

# The Shopfront

## YOUTH LEGAL CENTRE

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### Sentencing

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#### 1 What is sentencing?

Sentencing means imposing a **penalty** on a person who pleads (or is found) guilty in court.

For some people, the word "sentence" means a term of imprisonment, but that is not its only meaning. The courts have a range of sentencing options.

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#### 2 Sentencing procedure

##### 2.1 When does sentencing happen?

In the Local or Children's Court, sentencing often happens straight after the person pleads (or is found) guilty, especially if the charge is quite minor and the offender doesn't have much of a criminal record.

For more serious matters or repeat offences, the court will often adjourn the matter. This allows time for preparation of reports and other material, and it also ensures that the court allocates enough time to deal with the matter properly.

##### 2.2 Reports and references

The offender (or their lawyer) will often hand up **references** or **reports** from people such as employers, community members, youth workers, counsellors or psychiatrists.

A **reference** is usually a letter from a person who knows the offender and who can say something about their good character. A **report** is usually from a person who knows the offender in a professional capacity.

These reports, along with the **submissions** put to the court by the offender or their lawyer, will try to convince the court to impose a more lenient or appropriate sentence.

##### 2.3 Court-ordered reports

The court might also decide to order a **Sentencing Assessment Report (SAR)** from Community Corrections (for adults) or a **Background Report** from Juvenile Justice (for children). A report is necessary if the court is thinking of sentencing the offender to an order which includes community service or home detention conditions.

Some Local Courts have duty probation officers who can prepare a SAR on the same day if the case is not complex. For a full report, a 6-week adjournment is usually necessary (or a shorter period if the offender is in custody).

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## 3 Sentencing principles

### 3.1 Purposes of sentencing

The aims of sentencing include **punishing** the offender, publicly **denouncing** their conduct, **protecting** the community, promoting the **rehabilitation** of the offender, deterring the offender from committing further offences (**specific deterrence**) and also deterring others from offending (**general deterrence**).

These aims sometimes pull in different directions. For example, general deterrence often involves setting an example by imposing a sentence of imprisonment, whereas the rehabilitation of the offender is usually achieved by keeping them in the community. The protection of the community might be achieved in the short term by locking the offender away, but in the long term it is best served by rehabilitating the offender.

The court must carefully balance these considerations to arrive at an appropriate sentence.

### 3.2 What the court takes into account

In sentencing, the court considers a number of factors about the offence (**objective** factors) and about the offender (**subjective** factors).

Circumstances that increase the seriousness of the offence or call for a more severe penalty are known as **aggravating** factors, while circumstances that reduce the severity of the sentence are called **mitigating** factors.

**Aggravating** factors may include a high level of planning, serious harm caused to the victim, the use of a weapon, or the fact that the person committed the offence while they were already on bail or a community-based sentence.

**Mitigating** factors may include an offender's youth, mental health problems or cognitive impairment, a deprived background which has affected the offender's development, the fact that the offender had a minor role in the offence, a plea of guilty especially if entered at an early stage, remorse shown for having committed the offence, lack of a prior criminal record, and progress towards rehabilitation.

The involvement of alcohol or other drugs can be mitigating, aggravating, or neutral, depending on the situation.

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## 4 Sentencing options – Adults

### 4.1 Introduction

Sentencing options for adults in New South Wales are set out in the *Crimes (Sentencing Procedure) Act*. Lawyers and magistrates often refer to these options by section numbers.

Adult sentencing options also apply to children being sentenced “according to law” in superior courts or being sentenced for traffic offences in Local Courts. Otherwise, see Part 5 below for Children’s Court sentencing options.

*In 2018 there were some **changes to adult sentencing options**, which apply to all offences sentenced on or after **24 September 2018** (even if the offence was committed before that date).*

### 4.2 Dismissal of charge without conviction – “section 10”

The court may dismiss the charge unconditionally under section 10(1)(a). This means that although there is a finding of guilt, **no conviction** is recorded and there is no other penalty.

Section 10 is used mainly for minor offences, and usually for people without a prior criminal record. However, every case and every offender is different, and section 10 may be used even if the offence is quite serious and the offender has a criminal record.

### 4.3 Conditional Release Order (CRO) without conviction

A **Conditional Release Order (CRO)** is basically a **good behaviour bond**.

