HSC legal studies – sentencing and punishment

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## Aim

Legal studies develops students’ knowledge, understanding and critical thinking skills in relation to the legal system and its effectiveness in promoting a just and fair society, with a view to empowering students to participate effectively as responsible citizens at the local, national and international level.

## Principal focus

Through the use of a range of contemporary examples, students investigate criminal law, processes and institutions and the tension between community interests and individual rights and freedoms.

## Themes and challenges

* the role of discretion in the criminal justice system
* issues of compliance and non-compliance in regard to criminal law
* the extent to which law reflects moral and ethical standards
* the role of law reform in the criminal justice system
* the extent to which the law balances the rights of victims, offenders and society
* the effectiveness of legal and non-legal measures in achieving justice.

## Outcomes

A student:

* **H1** identifies and applies legal concepts and terminology
* **H2** describes and explains key features of and the relationship between Australian and international law
* **H3** analyses the operation of domestic and international legal systems
* **H4** evaluates the effectiveness of the legal system in addressing issues
* **H5** explains the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change
* **H6** assesses the nature of the interrelationship between the legal system and society
* **H7** evaluates the effectiveness of the law in achieving justice
* **H8** locates, selects, organises, synthesises and analyses legal information from a variety of sources including legislation, cases, media, international instruments and documents
* **H9** communicates legal information using well-structured and logical arguments
* **H10** analyses differing perspectives and interpretations of legal information and issues.

Outcomes referred to in this document are from [Legal Studies Stage 6 Syllabus](https://educationstandards.nsw.edu.au/wps/portal/nesa/11-12/stage-6-learning-areas/hsie/legal-studies) © NSW Education Standards Authority (NESA) for and on behalf of the Crown in right of the State of New South Wales, 2009.

# Learning sequence 4 – sentencing and punishment

|  |  |
| --- | --- |
| **Students learn about:** | **Students learn to:** |
| * statutory and judicial guidelines
* the purposes of punishment: deterrence (specific and general), retribution, rehabilitation, incapacitation
* factors affecting a sentencing decision: aggravating and mitigating circumstances
* the role of the victim in sentencing
* appeals
* types of penalties including: no conviction recorded, caution, fine, bond, suspended sentence, probation, criminal infringement notice, penalty units, community service order, home detention, periodic detention, forfeiture of assets, imprisonment, diversionary programs
* alternative methods of sentencing including circle sentencing, restorative justice
* post-sentencing considerations, including security classification, protective custody, parole, preventative detention, continued detention, sexual offenders’ registration, deportation
 | * discuss factors that affect sentencing decisions, including the purposes of punishment and the role of the victim
* evaluate the effectiveness of different types of penalties, including diversionary programs
* assess the roles of alternative methods of sentencing
* examine the implications of post-sentencing considerations in achieving justice
* evaluate the effectiveness of sentencing and punishment as a means of achieving justice.
 |

**Teacher note –** at the start of each section in sentencing it may be useful to link content to consequences of behaviour in schools. For example, when introducing the ‘purposes of punishment’, discuss the reasons why students at the school are punished. Brainstorming is likely to result in suggestions like deterrence, rehabilitation, retribution, to reflect the damage done, to reflect the values of the school, to protect other students and so on. These will be quite similar to the legislated purposes of punishment in the next activity.

The driving question for this learning sequence could come directly from the syllabus, that is, ‘evaluate the effectiveness of sentencing and punishment as a means of achieving justice.’

## Statutory and judicial guidelines

* Use school resources, online research and the websites below to construct definitions for the following terms:
	+ sentencing hearing
	+ judicial discretion
	+ mandatory sentence
	+ parole.

Resources for this task:

* + NSW Communities and Justice, [The sentencing hearing](http://www.sentencingcouncil.justice.nsw.gov.au/Pages/Sentencing/sentencing-hearing.aspx)
	+ NSW Courts, [Judicial discretion in sentencing](https://nswcourts.com.au/articles/judicial-discretion-in-sentencing-offenders/#:~:text=Posted%20February%209%2C%202016%20by,Lawyers%20%26%20filed%20under%20NSW%20Courts.&text=That%20power%20ranges%20from%20determining,guilty%20or%20are%20found%20guilty.)
	+ Attorney General’s Department, [Parole](https://www.ag.gov.au/crime/federal-offenders/parole).

