



sentencing
ADVISORY
COUNCIL

A GUIDE TO SENTENCING IN TASMANIA

Tasmania Sentencing Advisory Council 2020

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ABOUT THE GUIDE

A Guide to Sentencing in Tasmania describes how Tasmanian courts (judges and magistrates) sentence offenders – people who have been found guilty of an offence.

This is based on the *Quick Guide to Sentencing* prepared by the Victorian Sentencing Advisory Council and adapted to reflect the Tasmanian law. It is reproduced with the permission of VSAC.

When sentencing, a court decides the consequences that offenders face for what they have done.

The focus of this guide is on Tasmania. While some of what is described applies generally in other Australian states and territories, there are significant differences in the detail.

WHERE CAN I FIND MORE INFORMATION ABOUT SENTENCING?

You can find more information about sentencing on the Sentencing Advisory Council's website at **www.sentencingcouncil.tas.gov.au**.

You can attend sentencing hearings in most Tasmanian courts to see how sentencing works in practice. However, some hearings may be closed to the public. This can happen for a number of reasons, including the involvement of vulnerable offenders or victims.

Information on sentencing including how to prepare a plea in mitigation is available on the Legal Aid Commission of Tasmania website at **www.legalaid.tas.gov.au/fact-sheets/?crime**

You can also find out more information from the Hobart Community Legal Centre Inc's website at **www.hobartlegal.org.au/handbook**

GLOSSARY

Accused: A person who has been charged with an offence but who has not yet been found guilty or not guilty. This term is generally used in the Supreme Court.

Acquittal: A finding that a person is not guilty of a criminal charge.

Adjourned undertaking: An order that a criminal matter is set aside for a specified period and that the person is released on an undertaking.

Affidavit: A written statement, sworn or affirmed, that may be used instead of oral evidence in court.

Aggravating factor: A fact or circumstance about the offender or the offence that may lead to a more severe sentence.

Aggregate sentences: A single sentence given for two or more charges in a case, without specifying the individual sentence for each separate charge.

Appeal: A request made to a higher court to review a lower court's decision.

Area restriction order: An order that requires a person to stay away from a particular area.

Backdating sentences: If time is spent in custody before the sentencing hearing, the court may include this time spent in custody in the sentencing imposed.

Bail: The release of a person from legal custody into the community on condition that they reappear later for a court hearing to answer the charges.

Breach: A failure to comply with an order.

Case: A collection of one or more charges against a person sentenced at the one hearing.

Case law: Law made by courts, including sentencing decisions and decisions on how to interpret legislation. This is also known as **common law**.

Charge: A single count of an offence.

Closed court: A court that is closed to the public. There are limitations on the people who can be present in the Magistrates Court (Youth Justice Division). The court has the option in other cases to close the court to the public.

Committed for trial or sentence: This means that the case is moved to the Supreme Court, for trial of the offences charged (if the accused has entered a plea of not guilty) or sentence (if the accused has entered a plea of guilty).

Common law: Law made by courts, including sentencing decisions and decisions on how to interpret legislation. Also known as **case law**.

Community Corrections: Offices across Tasmania involved in the management and supervision of offenders on community correction orders and parole.

Community correction order: A flexible, non-custodial sentence that sits between imprisonment and fines in the range of sentences that can be given. It is served in the community under conditions that may include unpaid community work, alcohol and drug bans, participation in treatment and rehabilitation programs and/or restrictions on where the offender can go or live, or with whom they can associate (spend time with).

Community protection: Protection of the community from the offender.

Compensation order: An order made as well as a sentence under the *Sentencing Act 1997* (Tas), requiring payment of money to a victim of crime to compensate for *the injury or property loss or damage suffered because of the offence*. It is mandatory (compulsory) for burglary, stealing or unlawfully injuring property and discretionary in the case of other offences.

Concurrent sentences: Individual sentences, imposed for each of the charges in a case, that are to be served at the same time, rather than one after the other. For example, two prison sentences each of five years served fully concurrently would mean a total of five years in prison.

Confiscation: Taking or seizing the proceeds of crime or property connected to an offence through an order under the *Crime (Confiscation of Profits) Act 1993* (Tas).

Court of Criminal Appeal: A division of the Supreme Court. The Court of Criminal Appeal hears appeals against conviction, sentence or both.

Crown: In Tasmanian sentencing, the Crown refers to either the police prosecutor (in the Magistrates Court) or the prosecutor representing the Office of the Director of Public Prosecutions (in the Supreme Court) who represents the State of Tasmania in criminal matters.

Crushing sentence: A sentence that creates a feeling of helplessness for the offender and destroys any 'reasonable expectation' of a useful life after getting out of prison.

Culpability: Blameworthiness, the extent to which a person is held accountable/responsible for an offence.

Cumulative sentences: Individual sentences, given for each of the charges in a case, that are to be served one after the other, rather than at the same time. For example, two prison sentences each of five years served wholly cumulatively would mean a total of 10 years in prison.

Current sentencing practices: Sentences that have been given for similar cases.

Custodial order: An order that involves a term of imprisonment (for adults), or a period of detention (for youths).

Dangerous: Behaviour that is dangerous to the public (for example, dangerous driving causing death or serious injury).

Defendant: A person who has been charged with an offence but who has not yet been found guilty or not guilty. This is the term used in the Magistrates Court.

Defence: The accused/defendant, and the accused's/defendant's legal advisors.

Deferral: A postponement (holding back) of sentencing for up to 12 months to allow an offender to show their rehabilitation.

Deterrence: Reducing crime by the threat of a criminal sanction (punishment) or by someone experiencing a criminal sanction.

Director of Public Prosecutions: The Director of Public Prosecutions makes decisions about whether to prosecute — as well as prosecutes — serious offences in the Supreme Court for the State of Tasmania. The Director of Public Prosecutions is independent (separate) of government.

Discharge: An order recording a conviction but also releasing the offender without any conditions (rules attached).

Discretion: Discretion means choice. For most offences heard in Tasmanian courts, sentencing decisions are not automatic. This means that courts can give the sentence that is most appropriate in each case.

Dismissal: An order releasing an offender without recording a conviction or ordering any other sentence.

Drug treatment order: A prison sentence that is suspended (held back) so offenders can have treatment in the community for their addiction.

Electronic monitoring: A court may order an offender to wear an electronic tag that tracks their movements and sends an alarm to a monitoring unit if the offender breaks any restrictions on movement that have been imposed by the courts. This may be imposed as a special condition of a home detention order.

Fine: A sum of money payable by an offender to the State of Tasmania on the order of a court.

First appearance: The first court hearing for an accused in which charges are formally filed with the court.

Forfeiture order: An order under the *Crime (Confiscation of Profits) Act 1993* (Tas) that requires forfeiting (surrendering) property related to an offence.

Global sentence: One sentence imposed for all offences when an offender is convicted of multiple offences. This is also called a general sentence.

Good behaviour bond: A less serious sentencing outcome in which the Court releases the offender on the condition that they be of good behaviour for a period of time. Under Tasmanian legislation, this is called an undertaking. If the offender is of good behaviour for that period there is no further punishment.

Grievous bodily harm: bodily injury that endangers or is likely to endanger life or to cause or be likely to cause a serious injury to health.

Home detention: An order that means that a person must live in specified premises (their home or other place as required by the court). A home detention order will say when a person must be at the home detention premises. The maximum period of a home detention order is 18 months. It may have other conditions attached, including electronic monitoring, alcohol bans, judicial monitoring and treatment conditions.

Human rights: The basic rights and freedoms that all human beings are entitled to, including rights to life and liberty, freedom of thought and expression, and equality before the law.

Imprisonment: Detention in a prison. The most severe sentence in Tasmania.

Indictable offences: Serious crimes, such as murder and rape, usually tried before a judge and jury in the higher courts.

Indictable offence triable summarily: A less serious indictable offence that is dealt with summarily, usually in the Magistrates Court.

Indictment: A written statement of the indictable offence or offences charged.

Infringement: An offence that is dealt with by a notice alleging the offence (an infringement notice) and a fixed financial penalty (for example, a parking fine).

Instinctive synthesis: A sentencing method where the judge or magistrate takes into consideration all the factors that are relevant to the case, assesses their significance and makes a judgment as to the appropriate sentence, given all the circumstances of the case.

Intentional: The intention to cause a particular outcome, not just the intention to do the act that caused the outcome (for example, *intentionally* causing grievous bodily harm rather than *recklessly* causing grievous bodily harm).

Judge: The person who hears the case and decides the sentence in the Supreme Court.

Jury: A group of people (usually 12) without legal experience, chosen at random from the general community. A jury is responsible for determining questions of fact based on the evidence presented in a criminal trial for an indictable offence in the Supreme Court and deciding whether the defendant is guilty or not guilty.

Magistrate: The person who hears the case and decides the sentence in the Magistrates Court, including the Magistrates Court (Youth Justice Division).

Mandatory sentence: A sentence set by Parliament in legislation, allowing no discretion (no option) for the court to give a different sentence.

