held by mainstream society.

In deciding on a sentence the judge will increase the severity of the penalty if the aggravating factors listed in s21A(2) are present.

### Mitigating factors

Mitigating factors are those that reduce the liability of the accused. They are also detailed in the *Crimes (Sentencing Procedure) Act 1999* in s22A(3) (see below).

#### 3. Mitigating factors

The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

- a. the injury, emotional harm, loss or damage caused by the offence was not substantial,
- b. the offence was not part of a planned or organised criminal activity,
- c. the offender was provoked by the victim,
- d. the offender was acting under duress,
- e. the offender does not have any record (or any significant record) of previous convictions,
- f. the offender was a person of good character,
- g. the offender is unlikely to re-offend,
- h. the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise,
- i. the remorse shown by the offender for the offence, but only if: the offender has provided evidence that he or she has accepted responsibility for his or her actions, and the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both),
- j. the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability,
- k. a plea of guilty by the offender (as provided by section 22),
- l. the degree of pre-trial disclosure by the defence (as provided by section 22A),
- m. assistance by the offender to law enforcement authorities (as provided by section 23).

Adapted from source: [http://www.austlii.edu.au/legis/nsw/consol\\_act/cpa1999278/s22a.html](http://www.austlii.edu.au/legis/nsw/consol_act/cpa1999278/s22a.html)

It should be clear from reading the text above that the sentencing judge will need to take into account factors that reduce the level of culpability of the accused and thus lessen the penalty. Note that provocation and duress as defences are also mitigating factors. This recognises that the use of these defences might fail and also that there is some ambivalence of the use of provocation as a defence.

**Guilty plea and assisting enforcement authorities (s22 and s23)**

Sections 22 and 23 of the *Crimes (Sentencing Procedure) Act 1999* allow that an early guilty plea and the provision of assistance to the authorities can also act to lessen the severity of any sentence imposed. These sections recognise that if the accused is cooperative they should be rewarded for taking responsibility. They also recognise that an early guilty plea and/or assisting authorities is resource efficient, saves time and money.

**Review Activities – factors affecting sentencing: aggravating and mitigating factors**

1. Identify the law that details factors that are considered aggravating and those considered mitigating.
2. Define the term 'aggravating'.
3. List FOUR (4) aggravating factors and state why they are aggravating factors.
4. What is the effect of aggravating factors on a sentence?
5. Define the term 'mitigating'.
6. List FOUR (4) mitigating factors and state why they are mitigating factors.
7. What is the effect of mitigating factors on a sentence?
8. Why is provocation both a defence and also a mitigating factor?

### The role of the victim in sentencing

A victim generally has no role in the actual sentence, although there is some law reform question about whether it would be appropriate for the victim to suggest a punishment they would like to see. The victim, under mainstream Australian law has the following roles in respect of a trial and sentence:

- Can act as a witness
- Can provide the court with a Victim Impact Statement (or the victim's family)
- Can receive a limited amount of counselling and compensation

The criminal justice system removes the victim from being involved from the outset of a criminal matter. This is because the prosecution is done by the state acting on behalf of both the victim and broader society. In this context the victim is relying on the prosecuting authorities to properly represent their interests.

Part 3, Division 2 of the *Crimes (Sentencing Procedure) Act 1999* details the circumstances under which a victim (or their family) can present an impact statement to the court. Sections 26 – 32A specifically provide the authority for a victim to present an impact statement to the court during the sentencing hearing. There are several reasons for allowing this:

- It allows the victim or the victim's family to state the effects of the crime upon them
- It aims to persuade the court to give a sentence that reflects the impact of the crime on the victim and/or on the victim's their family
- It aims to empower those directly affected by crimes
- It can assist in the rehabilitation of the offender who may find hearing from the victim and seeing the victim very confronting

The use of impact statements has, however been criticised on the basis that they are usually very short (limited to two pages) and do not really allow the victim or the victim's family to properly express the full effect of the crime. Moreover, there is some question as to whether judges actually even consider such statements. A further issue is that they are not always allowed as the Act specifies the types of offences for which an impact statement can be presented to the court (sections 27 and 28). Lastly, the Act makes the use of the statements discretionary by the court, which means that a judge can decide not to allow one to be made.

### *Victims Rights and Support Act 2013 (NSW)*

Victim's compensation is provided for under this law. Division 2 of the Act details the Charter of Victims Rights, most of which are listed in s6. Article 6.14 of the Charter allows that a victim can make a statement to a court. However, this Act mainly details the right of the victim with respect to being informed during investigation, charging and trial processes, having their identity and personal details kept confidential and being informed about parole and release of offenders.

It Act also provides details about the compensation fund which obtains money from proceeds of crime and the forfeiture of assets (see later for further details).

Despite these laws, victims can often feel very disempowered in the criminal justice system for the following reasons:

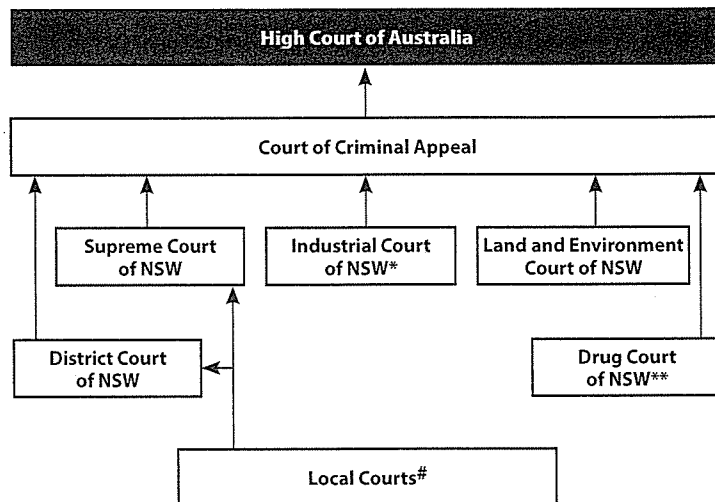
- They cannot stop the process of charge negotiation (plea bargaining) and can feel like the accused is rewarded rather than punished
- They can often feel like the full impact of a crime upon them and their family is not recognised or reflected in sentencing
- They find that the judge may not allow them to make a statement to the court, in the exercise of judicial discretion
- The compensation amounts are limited under the new scheme and this can feel for victims that they are devalued by the government
- For particular offences, such as serious sexual assaults, the cross examination of victims can be particularly brutal and can stop people from reporting serious crimes for fear of being bullied in subsequent proceedings

### **Review Activities – The role of the victim in sentencing**

1. Define the term victim.
2. Identify THREE (3) roles that a victim can have with respect to criminal proceedings.
3. Which law authorises the making of a statement by the victim (or victim's family) to the court?
4. Outline FOUR (4) benefits of allowing victims impact statements to be made.
5. How can judicial discretion affect the right of a victim to make a statement to the court?
6. Identify the Act that details the set up of a victim's compensation fund.
7. Examine the inclusion of victims in sentencing particularly and in the criminal justice system more generally.

## Appeals

The diagram below is a simplified representation of the criminal appeal process in NSW. Actual appeal rights are determined by the relevant legislation.



\* The Court of Criminal Appeal (CCA) may hear some appeals in matters relating to s 32A of the *Occupational Health and Safety Act 2000*.

\*\* Some appeals are made to the District Court of NSW.

# Some appeals from committal proceedings may be made to the Court of Criminal Appeal.

Source: [http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2\\_aboutus.html](http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_aboutus.html)

An appeal occurs when either party to a criminal matter decides to contest a decision made by the court in relation to the finalisation of the matter by the court. The main law authorising and detailing the right to appeal for either party (prosecution or defence) is the *Crimes (Appeal and Review) Act 2001* (NSW). In general terms there are two grounds for appeal under criminal law. These are:

- An error of law (question of law)
- A mistake of fact (questions of fact)

### ***Court of Appeal – grounds for appeal***

There are a number of grounds for appeal, including a challenge to a conviction involving a question of law. The Court of Criminal Appeal may also grant leave to appeal in matters involving questions of fact or mixed questions of fact and law. It may also grant leave to appeal in cases where the severity or adequacy of the sentence is challenged.