### Judicial guidelines

* Access [NSW Communities and Justice, Guideline judgements](http://www.sentencingcouncil.justice.nsw.gov.au/Pages/Sentencing/guideline-judgments.aspx#:~:text=Guideline%20judgments%20are%20court%20decisions,like%20cases%20are%20treated%20alike.) and use this to write 1-2 sentences explaining why judicial guidelines (guideline judgements) are issued.

### Statutory guidelines

**Teacher note -** For the final ‘tug of war’ activity in this sequence, students will need to be provided with paper and pegs. A string should be hung down the centre of the room with one end labelled ‘mandatory sentencing is about justice’ and the other labelled ‘mandatory sentencing is about elections.’ Students should be instructed to reflect on the question before providing justification for their point of view and attaching this to the rope with pegs.

* In small groups, research the statutory guidelines in the following areas:
	+ discounts to sentences for early guilty pleas at [*Crimes (Sentencing Procedure) Act* 1999 - Sect 22](http://www5.austlii.edu.au/au/legis/nsw/consol_act/cpa1999278/s22.html)
	+ maximum sentences for the offences of: wounding with intent to do bodily harm or resist arrest at [*Crimes Act 1900* s33CA](http://www5.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s33.html); and sexual assault at [*Crimes* Act 1900 s61I](http://www5.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s61i.html#:~:text=Any%20person%20who%20has%20sexual,to%20imprisonment%20for%2014%20years.)
	+ the minimum mandatory sentence that can be applied for the offence of assault causing death when intoxicated at [*Crimes Act* 1900 - Sect 25b](http://www5.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s25b.html#:~:text=(1)%20A%20court%20is%20required,not%20less%20than%208%20years.); and the murder of a police officer at [*Crimes Act* 1900 NSW s 19B](https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/act-1900-040#sec.19B).
* Use the examples of minimum mandatory sentences in the previous activity and the articles below to complete a simple [T-Chart](https://app.education.nsw.gov.au/digital-learning-selector/LearningActivity/Card/599#.YH0mSc3tgHo.link) identifying the benefits and limitations of mandatory sentences:
	+ [2016 US National Institute of Justice, 5 things about deterrence](https://nij.ojp.gov/topics/articles/five-things-about-deterrence#one)
	+ BBC news [Australia 'one-punch' attack: First man jailed under new law](https://www.bbc.com/news/world-australia-42274932)
	+ [ABC, One punch mandatory sentences, a recipe for injustice](https://www.abc.net.au/news/2014-01-22/one-punch-mandatory-sentences-27a-recipe-for-injustice27/5212462?nw=0).
* As a whole class, conduct a [tug of war](https://pz.harvard.edu/resources/tug-of-war) thinking routine in response to the following question: ‘To what extent are laws mandating minimum sentences about reflecting the electoral cycle rather than justice?’

##   The purposes of punishment

* Review the [*Crimes (Sentencing Procedure) Act* 1999, s 3a](http://classic.austlii.edu.au/au/legis/nsw/consol_act/cpa1999278/s3a.html) to identify the purpose of punishing offenders for crimes.
* For each of the following offenders, suggest the primary purpose(s) of punishment:
	+ Robert Xie: [Robert Xie sentenced to life in jail for 'blood-soaked' murder of Lin family](https://www.abc.net.au/news/2017-02-13/robert-xie-sentenced-for-life-for-murder-of-lin-family/8264814)
	+ Kristi Abrahams: [Kristi Abrahams jailed for at least 16 years for murder of 6yo daughter Kiesha Weippeart](https://www.abc.net.au/news/2013-07-18/kristi-abrahams-sentenced-over-kiesha27s-murder/4827790)
	+ Ivan Milat: [Ivan Milat: Australia's 'backpacker killer' and unanswered questions](https://www.bbc.com/news/world-australia-48346543#:~:text=Milat%20was%20sentenced%20to%20seven,of%20oesophageal%20and%20stomach%20cancer.)
	+ a drug offender ordered into treatment
	+ a young man sentenced to a minimum mandatory 8-year jail sentence for punching another person whilst on a drunken night out and killing him.
* Use ALRC, ‘[Considerations to be taken into account when sentencing](https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/6-sentencing-and-aboriginality/considerations-to-be-taken-into-account-when-sentencing/)’ to outline the difference between specific and general deterrence.
* In small groups, select one of the purposes of punishment and spend 10 minutes preparing an argument about how this is the most important purpose of punishment for society. Each group then assigns a team member to present to the class and after 15 minutes the class will vote based on the discussion. Purposes of punishment to select from include:
	+ specific deterrence
	+ general deterrence
	+ retribution
	+ rehabilitation
	+ incapacitation.

