

Sentencing Template

1. Understand the facts of the offence and identify the relevant facts for sentencing purposes;
2. Identify the objective seriousness of the offence;
3. Identify aggravating factors;
4. Identify mitigating factors;
5. Identify and analyse any specific sentencing factors or issues;
6. Consider sentencing objectives;
7. Consider other cases' treatment of the offences;
8. Consider general sentencing principles (e.g. totality, parity, parsimony);
9. Consider specific principle of proportionality;
10. Consider any other like cases;
11. Look at final sentence and ensure that the punishment is just in all the circumstances.

Topic 1: Sentencing Landscape

The Australian sentencing landscape

Typically one of the least principled and coherent areas of law, sentencing was **traditionally regarded as a discretionary exercise**

Sentencing is governed by **legislation and common law**

CL → largely dominated the development and recognition of various aggravating and mitigating considerations

Last 10 years → move towards a **more uniform sentencing jurisprudence** in Australia, largely led by the High Ct

Statutes address 3 main issues:

1. **Purpose** and aims of sentencing (deterrence, community protection, denunciation and rehab).

- **No attempt to prioritise which aim is more important**

2. **Specific matters** that are relevant to the sentence (aggravating or mitigating factors e.g. level of harm, criminal record, remorse, attitude of the victim, effect of proposed sanction, hardship to others (offenders family), parity, plea of guilty, voluntary reparation, social contributions.)

- **s 16A of Crimes Act 1914:**

- must be of a severity appropriate in all the circumstances of the offence

3. Types of **sanctions** that can be imposed (typically 10 types of sanctions broken down into 4 groupings:

- **Finding of guilt** without further harshness being imposed apart from promising not to reoffend.
- **Monetary Fine**
- **Imprisonment**
- **Intermediate punishments** (too serious for a fine but not serious enough for imprisonment)
e.g. Training, rehab, community service orders, home detention, suspended sentences, intensive corrections orders.

Punishment = study of the connection between wrongdoing and state → imposed sanctions.

Issue: basis upon which the hardships administered by the State to offenders can be justified = sentencing and punishment inseparably linked.

Theories of Punishment:

Punishment requires a **moral justification** because it involves the intentional infliction of some type of harm
TF infringes upon an important concern or interest.

TF it's not dissimilar to activities such as slavery, abortion & euthanasia.

Utilitarianism: The view that punishment is inherently bad due to the pain it causes the wrongdoer, but is ultimately justified because this is outweighed by the good consequences stemming from it.

- punishment = only acceptable if it increases future pleasure or decreases future pain
- **focus: likely future consequences of imposing punishment**
- **objectives → deterrence + moral reformation and compensation**

Retributivism: the offender deserves to suffer, and that the institution of punishment should inflict the suffering they deserve.

focus: past events in order to determine whether punishment is justified

3 similarities shared by retributive theories:

- 1. Punishment is only justified in cases of deliberate wrongdoing
- 2. Punishment must equal level of wrongdoing
- 3. Punishing criminals is just itself → can't be inflicted as a means of pursuing some other aim

Restorative theories: Alternative to traditional method:

- Victims play a greater role
- **focus:** compensation, reconciliation and integration
- greater emphasis on the role & experience of victim(s)
- lay and legal actors having decision-making authority
- more discussion & interaction b/w parties involved
- **Criticisms:**
 - Conflicts with fundamental aspects of criminal law ideology;
 - Breaks nexus between the accused and the victim;
 - Too arbitrary

Furthermore → High Court decisions of *Veen (No1)* and *Veen (No2)*: **proportionality is the predominant objective of sentencing in Australia.**

- Proportionality, deterrence and community protection aren't the only 'most' important sentencing objectives.

- Fox and Freiberg note: denunciation, rehabilitation and education also been treated by courts as only or predominant purpose of criminal sentencing.
- **Lack of a rationale** for sentencing law and practice has resulted in **several problems**.
 - judicial approach to sentencing make it even worse
- Vague → numerous competing principles have at various times been declared as the most important sentencing objective by the cts
- **Walden v Hensler**: chief purpose of criminal law is to deter those who are tempted to breach its provisions
- **Deterrence → Radich**: main purpose of punishment = protect the public from commission of such crimes by making it clear to the offender and others, that they will be meet with severe punishment if they have the same impulses.
 - **Even though punishment doesn't prevent EVERYONE** → shouldn't forget the fact that the fear of severe punishment does and will prevent the commission of many crimes that would have been committed if people thought they could escape w/out punishment/light punishment

Structure of Sentencing Law

Statute: *Sentencing Act 1991* (Vic).

Parsimony: If you can achieve the sentencing objectives without a prison sentence, then do that. Punishment in a non-disproportionate manner.

Uniformity has been made possible for standard offence classification, used by the ABS and set out in **Australian standard offence classification (ASOC)**.

ASOC set out 16 offence categories, which include:

- Homicide
- Acts intended to cause injury
- Sexual assault
- Abduction
- Dangerous or negligent acts
- Illicit drug offences
- Robbery
- Unlawful entry
- Theft
- Fraud