Source: Supreme Court of NSW website: [http://www.lawlink.supremecourt.nsw.gov.au/supremecourt/sco2\\_courtocriminalappeal.html](http://www.lawlink.supremecourt.nsw.gov.au/supremecourt/sco2_courtocriminalappeal.html)

### An error of law

This ground for appeal asserts that the law has been incorrectly understood or applied. This can happen if a judge misdirects a jury. It is therefore very important for all court cases to be fully recorded, as on appeal the transcripts will be reviewed in the appeals court. The most common forms of appeal based around an error of law or question of law are:

- An appeal against conviction. Here the appellant will be convicted, but will argue that the conviction should not hold because there has been an error in application of the law. If, for example, a jury is misdirected then it might form the view of guilt based on that misdirection. If this occurs then a conviction can be based on an error of law
- An appeal against the severity of the sentence. Here the defendant is asserting that the harshness of the sentence was based on an error in application of the law. Such an error could be in interpreting the statutory criteria or in placing incorrect weight in the sentence on particular subjective or objective factors. Sometimes a defendant will argue against a conviction but if that fails will argue 'in the alternative, the sentence is too severe'.

### Mistake of fact

The second ground for appeal is based on mistake of fact or question of fact. Here the issue is how evidence is interpreted. It is possible that the actual facts (including the actual offence) have been mistaken or misunderstood. When there is an appeal based on this then a conviction can be quashed. This was the case with Gordon Wood. Wood was originally convicted of throwing his girlfriend Caroline Byrne off a cliff. However the evidence of an expert witness, that was accepted in the original trial, was found to be highly dubious. The forensic evidence, on which the original conviction was based, was found to not be factual and thus there were mistakes of fact.

## Review Activities – Appeals

1. What is an appeal?
2. State the law that authorises and provides procedural details in regards to appeals in NSW.
3. Identify the TWO (2) broad grounds for an appeal.
4. Define the term 'an error of law'.
5. Explain TWO (2) types of appeal based on an error of law.
6. Define the term 'mistake of fact'.
7. Assess the use of appeals as a mechanism for increasing justice in the criminal justice system.



### Types of penalties

There is a range of penalties that can be imposed for offences, many of which are detailed in the *Crimes (Sentencing Procedure) Act 1999*. The Act divides sentences into those that are custodial in nature (sections 5 – 7) and those that are non-custodial (sections 8 – 17A). Other parts of the Act deal with how to set a non-parole term for those given a custodial sentence. Note, it is common for the maximum penalty for offences to be listed after the offence in the legislation in which the offence is detailed. However it is not very common for there to be minimum penalties imposed.

The types of penalties available are shown in Figure 10 below.

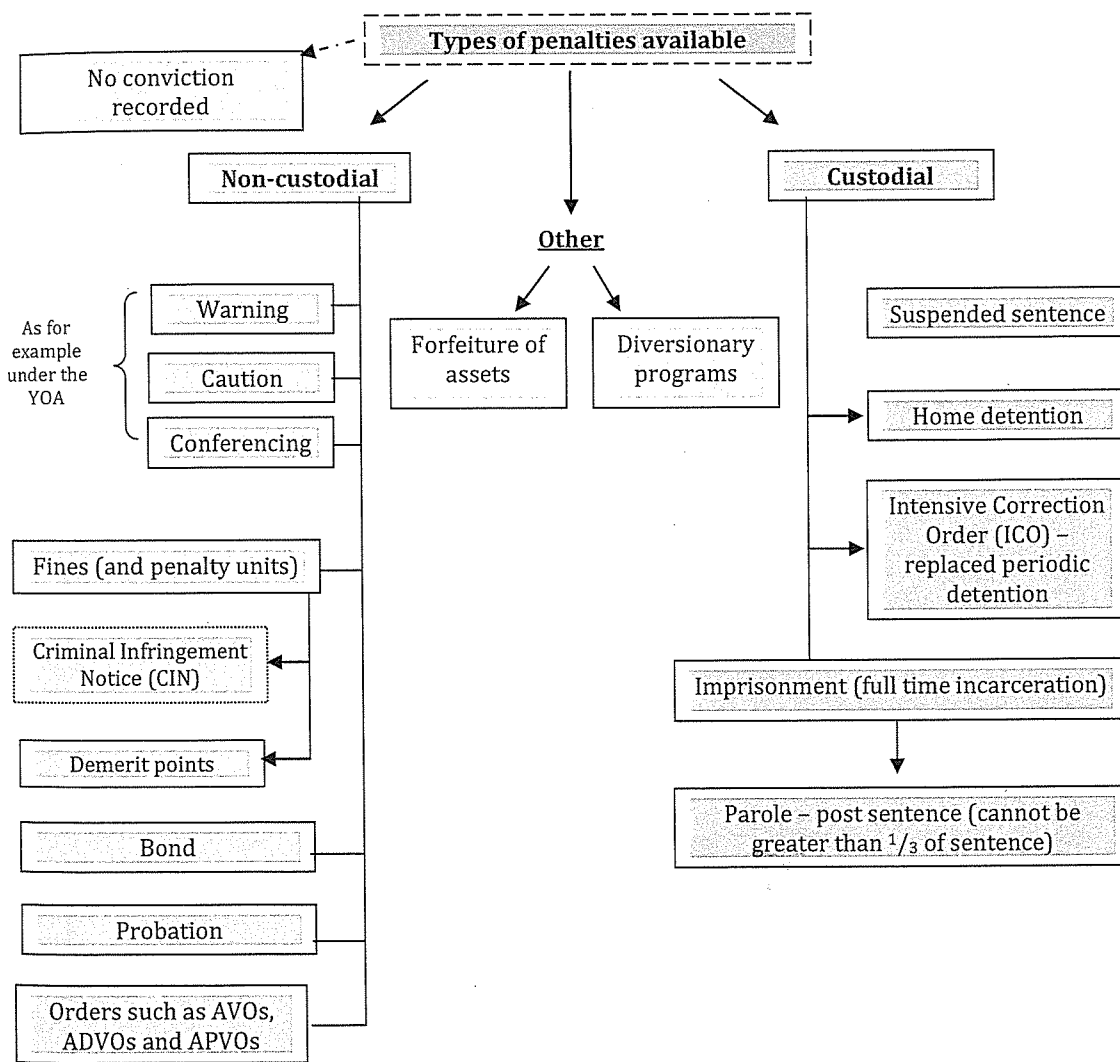


Figure 10 – An overview of the range of penalties available

### No conviction recorded

The *Crimes (Sentencing Procedure) Act 1999* authorises, under s10 that a court can find an offender guilty but can still dismiss charges and order that no conviction be recorded. This will normally be for a first offence, generally by a person of good character who has pleaded guilty and has good references. Typically this s10 will be given for minor offences such as driving offences like Driving Under the Influence (DUI) of alcohol or drugs. s10A allows for a conviction to be recorded but without any other penalty.

### Caution

Section 19A of the *Fines Act 1996* allows an authorised officer to issue a caution instead of a fine. Several other laws also allow enforcement officials to offer a caution as well, including:

- s11 *Summary Offences Act 1988* (in relation to possession of liquor by a minor)
- *Young Offenders Act 1997* (NSW) allows for cautions to be issued either by an authorised officer or by the Court. In addition, s33(1) of the *Children (Criminal Proceedings) Act* allows the Children's Court to issue a caution
- Under the *Cannabis Caution Scheme* in NSW a person caught in possession of a small amount of cannabis can be cautioned up to two times

A caution treats an offender with respect in that it recognises that they take responsibility for their actions, are apologetic and agree to undertake efforts to ensure they do not reoffend.

### Fine (and penalty units)

The State Debt Recovery Office (SDRO) administers the *Fines Act 1996* (NSW). The *Fines Act* details the parties that can impose a fine, including the courts (s5-6). In imposing a fine the courts must take into account the capacity of a person to pay. The SDRO has the power to issue cautions instead of insisting on the payment of a penalty. It will not do so however if serious offences are involved, such as speeding in a school zone, driving whilst using a mobile phone or speeding in excess of 30kph above the designated speed.

Fines are also called 'penalty notices'.

#### **State Debt Recovery Office (SDRO)**

In NSW, 230 different authorities can issue penalty notices. The authorities include the NSW Police Force, traffic police, parking inspectors working for local councils, RailCorp and statutory authorities are all authorised to issue penalty notices. Littering, driving offences, traffic offences, use of offensive language in public, engaging in graffiti and vandalism and carrying alcohol in an open container can all be subject to the issue of penalty notices. The SDRO collects the monies and administers the *Fines Act 1996*.

Source: [http://www.sdronsw.gov.au/lib/docs/misc/br\\_001.pdf](http://www.sdronsw.gov.au/lib/docs/misc/br_001.pdf)

The imposition of a fine will mean that the offender has to make a monetary payment to the state. Of all the penalties imposed this is the most common and it can be a penalty of itself or may be used in combination with other penalties. Up to 60% of penalties imposed by the Local Court include a fine. The *Crimes (Sentencing Procedure) Act 1999* allows fines to be imposed with other punishments such as a good behaviour bond (s14), with or as an alternative to imprisonment (s15) and a person usually has 28 days to pay a fine and must be issued with a reminder if a fine is unpaid within this time.