##  Factors affecting a sentencing decision – aggravating and mitigating circumstances

* Read S21A of the [*Crimes (Sentencing Procedure) Act* 1999](https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1999-092#sec.21A) and use this to construct definitions for aggravating and mitigating factors in sentencing.
* Adapt the following scenario to add one aggravating factor and one mitigating factor:

‘Bhavik is 19 years old. On his way to the train last Friday night, he robbed a man at knifepoint. ‘

* Review the factors considered in the sentencing of Kristi Abrahams at [SBS, cycle of abuse and failure](https://www.sbs.com.au/news/cycle-of-abuse-and-failure-kiesha-murder) and ABC, [Kristi Abrahams jailed for at least 16 years for murder of 6yo daughter Kiesha Weippeart](https://www.abc.net.au/news/2013-07-18/kristi-abrahams-sentenced-over-kiesha27s-murder/4827790). Use this information to help complete the following:
	+ identify the aggravating and mitigating factors that were considered
	+ evaluate whether the judicial discretion to consider aggravating and mitigating factors helped to achieve justice for the offender, **Kristi**
	+ evaluate whether the judicial discretion to consider aggravating and mitigating factors helped to achieve justice for the victim, **Kiesha.**

## The role of the victim in sentencing

* Conduct online research and read the [*Crimes (Sentencing Procedure) Act* 1999, s30E](http://classic.austlii.edu.au/au/legis/nsw/consol_act/cpa1999278/s30e.html) to assist in writing 1-2 sentences explaining how and when victim impact statements are used in sentencing.
* Explain how the consideration of victim impact statements reflects Australia’s obligations under international law, that is, the [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](https://www.ohchr.org/en/professionalinterest/pages/victimsofcrimeandabuseofpower.aspx).
* Use a [think-pair-share](https://app.education.nsw.gov.au/digital-learning-selector/LearningActivity/Card/645#.YEfrP0AYVhU.link) strategy to complete the following:
	+ read [‘Curtis Cheng’s wife reads victim impact statements, revealing family’s pain’](https://www.abc.net.au/news/2018-01-31/curtis-cheng-wife-reveals-pain-victim-impact-statement/9378696) and use this to suggest the benefits for the victim’s family of participating in this process
	+ conduct a class discussion on the following question: ‘Should we punish offenders more harshly just because their victim had a loving family who are impacted by the crime?’
* Write a one paragraph response to the following question: ‘To what extent does the involvement of the victim is sentencing help to achieve justice?’

## Appeal

* Use [Legal Aid, a guide to indictable appeals](https://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/a-guide-to-indictable-appeals) to complete the following:
	+ explain what is meant by an appeal
	+ distinguish between a sentence appeal, a conviction appeal and a crown appeal against sentence
	+ summarise the process of seeking permission to appeal.
* Research 2 appeals (select your own or use the 2 provided below) and briefly discuss the role of the appeals process in achieving justice for each of the following parties:
	+ the convicted person
	+ the victim(s)
	+ the community.
* Resources for this task:
	+ [Thomas Kelly case: Kieran Loveridge gets more jail time over one-punch death](https://www.abc.net.au/news/2014-07-04/loveridge-gets-more-jail-time-over-one-punch-death/5571222)
	+ [Gordon Wood wins murder conviction appeal](https://www.abc.net.au/news/2012-02-24/gordon-wood-wins-murder-conviction-appeal/3851284).

## Types of penalties

**Teacher note –** this is an area of significant reform with the new *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act* 2017 allowing courts more discretion and flexibility to impose a range of sentences with more community-based options. Three new sentencing options were introduced: an Intensive Correction Order (replacing home detention orders and suspended sentences), Community Correction Orders (replacing community service orders and good behaviour bonds) and Conditional Release Orders.