Maximum penalty: The most severe sentence set in legislation that a court can impose for a particular type of offence. Also known as the **statutory maximum**.

Mitigating factor: A fact or circumstance about the offender or the offence that may lead to a less severe sentence.

Negligent: Generally, in the criminal law, the person falls short of the standard of care that a reasonable person would have in the circumstances. The risk of serious injury is so great that the negligent act or omission warrants punishment under the law (for example, *causing death by culpable negligence* rather than *intentionally* causing death).

Non-custodial order: A sentencing order that does not involve an order of custody.

Non-parole period: The period of imprisonment set by the court that the offender must serve in prison before being eligible for release on parole.

Objective seriousness: The seriousness of the offending without considering anything personal about the offender.

Offender: A person who has been found guilty of an offence, or who has pleaded guilty to an offence (has admitted the facts of an offence).

Office of the Director of Public Prosecutions: An independent statutory authority that commences, prepares and runs criminal prosecutions on behalf of the Director of Public Prosecutions.

Parity (principle of parity): Consistency of punishment for co-offenders in a case.

Parole: Supervised and conditional release of an offender from prison before the end of a prison sentence. While on parole, the offender is still serving their sentence, and is subject to conditions designed to help with their rehabilitation and reintegration into (re-joining) the community, and to reduce the chance of their reoffending.

Parole Board: The body responsible for making decisions about **parole** for adults in prison.

Parolee: An offender who has been released on parole.

Parsimony (principle of parsimony): To be parsimonious is to do no more than is necessary to achieve an intended purpose. The principle of parsimony means that the sentence imposed must be no more severe than is necessary to meet the purpose or purposes of sentencing the offender.

Partially suspended sentence: A suspended sentence where a person serves part of the imprisonment term immediately and then is released with the remaining part of the sentence suspended, as long as the offender does not offend again within a given period and complies with any other conditions of the order.

Penalty unit: Fine amounts are based on penalty units rather than specific dollar amounts. Penalty units are adjusted annually to keep pace with inflation. For the financial year 2019–20, a penalty unit is \$168.

Plea: The response by the accused/defendant to a criminal charge — ‘guilty’ or ‘not guilty’.

Plea in mitigation: When the accused/defendant pleads guilty or is found guilty, the court conducts a sentencing hearing, sometimes called a **sentencing hearing** or a **plea hearing**. The aim is to explain the accused’s/defendant’s personal circumstances and provide an explanation for the offending.

Precedent: A decision that sets down a legal principle to be followed in similar cases in the future.

Prescribed offence: These are offences involving a youth that must be determined in the Supreme Court or the Magistrates Court (depending on the court that would deal with the matter if it involved an adult). For a youth less than 14 years old, these offences are murder, manslaughter and attempted murder. For a youth who is 14, 15 or 16, these offences are murder, manslaughter, attempted murder, aggravated sexual assault, rape, maintaining a sexual relationship with a young person, armed robbery, aggravated armed robbery, being found prepared for the commission of a crime armed with a dangerous or offensive weapon, and evading police. For a youth who is 17 years old, these offences are murder, manslaughter, attempted murder, aggravated sexual assault, rape, maintaining a sexual relationship with a young person, armed robbery, aggravated armed robbery, being found prepared for the commission of a crime armed with a

dangerous or offensive weapon, evading police, driving offences involving excessive noise, unnecessary speed or racing, and drink and drug driving offences (in some circumstances).

Principal sentence: The main sentence type for an offender. This is the most serious sentence imposed.

Probation order: An order for a youth to be supervised in the community. An order for an offender to undergo supervision by a youth justice worker. This may include a number of activities to reduce their risk of re-offending.

Proportionality (principle of proportionality): A sentencing principle that stops a court from ordering a punishment that is more severe than is appropriate for the seriousness of the offence.

Prosecution: A legal proceeding against an accused/defendant for a criminal offence. Prosecutions are brought by the Crown (through the Office of the Director of Public Prosecutions or police prosecutors), not the victim.

Reckless: The person foresees the consequences (or likely consequences) but is indifferent to whether or not the consequences come about (for example, *recklessly* causing grievous bodily harm rather than *intentionally* causing grievous bodily harm).

Rehabilitation: The reintegration into society of someone who has been convicted of a crime, in order to avoid reoffending.

Remand: To place an accused/defendant in custody pending further court hearings dealing with the charges laid against them.

Remorse: Regret for past actions.

Reoffending: Returning to or repeating criminal behaviour. Also known as **recidivism**.

Restitution: An order made in addition to sentence under the *Sentencing Act 1997* (Tas) requiring an offender (or any other person in possession or control of stolen property) to return the stolen property, return the proceeds of the sale of stolen property or to make payment of a sum of money up to the value of the stolen property.

Sanction: A penalty or sentence.

Sentence: The penalty that the court imposes on a person who has been found guilty of an offence. In the Magistrates Court (Youth Justice Division), the sentence is usually referred to as the Order.

Sentence indication: An indication from a magistrate hearing proceedings for a summary offence, or an indictable offence triable summarily, of the type of sentence that will be imposed if the defendant pleads guilty, or an indication from a judge hearing

proceedings for an indictable offence of whether the defendant would be likely to receive a sentence of imprisonment if they plead guilty. This can occur as part of a **contest mention** hearing.

Sentencing factors: The factors that the court must think about when sentencing.

Sentencing hearing: When the accused/defendant pleads guilty or is found guilty, the court runs a sentencing hearing, sometimes called a **plea in mitigation** or a **plea hearing**.

Sentencing principles: The principles that form the basis of sentencing decisions, including parity, parsimony, proportionality and totality.

Sentencing purposes: The reasons for sentencing an offender. Sentencing purposes for adult offenders in Tasmania are: just punishment, deterrence, rehabilitation, denunciation and community protection.

Sentencing remarks: The comments that a judge or magistrate makes at the end of a sentencing hearing. Sentencing remarks include a summary of the case, the sentence and reasons for the sentence.

Special reasons: Unusual circumstances that allow a court to give a sentence that is less severe than the statutory minimum sentence.

Statute law: Law made by Parliament and set out in legislation (statutes) called Acts of Parliament.

Statutory maximum: The maximum penalty for an offence as given in legislation (statutes).

Statutory minimum: The minimum penalty for an offence as given in legislation (statutes).

Summary hearing: A hearing in the Magistrates Court, including the Magistrates Court (Youth Justice Division) to determine whether the defendant is guilty or not guilty.

Summary offences: Offences that are less serious than indictable offences (for example, minor traffic offences and offensive behaviour). Generally, summary offences are heard in the Magistrates Court.

Supreme Court: Tasmania's highest court. The Supreme Court hears most indictable offences (other than those triable summarily), including treason, murder and attempted murder, manslaughter, rape, robbery, armed robbery, dangerous driving causing death or grievous bodily harm, assault, wounding and causing grievous bodily harm.

Suspended sentence: A sentence of imprisonment that is imposed on a person, but the person is not required to serve all or part of the period of imprisonment as long as the

offender does not offend again within a given period and complies with any other conditions of the order.

Totality (principle of totality): Where an offender is sentenced on more than one charge, the principle of totality requires the court to ensure that the total sentence is 'just and appropriate' for the total offending behaviour.

Trial: A hearing in the Supreme Court to determine whether the accused is guilty or not guilty.

Undertaking: Unsupervised release of an offender, with or without conviction, for a set period with or without conditions.

Victim: A person who has been injured directly because of a criminal offence, or a family member of a person who has died because of a criminal offence. **Injury** includes physical harm, grief, psychological trauma (harm), financial (monetary) loss and damage to property.

Victim Impact Statement: A statement by a victim, presented to the court at the time of sentencing, explaining how the crime has affected them.

Youth: A person who is aged 10 years or over but under 18 years at the time of the offence. A youth is usually sentenced in the Magistrates Court (Youth Justice Division) under the *Youth Justice Act 1997* (Tas).

Youth Justice Division: A division of the Magistrates Court that hears offences committed by youth.

Wholly suspended sentence: A suspended sentence where a person is not required to serve any of the period of imprisonment as long as the offender does not offend again within a given period and follows any other conditions of the order.

1. WHO IS RESPONSIBLE FOR SENTENCING?

In Tasmania, responsibility for sentencing is shared between Parliament, the courts and government departments and agencies. This shared responsibility means that no one group has complete control over sentencing outcomes.

Parliament makes laws about sentencing.

Courts interpret these laws and decide the actual sentence to be imposed on each offender. Sentencing decisions made by the courts form part of the law.

Government departments and agencies administer sentences that have been imposed, for example, by managing offenders in prison or by supervising offenders on probation or community service orders.

Where is sentencing law made?

There are two sources of sentencing law in Tasmania:

- **Statute law** – law in legislation made by Parliament. Statute laws define crimes, establish penalties, list the available sentences and set out some of the rules and considerations that courts must apply when sentencing.
- **Case law** – decisions made by courts when sentencing, and decisions about how statutes should be interpreted or applied. This is also known as **common law**.