### Fines and penalty units

The *Fines Act* (s128) allows that regulations (or subordinate legislation) may impose a fine prescribed in terms of penalty units. Regulations cannot impose a fine of greater than 50 penalty units. A penalty unit, according to s17 of the *Crimes (Sentencing Procedure) Act* is currently set at \$110.

Fines are commonly associated with strict liability offences and regulatory offences. Default on the payment of a fine can lead to penalties of increasing severity including a Community Service Order (CSO) or even a short term of imprisonment.

### Bond

The *Crimes (Sentencing Procedure) Act 1999* allows the court to impose a bond as a penalty (s9). A bond is commonly referred to as a 'good behaviour bond' and requires an offender to be of good behaviour for a prescribed period of time. That period of time is usually between 2 and 5 years. Bonds are always conditional which means that the offender must comply with particular conditions that are imposed. A failure to abide by the conditions can lead to the offender appearing before a magistrate or judge who will impose a more serious penalty. The conditions associated with bonds include:

- Counselling for drug or alcohol abuse
- Supervision by a probation officer and regular reporting to a probation officer
- To be of 'good behaviour' – that is, not reoffend within the prescribed period
- To live in a rehabilitation centre (for the purposes of rehabilitating with appropriate qualified support) or engage in other forms of intervention (s95A)

Another form of good behaviour bond is a suspended sentence (s12 good behaviour bond) below.

### Suspended sentence

According to s12 of the *Crimes (Sentencing Procedure) Act 1999*, a judge who imposes a custodial term (imprisonment) of 2 years or less, can opt to suspend the sentence and impose a good behaviour bond of the same period. A suspended sentence is a serious penalty and an offender must abide by the conditions of the bond. If the conditions are breached the original sentence of imprisonment will apply, in addition to any other sentence imposed. The breach of a court order, such as a good behaviour bond, is considered a serious affront to the authority of the state and thus will generally be harshly penalised.

## Probation

A probation order is a form of order (bond) that includes home detention and Community Service Orders (CSOs). The purpose of a probation order is to keep the offender out of jail and to keep them close to significant people within their community. In order to be eligible for a probation order a person must have been assessed by the Probation and Parole Service (now called the Community Offender Service, COS). The offender will be under supervision by a parole officer and may have conditions imposed such as:

- Regular contact with a probation officer
- Regular drug and alcohol testing
- Enrolment into educational and/or vocational programs

Probation is also a sentencing option applied to young offenders.

## Criminal Infringement Notice (CIN)

These cannot be issued for minors (those under the age of 18-years-old). A CIN allows police officers to issue an on-the-spot fine. Features of CINs are detailed below.

### Criminal Infringement Notices (CINs)

Chapter 7, Part 3 of the *Criminal Procedure Act* 1986 permits police officers to issue penalty notices known as Criminal Infringement Notices (CINs) for prescribed offences. The *Criminal Procedure Regulation* 2010 identifies the prescribed criminal offences for which police are permitted to serve a Criminal Infringement Notice (CIN) on a person whom they reasonably believe has committed the prescribed offence. A CIN can be issued for the following seven criminal offence categories:

- Stealing (less than \$300) - fine of \$300
- Offensive Language - fine of \$150
- Offensive Behaviour - fine of \$200
- Unlawful entry of a vehicle/boat - fine of \$250
- Obstruct Traffic - fine of \$200
- Goods in Custody - fine of \$350
- Continuation of intoxicated and disorderly behaviour following move on direction - fine of \$200

**NOTE: Fine amounts quoted as at January 2012.**

Like other penalty notices, the CIN must be paid within 21 days of issuing. The option is available to elect to have the matter heard before a court by completing the court election form, for more information visit the State Debt Recovery Office website (SDRO).

Source: [http://www.police.nsw.gov.au/community\\_issues/the\\_law\\_and\\_you/criminal\\_infringement\\_notices](http://www.police.nsw.gov.au/community_issues/the_law_and_you/criminal_infringement_notices)

### Community Service Orders (CSOs)

The *Crimes (Sentencing Procedure) Act 1999* – s8 – allows that a penalty of community service, through a Community Service Order (CSO) can be imposed upon an offender. In this Act, s13 allows that such an order can be made instead of using a good behaviour bond.

#### ***Crimes (Sentencing Procedure) Act 1999 - s8 - Community service orders***

1. Instead of imposing a sentence of imprisonment on an offender, a court may make a community service order directing the offender to perform community service work for a specified number of hours.
2. The number of hours specified in a community service work in relation to an offence must not exceed 500, or the number of hours prescribed by the regulations in respect of the class of offences to which the offence belongs, whichever is the lesser.

Source: [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/cpa1999278/s8.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1999278/s8.html)

It can be seen from the extract above that the court can impose a penalty of up to 500-hours of community service.

#### ***NSW Corrective Services - Offender management in the community - CSOs***

Offenders deemed suitable for the program may be sentenced to perform unpaid work in the community, providing services to local communities. The CSO program is administered by Probation and Parole Officers who allocate offenders to work with voluntary community organisations, including services to the young, sick, disabled and elderly, as well as in environmental projects. Offenders are carefully screened for appropriate placement and are supervised for the duration of their hours, both in terms of work and behaviour. Community Offender Services supervises approximately 4,600 offenders with Community Service Orders, who perform around \$12 million worth of unpaid community work for 1,600 non-profit organisations.

Source: [http://www.correctiveservices.nsw.gov.au/offender-management/offender-management-in-the-community#service\\_orders](http://www.correctiveservices.nsw.gov.au/offender-management/offender-management-in-the-community#service_orders)

Whilst the extract above indicates that a CSO is the performance of *unpaid* community service work, if an offender is unable to pay a fine then the SDRO can order a term of community service equivalent in value to the unpaid fine. Each hour of community service will pay off \$15 of the fine. The breach of a CSO can lead to more severe penalties being imposed, including a term of imprisonment.

#### ***Trends in use of CSOs***

According to the NSW Bureau of Crime Statistics and Research (BOCSAR) and the NSW Law Reform Commission, the use of CSOs has steadily fallen since 1997. In 2012 only 3.5% of offenders were given a CSO as their primary punishment, whereas in 1997 the figure was 5.44%. The main reason is the increased use of suspended sentences.

Source: NSW Law Reform Commission, *Sentencing Patterns and Statistics*, from [http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/\\_assets/lrc/m731654110/report%20139-a.pdf](http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/_assets/lrc/m731654110/report%20139-a.pdf)

### Home detention

s6 of the *Crimes (Sentencing Procedure) Act 1999* allows that if a court has imposed a custodial penalty of 18 months or less it can instead order that the penalty be served by way of home detention. Home detention is a form of restricted movement order, and is sometimes even called 'house arrest'.

#### **About home detention**

The offender must be of good behaviour, remain in his or her home except when authorised, not consume alcohol or prohibited drugs, submit to electronic monitoring, obey reasonable directions, engage in personal development activities and undertake community service work as directed when not otherwise employed [from the *Crimes (Administration of Sentences) Regulation 2008 (NSW)*, cl 200]. Corrective Services NSW oversees the conditions of a home detention order and a court may only sentence an offender to home detention after a Corrective Services NSW suitability assessment. If a home detention order is revoked, the offender must serve the remainder of the sentence in full-time custody unless the order is later reinstated.

Source: NSW Law Reform Commission Report 139-A Sentencing Patterns and Statistics, p47

The use of home detention was intended to allow particular offenders to remain close to family and thus to benefit from good influences. Despite recommendations that the use of home detention be expanded over time, in 2012 only 0.17% of offenders (161 people) were given a home detention order.

The movements of people in home detention are monitored through the use of electronic bracelet or other electronic monitoring that can be worn or placed under the skin.

#### **Periodic detention (no longer available in NSW) – replaced by ICOs in 2010**

Periodic detention (or 'weekend detention') required offenders to spend some time in prison whilst maintaining work and/or family contacts. However, the periodic detention system in NSW was unsuccessful and in 2010 it was replaced with the use of Intensive Correction Orders (ICO). ICOs are a custodial alternative to full-time imprisonment.

#### **What is an ICO?**

An ICO is an order of imprisonment for not more than 2 years made by a court, which directs that the sentence is to be served by way of intensive correction in the community. An ICO is served in the community under the strict supervision of Corrective Services NSW (CSNSW) rather than in full-time custody in a correctional centre.

Source: <http://www.correctiveservices.nsw.gov.au/information/legislation/intensive-correction-order>

As with home detention, there are particular types of offences that preclude an offender from being given this type of punishment. If an offender has been involved with offences involving violence or a prescribed sexual offence then they will not be able to be given an ICO. In 2012 some 898 offenders or 0.92% were given a sentence using an ICO (NSW Law Reform Commission Report 139-A, p53). Only persons assessed by Corrective Services as 'suitable' can be given an ICO.