* Use [NSW Justice, ‘Sentencing reform’](https://www.justice.nsw.gov.au/Pages/Reforms/Sentencing.aspx#:~:text=The%20sentencing%20reform%20is%20expected,less%20crime%20means%20fewer%20victims)) to complete definitions for each of the penalties available to the courts and explain the circumstances where these may be applied:
	+ no conviction recorded
	+ caution
	+ fine (including penalty units)
	+ bond
	+ probation
	+ criminal infringement notice
	+ periodic detention
	+ forfeiture of assets
	+ imprisonment
	+ community correction order (CCO), new in 2018
	+ intensive correction Order (ICO), new in 2018
	+ conditional release orders (CRO), new 2018.
* complete brief definitions of the penalties replaced by 2018 law reform:
	+ suspended sentence (replaced by ICO)
	+ community service order (replaced by CCO)
	+ home detention (replaced by ICO).
* Work in small teams to complete a [plus-minus-interesting chart](https://app.education.nsw.gov.au/digital-learning-selector/LearningActivity/Card/551#.YEgbTQctras.link) on the changes to sentencing introduced in 2017. The PMI chart should identify benefits and limitations from a variety of perspectives.
* Resources for this task:
	+ [NSW Justice media release 2018 ‘Historic criminal justice reforms delivered](https://www.justice.nsw.gov.au/Pages/media-news/media-releases/2018/historic-criminal-justice-reforms-delivered.aspx)’
	+ [Justice NSW, sentencing and penalties](http://www.sentencingcouncil.justice.nsw.gov.au/Pages/Sentencing/penalties.aspx).
* Summarise how the following [diversionary programs](https://localcourt.nsw.gov.au/local-court/about-us/diversion-programs.html) keep some offenders away from the courts:
	+ [Magistrates early referral into Treatment (MERIT)](http://www.merit.justice.nsw.gov.au/)
	+ Traffic Offender Intervention program at: Local Court NSW, [Traffic Offender Intervention Program](https://localcourt.nsw.gov.au/local-court/sentencing--orders-and-appeals/sentencing-in-criminal-cases/traffic-offender-intervention-program.html) and [‘Confronting psych course is saving driver lives every time they hop in the car’](https://www.lithgowmercury.com.au/story/6211499/confronting-pcyc-course-is-saving-drivers-lives-every-time-they-hop-in-a-car/)
* Locate an argument for or against the following statement, ‘Diversionary programs are the only effective type of penalty in NSW.’  Add this to a class [Padlet](https://app.education.nsw.gov.au/digital-learning-selector/LearningTool/Card/592#.YH0v7JfN3Yw.link).
* Use the information in the class Padlet and your notes to write a one paragraph response to the question: ‘Diversionary programs are the only effective type of penalty in NSW. Discuss.’
* Swap the response with another person and use a [2 stars and a wish](https://app.education.nsw.gov.au/digital-learning-selector/LearningActivity/Card/549#.YHONefPtueM.link) peer feedback strategy and the criteria below to gain ideas on improving the writing:
	+ presents a logical and cohesive argument
	+ includes a topic sentence with supporting arguments and evidence
	+ integrates relevant legislation, cases and media
	+ demonstrates substantial knowledge of sentencing
	+ makes clear judgement(s).

## Alternative methods of sentencing

* Use the resources below to complete the following table:

|  |  |  |  |
| --- | --- | --- | --- |
| Alternate method of sentencing | Description of the approach | Strengths | Weaknesses |
| Circle sentencing |  |  |  |
| Drug court |  |  |  |
| Youth Justice Conferencing |  |  |  |