Statute law and case law together create a framework that courts must follow when sentencing offenders.

Parliament of Tasmania

The Tasmanian Parliament makes laws about offences and sentencing specific to Tasmania. Parliament sets these laws out in legislation (Acts of Parliament). A draft Act is called a Bill. Bills are introduced into Parliament for discussion, debate and possible amendment (change). Both the House of Assembly (lower house) and the Legislative Council (upper house) must vote on and pass a Bill before it can become an Act and part of statute law.

There are over 200 Acts that create offences in Tasmania. However, common Tasmanian offences and their penalties are found in the following Tasmanian Acts:

- the *Criminal Code 1924* (Tas)
- the *Police Offences Act 1935* (Tas)
- the *Misuse of Drugs Act 2001* (Tas)

- the *Road Safety (Alcohol and Drugs) Act 1970* (Tas)
- the *Firearms Act 1996* (Tas).

Acts that create offences define what behaviour is against the law. They also set out the highest sentence (known as the **maximum penalty**) that courts can impose on a person found guilty of an offence. In Tasmania, the maximum penalty for all crimes contained in the *Criminal Code* (Tas), other than for murder and treason, is imprisonment for 21 years, or a fine or both. The maximum penalty for murder and treason is life imprisonment.

Tasmanian sentencing rules and considerations are set out in:

- the *Sentencing Act 1997* (Tas)
- the *Youth Justice Act 1997* (Tas).

These Acts describe the types of sentencing orders (for example, a fine or imprisonment) available to the courts, and the purposes, principles and factors that courts must consider when deciding on a sentence.

The *Sentencing Act 1997* (Tas) sets few limits on the flexibility that courts have when choosing a sentence for particular offences. One exception is the setting of a minimum penalty of at least six months' imprisonment for the offence of causing serious harm to a police officer, unless there are exceptional circumstances.

Parliament changes laws by introducing Bills that, when passed:

- amend (change) existing Acts or
- replace existing Acts.

Parliament has passed numerous acts that have amended the *Sentencing Act 1997* (Tas) since the Act was introduced.

What if I think sentencing law needs to change?

Parliament has changed laws about crimes and sentencing many times. These changes are often in response to community concerns expressed by individuals, organisations and the media. Tasmania has laws that protect the rights of citizens to participate in public debate and to lawfully campaign to change the law. Citizens influence sentencing law by voting for the candidates and parties that reflect their individual views.

Parliament of Tasmania

In addition to hearing cases and passing sentence for Tasmanian offences, Tasmanian courts hear cases and pass sentence for some Commonwealth (federal) offences, such as child exploitation and drug importation.

There are differences between sentencing law for Commonwealth offences and sentencing law for Tasmanian offences. For Commonwealth offences, national laws

define the offence, the applicable maximum penalty and the available sentencing options.

Commonwealth offences are set out in Commonwealth legislation, which are Acts passed by the Parliament of Australia (also known as the Commonwealth Parliament or federal Parliament). Such Acts include the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth).

Courts

Case law (or **common law**) is law made by the courts. Case law includes past decisions on sentencing and on how to interpret or apply legislation. These past decisions are relevant to current or future cases.

When sentencing an offender for an offence, the court must consider other sentences that have been given for that offence in other cases.

In Tasmanian courts, prosecutors and defence lawyers can make submissions (arguments) to the court about what matters they think are relevant to the sentence that the court will order. However, the judge or magistrate makes the decision.

Some cases become law that courts must apply when sentencing in similar cases, or when applying particular sentencing laws.

2. WHERE DOES SENTENCING HAPPEN?

Tasmania has a number of sentencing courts. Each court deals with different types of offences and offenders.

Magistrates Court and Supreme Court

Two levels of Tasmanian courts sentence adults:

- Magistrates Court
- Supreme Court.

The type of offence that a person is charged with and the seriousness of the offence determine the court in which the case is heard and then sentenced. A person can plead guilty or not guilty. If a person pleads not guilty, the case is heard through a **trial** or a **summary hearing** to determine whether the person is guilty or not guilty.

Tasmanian law classifies most offences as:

- **Indictable offences** (more serious offences), such as murder, rape, sexual offences involving children, causing grievous (very serious) bodily harm and armed robbery. Most indictable offences are contained in the *Criminal Code* (Tas). Indictable offences must be determined and sentenced in the Supreme Court.
- **Summary offences** (less serious offences), such as theft, minor assaults and minor driving offences. Summary offences are determined and sentenced in the Magistrates Court.
- **Indictable offences triable summarily** (less serious indictable offences), such as a number of property offences where the value of the property is worth less than \$5,000. These are indictable offences that are determined and sentenced in the Magistrates Court, rather than in the Supreme Court, unless the magistrate thinks that the matter should be decided in the Supreme Court. An accused can also choose to have an indictable offence determined and sentenced in the Magistrates Court for certain property offences where the value of the property exceeds \$5,000 but is less than \$20,000, escape, aiding escape (helping someone else escape), false declarations (statements), indecency, indecent assault and stalking. If the magistrate and the prosecution agree, perverting the course of justice in relation to certain traffic offences can also be heard in the Magistrates Court, if the defendant is willing to have the matter decided summarily.

Remitting matters from the Supreme Court: There is also a rule that allows for the Supreme Court to send indictable matters to the Magistrates Court for determination and sentencing if the accused has been charged with multiple (more than one) summary

offences and a relatively small number of indictable offences that are not of great seriousness or the proceedings are not so serious that it would be inappropriate for a magistrate to deal with them. A judge can only do this if he or she thinks that a fine of no more than 20 penalty units (currently \$3,360) or imprisonment of no more than one year would be an adequate sentence. The accused must also agree to have the matter heard and determined in the Magistrates Court.

The Magistrates Court is responsible for most sentencing in Tasmania (around 97% of all people sentenced). From July 2012 to June 2017, on average, 10,569 people were sentenced each year in the Magistrates Court.

Magistrates Court (Youth Justice Division)

The Youth Justice Division is a division of the Magistrates Court and is a specialist court for offenders who are children aged 10 to 17 years at the time of an alleged offence.

The Youth Justice Division can deal with both summary and indictable offences, except for **prescribed offences**. Prescribed offences are generally serious offences and the offences that are classified as prescribed offences change depending on the age of the young person.

There are special sentencing options for young offenders who are sentenced in the Youth Justice Division or the Supreme Court (see '**Sentencing young people**').

Specialist court lists and services

A court list is a way of grouping and managing certain types of cases. Court lists provide specialist services to meet the needs of certain types of victims, witnesses and people charged with offences. These include people charged with offences who have particular needs arising from drug use, mental illness or cognitive impairment (cognitive impairment is when a person has trouble remembering, learning new things, concentrating or making decisions that affect their everyday life. Cognitive impairments can be mild or severe). Court lists also allow better access to specialist services for people involved in certain types of offences, such as family violence offences.

Lists are not specialist courts. Lists operate in Tasmanian courts at specified times.

Court mandated Drug Diversion Program (CMD)

CMD is a program that aims to direct people, whose offending behaviour is linked to illicit/illegal drug use, into drug treatment. A drug treatment order may be made in the Magistrates Court or the Supreme Court. The supervision of all drug treatment orders is carried out by the Magistrates Court.

CMD uses a special sentencing order called a **drug treatment order**. This order is aimed at rehabilitation — breaking the cycle of addiction and offending and supporting offenders to re-join the community. The drug treatment order is a prison sentence that is

suspended (stopped for a time) while the offender participates in intensive rehabilitation programs under supervision in the community. This assists the offender to maintain employment and preserve relationships that imprisonment might damage or destroy.

To be allowed a drug treatment order, offenders must meet a number of criteria. The main criteria are that offenders must have an illicit drug dependency that contributed to the offending.

Offenders who **breach** (fail to obey) the terms of their drug treatment order return to court. They may have more restrictive conditions placed on them or they may be resentenced to another type of sentence, such as imprisonment.

A drug treatment order is not available for offences involving sexual offences or offending that causes actual bodily harm that is not considered minor harm. This includes both physical and psychological harm.

Diversion list

The Diversion List is available for defendants with a mental illness and/or impaired mental functioning charged with summary offences or minor indictable offences that can be tried summarily. A person who is eligible for the Diversion List has access to specialist services such as mental health, disability and other welfare services to address the things that might lead to criminal behaviour. This happens before a person is sentenced by the court. During this time, a person has a treatment plan made for them and if they follow the plan, the prosecution may drop the charges, or the person may get a lighter sentence than they otherwise would have received.

Family Violence List

The Family Violence List allows family violence matters to be listed in separate court sessions. This aims to improve the response of the court and to allow for coordination with support agencies including specialist police prosecutors, Safe Families Coordination Unit, Legal Aid, and the Court Support and Liaison Service.

Government departments and agencies

Government agencies, such as Corrective Services and Monetary Penalties Enforcement Services (MPES), administer sentences imposed by the courts. These departments and agencies are independent to the courts and police.