A court may impose a CRO for up to 2 years without recording a conviction. This is what used to be known as a “section 10 bond”.

**Good behaviour** is a condition of every CRO. If a court finds you guilty of an offence committed while on a CRO, it can take **breach** action (getting an on-the-spot fine usually won't be a breach).

A CRO can also have other conditions, but a non-conviction CRO usually doesn't.

A **breach** of a non-conviction CRO can mean that the offender is re-sentenced and a conviction may be recorded.

### 4.4 Dismissal with conviction but no penalty - section 10A

This option may be used when the court decides it is appropriate to record a conviction (meaning the offence will go on the defendant's criminal record) but inappropriate to impose any penalty.

### 4.5 Fine

A fine may be imposed on its own or (sometimes) in addition to imprisonment or another penalty like a CCO.

The court must consider the defendant's capacity to pay the fine. The magistrate can only allow 28 days to pay, but **time to pay** applications may be made to the court registry.

Failure to pay fines may lead to licence suspension, property seizure or (as a last resort) imprisonment. Other options such as **Work and Development Orders** are available.

For more information, see our fact sheet on **Fines**.

### 4.6 Conditional Release Order (CRO) with conviction

A **Conditional Release Order (CRO)** is basically a **good behaviour bond**.

A court may impose a CRO for up to 2 years, with a conviction recorded. This is similar to the old “section 9 bond”.

**Good behaviour** is a condition of every CRO. If a court finds you guilty of an offence committed while on a CRO, it can take **breach** action (but getting an on-the-spot fine usually won't be a breach).

A CRO can also have other conditions. The most common condition is **supervision** from Community Corrections.

A **breach** of a CRO means that the court may decide to re-sentence the offender.

### 4.7 Community Correction Order (CCO)

A **Community Correction Order (CCO)**, like a CRO, is basically a **good behaviour bond**.

However, unlike a CRO, it is aimed at more serious offending, it always carries a conviction, it can be imposed for up to 3 years, and it can contain conditions like community service that can't be part of a CRO. CCOs are an alternative to imprisonment and can't be imposed for fine-only offences.

As well as a condition to be of **good behaviour**, a CCO can have other **conditions** such as supervision, community service work, non-association, completing rehabilitation programs, and not consuming alcohol or other drugs.

**Breach** of a CCO is similar to a breach of a CRO.

#### 4.8 Deferred sentence (“Section 11 bond” or “Griffiths Remand”)

Instead of sentencing the offender straight away, the court may **adjourn the matter for up to 12 months** from the date of the finding of guilt, to assess the offender’s rehabilitation prospects or progress.

During the adjournment the offender will usually be placed under strict bail conditions (for example, a requirement to complete a residential drug rehabilitation program).

A section 11 bond is often used when the court is thinking of imposing full-time imprisonment. An offender who has complied with the conditions and not re-offended can usually expect to receive an alternative to full-time custody (e.g. CCO, ICO) when the matter comes back to court.

#### 4.9 Intensive Correction Order (section 7)

An **Intensive Correction Order (ICO)** involves intensive supervision, and often involves extra conditions such as participation in programs, community service, and drug testing.

An ICO is a **direct alternative to full-time imprisonment** and is the only form of imprisonment that does not involve full-time custody. The court must first decide to impose a sentence of imprisonment for 2 years or less (or 3 years if the defendant is being sentenced for multiple offences).

Every ICO has **standard conditions** which are not to commit any offence and to accept supervision from Community Corrections. The court may impose **additional conditions**, e.g. community service, non-association, curfews, electronic monitoring, or home detention.

If a defendant breaches the ICO by re-offending or breaking other conditions, their parole officer has a few options. They may choose to record the breach without taking action, give a formal or informal warning, or refer the breach to the **State Parole Authority (SPA)**.

The SPA may decide to revoke the ICO, which means the offender will have to go to prison. An ICO may be reinstated after a period in full-time custody, so the offender won’t necessarily have to serve the whole of their sentence in prison.

#### 4.10 Full-time imprisonment

A sentence of full-time imprisonment is a **last resort** where no other alternatives are appropriate.

The maximum term of imprisonment that can be imposed by a **Local Court** is **2 years** for any one offence, or **5 years** if the court is sentencing the offender for multiple offences. In superior courts, the limit is the maximum penalty for the offence.