***Crimes (Administration of Sentences) Regulation 2008 - s175 - Mandatory conditions for intensive correction orders***

- a. a condition that requires the offender to be of good behaviour and not commit any offence,
- b. a condition that requires the offender to report, on the date fixed, to such local office of Corrective Services NSW or other location as may be advised by the Commissioner,
- c. a condition that requires the offender to reside only at premises approved by a supervisor,
- d. a condition that prohibits the offender leaving or remaining out of New South Wales without the permission of the Commissioner,
- e. a condition that prohibits the offender leaving or remaining out of Australia without the permission of the Parole Authority,
- f. a condition that requires the offender to receive visits by a supervisor at the offender's home at any time for any purpose connected with the administration of the order,
- g. a condition that requires the offender to authorise his or her medical practitioner, therapist or counsellor to provide to a supervisor information about the offender that is relevant to the administration of the order,
- h. a condition that requires the offender to submit to searches of places or things under his or her immediate control,
- i. a condition that prohibits the offender using prohibited drugs, obtaining drugs unlawfully or abusing drugs lawfully obtained,
- j. a condition that requires the offender to submit to breath testing, urinalysis or other medically approved test procedures for detecting alcohol or drug use,
- k. a condition that prohibits the offender possessing or having in his or her control any firearm or other offensive weapon,
- l. a condition that requires the offender to submit to such surveillance or monitoring (including electronic surveillance or monitoring) as a supervisor may direct,
- m. a condition that prohibits the offender tampering with, damaging or disabling surveillance or monitoring equipment,
- n. a condition that requires the offender to comply with any direction given by a supervisor that requires the offender to remain at a specified place during specified hours or that otherwise restricts the movements of the offender during specified hours,
- o. a condition that requires the offender to undertake a minimum of 32 hours of community service work per month, as directed by a supervisor from time to time,
- p. a condition that requires the offender to engage in activities to address the factors associated with his or her offending as identified in the offender's assessment report,
- q. a condition that requires the offender to comply with all reasonable directions of a supervisor,
- r. a condition that requires the offender to submit to a medical examination by a specified medical practitioner in relation to the offender's capacity to undertake community service work or to otherwise comply with the offender's obligations under the intensive correction order.

Adapted from: *Crimes (Administration of Sentences) Regulation 2008, cl 175*

It can be seen from the above that the conditions imposed on offenders granted an ICO are very stringent. Nevertheless, the use of ICOs is increasing. This reduces the prison population and can assist in the rehabilitation of offenders.

## Imprisonment

Full-time incarceration is the harshest form of punishment available in NSW and in Australia. Judges are guided by the *Crimes (Sentencing Procedure) Act 1999* to use this as a last resort after all other options have been explored and found to be inadequate or inappropriate (s5).

### **Imprisonment numbers**

On June 30th 2012 there were 7,169 full-time prisoners in NSW. In every year between 1997 and 2013 the courts have sentenced 8-9% of all offenders to periods of full-time imprisonment. The number of prisoners sentenced to full-time imprisonment in NSW reached a peak in 2009, but has fallen sharply since then.

Reference: NSW Law Reform Commission Report 139-A Sentencing Patterns and Statistics, pp19-21

Full-time imprisonment removes the personal freedom of an offender and subjects the offender to particular hardship. There can be difficulty in obtaining access to education, communicating with and seeing family members, accessing legal support, keeping out of harm from other offenders and accessing religious instruction.

When imposing a custodial sentence on an offender judges will be guided by the relevant legislation. The maximum penalty for some offences is life imprisonment (never to be released): ss19A(1) and (2) *Crimes Act 1900*. This penalty applies to the murder of a police officer (who is in the course of their duties), aggravated sexual assault in company (s61JA) and having commercial quantities or cultivating a commercial quantity of drugs (s33 *Drug Misuse and Trafficking Act*). When such a sentence is imposed the option for parole may be restricted.



## Other penalties

There are numerous other penalties that are available under the law. These include the following:

- The imposition of other order such as place restriction orders, non-association orders and Apprehended Violence Orders (AVOs)
- Forfeiture of assets
- Diversionary programs

### Place restriction orders and non-association orders

#### ***Crimes (Sentencing Procedure) Act 1999 - s17A - Non-association and place restriction orders***

1. This section applies to any offence that is punishable by imprisonment for 6 months or more
2. When sentencing an offender for an offence to which this section applies, a court may make either or both of the following orders in respect of the offender:
  - a. a non-association order, being an order prohibiting the offender from associating with a specified person for a specified term, or
  - b. a place restriction order, being an order prohibiting the offender from frequenting or visiting a specified place or district for a specified term,

if it is satisfied that it is reasonably necessary to do so to ensure that the offender does not commit any further offences to which this section applies.

Adapted from source: [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/cpa1999278/s17a.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1999278/s17a.html)

As can be seen from the excerpt from the Act above, a court can order that an offender refrain from contacting particular people and also from visiting particular locations, in order to assist the offender to keep away from influences that may hamper their rehabilitation.

### Apprehended Violence Orders (AVOs), ADVOs and APVOs

The *Crimes (Domestic and Personal Violence) Act 2007* allows a judicial officer to issue various orders with a view to protected people from violence. Apprehended Violence Orders (AVOs), Apprehended Domestic Violence Orders (ADVOs) and Apprehended Personal Violence Orders (APVOs) are to keep people safe, free from violence, intimidation (including harassment) and stalking.

These penalty options are specific to the circumstances of the offence and the offender and give further scope to judges during sentencing.

### **Review Activities – Types of penalties**

1. Define the term penalty.
2. Identify the law that details the penalties available for sentencing judges.
3. Distinguish between custodial and non-custodial penalties.
4. Outline what is meant by the term no conviction recorded.
5. What is a caution?
6. Identify the law that details the penalty of fines.
7. Name the body that administers the collection of fines.
8. Define the term 'penalty unit'.
9. Describe the penalty of a bond.
10. What is a suspended sentence and how are they related to good behaviour bonds?
11. Explain the penalty of probation.
12. Detail the use of Criminal Infringement Notices (CINs).
13. Explain the features and purpose of Community Service Orders (CSOs).
14. Outline the punishment of home detention.
15. What is an Intensive Correction Order (ICO)?
16. Detail some of the conditions for use of ICOs.
17. Explain the punishment of imprisonment.
18. What is the maximum sentence that can be imposed in NSW?
19. Identify THREE (3) other penalties that may be imposed.
20. Outline how place restriction orders operate.
21. What is the purpose of non-association orders?
22. What is the purpose of Apprehended Violence Orders (AVOs)?

## Forfeiture of Assets - Proceeds of Crime and Criminal Assets Recovery

There are three laws that regulate the forfeiture of assets in NSW. Forfeiture of assets means that the offender has to give up assets (property, cash and other forms of wealth) that have been gained through illegal or suspected illegal activities. The three laws in this area are:

- *Criminal Assets Recovery Act 1990 (NSW) (CARA)*
- *Confiscation of Proceeds of Crime Act 1989 (NSW) (COPOC)*
- *Proceeds of Crime Act (Cth) (POCA) 1987 and 2002*

### *Criminal Assets Recovery Act 1990 (NSW) (CARA)*

Section 22 sets out the forfeiture regime. If a person was at any time not more than 6 years before the making of the application for the assets forfeiture order, engaged in a serious crime related activity, then the Supreme Court must make an assets forfeiture order.

### *Confiscation of Proceeds of Crime Act 1989 (NSW) (COPOC)*

This statute is conviction based and operated by the NSW DPP. If the offence is deemed serious then the forfeiture process occurs. The first step is to prove that the property sought to be forfeited is tainted\* and then the onus is on the convicted person to avoid the forfeit by demonstrating the normal and intended use of the asset and/or demonstrating hardship.

### *Proceeds of Crime Act (Cth) (POCA) 1987 and 2002*

The 1987 Act is strictly conviction based, but the 2002 amendments made forfeiture either conviction or non-conviction based. Conviction based forfeiture occurs when the offence is deemed a serious offence as defined under POCA. This is effected without a hearing and occurs simply by operation of the statute.

**\*Tainted property:** Is a notion under the *Confiscation of Proceeds of Crime Act 1989 (NSW) (COPOC)*. Property becomes 'Tainted' by virtue of an offence. The defining of particular property as being tainted by the offence is the vital first step in the forfeiture process of COPOC.