* Resources:
	+ [Circle sentencing ‘helping to keep our mob out of jail’](https://www.sbs.com.au/nitv/article/2016/03/08/circle-sentencing-helping-keep-our-mob-out-jail)
	+ BOCSAR 2020 [‘New Circle Sentencing Evaluation finds positive results’](https://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2020/mr-circle-sentencing-cjb226.aspx)
	+ [Drug Court NSW](https://www.drugcourt.nsw.gov.au/)
	+ [The Guardian, Justice done differently](https://www.theguardian.com/society/2015/feb/07/justice-done-differently-how-the-nsw-drug-court-transforms-lives)
	+ [ABC, Youth justice trial puts offenders face to face with victims](https://www.abc.net.au/news/2017-04-06/nt-youth-justice-trial-puts-offenders-face-to-face-with-victims/8420670)
	+ [ABC, Young crime is often a phase and locking kids up is counterproductive](https://theconversation.com/young-crime-is-often-a-phase-and-locking-kids-up-is-counterproductive-120968)
	+ The Guardian, ‘[Prisons at breaking point.](https://www.theguardian.com/australia-news/2017/dec/29/prisons-at-breaking-point-but-australia-is-still-addicted-to-incarceration)’
* Use the table and the article at The Guardian, [‘Prisons at breaking point’](https://www.theguardian.com/australia-news/2017/dec/29/prisons-at-breaking-point-but-australia-is-still-addicted-to-incarceration), to assist in completing a one paragraph response to the following question:

‘Assess the role of alternate sentencing in achieving justice for offenders and society.’

## Post-sentencing considerations

**Teacher note** – for this activity, the class should be broken into 6 groups and each expert group should be assigned one of the post-sentencing considerations. In determining whether the post sentencing consideration achieves justice, students may need some assistance to get started. For example, is it fair? Does it punish offenders after they have ‘served their sentence?’ Does it effectively manage the balance between the need to protect the community and the need to protect individual rights?

* Use a [jigsaw](https://app.education.nsw.gov.au/digital-learning-selector/LearningActivity/Card/546#.YEggel6tCTo.link) strategy with expert groups researching the use and effectiveness of an assigned post sentencing consideration. On return to home groups, each expert presents to the team, who summarise this information into the table below:

|  |  |  |
| --- | --- | --- |
| **Post sentencing consideration** | **Description of the consideration** | **Does this achieve justice?**  |
| **Security classification**[ABC, Counter-terrorism officials fear Supermax prison further radicalising inmates](https://www.abc.net.au/7.30/counter-terrorism-officials-fear-supermax-prison/7920266) |   |   |
| **Protective custody**[ABC news, ‘High risk’](https://www.youtube.com/watch?v=ZsoFXupK_C8) |   |   |
| **Parole**[Victim 'gutted' after violent ex-partner released on parole because of coronavirus](https://www.abc.net.au/news/2020-03-28/domestic-violence-offender-released-prison-coronavirus/12098082) |   |   |
| **Preventative detention**[Australia’s counter terrorism laws, Preventative detention orders](https://www.ag.gov.au/national-security/australias-counter-terrorism-laws/preventative-detention-orders) |   |   |
| **Sexual offenders’ registration**[ABC, ‘Known paedophile pleads guilty to fresh charges’](https://www.abc.net.au/news/2018-08-07/known-nsw-paedophile-pleads-guilty-to-fresh-charges/10083596)[ABC, ‘Dutton proposes national database of sex offenders’](https://www.abc.net.au/news/2019-01-09/peter-dutton-proposes-national-database-of-sex-offenders/10701202) |   |   |
| **Deportation**[Migration Act 1958, s201](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ma1958118/s201.html)ABC, ‘[Hundreds of convicted criminals have visas revoked under Migration Act Amendment’](https://www.abc.net.au/news/2015-02-24/convicted-criminals-have-visas-cancelled/6254120) |   |   |

**Teacher note –** this activity allows students the opportunity to practise responding to questions related to the principal focus and themes and challenges in the syllabus. It is important to note that these should be integrated throughout the teaching of the topic. Students will need guidance and support to unpack the elements of these themes and challenges if this has not been done already.

* In small groups, collaboratively write an essay plan that includes an introduction and a summary of at least 3 ‘big ideas’ for each of the following questions. This can be done in person or on tools like [Jamboard](https://app.education.nsw.gov.au/digital-learning-selector/LearningTool/Card/593#.YF1aRxmmnI0.link) or [Google Slides](https://app.education.nsw.gov.au/digital-learning-selector/LearningTool/Card/70#.YF1aoSNcA7o.link):
	+ How well do laws and processes in sentencing balance the tension between community interests and individual rights and freedoms?
	+ How does discretion impact on the effectiveness of the sentencing process?
	+ Assess the extent to which sentencing and punishment reflects the values and ethics of society
	+ Evaluate the role of law reform in ensuring sentencing is effective.