If a court imposes a sentence for **6 months or less**, it will be a fixed term, i.e. the offender will spend the whole sentence in prison without any parole at the end.

Sentences longer than 6 months will usually be split into a **non-parole period** and then a period served out on **parole**. The non-parole period is usually three quarters of the total sentence, but the court can vary this if there are “special circumstances” (e.g. the need for a longer period under supervision to assist with rehabilitation).

Like an ICO, **breach** of parole may be reported to the **State Parole Authority (SPA)**, which may revoke parole and send the offender to serve the rest of their sentence in full-time custody.

#### 4.11 Old sentencing options

Some of the sentencing options that existed before 24 September 2018 are no longer available.

A **good behaviour bond** is now called either a conditional release order (CRO) or a community correction order (CCO).

A **community service order** (CSO) is no longer a sentencing option on its own, but community service hours may be imposed as a condition of a CCO or an ICO.

**Home detention** is no longer a sentencing option on its own, but it can be imposed as a condition of an ICO.

**Suspended sentences** are no longer an available sentencing option. However, suspended sentences that were imposed before 24 September 2018 continue to run. A breach of a suspended sentence usually means imprisonment, either full-time or by way of an ICO.

## 5 Sentencing options – Children

The options below are available to the Children's Court under the *Children (Criminal Proceedings) Act*.

For children who are sentenced by superior courts for serious indictable offences, adult sentencing options usually apply.

For children aged 16 and over who are dealt with in the Local Court for traffic offences, the court may choose to use either children's or adult sentencing options. The only limit is that the Local Court cannot sentence a child to imprisonment for a traffic offence.

### 5.1 Dismissal/caution (section 33(1)(a)(i))

The court may dismiss minor charges with or without a caution. This means there is no punishment and no conviction.

### 5.2 Bond (section 33(1)(a)(ii) or 33(1)(b))

A bond is an agreement to be of good behaviour (i.e. not commit offences) for a period of time.

The Children's Court may impose a bond for up to 2 years, with or without conviction.

A bond may be subject to **conditions** and often involves supervision by a Juvenile Justice Officer.

If a defendant re-offends or breaks the conditions, they may be brought back to court for **breach**, and may be re-sentenced for the original offence.

A child who has difficulties complying with the conditions of a bond can apply to the Children's Court to have the conditions varied.

### 5.3 Fine (section 33(1)(c))

The Children's Court may impose a fine of up to 10 penalty units (currently \$1,100). A fine may be combined with a bond. The court must take into account the offender's capacity to pay the fine.

### 5.4 Release on conference outcome plan (section 33(1)(c1))

If the court has referred a child to a youth justice conference, the child may be released on the condition that they comply with the conference outcome plan (see separate document on *Young Offenders Act*).

### 5.5 Deferred sentence (“Griffith Remand”) (section 33(1)(c2))

Like an adult section 11 bond, the deferred sentence option is available in the Children’s Court.

### 5.6 Probation (section 33(1)(e))

A probation order is an extra sentencing option in the Children’s Court. It is like a bond but usually involves more intensive supervision by Juvenile Justice.

### 5.7 Community service order (CSO) (section 33(1)(f))

A CSO is a direct alternative to a control order. A CSO will not be made unless the court is satisfied that the young person is suitable for community service, and there is work available in the person’s local area. This assessment is usually done by a Juvenile Justice Officer.

The maximum number of hours that may be imposed on a child under 16 years of age is 100 hours; the court may impose up to 250 hours for children over 16.

### 5.8 Suspended sentence (section 33(1B))

A Children’s Court **control order** may be **suspended** for up to 2 years, which means you don’t go into detention unless you breach it.

**Breach** will almost always lead to full-time detention.

### 5.9 Control order (section 33(1)(g))

A control order may be made to **detain** an offender in a juvenile detention centre for up to **two years**.

Like adult sentences, if the sentence is longer than 6 months the court must impose a non-parole period and a period out on parole.

A control order is a **last resort**, and the court must give reasons why it was inappropriate to impose any other penalty.

## 6 Sentencing options – Commonwealth offences

### 6.1 Introduction

Sometimes, a defendant might be charged under **Commonwealth** law instead of NSW law. A common example that affects young people is “use carriage service to menace/harass/offend” (i.e. harassing or intimidating someone by phone or online).