For example, when a court orders a fine and the offender does not pay, MPES is responsible for enforcing payment. In certain circumstances, MPES can use enforcement sanctions such as suspending a person's driver licence, suspending vehicle registration, publishing a person's name, address and details of the penalty on the MPES website, imposing a charge on land, redirecting money or seizing (taking) and selling property.

When a court imposes a **community correction order, a drug treatment order or a home detention order**, Community Corrections Tasmania administers the sentence.

Offenders are under the supervision of a Probation Officer who monitors/regulates compliance with the conditions of the order (courts can order conditions such as regular reporting, drug and alcohol testing or participation in treatment and rehabilitation programs).

Parole Board

The Parole Board decides whether an offender serving a custodial sentence in prison can be released on parole (under certain conditions) and be supervised in the community.

3. *WHEN IS A SENTENCE IMPOSED?*

A sentence can only be imposed when a court finds a person guilty of an offence (a crime).

The process leading to a sentence

Investigation

Normally, an offence is reported to (or detected by) the police, who then gather evidence. Other agencies can also investigate offences (for example, the Environment Protection Authority or Work Safe Tasmania). The evidence collected helps decide which offence (if any) the person is charged with.

Police (or the other relevant agency) gather evidence by having an investigation and interviewing victims and witnesses. Once police (or the agency) identify a suspect, they will attempt to find and then question this person.

Arrest and the charge

When police have enough evidence and decide to charge a person, they may arrest the alleged offender (take the person into custody) or proceed by summons (issue a document that requires the person attend court on the date set out).

The type of offence (or offences) that a person is charged with determines which court deals with the offence (the Magistrates Court or the Supreme Court). The type of offence also influences what kind of sentence the person might get if they plead guilty or are found guilty of the offence.

Police sometimes get advice from the Office of the Director of Public Prosecutions when deciding whether to charge a person with a serious offence and selecting the type of offence(s) to be charged. There are some matters where the police are required to consult with the Office of the Director Public Prosecutions.

More information about the decision to prosecute and charging guidelines can be found in the Director of Public Prosecutions (Tas) *Prosecution Guidelines*. This is available on the Director of Public Prosecutions website (www.dpp.tas.gov.au/prosecution_obligations/prosecution_policy_and_guidelines).

A person charged with an offence can choose whether to admit to the charge (plead guilty) or not admit to the charge (plead not guilty).

A person who has been charged with an offence but who has not (yet) been found guilty or not guilty is called a **defendant** in the Magistrates Court and an **accused** in the Supreme Court.

Sometimes the prosecution may accept a plea of guilty to a less serious charge.

Prosecution

Police prosecutors normally prosecute less serious offences. The Office of Public Prosecutions normally prosecutes more serious offences on behalf of the Director of Public Prosecutions.

Bail and remand

A person who has been arrested and charged with an offence may be held in custody by police (held on **remand**) or released into the community (released on **bail**) until the matter comes to court. A person charged with an offence (an **accused**) can apply for bail either to the police or to a court at a hearing.

If granted bail, the accused/defendant must comply with bail conditions (rules), such as reporting regularly to police and appearing in court for all hearings. If the accused/defendant breaches bail conditions, they may be taken into custody and may face more charges for breaching bail.

First appearance

Normally, an adult charged with an offence has their first court hearing in the Magistrates Court. This applies for both summary matters (which will be heard and determined in the Magistrates Court) and indictable offences (which will be heard and determined in the Supreme Court).

The first appearance is the first time the parties appear in court for the offence. At the first appearance, the parties (the prosecution and the defence) discuss the status of the case with the magistrate. The defence may say whether the defendant intends to plead guilty or not guilty. However, the accused may ask for an **adjournment**, without saying whether or not they will plead guilty or not guilty. An adjournment means that the case is put off and will come back to court at a later date.

Young people charged with an offence usually have their first hearing in the Youth Justice Division. They may then be moved to the Supreme Court.

Contest mention

Contest mention is a process which operates only in the Magistrates Court for some matters to be heard in the Magistrates Court. It is a pre-trial hearing that allows the prosecution and defence to try to agree about certain things, such as some of the facts, before the trial.

It can also be used to give a defendant a sentence indication.

Sentence indication is when the court gives a person a general idea of the sentence they could face if they plead guilty to the offence (or offences).

A sentence indication usually outlines whether or not the court would be likely to impose:

- a sentence of imprisonment
- another type of sentence (for example, a community correction order or a fine).

Guilty plea

The accused/defendant can choose to plead guilty or not guilty to a charge at any time after being charged with an offence.

A person is presumed (considered to be) innocent until they plead guilty or are found guilty by a magistrate or a jury.

When an accused/defendant pleads guilty, the court usually finds the charges proven. The case then goes to a sentencing hearing, either before a magistrate in the Magistrates Court or before a judge in the Supreme Court.

When a person pleads not guilty, the court determines (decides) criminal responsibility for the charge (whether the accused is guilty or not guilty). This is decided by a magistrate in a summary hearing, or by a jury in a trial. A separate finding of guilt is needed for each charge. As a result, a magistrate or a jury may find the person guilty of some charges and not guilty of others.

Summary hearing

Cases involving **summary offences** (and some **indictable offences triable summarily**) are heard in the Magistrates Court. In a summary hearing, the magistrate hears the case, determines whether the defendant is guilty or not guilty and orders a sentence. If the magistrate decides that the defendant is not guilty, the defendant is released (set free). A finding of not guilty is called an **acquittal**.

Transfer of indictable offences to Supreme Court

Cases involving **indictable offences** must generally be heard in the Supreme Court. However, a person charged with an indictable offence first appears in the Magistrates Court, and the case is moved to the Supreme Court once the person has entered a plea (not guilty or guilty). The first day that a person appears in the Supreme Court is called a remand day.

Trial

If a person enters a plea of not guilty to an indictable offence, a trial in the Supreme Court will be held.

A trial is a hearing to determine whether the accused is guilty or not guilty. A judge runs the trial, while a jury listens to the evidence and decides whether the accused is guilty or not guilty. Having made this decision, the jury's job is finished. If the jury finds the accused guilty, the judge decides the sentence. If the jury finds the accused not guilty, there is an acquittal and the accused is free to go.

Witnesses may be required to come to a trial or hearing to give evidence.

With or without conviction

After a person has pleaded guilty or has been found guilty, it is then the responsibility of the magistrate or the judge to decide the sentence that is ordered and choose whether a conviction is recorded.

Courts must record a conviction when imposing certain types of sentence, such as:

- imprisonment (jail time)
- a drug treatment order
- home detention (offender has to stay inside a certain property)
- detention for young offenders (if a suspended detention order is not made).

The court may choose not to record a conviction when giving other types of sentence, such as:

- a community correction order
- a fine
- a rehabilitation program order (for family violence offences)
- an adjourned undertaking
- dismissal.

A conviction forms part of a person's criminal record. A person with relevant prior recorded convictions is normally sentenced more severely/heavily than someone without any relevant past criminal history.

When deciding whether or not to record a conviction, the judge or the magistrate considers factors like the nature of the offence, the character and history of the offender, and the impact that a conviction would have on the offender's wellbeing and employment prospects or opportunities.

A finding of guilt also forms part of an offender's criminal record. Even if no conviction is recorded, a criminal record can have negative effects on an offender's future prospects, even after an offender has completed a sentence. A conviction or a previous finding of guilt can be:

- looked at by the police when investigating other crimes
- relied on in any future criminal case against the offender
- included in police record checks, limiting an offender's eligibility for:
 - international travel
 - certain jobs (for example, as a teacher) or volunteer roles
 - insurance policies
 - various types of licence (for example, a taxi driver licence or firearms licence).

Deferral of sentencing

In the Magistrates Court and the Supreme Court, sentencing may be deferred (postponed) for up to two years. The Youth Court Division can also postpone sentencing for up to 12 months. The power to defer or postpone a sentence allows a longer period for offenders to demonstrate that they can be rehabilitated, for example, by participating in programs that deal with the underlying causes of offending. The court will give a sentence at the end of the time that the sentencing is deferred.

Pre-sentence reports

After finding a person guilty of an offence, but before passing sentence, the court may order a pre-sentence report about the person. The court will then adjourn (postpone) the court hearing to allow the report to be prepared.

A court must order a pre-sentence report if it is considering making a:

- home detention order
- youth probation order
- youth community service order
- youth detention order.

Pre-sentence reports provide vital information to judges and magistrates, so that they have as broad a picture of the offender as possible. A pre-sentence report in relation to an adult offender is prepared by a probation officer.

Pre-sentence reports for young offenders are prepared by youth justice workers.

A pre-sentence report may contain information about the offender's:

- age
- social history and background
- medical, psychological and psychiatric history
- education
- employment/job history
- past offences
- level of compliance with any sentence currently in force
- suitability for home detention and the opinion of other people who will live at the house
- financial circumstances
- special needs
- need for courses, programs, treatment, therapy or other assistance/help
- the nature and history of the relationship between the offender and the victims.