### **Compensation from forfeiture**

#### ***Victims Rights and Support Act 2013 - s15 - Payments into Fund***

The following are to be paid into the Fund:

- a. all proceeds confiscated under the *Confiscation of Proceeds of Crime Act 1989*,
- b. all money required by the *Criminal Assets Recovery Act 1990* to be credited to the Fund

Adapted from source: [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/vrasa2013318/s15.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/vrasa2013318/s15.html)

In addition to government grants, it can be seen from the extract above that the Victims Support Fund is allocated money that is derived from the confiscation of assets of offenders. In this way offenders do not profit from crime and they are literally made to 'pay for crime'.

### **Review Activities – Forfeiture of assets**

1. What does the term forfeiture mean?
2. Identify THREE (3) laws that allow the state to take assets suspected of having been garnered through illegal activities.
3. What does the *Criminal Assets Recovery Act 1990* (NSW) authorise?
4. What does the *Confiscation of Proceeds of Crime Act 1989* (NSW) authorise?
5. What does the commonwealth *Proceeds of Crime Act* authorise?
6. Explain where the money from the forfeiture of assets goes.

## Diversionsary programs

These are rehabilitation focused and include programs designed to help an offender overcome drug addiction or substance abuse, where it is a factor in the criminal behaviour. Court diversion programs typically involve the Local Court magistrate adjourning a case while a defendant participates in rehabilitation or other program to assist with his/her needs. Other court programs provide an alternative forum for hearing a case or negotiating an outcome. Examples of diversionsary programs include:

- MERIT - Magistrates Early Referral Into Treatment
- CREDIT - Court Referral of Eligible Defendants into Treatment
- Traffic Offenders Intervention Program
- DVICM - Domestic Violence Intervention Court Model
- NSW Drug Court
- Forum sentencing
- Circle sentencing

### **Local Court diversion programs**

#### **MERIT**

The Magistrates Early Referral into Treatment program (MERIT) is a treatment and rehabilitation program that provides adult defendants an opportunity to break the drug-crime related cycle. Since July 2009 MERIT is also offered in select locations for defendants with alcohol abuse or dependence problems. The MERIT program is designed to allow defendants to focus on treating their drug or alcohol problems independently from their legal matters. Defendants are closely case-managed by the MERIT team throughout the program and the Magistrate receives regular reports on the participant. Magistrates are able to consider the defendant's progress in treatment as part of final sentencing.

#### **Court Referral of Eligible Defendants into Treatment (CREDIT)**

The CREDIT program targets adult defendants at the Local Court who want to address underlying issues related to their offending behaviour. Those identified as at risk of re-offending undergo case management and are referred to educational, training, treatment or social welfare services. CREDIT operates at Burwood and Tamworth Local Courts.

#### **Traffic Offender Intervention program**

This program, offered by the NSW Department of Roads and Maritime Services, targets offenders who have pleaded guilty or been found guilty of traffic offences in the Local Court. The Traffic Offender Intervention program is a community-based, road safety education program. It provides offenders with the information and skills necessary to develop positive attitudes towards driving and become safer drivers.

#### **Domestic Violence Court Intervention Model (DVCIM)**

The DVCIM program operates at Wagga Wagga and Campbelltown Local Court and is an integrated criminal justice and community social welfare response to domestic violence. Where the matter is appropriate for prosecution, DVCIM provide witness preparation and ensures victim safety and support is addressed.

Source: [http://www.localcourt.lawlink.nsw.gov.au/localcourts/court\\_programs.html](http://www.localcourt.lawlink.nsw.gov.au/localcourts/court_programs.html)

## NSW Drug Court

This specialist diversionary court offers special programs to reduce reoffending by adults who are dependent on drugs.

### **About the NSW Drug Court**

The objectives of the Drug Court of NSW are set out in the *Drug Court Act 1988*. These objectives deliver an overall benefit to the community of NSW - reducing the risk of re-offending by drug dependent people. The most recent evaluation by the Bureau of Crime Statistics and Reporting (BOCSAR) found that when compared to a comparison group, people who had been treated through a Drug Court program were:

- 37% less likely to be convicted of an offence
- 65% less likely to be convicted of an offence against a person
- 35% less likely to be convicted of a property offence
- 58% less likely to be reconvicted of a drug offence.

### **Achieving the objectives of the *Drug Court Act***

Section 3 of the *Drug Court Act 1998* sets out the objectives the Drug Court seeks to achieve. These are to:

- reduce the drug dependency of eligible persons
- promote the re-integration of such drug dependent persons into the community
- reduce the need for such drug dependent persons to resort to criminal activity to support their drug dependencies.

These objectives are to be achieved by establishing a scheme, under which drug dependent persons, who are charged with criminal offences, can be diverted into programs designed to eliminate, or at least reduce, their dependency on drugs. Reducing a person's dependency on drugs should reduce the person's need to resort to criminal activity to support that dependency, and should also increase the person's ability to function as a law-abiding citizen.

Source: [http://www.lawlink.drugcourt.nsw.gov.au/drgcrt/dc\\_role.html](http://www.lawlink.drugcourt.nsw.gov.au/drgcrt/dc_role.html)

## Alternative methods of sentencing including circle sentencing, restorative justice

### Forum Sentencing

Forum sentencing brings together an offender, the victim and other people affected by the crime. Forum Sentencing operates at selected NSW Local Courts and will be extended across the state over the next few years.

#### **About Forum Sentencing**

Forum Sentencing brings together an offender, their victim(s), and other people affected by a crime at a 'Forum'. The aim is to help repair harm to the victim and the community, and reduce the offender's likelihood of re-offending. It also gives an offender the opportunity to learn about the impact of their behaviour on victim(s) and other people. Courts can refer eligible offenders to the Forum Sentencing program and sentence offenders after the Forum has taken place. Offenders may be referred if they meet certain criteria, are suited to the program and face a prison sentence. The Forum Sentencing Program currently operates in thirteen locations to 52 Local Courts in NSW

Source: <http://www.lawlink.nsw.gov.au/forumsentencing>

### Circle Sentencing

Circle Sentencing is an alternative sentencing court for adult aboriginal offenders. The circle has the full sentencing powers of the court. It directly involves local aboriginal people in the process of sentencing offenders, with the key aims of making it a more meaningful experience for the offender and improving the aboriginal community's confidence in the criminal justice system.

#### **Objectives of circle sentencing**

The objectives for circle sentencing are identified in the *Criminal Procedure Amendment Regulation 2005* and they are as follows:

- Establish a sentencing format which allows for aboriginal community involvement
- Provide support to aboriginal victims of crime
- Empower aboriginal communities in the sentencing process
- Increase aboriginal community confidence in the sentencing process
- Reduce barriers between aboriginal communities and courts
- Provide more appropriate sentencing options for aboriginal offenders
- Provide effective support to aboriginal defendants when completing sentences
- Reduce recidivism in aboriginal communities.

Source: Attorney General Factsheet 2009, Aboriginal programs: Circle Sentencing

### **Restorative justice**

This is a reference to reparation or action undertaken within the criminal justice system to assist offenders to make amends for the crimes they have committed. Examples of restorative justice include:

- Conferencing where the offender and victim come face-to-face
- Youth Justice Conferences

#### ***About Conferencing***

Conferencing is typically used as a diversionary measure from court proceedings, and aims to bring the offender face-to-face with the victim/s of the offence, as well as any family and/or support persons (for either party) (Daly & Hayes, 2001). The purpose of a conference is to encourage the young person to accept responsibility for the offence, and to attempt to repair the harm caused by the young person agreeing to some form of restitution to the victim, for example, an apology, monetary compensation, community work, or participation in a behavioural program (Clancey, Doran, & Maloney, 2005; Trimboli, 2000). In addition, the conference process is designed to give the victim a voice in the criminal justice process (Clancey et al., 2005).

Source: E Moore, *Restorative Justice Initiatives: Public opinion and support in NSW*, Feb 2012 from: [www.bocsar.nsw.gov.au/agdbasev7wr/bocsar/documents/pdf/bb77.pdf](http://www.bocsar.nsw.gov.au/agdbasev7wr/bocsar/documents/pdf/bb77.pdf)

### **Review Activities – Alternative methods of sentencing**

1. Define the term alternative methods of sentencing.
2. What are diversionary programs?
3. Outline THREE (3) Local Court diversion programs.
4. What is the purpose of the NSW Drug Court?
5. Distinguish between forum sentencing and circle sentencing.
6. Define the term restorative justice.
7. Outline how conferencing operates.