For adults, the sentencing options under the Commonwealth *Crimes Act* are similar to those under NSW law, though they are not exactly the same.

Children who are guilty of offences under Commonwealth laws are still dealt with under state laws, i.e. the *Children (Criminal Proceedings) Act*.

### 6.2 Discharge without conviction (section 19B(c))

This is basically the Commonwealth equivalent of a section 10.

### 6.3 Fine

A fine can be imposed on its own or in combination with other options.

Unlike in NSW law, a fine can be made a condition of a good behaviour bond.

#### 6.4 Conditional release order without conviction (section 19B(d))

This is the Commonwealth equivalent of a non-conviction CRO. It may be imposed for up to 3 years.

A breach may lead to the offender being re-sentenced and a conviction recorded.

#### 6.5 Conditional release order with conviction (section 20(1)(a))

This is the Commonwealth equivalent of a CRO. It may be imposed for up to 5 years.

#### 6.6 CCOs and ICOs (section 20AB)

The Commonwealth law allows for additional sentencing options that are available under state law.

This means that CCOs and ICOs are available for Commonwealth offences.

#### 6.7 Suspended sentence (section 20(1)(b))

Unlike NSW offences, suspended sentences are still available for Commonwealth offences if the sentence imposed is 3 years or less.

A sentence can be suspended immediately or after serving a period of time in custody.

#### 6.8 Imprisonment

Imprisonment is a last resort. The court must first consider all available sentences and be satisfied that no other sentence is appropriate.

Like with NSW offences, sentences of 6 months or less will be for a fixed term.

Sentences which are longer than 6 months but less than 3 years will usually be suspended after some time in custody (section 20(1)(b)).

Sentences longer than 3 years are split into non-parole and parole periods.

## 7 Court costs, levies and compensation

### 7.1 Court costs levy and victims support levy

Nearly everyone who is found (or pleads) guilty in a Local Court is automatically charged a **court costs levy** and a **victims support levy**.

These are basically taxes which go towards the running of the court system and the victims compensation scheme.

They usually increase every financial year. As of July 2019, the court costs levy is \$85 and the victims support levy is \$83.

Some offences do not incur these levies, e.g. fine-only offences which are dealt with under section 10(1)(a).

These costs and levies also apply to Children's Court matters but the court can **waive the levies for children**. If you are under 18 and the magistrate has not waived the levies, you can apply to the registrar of the court to waive them later on.

Although these levies are not fines, they are treated like fines, which means you can apply for time to pay or to put them on a Work and Development Order.

### 7.2 Compensation

If someone has suffered financial loss or injury as a result of your crime, the court may order you to pay **compensation** to the victim.

These orders are usually made if you have stolen or damaged someone's property, to pay for it to be replaced or repaired.

The courts have power to order you to pay compensation for victims with injuries (e.g. for you to pay their medical expenses) but this is rare. Victims of violent crime usually apply for compensation through the victims compensation scheme. If you have been found guilty of the offence, Victims Services may later take restitution proceedings to claim their money from you. For more information see our fact sheet on **Victims compensation and support**.

## 8 Convictions and criminal records

### 8.1 Adults

Being found guilty of a criminal offence automatically carries a **conviction** (i.e. an entry on your **criminal record**) unless the court decides to dismiss your charge under **section 10** or impose a **non-conviction CRO**.

Most adult convictions will be **spent** (wiped off the record) after 10 crime-free years. Some convictions can never be spent (e.g. sex offences, offences where the defendant was sentenced to imprisonment for more than 6 months).

### 8.2 Children

A conviction cannot be recorded against a child **under 16**, unless it is for an indictable offence dealt with by the District or Supreme Court.

For children aged **16 and over**, the Children's Court can decide whether or not to record a conviction.

**Juvenile convictions don't automatically get wiped off your record once you turn 18!** However, most juvenile convictions can be **spent** after 3 crime-free years.

**Warning: even if the court does not record a conviction, it can still be treated as a conviction for some purposes.** For more information, see our fact sheet on **Convictions and Criminal Records**.

### The Shopfront Youth Legal Centre Updated December 2019

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*The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills, in association with Mission Australia and The Salvation Army.*

*This document was last updated in December 2019 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.*

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