Other matters that may be included in a pre-sentence report include:

- suitability for community service
- alcohol, drug or other substance use history.

In relation to drug treatment orders, the court will order a drug treatment assessment report to consider whether the person is suitable for a drug treatment order and to make recommendations about the conditions that should be part of the order. Generally, similar matters are contained in the drug treatment assessment report as other pre-sentence reports. The report may also advise on programs, courses and treatments that may be able to address the defendant's drug use problem and other social needs.

In relation to young offenders, a pre-sentence report will normally include the following information:

- sources of information on which the report is based. This will usually include reference to the young person, their parent or guardian, the Education Department, Child Safety Services etc
- circumstances of the offence of which the young person has been found guilty and attitude of the young person to the offence
- any previous orders in respect of the young person involving the Secretary. This sets out both previous sentencing Orders, remand Orders and any Child Safety Services involvement
- family circumstances of the child or young person
- education/training of the child or young person
- employment/job history of the young person
- recreation and leisure activities (hobbies) of the child or young person
- medical or health matters relating to the child or young person
- drug or alcohol matters relating to the child or young person
- a recommendation for sentence.

Another form of pre-sentence report that may be provided to the court is a **Victim Impact Statement** — a statement prepared by any victim of the offence (see definition below).

Sentencing hearing

When a person pleads guilty or is found guilty, the court runs a sentencing hearing (sometimes called a **plea in mitigation** or a **plea hearing**).

At the sentencing hearing, the Crown (a police prosecutor or a prosecutor from the Office of the Director of Public Prosecutions) represents the state, and a defence lawyer represents the offender. The Crown does not represent the victim in these proceedings.

The Crown and the defence give information to the court about:

- the facts of the case
- the circumstances of the offender (for example, the prosecution could point out the offender's criminal history, and the defence could point out that the offender has shown remorse/regret)
- relevant **sentencing principles** including information about relevant case law and legislation
- the type of sentence that might be appropriate (for example, imprisonment or a community correction order).

The Crown will also give the court information about the impact of the offending on the victim/s.

A **Victim Impact Statement** may also be read out at a sentencing hearing, either by the victim or by the prosecution on the victim's behalf.

The judge or magistrate can ask questions to seek information and clarify (make clear) issues.

The information given in a sentencing hearing helps the judge or the magistrate to decide the sentence to impose.

Can I watch a sentencing hearing?

Most hearings are open to the public. Anyone can sit in court and listen to what is said. However, sometimes hearings are closed to the public. This can happen for a number of reasons, for example, if the offender's identity is protected because they have cooperated with law enforcement agencies. Hearings in the Youth Justice Division are also closed to the public. A judge or a magistrate may also ask a person to leave the court if they are disruptive, or if requested by the prosecution or defence.

Imposing sentence and making sentencing remarks

At the end of the sentencing hearing, the judge or the magistrate summarises the case, imposes a sentence and (especially for cases in the higher courts) outlines the reasons for giving the sentence. The judge or the magistrate makes their **sentencing remarks** in open court for anyone in the court (including media) to hear, unless a **closed court order** has been made.

In the Magistrates Court, sentencing remarks are recorded to audio but are not often published as written remarks.

In the Supreme Court, judges normally write down their sentencing remarks (reasons for the decision). Supreme Court sentencing remarks are usually published as judgments on the Supreme Court website (after a short delay for editing and formatting).

Sentencing remarks for the Supreme Court from 2008 onwards are also published on the Supreme Court library website.

After the sentencing hearing

An offender who is sentenced to imprisonment is taken into custody immediately after the sentencing hearing.

For other sentences, the offender is either released into the community if they have been held on remand or remains in the community if they have been on bail. When a community correction order is imposed, the offender must report within the time frame specified in the order to a probation officer to make arrangements for their supervision and for any other conditions imposed by the court.

When the court imposes a fine, the offender is given a date by which the fine must be paid. Offenders can request to pay fines by instalments (in small amounts).

The role of victims in sentencing

When sentencing an offender, the impact of the crime on any victim is relevant to the sentence imposed. The court will consider:

- the effect of the offence on any victim of the offence
- the personal circumstances of any victim of the offence.

The prosecution will communicate this information to the court as part of the sentencing hearing.

One way a court can determine the effect of a crime on any victim is through a **Victim Impact Statement**.

When a court finds a person guilty of an indictable offence or a summary offence that has resulted in death or serious injury of a person or a family violence offence, a victim of the crime can make a Victim Impact Statement to the court. The statement may assist the court in deciding the sentence. However, the court will still take into account the effect of the offence on the victim even if the victim does not provide a statement.

The right to make a Victim Impact Statement is outlined in the *Sentencing Act 1997* (Tas). Victims (and in some circumstances their immediate family) may prepare a Victim Impact Statement, which the court may consider in sentencing the offender.

A victim can:

- be assisted in preparing a Victim Impact Statement
- apply to be included on the **Eligible Persons Register** (formerly known as the Victims register) if they are the victim of a violent crime and the offender has been imprisoned.

Once included on the Eligible Persons Register, a person can find out certain information about the offender, such as the length of the sentence and the likely date of release. If the **Parole Board** is considering releasing an offender who is in prison, a person on the Eligible Persons Register can ask the parole board to consider the effect

of the crime of the person and also how they would feel about the offender's being released from prison. Victim Support Services will contact the victims on the Eligible Persons Register to ensure they are advised as soon as possible of the outcome of the Parole Board hearing.

A victim may also be eligible for a compensation order made by the court. The court must make a compensation order in all cases of burglary, stealing or unlawfully injuring property and there is evidence of injury, loss, destruction or damage as a result of the offence. In other cases, the court may make a compensation order, if there is enough evidence of injury, loss, destruction or damage. A **compensation order** requires the offender to pay compensation for that injury, loss, destruction or damage.

Victims of criminal conduct may be eligible for compensation under the *Victims of Crime Assistance Act 1976* (Tas). Compensation may be paid where a person is killed or injured as a result of an offence of violence by one person against another.

More information about support services for victims is available from the Victims Support Services (see www.justice.tas.gov.au/victims/about).

4. WHAT SENTENCES CAN BE IMPOSED?

There are a number of sentences that can be imposed on a person found guilty of an offence. These sentences range from less severe/serious sentences (like fines) to more severe/serious sentences (like imprisonment). Different sentencing options are available for young people (aged 10 to 17 at the time of the alleged offence).

Sentencing adult offenders

Adults are always sentenced under the *Sentencing Act 1997* (Tas). Sometimes young people can be sentenced under the *Sentencing Act 1997* (Tas) for some offences. The main types of sentences available for adults include fines, community correction orders, home detention, and imprisonment. A sentence of imprisonment can be suspended, either fully or partially.

In December 2018, changes to the law mean that the court can no longer impose a probation order or a community service order as separate sentencing options, but probation and community service can be imposed as conditions of a community correction order.

Non-custodial orders

Low-end orders

Orders for dismissal or discharge are at the lowest end of the sentencing range.

Dismissal means that a person is found guilty, but a conviction is not recorded. No other sentence is ordered.

Discharge means that the court records a conviction, but no other sentence is ordered. The person is released without any conditions (there are no special rules they have to follow).

Adjourned undertaking

An adjourned undertaking involves postponing the court proceedings and releasing a person on an undertaking (agreement). The time that the court proceedings are postponed is known as the **adjournment period**. During this time, the person agrees to behave in a particular way. An adjourned undertaking may last for up to five years.

During the adjournment period, the offender must be of good behaviour (not reoffend) and must meet any special conditions set by the court. For example, a person may have to complete a drug and alcohol treatment program. If a person does not follow the agreement, then they may be required to appear back in court.

The court can order an adjourned undertaking with or without recording a conviction.

Fine

Fines are the most common sentence imposed by Tasmanian courts.

When people are fined, they must pay a financial penalty (money) to the State of Tasmania. Fine amounts are described in **penalty units**. For the financial year 1 July 2019 to 30 June 2020, one penalty unit is \$168. The amount of a penalty unit is changed each financial year in line with inflation.

Fines imposed by the courts are different from fines (infringement penalties) issued by bodies like local governments or Tasmania Police. For example, a court may order a fine for offences such as theft or vandalism, while a person can be fined (receive an infringement penalty) for minor driving offences. Courts decide the amount of a court-imposed fine, but infringement penalty amounts are set automatically.

In deciding the amount of the fine, the court considers the financial circumstances of the offender (that is, the ability of offender to pay) and the maximum penalty for the offence (given as penalty units in legislation). The court can combine fines with other sentences such as imprisonment, home detention and community correction orders.

Offenders can apply to the Director of Monetary Penalties Enforcement Service (MPES) to have a fine changed to an order to perform unpaid community service. There are also other enforcement measures available to recover fines, including the ability of the Director of MPES to apply to the court for a person to serve a period of imprisonment as a last resort.

How common are fines?