## Post-sentencing considerations

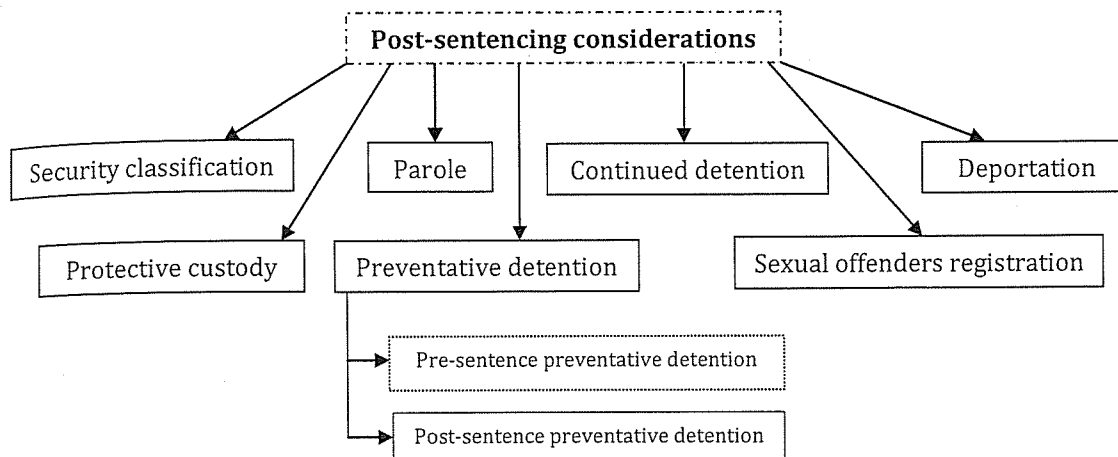


Figure 11 – Post sentencing considerations

After a judge has passed a sentence there are a number of administrative decisions that need to be made in regards to the offender. These decisions include:

- Security classification
- Protective custody
- Parole
- Continued detention
- Sexual offenders registration
- Deportation (if the crime is one that leads to visa cancellation)

Preventative detention may also be a consideration, however this is not generally a post-sentencing decision, unless it involves continuing detention. Each of these decisions shall now be explored.

### Security classification

Inmates to prisons need to be allocated a security classification. The various classifications that can be assigned aim to reflect the risk the inmate is to other inmates, the time the prisoner has to serve and the seriousness of the offences they have been involved in. The security classification of inmates is reviewed every six months, unless they are classified as a serious offender (found guilty of serious offences and serving a term of imprisonment with a non-parole period of 12 months or more).

#### **Crimes (Administration of Sentences) Regulation 2008 – cl 22 - Classification of male inmates**

**Category AA** being the category of inmates (serious offenders) who represent a special risk to national security (for example, because of a perceived risk that they may engage in, or incite other persons to engage in, terrorist activities) and should at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment.

**Category A1** being the category of inmates who, represent a special risk to good order and security and should at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment.

**Category A2** being the category of inmates who should at all times be confined by a secure physical barrier that includes towers, other highly secure perimeter structures or electronic surveillance equipment.

**Category B** being the category of inmates who should at all times be confined by a secure physical barrier.

**Category C1** being the category of inmates who should be confined by a physical barrier unless in the company of a correctional officer or some other person authorised.

**Category C2** being the category of inmates who need not be confined by a physical barrier at all times but who need some level of supervision by a correctional officer or some other person authorised by the Commissioner.

**Category C3** being the category of inmates who need not be confined by a physical barrier at all times and who need not be supervised.

#### **cl 24 Escape-risk classifications**

1. Each inmate (male or female) who commits an escape offence is to be classified in one of the following categories:

**Category E1** being the category of inmates who, in the opinion of the Commissioner, represent a special risk to security and should at all times be confined:

- a. in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment, or
- b. by a secure physical barrier that includes towers, other highly secure perimeter structures or electronic surveillance equipment.

**Category E2** being the category of inmates who, in the opinion of the Commissioner, should at all times be confined by a secure physical barrier.

Adapted from: <http://143.119.201.4/maintop/view/inforce/subordleg+376+2008+cd+0+N>

The security classification assigned to inmates will help in deciding which prison or 'Correctional Centre' to house the prisoner. Corrective Services NSW manages the correctional centres and also assigns a classification to the prisons (see text box below).

### **Corrective Services NSW oversees**

- 31 correctional centres - 8 maximum, 13 medium and 10 minimum security facilities;
- 8 periodic detention centres;
- 1 transitional centre for female inmates;
- 65 probation and parole district offices

These correctional centres are divided into 4 types. Note: Some centres cover more than one type of security classification

#### **Reception**

New inmates go through a Reception, Screening and Induction Program to identify their immediate needs and issues such as risk of suicide, mental illness and drug and alcohol withdrawal.

#### **Maximum Security**

Maximum security correctional centres hold inmates whose escape would be highly dangerous to members of the public or the security of the State. These prisons have high walls, electronic perimeter security and sensors on fences and cameras.

#### **Medium Security**

Medium security correctional centres are normally surrounded by walls or high security fences, but inmates move around inside more freely than in maximum security. Prisons are surrounded by high walls and perimeter security fences.

#### **Minimum Security**

Minimum security correctional centres hold inmates who can be trusted in open conditions where there are fewer physical barriers to escape.

Reference: <http://www.correctiveservices.nsw.gov.au/offender-management/correctional-centres>

## Protective custody

*Persons deprived of their liberty shall be treated with humanity  
and with respect for dignity of the person*

Source: International Covenant on Civil and Political Rights, Article 10

Occasionally inmates need to be protected from other inmates. This can occur because of the nature of the offence(s) they have committed (such as child sex offences) or because of media coverage of the offence. Other reasons for the Governor of a jail granting protective custody to an inmate through segregation are the perception either of Correctional Officers, or the inmate, that the inmate is under threat for one or more of the following reasons:

- The sexual orientation of the inmate
- Having a physical mental or health disability leaving the inmate vulnerable
- The inmate bringing to attention breaches of prison security
- Turning against (testifying against) accomplices, leading the inmate to become a witness against other inmates

### **14.1. Criteria for segregated/protective custody direction**

An inmate can be placed in segregated custody if, in the opinion of the General Manager (delegate) the association of this inmate with other inmates constitutes or is likely to constitute a threat to:

- the personal safety of any other person;
- the security of a correctional centre; or
- the good order and discipline within a correctional centre.

An inmate can be placed in protective custody in one of two ways - either:

- at the General Manager's (delegate) direction if, in his/her opinion the association of this inmate with other inmates constitutes, or is likely to constitute a threat to the personal safety of the inmate; or
- at the request of the inmate.

Note: Inmates who request protective custody must do so in writing to the Commissioner.

### **14.2. Effect of segregated or protective custody direction**

An inmate who is subject to a segregated or protective custody direction must be detained:

- in isolation from other inmates;
- in association only with other like inmates as the General Manager (delegate) may determine.

Source: [http://www.correctiveservices.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0017/294200/OPM-Sec-14-segregated-and-protective-custody-v1.5.pdf](http://www.correctiveservices.nsw.gov.au/__data/assets/pdf_file/0017/294200/OPM-Sec-14-segregated-and-protective-custody-v1.5.pdf)

## Parole

Parole is the conditional and supervised release from custody, following the completion of the minimum term of imprisonment as determined in the sentence. The decision to grant parole is made by the Parole Board. The Board will consider the inmate's conduct whilst in custody, whether parole is in the interest of the public and how well the inmate will reintegrate into society without reoffending. If the Parole Board does not grant the inmate parole then there is no right to appeal for the inmate.

The NSW State Parole Authority is an independent statutory authority governed primarily by the *Crimes (Administration of Sentences) Act 1999*.

In summary, the Authority:

- makes decisions relating to inmates being released to parole if their sentence includes a non-parole period;
- sets the conditions of release;
- determines if and how a parole order should be revoked;
- determines if and how an Intensive Corrective Order (ICO) or Home Detention Order is revoked, substituted or reinstated.

The Authority considers the release to parole of inmates who have sentences of more than three years with a non-parole period. A non-parole period is the period of imprisonment during which an offender is not eligible to be released to parole.

When deciding whether to release an offender on parole, the Authority considers the interest of the community, the rights of the victim, the intentions of the sentencing court and the needs of the offender. The Authority considers a broad range of material when deciding whether or not to release an inmate to parole and must have determined that it has sufficient reason to believe that the offender, if released from custody, would be able to adapt to normal lawful community life.

### ***The purpose of parole***

The principal purpose of granting parole is to serve the public interest by closely supervising the offender during his or her period of reintegration into the community. In all cases, strict conditions of parole are imposed and the Authority may also set additional conditions specifically tailored to address the underlying factors of an inmate's offending behaviour.

Adapted from: <http://www.paroleauthority.nsw.gov.au/>

### **Preventative detention**

Preventative detention is a controversial approach to managing behaviour because it is based on what a person may do or is likely to do rather than what has been done. As such, preventative detention is not generally a post-sentencing option because, as the name suggests, it is 'preventative' or is imposed prior to an offence occurring.

