



Pacific Judicial
Integrity Program

Advanced Judicial Officers' Fraud and Corruption Online Course

Justice Michael Wigney

Topic 4: Sentencing



**FEDERAL COURT
OF AUSTRALIA**



Papua New Guinea
Centre for Judicial Excellence

Caution!

1. Sentencing laws vary and can be complex
2. Go first to the applicable statute in your jurisdiction
3. Go next to leading judicial precedents in your jurisdiction
4. Then to precedents in like jurisdictions (if necessary)



General Principles

1. The purposes of sentencing
2. Some relevant factors and considerations
3. “Instinctive synthesis”
4. Yardsticks
5. Proportionality
6. Totality
7. Consistency and parity
8. Comparative cases and guideline judgments
9. Imprisonment as a last resort
10. Procedural issues



Purposes of Sentencing

1. Punishment (retribution) and denunciation
2. Protection of the community
3. Deterrence – specific and general
4. Reform and rehabilitation

See: *Veen (No 2)* [1988] HCA 14; 164 CLR 465, 476

Note:

- The purposes are overlapping and at times point in different directions
- No order of priority

Punishment and Retribution



- “just desserts”
- a penalty which is of a severity which is appropriate in all the circumstances of the offence
- community expectations

See: *Ryan* [2001] HCA 21; 206 CLR 267 at [46]; [55]

Markarian [2005] HCA 25; 228 CLR 357 at [82]

Protection of the community



- can involve removing the offender from the general population (i.e. jail)
- removing from a position where they may re-offend
- overlaps with (and in some respects may conflict with) rehabilitation

Ryan at [47]

Deterrence

- Specific deterrence
 - deterring the offender from re-offending
- General deterrence
 - deterring others who might be tempted to re-offend
 - can be a particularly important factor in sentencing for offences involving fraud and corruption
 - See: *R v Hannes* [2000] NSWCCA 503, [394].

Reform and Rehabilitation

- Imprisonment generally speaking is more punitive than rehabilitative

see: *Muldrock* [2011] HCA 39; 244 CLR 120 at [57]

- Rehabilitation may in an appropriate case require the court to consider alternatives to full time custody

“Instinctive Synthesis”

- the Court must identify and ascribe weight to the relevant factors and make a value judgment as to what is an appropriate sentence in the light of them
- the sentencer is called on to reach a sentence which balances many different and conflicting features

Markarian, [39]; **Wong** [2001] HCA 64; 207 CLR 584 at [78]

- discretionary and evaluative
- there is no single correct sentence

“Instinctive Synthesis” (Cont.)

- Avoid a staged, incremental, “tiered” or mathematical approach
 - E.g. avoid starting with a sentence and then adjusting by mathematical values given to one or more features: *Wong* at [74]-[77]
- Though there are exceptions, e.g:
 - Percentage discounts for assistance to authorities and early guilty pleas: *Markarian* at [74]
- And of course – depends on the relevant statutory provisions in your jurisdiction

Relevant factors and considerations

- Generally, relate to either:
 - the objective seriousness of the offence and offending conduct;
 - the offender's subjective circumstances; or
 - both
- But avoid a “checklist” approach (a myriad of factors)
- Some jurisdictions (not all) focus on identifying:
 - Aggravating factors
 - Mitigating factors

Relevant factors and considerations (cont.)

Some factors that may be relevant to assessing the seriousness of an offence involving fraud or corruption:

- an abuse of trust or abuse of authority?
- duration and scale of the offending conduct
- extent to which conduct was deliberate, systematic or covert
- benefit obtained
- loss caused
- course of conduct
- prevalence of the offence
- motivation (e.g. “greed” rather than “need”)
- need for deterrence: specific and general

Relevant factors and considerations (cont.)



Some factors relating to the offender's subjective circumstances:

- contrition and remorse
- plea of guilty
- assistance and cooperation with the authorities
- character and antecedents
- other personal circumstances (age, health etc)
- prospect of rehabilitation
- extra-curial punishment

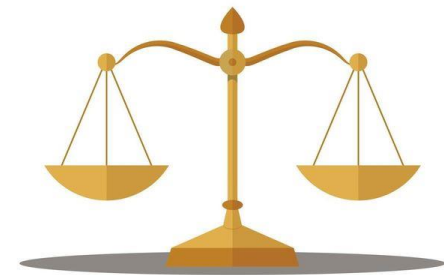
“Yardsticks”

- Maximum penalty
 - The legislature’s assessment of the seriousness of the offence
 - Invites comparison between the worst possible case and the case before the Court: *Markarian* at [31]
- Some jurisdictions have minimum penalties
 - May be seen as indicating the appropriate penalty for the least serious case

Proportionality

- The sentence imposed must be proportionate to the gravity of the offence committed
- A sentence should not be increased beyond what is proportionate to the crime in order to extend the period of protection of society

See: *Veen (No 2)* at 472



Totality and course of conduct



- where an offender is being sentenced for multiple offences
- where multiple offences forming part of a multi-faceted course of conduct – need to avoid double punishment by structuring or adjusting sentences
- the aggregate sentence should be reviewed to ensure it is “just and appropriate” having regard to totality of the criminal behaviour

Mill v the Queen [1988] HCA 70; 166 CLR 58 at 63

Parity

- like offenders should be treated in a like manner
- different sentences can be imposed to reflect different degrees of culpability and different circumstances
- must avoid any marked disparity which gives rise to a justifiable sense of grievance

Postiglione v the Queen [1997] HCA 26; 189 CLR 295 at 301

Comparative Cases and Guideline Judgments



- Comparative cases – sentences imposed in previous cases which are comparable
- May be useful for:
 - identifying unifying sentencing principles that should be applied
 - disclosing discernible sentencing patterns of a range of sentences for such cases
- Caution:
 - may be insufficient cases to establish any range
 - the range may not be determinative
 - may not be truly comparable
 - starting with sentence imposed in another case and comparing and contrasting may lead to error

Hili v the Queen [2010] HCA 45; (2010) 242 CLR 520 at [53]-[55]

Guideline judgments

- For some common offences
- Promote consistency
- A “guide” or “check” – indicative only
- Do not constrain the sentencing discretion
- Numerical guidelines should be approached with caution
 - Wong* at [5]-[6], [78]-[83]; *Markarian* at [255]
- Note: may depend on statutory provisions in your jurisdiction

Imprisonment is a sentence of last resort



- The court must generally be satisfied that no penalty other than imprisonment is appropriate
- Must consider all possible alternatives
- Most jurisdictions provide alternatives to sentences of imprisonment – ranging from good behaviour bonds to community service and home detention

Some procedural issues

1. Determining the facts:

- some facts will be determined by the verdict or plea of guilty
- it is common for an agreed statement of facts to be tendered where there has been a plea of guilty

2. In general

- If the offender relies on facts in mitigation, he/she must establish them on the balance of probabilities
- If the prosecutor relies on aggravating facts, those facts must be proved 'beyond reasonable doubt'
- Some facts or matters may remain unknown

Olbrich [1999] HCA 54; 199 CLR 270

Weininger [2003] HCA 14; 212 CLR 629