Fines are the most common sentence in Tasmania courts. The Magistrates Court imposes most of the fines because it deals with less serious offending than the higher courts, and fines are at the low end of the sentencing range.

Community correction order

The community correction order (CCO) was introduced in December 2018. Community correction orders are less severe than imprisonment or drug treatment orders, but more severe than fines. Community correction orders replaced two previous community orders, being probation orders and community service orders. These orders were abolished in December 2018.

As the name suggests, a community correction order is served in the community. A community correction order may be imposed in addition to a fine, home detention, or a prison term of two years or less.

A community correction order can last for up to three years.

All offenders sentenced to a community correction order must follow standard (core) terms, including:

- not committing another offence punishable by imprisonment
- notifying a probation officer of any change of address or employment
- not leaving Tasmania without permission
- reporting to a probation officer
- following directions of a probation officer or supervisor.

Additional conditions can be attached to a community correction order. These are set out below. A court must impose a community service condition and/or a supervision condition as part of a community correction order as an extra condition. Otherwise, the court has a choice about whether to impose any of these additional conditions.

Additional conditions can require the offender to:

- be monitored (supervised) by the court to ensure compliance with the order
- undertake an educational or other program
- be supervised by a probation officer
- complete unpaid community work (up to a total of 240 hours)
- undergo assessment and treatment for drug dependency and/or alcohol
- submit for drug and/or alcohol testing
- undergo medical, psychological or psychiatric assessment or treatment
- not to consume alcohol
- not contact or associate (socialise/mix) with particular people (for example, co-offenders) or a particular type of person (for example, club members)
- stay away from certain places
- follow a curfew (be inside a certain property at a certain time).

These conditions can be for all or part of its duration.

The offender, the police or the prosecutor representing the Office of the Director of Public Prosecutions can ask the court to make changes to a community correction order or to cancel the order. The court may change or cancel a community correction order for a range of reasons, for example, if the offender no longer agrees to the order, or cannot comply with its conditions because of a change of circumstances.

Offenders who breach a condition of their community correction order may be returned to court. The court may change the community correction order and its conditions, or the offender may be resentenced for the original offence.

Home detention

Home detention was introduced in December 2018. Home detention means that a person must live in specified premises (their home or other place as required by the

court). These premises are called the 'home detention premises'. A home detention order will say when a person must be at the home detention premises. A person may be able to leave the premises for things such as work, study or medical treatment. The maximum period of a home detention order is 18 months.

All offenders sentenced to a home detention order must abide by standard (core) terms, including:

- not committing another offence punishable by imprisonment
- living at the home detention premises
- being at the home detention premises during the times set out in the order
- letting a police officer, probation officer or prescribed officer enter the premises
- allowing a police officer to search the premises and do frisk searches
- complying with directions of a probation officer, including directions as to employment
- submitting to electronic monitoring (if required)
- submitting to urine, breath or other test for illicit drugs and, in some circumstances, alcohol
- engaging/participating in a personal development activity, counselling, or treatment (if told to).

Extra conditions can be attached to a home detention order. These conditions can be for all or part of its duration. Additional conditions can require the offender to:

- be monitored by the court to ensure compliance with the order
- take medication as required by a psychiatrist or a medical practitioner
- not to consume alcohol.

The offender or police or the prosecutor can ask the court to make changes to a home detention order or to cancel the order. The court may change or cancel a home detention order for a range of reasons, for example, if the offender no longer agrees to the order or cannot follow its conditions because of a change of circumstances.

Offenders who breach a condition of their home detention order may be returned to court. The court may change the home detention order and its conditions, or the offender may be resentenced for the original offence.

Custodial orders

Imprisonment

Imprisonment is the most severe sentence in Tasmania. Tasmanian law treats imprisonment as the sentence of **last resort**, meaning imprisonment is only imposed if no other type of sentence is appropriate (suitable). However, in 2014 Parliament passed

legislation making a prison sentence of six months mandatory (compulsory) for causing serious bodily harm to a police officer.

Imprisonment is far more common as a sentencing outcome in the Supreme Court than it is in the Magistrates Court.

When imposing a sentence of imprisonment, the court usually sets a **non-parole period**. There are rules about when a court must set a non-parole period, depending on the length of the sentence of imprisonment. The non-parole period is the minimum period that the offender must spend in custody before they can apply for release on **parole**.

Release on parole is not automatic. Offenders can only be let out of prison on parole if they have finished the non-parole period in prison, and a parole board has thought about their case and granted parole (see '**Parole**').

Suspended sentence

A suspended sentence is a prison term that is suspended (held back) wholly or in part for a specified period. Where the prison term is partially suspended, the offender spends some time in prison and some time in the community.

Where the prison term was wholly suspended, the offender does not go to prison and is released into the community.

A suspended sentence is conditional (dependent) on an offender not committing another offence that has imprisonment as the maximum penalty during the time that the sentence is in force. The threat of prison hangs over the offender. If the offender commits a further offence that has imprisonment as the maximum penalty, the court must order that they serve the suspended sentence in prison, unless it would be unfair to do so. The suspended sentence order may also contain conditions such as a requirement to do community service or to be supervised by a probation officer.

Drug treatment order

A drug treatment order falls below imprisonment in the range of sentences. Technically, it is a custodial sentence — it is a prison sentence that is suspended so offenders can have treatment in the community for their addiction.

A drug treatment order can be made in the Magistrates Court and the Supreme Court. People are eligible for a drug treatment order if they have shown a history of illicit (illegal) drug use, and that illicit drug use contributed to their offending. Drug treatment orders are not available for offenders who are convicted of sexual offences, or offences leading to actual bodily harm that is not minor. This includes psychological and physical harm.

A drug treatment order has two parts:

- **The custodial part** is a sentence of imprisonment imposed. This time in prison is not served by the offender unless the court **activates** the custodial part (orders the offender to spend the time in prison).
- **The treatment and supervision part** consists of core conditions. This part includes conditions such as participation in treatment programs, reporting to court or corrections staff and attending the Magistrates Court as required.

A range of consequences and rewards encourage offenders to successfully complete their drug treatment order. Offenders who breach the conditions of their drug treatment order (for example, by resuming drug use, reoffending or failing to attend treatment) may have longer or additional conditions imposed, or they may be imprisoned.

Offenders may be rewarded for successfully following the conditions of their drug treatment order and showing progress towards their treatment goals (for example, through reduced supervision or early completion of the order).

Dangerous criminal declarations

In limited circumstances, it is possible for the Supreme Court to declare that an offender is a dangerous criminal. This is an exceptional order that can be made if the offender has been convicted for a crime involving violence, the offender has at least one previous conviction for a crime involving violence, the offender is 17 years or older and the judge thinks that the declaration is necessary for the protection of the public. A dangerous criminal declaration means that the person is detained indefinitely (for an unknown period of time), unless the order is discharged (removed). It means that the offender is ineligible to be released until the order is discharged (even if the sentence imposed by the court has finished).

Orders in addition to sentence

Courts may make orders in addition to the sentence imposed on the offender. They may do this under Part 9 of the *Sentencing Act 1997* (Tas) and some other Acts that are listed below.

A **restitution order** may require the offender to return stolen property to its owner or pay the owner an amount of money up to the value of the stolen property.

A **compensation order for property loss or damage** requires an offender to pay compensation for any property that was lost, destroyed or damaged as a result of the offence. The court must make this order if the offence is burglary, stealing or unlawfully injuring property.

An **area restriction order** is an order of the court that the offender must not loiter (hang around without purpose) in an area or class of area specified in the order at any time, or at such times or during such periods as are specified in the order.

A **compensation order for injury, loss, destruction or damage** requires an offender to pay an amount as compensation for that injury loss, destruction or damage.

Driving-related orders include orders available under the *Road Safety (Alcohol and Drugs) Act 1970* (Tas), the *Vehicle and Traffic Act 1999* (Tas), and the *Police Offences Act 1935* (Tas). Such orders may result in:

- mandatory (compulsory) driving licence disqualification for drink driving offences and the offence of driving with prescribed illicit (illegal) drug in the blood under the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) or excessive speeding under the *Vehicle and Traffic Act 1999* (Tas)
- discretionary driving licence disqualification (the judge decides whether to give it) under the *Police Offences Act 1935* (Tas) for a person convicted of the summary offence of motor vehicle stealing or procuring the hire or use of a motor vehicle by fraud
- a person's motor vehicle being confiscated permanently under the *Police Offences Act 1935* (Tas).

Forfeiture orders are made under the *Crime (Confiscation of Profits) Act 1993* (Tas). A court can make a **restraining order**, stopping the offender from dealing with the restrained property. Restraining orders can be placed on the property of the defendant or specified property of a person other than the defendant. A court can also make a **forfeiture order** in relation to proceeds of crime (assets acquired through committing a crime) and instruments of crime (assets used to commit a crime). The court can also make a **pecuniary penalty order**, which means that a person is ordered to pay money that reflects the value of the benefit that a person gained by committing the crime.