Whilst preventative detention is not a post-sentencing decision, there are forms of preventative detention that can take place at the end of a period of incarceration. Continuing detention orders are an example of this form of preventative detention.

### **Preventative detention and planned terrorism offences**

The main area of use of preventative detention is in the management of planned terrorism offences. The state has a duty to protect the citizens from harm and in recent history, such harm includes the possibility of a terrorist attack. However, sometimes the law enforcement authorities do not have enough evidence to arrest and charge. Hence, the law has to find a balance between protecting the interests of the community with the rights of an individual to have freedom from arbitrary abuse by the state.

It can be seen from the text on the next page that the legislature has sought to provide some protection for those detained under a regime of preventative detention. Nevertheless in all jurisdictions, domestically and in other nations, the laws in relation to preventative detention are controversial from a human rights perspective.

On the next page it can be seen that both the Commonwealth and all of the states and territories have passed laws in respect of preventative detention and terrorism offences. The rules regarding the commonwealth laws and some basic protections are shown.

### **Preventative detention orders**

The police can detain people under preventative detention orders only:

- where there is a threat of an imminent terrorist attack and the order might help prevent it or
- immediately after a terrorist act if it is likely vital evidence will be lost.

A person can be detained for a maximum of:

- 48 hours under Commonwealth law
- 14 days under state and territory laws
- 14 days under a combination of Commonwealth and state and territory regimes.

Australia's Commonwealth laws on preventative detention orders are found under Division 105 of the *Criminal Code Act 1995*. This department administers the Act.

### **Rights under a preventative detention order**

A person detained under a preventative detention order has the right to:

- be treated humanely and not be subjected to cruel, inhuman or degrading treatment
- contact a lawyer
- contact family members and employers to let them know they are safe
- not be questioned
- have a copy of the preventative detention order, which contains a summary of the reasons for making the order
- an interpreter if they have difficulty with English.

Children under 16 years old cannot be detained. Someone at least 16 years old but under 18 can be detained but must be detained separately from adults. They can have a parent or guardian visit them while they are detained.

### **States and territories**

States and territories have enacted their own legislation allowing for the detention of a person for up to 14 days.

New South Wales: *Part 2A of Terrorism (Police Powers) Act 2002*

Queensland: *Terrorism (Preventative Detention) Act 2005*

South Australia: *Terrorism (Preventative Detention) Act 2005*

Tasmania: *Terrorism (Preventative Detention) Act 2005*

Victoria: *Part 2A of Terrorism (Community Protection) Act 2003*

Western Australia: *Terrorism (Preventative Detention) Act 2006*

Australian Capital Territory: *Terrorism (Extraordinary Temporary Powers) Act 2006*

Northern Territory: *Part 2B of Terrorism (Emergency Powers) Act*

Source: <http://www.ag.gov.au/NationalSecurity/Counterterrorism/law/Pages/Preventativedetentionorder.aspx>

### Continuing detention (post-sentence preventative detention)

Extended supervision orders and continuing detention orders apply to offenders that have been classified as 'of high risk'. The orders apply to offenders who have been convicted of sex offences or violent crimes. The purpose of such orders is to err on the side of protecting the community in circumstances where imprisonment has not led to rehabilitation.

The use of continuing detention orders is controversial from a human rights perspective. This is because the law is meant to be 'discoverable' and to apply prospectively. Once a person has been given a sentence and fulfilled the sentence then there is some question as to whether it is fair for their penalty to continue. This issue of equity needs to be balanced against the purpose of punishment, especially that of rehabilitation. What if an offender has been jailed but shows no remorse at the end of their sentence? Further, what if an offender actively threatens the victim or victim's family that upon release they will be harmed by the offender? In *Kable's case* (see below) these were issues for the executive, who sought to protect the community and individuals by passing laws that extended Kable's incarceration after the time he was due for release.

#### ***Kable's case***

On May 5, 1990, Gregory Wayne Kable stabbed his wife to death in their house. This followed a bitter custody dispute over their two young children. He was charged with murder, but later the Director of Public Prosecutions accepted a plea of guilty to manslaughter on the basis of Kable's diminished responsibility. He got a minimum of four years in jail.

Once he was locked up Kable started writing threatening letters to the relatives of his dead wife, who were caring for the children. A psychologist said the letters were a form of "psychological violence"; a step removed from extreme physical violence. The authorities feared, once he was released, Kable would reoffend and the politicians went on red alert that this was something that could inflame the voters.

In response the *Community Protection Act* was passed. The government could apply to the Supreme Court for a preventive detention order to keep someone locked up after they had served their term.

Initially the act applied to one person: Gregory Wayne Kable. Even though the legislation was hedged with words that seemed to give the judges lots of discretion, such as "may" and "satisfied on reasonable grounds", the High Court found it unconstitutional because it smacked too much of the government seeking to tell the judges what to do.

Reference and source: <http://www.smh.com.au/opinion/society-and-culture/rights-and-wrongs-of-separation-of-powers-20091203-k8ph.html#ixzz2K9tgTUxl>



In NSW there are two laws that specify that continuing supervision and continuing detention orders can be applied to high risk offenders. These laws are:

- *Crimes (High Risk Offenders) Act 2006*, ss13B and C
- *Crimes (Serious Sex Offenders) Act 2006*, ss5D and G

***Crimes (High Risk Offenders) Act 2006 - s13B - Application for high risk sex offender continuing detention order***

1. An application for a high risk sex offender continuing detention order may be made only in respect of:
  - a. a detained sex offender or
  - b. a supervised sex offender.

***Crimes (High Risk Offenders) Act 2006 - s13C - Application for high risk violent offender continuing detention order***

1. An application for a high risk violent offender continuing detention order may be made only in respect of:
  - a. a detained violent offender or
  - b. a supervised violent offender.

Source: [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/croa2006246/](http://www.austlii.edu.au/au/legis/nsw/consol_act/croa2006246/)

## **Crimes (Serious Sex Offenders) Amendment Act 2013**

### **5D - High risk sex offender**

1. An offender can be made the subject of a high risk sex offender extended supervision order or a high risk sex offender continuing detention order as provided for by this Act if and only if the offender is a high risk sex offender.
2. An offender is a *high risk sex offender* if the offender is a sex offender and the Supreme Court is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious sex offence if he or she is not kept under supervision.
3. The Supreme Court is not required to determine that the risk of a person committing a serious sex offence is more likely than not in order to determine that the person poses an unacceptable risk of committing a serious sex offence.

### **Extended supervision orders for high risk sex offenders**

1. The Supreme Court may make an order for the supervision of an offender if the offender is a high risk sex offender.
2. An order made under this section is an extended supervision order.
3. An extended supervision order made under this section may also be referred to as a *high risk sex offender extended supervision order*.

### **Continuing detention orders for high risk sex offenders**

1. The Supreme Court may make an order for the detention of an offender if the offender is a high risk sex offender and the Supreme Court is satisfied that adequate supervision will not be provided by an extended supervision order.
2. An order made under this section is a *continuing detention order*.

### **5G - High risk violent offender**

1. An offender can be made the subject of a high risk violent offender extended supervision order or a high risk violent offender continuing detention order as provided for by this Act if and only if the offender is a high risk violent offender.
2. An offender is a *high risk violent offender* if the offender is a violent offender and the Supreme Court is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious violence offence if he or she is not kept under supervision.
3. The Supreme Court is not required to determine that the risk of a person committing a serious violence offence is more likely than not in order to determine that the person poses an unacceptable risk of committing a serious violence offence.

### **Extended supervision orders for high risk violent offenders**

1. The Supreme Court may make an order for the supervision of an offender if the offender is a high risk violent offender.
2. An order made under this section is an *extended supervision order*.
3. An extended supervision order made under this section may also be referred to as a *high risk violent offender extended supervision order*.

### **Continuing detention orders for high risk violent offenders**

1. The Supreme Court may make an order for the detention of an offender if the offender is a high risk violent offender and the Supreme Court is satisfied that adequate supervision will not be provided by an extended supervision order.
2. An order made under this section is a *continuing detention order*.

Source: [http://www.parliament.nsw.gov.au/prod/parlament/nswbills.nsf/131a07fa4b8a041cca256e610012de17/c30d6b6cea-f99a7eca257b17001626ff/\\$FILE/b2012-082-d21-HOUSE.pdf](http://www.parliament.nsw.gov.au/prod/parlament/nswbills.nsf/131a07fa4b8a041cca256e610012de17/c30d6b6cea-f99a7eca257b17001626ff/$FILE/b2012-082-d21-HOUSE.pdf)

**Crimes (Serious Sex Offenders) Act 2006 - s14 - Application for continuing detention order**

1. The State of New South Wales may apply to the Supreme Court for a continuing detention order against a sex offender who, when the application is made, is in full time custody in a correctional centre.

