

SENTENCING AND THE PRINCIPLES OF JUSTICE

This fact sheet explains how the processes and structure of the County Court uphold the **principles of justice** that underpin the Victorian legal system. These principles are reflected in both criminal law and civil law, which aim to protect individual rights, while also ensuring cohesion in our society as a whole. In this fact sheet you will learn how the criminal law reflects these principles, by using an example of criminal plea and sentence in the County Court.

PRINCIPLES OF JUSTICE

<p>Fairness There are fair legal processes in place and all parties receive a fair hearing.</p>	<p>Equality All people are treated equally before the law with an equal opportunity to present their case.</p>	<p>Access People have an understanding of their legal rights and ability to pursue their case.</p>
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THE PRINCIPLES OF JUSTICE IN A CRIMINAL PLEA AND SENTENCE

The charge

The criminal law is a set of rules aimed at maintaining social order and the prevention of harm within our community. If a person breaches or infringes the criminal law, he or she can be charged with a criminal offence. If the person is found guilty of the charge, they can face consequences under the criminal law in response to their criminal behaviour. If the charge is for an **indictable offence**, the case will likely be heard in the County Court. Indictable offences are more serious crimes, such as physical and sexual assaults, commercial drug offences, and property offences, such as armed robbery and arson.

The public nature of the criminal law ensures that there is **fairness** and **equality** in that community members are aware of the law and the consequences when the law is broken.

Legal representation

When a person is charged with an offence, an important step in the process is for the accused to seek and have access to legal representation (see Fact Sheet 3). Legal representation is an essential part of ensuring the principle of access to justice.

Legal representation can include legal advice from a solicitor about the nature of the criminal charge, the strength of the evidence in the prosecution's case against the accused and the consequences if they are found guilty.

This ensures that an accused person understands that he or she has a right to the presumption of innocence when charged with an offence and that the prosecution must prove its case against the accused beyond a reasonable doubt.

Legal representation can include a barrister representing the person in court if there is trial, if there is a plea hearing or if the accused is found guilty and is to be sentenced. This ensures the accused has the ability to pursue their case by engaging a legally trained and skilled advocate to test the prosecution evidence, argue their case on their behalf and make submissions about their personal circumstances that are relevant to the sentencing.

If an accused person appears in the County Court and does not have legal representation, this may be a cause for concern and the judge would usually raise this with the accused. The judge may ask why they haven't sought legal advice and advise him or her to seek legal advice and that proceeding without legal representation may be adverse to their case. The County Court website provides a lot of information for people who are self-represented, which tends to occur more often in the civil jurisdiction.

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Presumption of innocence

When a person is charged with an offence, it is a fundamental principle that they are presumed to be innocent until proven guilty. The jury decides whether the accused is guilty beyond a reasonable doubt.

The prosecution bears the burden of proving the guilt of an accused.

The presumption of innocence ensures that all people who are charged with an offence receive a fair hearing, are treated equally and have an equal opportunity to present their case in defence of the charge.

Plea

An accused can elect to plead guilty to an offence rather than go to trial where a jury will decide whether they are guilty or not guilty. Before an accused pleads guilty, it is important for them to receive legal advice about the consequences of pleading guilty. One consequence is that the accused gives up their right to plead not guilty and have the prosecution case tested. Another consequence is that the accused will receive a reduction on their sentence for pleading guilty. This recognises that where the accused has committed the offence as charged, he or she has taken responsibility for their criminal behaviour and saved the trauma, cost and time of witnesses giving evidence at a trial.

The sentencing hearing

The sentencing hearing is when the judge hears submissions (arguments) from both parties, the prosecution and the defence about what sentence should be imposed. The parties must make submissions on:

- the facts that the sentence should be based upon;
- the relevant principles that the judge should apply under sentencing law; and
- what sentences have been imposed in other cases compared to the case before the court.

In this context, it is the duty of the lawyers to assist the court to uphold justice under the law. The offender's lawyer has a duty to be independent and to do, to the best of his or her ability, all that can be done under the law in the client's interest and to make a plea in mitigation of sentence. This means to make arguments to reduce the sentence that the judge imposes on the offender. The prosecution must also be independent and fair and assist the court in the sentencing process and represent the community in making submissions about what sentence should be imposed.

County Court judges, like all sentencing judges, must ensure the hearing is conducted in an appropriate judicial manner. This reflects two of the principles of justice:

1. the judge's discretion is exercised appropriately ensuring that similar cases are treated alike and there is consistency of approach in sentencing – ensuring that all people are treated equally before the law;
2. the judge conducts the sentencing hearing process in a way that is fair – ensuring that there are fair legal processes in place and all parties receive a fair hearing and are treated equally before the law with an equal opportunity to present their case.

The judge must conduct the sentencing hearing in accordance with the requirements of procedural fairness. There are two important requirements which are connected to the requirement that the judge gives both the defendant and the prosecution fair opportunity to tender evidence or make submissions to the judge rebutting findings that may potentially be adverse to either party. The first is fairness in relation to the facts on which the judge should rely in deciding on a sentence. The second is fairness in the approach under the law that the judge takes in sentencing.

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Proportionate sentence

Discretion means the power to make a decision. It means that when there is no specific rule about how a law should apply, the judge has the power to decide how to apply it.

Judicial discretion is a fundamental feature of the Victorian legal system, in particular in sentencing. Judges must exercise this power consistently with the rule of law and the principles of justice.

Under Victorian sentencing law, the method for deciding on the correct sentence in Victoria is by the **instinctive synthesis** of all relevant considerations. Justice McHugh, a former judge of the High Court of Australia has explained what this means:

[B]y instinctive synthesis, I mean the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.¹

When a person is found guilty of an offence and then comes to be sentenced, it is a fundamental principle that the consequences the offender faces by way of sentence are proportionate to the crime that they have committed and their responsibility for it. This means the seriousness of the punishment must be proportionate to the seriousness of the offence. Another key principle is that the judge must choose the least severe sentencing option which is available to him or her to punish the offender and protect the community in the particular case. This is called the principles of parsimony. These sentencing principles reflect all three the key principles of fairness, equality and access.

The judge must also take into account specified purposes of sentencing and particular factors identified to be relevant to sentencing under the law. These are the only purposes for which a sentence may be imposed in Victoria:

- just punishment – punishing an offender to the extent that is just in all of the circumstances;
- deterrence – discouraging the offender or other people from the same or similar offending
- rehabilitation – to help the offender stop offending and live a life free from crime;
- denunciation – to send a message to the community that the offender’s behaviour is wrong; and
- protection of the community – protect the community from the offender.

FOOTNOTES

¹ *Markarian v The Queen* (2005) 228 CLR 357, 378.