These orders can be made if a person is found guilty of an indictable offence (even if it can be tried summarily).

For some offences, confiscation or forfeiture is automatic once an offender is convicted of an offence. For example, the state may confiscate (take away) a house bought with money gained from drug trafficking.

It is possible for the offender (or other people, such as family members of the offender) to apply to the court to keep money or property that is subject to a restraining or forfeiture order. They must show that they lawfully (legally) acquired the money or the property and it is not connected to the offending.

There are also forfeiture powers under other legislation, including the *Misuse of Drugs Act 2001* (Tas), the *Criminal Code* (Tas), the *Living Marine Resources Management Act 1995* (Tas), the *Police Offences Act 1935* (Tas), and the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas). An example that applies to drug offences is the power of the court to order the forfeiture of drug-related equipment.

Sex offender registration requires an offender to be included on a register of sex offenders. Offenders who are found guilty of a reportable offence (which is defined to include a large number of sexual offences) are registered by the court as sex offenders

unless the court is satisfied that the person does not pose a risk of committing a reportable offence in the future.

Registered sex offenders must comply with various reporting requirements under the *Community Protection (Offender Reporting Act) 2005* (Tas).

A **family violence record** is a direction from a judge or magistrate that an offence be recorded on the person's criminal record as a family violence offence if a person is found guilty of an offence where the judge or magistrates thinks that it is a family violence offence.

A **special penalty** applies for certain offences, such as some environmental and fisheries offences. A special penalty must be imposed by the court. This means the court must order that the amount of money set out as the special penalty is imposed.

Additional orders for people suffering from a mental illness

There are special orders that may be made if a person is found guilty and is to be sentenced by a court and there is expert evidence that the person has a mental illness. These orders can be made instead of or in addition to any other sentence (such as imprisonment or a community correction order).

Restriction order

A court can order a **restriction order** for an offender with a mental illness. The offender is detained and treated at a secure mental health unit (SMHU) instead of being detained in a prison. This order is imposed on offenders whose mental illness requires treatment that can be obtained from admission to the SMHU and whose admission is needed to prevent them from harming themselves or others. This order can only be made by the Supreme Court. This type of order can only be made where the court would otherwise have imposed a sentence of imprisonment. It is an indefinite (ongoing) order that can only be discharged (removed) by the Supreme Court.

Supervision order

A court can order a **supervision order** for an offender with a mental illness. This order is imposed on offenders whose mental illness requires treatment that can be obtained by releasing the person into the community under supervision. This order can only be made by the Supreme Court. It is an indefinite order that can only be discharged (removed) by the Supreme Court.

Treatment order

A court can order a **treatment order** for an offender with a mental illness. The offender is detained and treated as an involuntary patient (a patient who is not there by choice) in an approved hospital for a period of no more than six months. This order is imposed on offenders whose mental illness requires treatment that can be obtained from admission to the approved hospital and whose admission is needed to stop them from harming themselves or others. It can be made by the Magistrates Court and the Supreme Court.

Sentencing young people

The justice system in Tasmania has separate rules that apply to young people. These rules apply to **youths** who are young people aged 10 years or older but under 18 years at the time of an offence.

A youth is usually sentenced in the Youth Justice Division of the Magistrates Court under the *Youth Justice Act 1997* (Tas).

There are exceptions for **prescribed offences**, where the Supreme Court or **Magistrates Court (depending on the court that would deal with the matter if it involved an adult)** may sentence the youth under the *Sentencing Act 1997* (Tas) or if the person the Youth Justice Division is sentencing was a youth at the time that he or she committed an offence but at the time of sentencing is 18 or older. In this case, the person may be sentenced to certain sentences under the *Sentencing Act 1997* (Tas).

The law says that young people should not generally be punished as harshly as adults.

This recognises that young people are still developing and learning, are usually less mature than adults and are less able to make moral judgments. Young people are generally less aware than adults of the consequences of their actions.

Young people have special treatment and rehabilitation needs. Young people in custody are especially vulnerable to physical, sexual and emotional abuse.

The *Youth Justice Act 1997* (Tas) puts the child's rehabilitation as a core purpose (but not the only purpose) of sentencing children. The Youth Justice Division must consider this when sentencing children aged 10 to 17 years at the time of the offence.

The sentencing options for young people in the *Youth Justice Act 1997* (Tas) are different from sentencing options for adults in the *Sentencing Act 1997* (Tas). Orders for young people include detention orders, community service orders and probation.

How young is too young to commit a crime?

The age of criminal responsibility in Tasmania is 10 years. A child under 10 years of age is legally considered unable to commit an offence. A child aged between 10 and 14 years is presumed to be unable to commit an offence, unless the prosecution can prove that the child is capable of knowing that the act or omission (failure to do something) is one that he or she should not do.

The age of criminal responsibility changes from country to country — for example, it is six years of age in some American states, and 15 years of age in Sweden.

Orders served in the community

Dismissal

Dismissal is the least severe sentencing option for young offenders sentenced under the *Youth Justice Act 1997* (Tas). Dismissal means that a youth is found guilty, but the charge is dismissed and no other sentence is ordered. A conviction cannot be recorded.

Reprimand

A reprimand means that a youth is found guilty and the charge is dismissed and the youth is reprimanded. This is a formal warning by the court. A conviction cannot be recorded.

Dismissal with undertaking to be of good behaviour

A dismissal with an undertaking to be of good behaviour is a form of conditional unsupervised release. An undertaking to be of good behaviour is an agreement by a youth to do, or not do, some particular thing for a period of no more than six months. If a youth breaches this undertaking, the court can take no further action. A conviction cannot be recorded.

Release and adjournment with conditions

The youth is released and sentencing is postponed for a nominated period (no more than 12 months) on conditions set out by the court. A conviction cannot be recorded.

At the conclusion of the adjournment with conditions, if the youth does everything required by the conditions, the youth is discharged from the order. This means that the case ends.

If the youth does not do everything required under the conditions, the youth may have to return to court and the court may impose a new order.

Fine

A fine is a less severe sentence than detention or a probation or community service order. When imposing a fine, the Youth Justice Division looks at how much the youth can afford to pay, and the maximum fine amount for the youth's age.

Fine amounts are described in **penalty units**. For the financial year 1 July 2019 to 30 June 2020, one penalty unit is \$168. The amount of a penalty unit is changed each year in line with inflation.

For youths aged under 15 years, the maximum fine is two penalty units (or the maximum fine that would apply to an adult offender, whichever is lower) if they are sentenced for one offence, and five penalty units (or the maximum fine that would apply to an adult offender, whichever is lower) if they are sentenced for more than one offence.

For youths aged 15 or 16, the maximum fine is five penalty units (or the maximum, whichever is lower) if the youth is sentenced for one offence, and 10 penalty units (or the maximum, whichever is lower) if they are sentenced for more than one offence.

For youths aged 17 or more, the maximum fine is the maximum fine which may be imposed on an adult for the same offence.

Probation order

Probation is a more severe sentence than a fine for youths who are sentenced under the *Youth Justice Act 1997* (Tas). Young people on probation orders must report to youth

justice workers as required. The court can attach special conditions, such as attending school or other educational programs, counselling or treatment. The youth may also be required to not drink alcohol, to live at a specified address and/or comply with a curfew.

The youth must not reoffend during the order.

Probation orders must not last for more than two years if it an offence for which an adult could receive a sentence of imprisonment of two years or more and in all other cases the probation order must not last for more than one year.

The court may or may not record a conviction.

Community service order

A community service order is an order that the youth do community service under the direction of a youth justice worker.

The court can attach special conditions, such as attending school or other educational programs, counselling or treatment. The youth may also be required to not drink alcohol and use controlled substances, submit to testing for controlled substances and alcohol, to live at a specified address and/or comply with a curfew.

Community service orders can only be made if a youth is 13 years or older and agrees to comply with the order.

Community service orders cannot be for more than 70 hours if the youth is 13, 14 or 15 years old and cannot be for more than 210 hours if the youth is 16 years or older.

The court may or may not record a conviction.

Orders served in detention

Young people (youths) sentenced under the *Youth Justice Act 1997* (Tas) cannot be sentenced to imprisonment. However, they can be kept in detention and lose their freedom. Ashley Youth Detention Centre is the only youth detention centre in Tasmania.

Detention is the most severe sentence that can be imposed on a child. Detention is a sentence of **last resort** — it can only be used if no other sentence is appropriate. It cannot be imposed if an adult who committed the same offence could not be sentenced to imprisonment.

A detention order must not be for more than two years. However, the reality may be for some young people that they spend more than two years in detention because they are going in and out of detention on multiple orders and also periods of remand.

If the court imposes a detention order and does not suspended the whole period of detention, the court must record a conviction.

Suspended detention order

A suspended detention order is a term of detention that is suspended (held back) fully or in part for a specified period. Where detention is partially suspended, the young person spends some time in detention and some time in the community.

Where detention is fully suspended, the young person does not go to detention and is released into the community.