Adapted from: [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/csoa2006309/s14.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/csoa2006309/s14.html)

**Post-sentence preventive detention - Introduction**

Post-sentence preventive detention involves detaining offenders after they have already served their full sentence for the particular offence or offences that they committed. Because the offender has already been punished for the crime, the purpose of such schemes should not be to further punish the offender. The accepted purposes of preventive detention schemes are generally the protection of the community and/or the rehabilitation of the offender.

Queensland, Western Australia and New South Wales now have legislative schemes in place, aimed at sex offenders, which allow for post-sentence preventive detention in prison. The purposes of the legislation that sets up the preventive detention scheme in each in New South Wales, are:

- to ensure the safety and protection of the community
- to facilitate the rehabilitation of serious sex offenders (*Crimes (Serious Sex Offenders) Act 2006* (NSW), s 3).

Source: Preventive Detention for Dangerous Offenders in Australia; <http://www.criminologyresearchcouncil.gov.au/reports/200405-03.pdf>

### Sexual offenders registration

If a person is proven to be a child sex offender then the *Child Protection (Offenders Registration) Act 1990* allows the NSW Police Commissioner to add that person's name to the Child Protection Register (s19). This Act imposes upon the offender a positive duty to report annually on a wide range of personal information including:

- Their full name and any previous names and their date of birth
- Where they live
- The make, model, colour and registration of any cars they own/use
- Who their internet services provider and telecommunications carrier is and any email addresses and on-line user names they have
- Any tattoos or other identifying marks (including any that have been removed)
- Where they work

S9(1) Child Protection (Offenders Registration) Act 1990, Source: [www.austlii.edu.au/au/legis/nsw/consol\\_act/cpra2000403/s9.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/cpra2000403/s9.html)

Sex offenders registers are controversial because sometimes information within such registers gets leaked to the media. This can mean that the address of a person having been convicted of a sex offence may be publicly revealed. When the media does find out the address of a convicted sex offender then there can be mass hysteria created about the offender. This can lead to a community smashing the windows of the home of the offender or taking some other form of retributive action.

It should be understood however that sex offenders on the register have already been punished and that their chances of employment will be curtailed on account of their criminal record and appearance on the Child Protection Register. There is an issue as to whether the revelation of a person's whereabouts after they have been penalised is beneficial to the community (as parents may believe that they have a right to know if a convicted sex offender is living in their midst).

Child Protection Registers are currently for use by particular authorities and institutions (such as childcare centres). There is a criminal justice question as to whether the registers should be open to public view or whether this would cause people to 'take justice into their own hands' through committing acts of violence against those on the Register. A further issue is that mistakes can be made and it is possible that a person's name may erroneously be placed on the Register and this can lead to disastrous consequences.

## Deportation

Deportation is the forced removal of a non-citizen ('illegal alien') to another nation (usually their nation of origin). Sections 201 – 203 of the *Migration Act 1958* (Cth) detail the grounds under which a non-citizen can be removed from Australia. There are different forms of deportation depending on the nature of the offence committed:

### Five different sorts of deportation

1. Arrested when entering Australia
2. People arrested while they hold a temporary visa in Australia
3. People who overstay their visa (and are then in Australia unlawfully) and are arrested
4. Permanent residents who are convicted and sentenced to imprisonment of greater than 12 months
5. Persons who were foreign nationals who have finished their sentence but do not have a passport

### **Robert Jovicic's case**

Robert Jovicic came to Australia with his parents in 1968, when he was two years old. He'd only been to Serbia once. But after he was jailed for a string of burglaries to support a heroin addiction, he was deported from Australia on character grounds. Mr Jovicic was unable to speak the language. He became ill and was reduced to sleeping on the streets of Belgrade. After revelations of his case on the ABC's Lateline program, he was allowed to return to Australia on compassionate grounds but was only given on two-year temporary visa. Later in 2007 he told the AM program he was still living in limbo.

ROBERT JOVICIC: There's no clear outline at the end of those two years indicating in any certain terms where my future might lie.

My life's still been placed on hold. I can't engage in really any meaningful relationships, especially on a long-term basis because my future is so undecided.

LINDY KERIN: Last night the Immigration Minister Chris Evans announced Mr Jovicic had been granted a permanent visa.

Source: <http://www.abc.net.au/am/content/2008/s2170613.htm>

Deportation is effected after a convicted person has completed their sentence. This means that they will be arrested, charged and prosecuted, serving time in an Australian jail. At the completion of their sentence they are then deported to their home nation. Deportation was effected recently for the murderers of Dr Victor Chang.

### ***Sentence – parole – deportation***

The man who murdered heart surgeon Victor Chang will be released from jail and deported to Malaysia after the NSW Attorney-General failed in its bid to keep him behind bars. Chiew Seng Liew, 69, has been serving a 26-year sentence after being found guilty of shooting Dr Chang in his car at Cremorne in 1991.

After Liew completed his 21-year non-parole period, the NSW Parole Authority ordered Liew's release and deportation, finding that his advancing Parkinson's disease meant he was no longer a threat to the community and would soon be unfit to travel.

NSW Attorney-General Greg Smith appealed against the decision, arguing in court that the authority had failed to consider that, because Liew was going to be deported immediately, none of the normal restrictions imposed on paroled prisoners would apply. This would have the effect of "expunging the remaining five years of his sentence".

But Justice Robert Beech-Jones rejected the appeal, finding that the authority had acted in accordance with the rules governing its activities. He ordered a temporary stay of the order to release Liew so that arrangements could be made for an accompanied flight back to Malaysia.

Speaking outside court, Victims of Crime advocate Howard Brown said Mr Chang's family had told him they were devastated by the decision.

*"Dr Chang's son said to me the thing that distresses him and his family the most is that Chiew Seng Liew was sentenced to 26 years, 21 years, in jail and an additional five years on parole," Mr Brown said. "By removing Chiew Seng Liew from the jurisdiction of Australia, what has been done is that the supervision which would normally be conducted while on parole cannot occur. So as far as they are concerned the actions of the court pervert the system of parole...He has failed in the 21 years of his incarceration to take place in prison rehabilitation programs in any way shape or form....He refused point blank to learn English, he refused point blank to participate while in custody and yet the defence claimed that that was something that should be taken as a credit to him."*

Source: P Bibby, "Chang murder wins release to be deported", SMH, 11.10.12 from: <http://www.smh.com.au/nsw/chang-murderer-wins-release-to-be-deported-20121011-27f1s.html#ixzz2pDaUp4TQ>

A 24-year-old New Zealander who has lived in Australia since he was nine is to be deported because he has a history of violence. Marouna Williams' will be sent home after losing an appeal on December 20 against the cancellation of his visa. He had had several brushes with the law before October 2008 when, while carrying out a home invasion with others in Melbourne, he senselessly beat a stranger, stomping so hard on his head his shoe left an impression on the man's face. He was convicted in 2011 on five charges over that incident - including intentionally causing serious injury - and sentenced to 43 months' imprisonment. He was released on parole in November 2012 but was immediately taken into immigration detention, where he has remained since. A psychologist who examined Williams said he had a medium risk of re-offending, but the Administrative Appeals Tribunal vice-president James Constance said he was satisfied "there is a reasonable likelihood that Mr Williams will re-offend". The risk of future harm if Williams was allowed to stay in Australia was unacceptable and "he should forfeit the privilege to continue to hold a visa", Mr Constance felt. Williams was responsible for "repeated acts of extreme violence", the tribunal said - putting a train passenger in a coma in hospital for "a few months" after an unprovoked attack committed with his cousins when he was 15. He was also guilty of burglary, dishonesty offences, theft of a motor vehicle, and drink driving.

Source: L Hislop, "Australia to deport NZ burglar after series of violent incidents" (04.01.14) <http://www.smh.com.au/national/australia-to-deport-nz-burglar-after-series-of-violent-incidents-20140103-309se.html#ixzz2paUsX0rZ>

### **Review Activities – Post sentencing decisions**

1. Identify SEVEN (7) post-sentencing decisions.
2. Define the term security classification with respect to offenders.
3. Outline how correctional centres are assigned a security classification.
4. Define the term protective custody.
5. When would an inmate be given protective custody?
6. Explain the circumstances under which parole is given.
7. What law determines the parole decision?
8. Explain how preventative detention may be a pre- or post sentencing decision.
9. How are human rights considerations an aspect of preventative detention for terrorism matters?
10. Describe the role and purpose of continuing detention.
11. Outline the types of offenders who may be subject to continuing supervision orders or continuing detention orders.
12. Explain the purpose of sexual offenders registers.
13. Describe how deportation is used for offenders who are non-citizens.