All suspended detention orders are made conditional on the young person:

- not committing another offence that has imprisonment as the maximum penalty during the time that the sentence is in force
- reporting to a youth justice worker and following reasonable directions
- attending educational, personal, health and other programs as directed
- submitting to testing for controlled substances or alcohol
- undergoing medical, psychiatric, psychological and drug counselling and treatment.

There are also special conditions that a young person may be required to comply with, including:

- not unreasonably missing school
- not drinking or using controlled substances
- living at a particular address
- complying with a curfew order.

There are limits on the length of a suspended detention order that can be imposed on a young person. If the youth is less than 16 years old, the order cannot be longer than 12 months. If the youth is 16 or 17, then the order cannot be longer than two years.

The threat of detention hangs over the young offender. If the young offender does not follow the condition of the suspended detention order, they could be ordered to serve part or all of the suspended detention order at Ashley.

Parole for young people?

Non-parole periods are not set for detention orders and the **parole board** does not decide if a youth is released from detention. Instead, generally, the youth must be released from detention on the **earliest release date**. The earliest release date is the day after the completion of 50% of the period of detention imposed by the court as a sentence or three months, whichever is longer.

For example, if the court sentences a youth to three months' detention, the earliest release date is after three months' detention. If the court sentences a youth to eight months' detention, the earliest release date is after four months.

A supervised release order is made by the Secretary of the Department of Health and Human Services.

A young person on a supervised release order is subject to certain core conditions, including that the youth:

- not commit another offence that has imprisonment as the maximum penalty during the time that the sentence is in force
- report to a youth justice worker and comply with any reasonable direction
- not move to a new house unless approved by the youth justice worker.

The supervised release order may also include special conditions.

If a young person breaches the conditions of the supervised release order, a court may cancel the order and so the youth returns to detention. If the supervised release order is breached by further offending and the court sentences a young person to a detention order or a term of imprisonment, the supervised release order is cancelled.

Which offences cannot be heard by the Youth Justice Division?

Prescribed offences cannot be heard in the Youth Justice Division and must be heard in the Supreme Court or Magistrates Court (depending on the court that would deal with the matter if it involved an adult).

The Youth Justice Division cannot hear serious offences involving death, including murder, manslaughter and attempted murder. These are **prescribed offences** for **all** youth offenders.

For youths aged 14, 15 and 16 years old, the following offences are also prescribed offences:

- aggravated sexual assault
- rape
- maintaining a sexual relationship with a young person under the age of 17 years
- armed robbery
- aggravated robbery
- being found prepared for the commission of a crime (ready to commit a crime) armed with a dangerous or offensive weapon or instrument
- evade (escape/avoid) police.

For a youth aged 17 years old, all the offences listed above are prescribed offences. In addition, the following offences are also prescribed offences:

- offences in relation to excessive noise or smoke for vehicles and racing a vehicle
- offences in relation to drink driving, drug driving, offences under the *Traffic Act 1925* (Tas) (this includes negligent driving causing death or serious injury, reckless driving), offences under the *Vehicle and Traffic Act 1999* (Tas) (this includes driving without a licence, driving while disqualified, excessive speeding) unless there are proceedings that involve other offences that are not prescribed offences.

5. HOW DO COURTS CHOOSE A SENTENCE?

There is no single, correct or automatic sentence that courts impose for any type of offence in Tasmania.

When choosing a sentence for an offender, the court must consider a number of **factors** about the offender and the details of the offence. However, it is not a mathematical exercise. Instead, judges and magistrates look at all the features of the case and the offender and decide the appropriate sentence. The sentences given by other judges and magistrates in similar cases involving the same offence may help in deciding the appropriate sentence. Ultimately, each sentence is based on the facts of the particular case and the particular offender.

The process of reaching a sentence is known as **instinctive synthesis**.

The purposes of sentencing

Sentencing purposes for adults

In Tasmania, the *Sentencing Act 1997* does not expressly set out the purposes of sentencing. However, the protection of the community is set out in the *Sentencing Act 1997* (Tas) as a primary purpose of the Act. Other purposes relevant to the sentence imposed on an adult offender are the following:

- **Just punishment** – to punish the offender in a way that is just in all the circumstances.
- **Deterrence** – to discourage the offender (known as **specific deterrence**) or other people (known as **general deterrence**) from committing the same or similar offences.
- **Rehabilitation** – to create conditions that help the offender to lead a law-abiding life.
- **Denunciation** – to denounce, condemn or censure the offender's behaviour (that is, make it clear to the community that the behaviour is wrong).

For each case, the court looks at the features of the offending and the offender and decides on the purpose or combination of purposes that apply.

The *Sentencing Act 1997* (Tas) also specifies consistency in sentencing, fairness in sentencing procedures, and to recognise the interests of victims as purposes of the Act.

Sentencing purposes for youths

The *Youth Justice Act 1997* (Tas) provides that **rehabilitation** is the most important purpose of sentencing, and the court must make sure that the rehabilitation of the youth

is given more weight than is given to any other individual matter. Purposes such as community protection and specific deterrence are also reflected in the factors that are to be taken into account in sentencing young offenders. In sentencing a youth, general deterrence is less important, and rehabilitation is the main consideration.

Sentencing factors

Sentencing factors for adults

In choosing a sentence, a court is required to consider the following factors:

- the maximum penalty for the offence — set in legislation, this is the maximum term of imprisonment and/or a maximum fine amount that a court can impose for a particular type of offence. In Tasmania, the maximum penalty for all offences, except murder and treason, under the *Criminal Code* (Tas) is 21 years imprisonment, or a fine or both. The maximum penalty for murder and treason is life imprisonment.
- the current sentencing practices for the offence type (the sentences that have been given for similar cases)
- the nature and seriousness of the offence
- the offender's blameworthiness (culpability) and the degree to which the offender should be held accountable/responsible for the offence (for example, a mental impairment might make a person less blameworthy for an offence but not reduce (lessen) their legal responsibility)
- whether the offence was motivated by hate or prejudice or bias (for example, racism)
- the impact of the offence on any victim, including any injury, loss or damage caused by the offence
- the personal circumstances of any victim
- whether the offender pleaded guilty or had an intention to plead guilty, and the stage in the proceedings that this occurred (for example, straight after being arrested compared with just prior to the trial)
- whether the offender cooperated with law enforcement agencies (for example, by providing information to authorities on co-offenders or other criminal activity)
- the offender's previous character (including prior criminal history, general reputation and any contributions to the community). However, for certain sexual offences the court is not to take into account the offender's good character or lack of previous convictions if the court is satisfied that the offender's alleged good character or lack of previous convictions was of assistance to the offender in the commission of the sexual offence

- whether there has been a significant delay in hearing the case, and the effect that such a delay might have had on the offender, witnesses or victims
- any mitigating or aggravating factors (see '**Mitigating and aggravating factors**').

In addition, the *Sentencing Act 1997* (Tas) sets out matters to be taken or not taken into account for certain sexual offences (see '**Mitigating and aggravating factors**').

Sentencing factors for youths

The objectives of the *Youth Justice Act 1997* (Tas) are focused on treatment, rehabilitation and, if necessary, the imposition of an appropriate sanction. The objectives refer to strengthening and reinforcing the roles of guardians, families and communities in reducing youth crime, sanctioning and managing youths who have committed crime and rehabilitating youths. The objectives also include having a matter dealt with in a manner that:

- is culturally appropriate and recognises and enhances the youth's cultural identity
- takes into account the youth's social and family background and that enhances the youth's capacity to take personal responsibility for their behaviour
- provides appropriate opportunities to repair any harm caused by the commission of the offence to the victim and the community.

The Acts also identifies principles relevant to the exercise of powers in the Act (including sentencing powers). These include:

- to deal with the youth in a way that encourages the acceptance of personal responsibility
- not treating the youth more severely than an adult would be
- the need for community protection
- the opportunity for the victim of crime to participate in the process
- encouraging and supporting guardians to fulfil their responsibility for care and supervision
- detention should only be used as a last resort and for as short a time as is necessary
- any sanctioning should be designed to give the youth an opportunity to develop a sense of social responsibility and develop in beneficial and socially acceptable ways
- any sanctioning is to be appropriate to the age, maturity and cultural identity of the youth
- any sanctioning is to be appropriate to the previous offending history of the youth.

In individual cases, the Act requires the court to give effect to the following principles (where so far as the circumstances of the individual case allows):

- compensation and restitution should be provided for victims
- the need to strengthen and preserve the relationship between the child and their family
- the need to ensure that the youth is not withdrawn unnecessarily from their family environment
- no unnecessary interruption to education or employment
- a youth's sense of racial, ethnic or cultural identity should not be impaired (weakened or damaged)
- an Aboriginal youth should be dealt with in a way that involves his or her cultural community.

In determining the sentence to impose on a youth, the court is to give more weight to the rehabilitation of the youth than any other individual matter. The court is also to have regard to all the circumstances of the case including:

- the nature of the offence
- the youth's age and any other sentences or sanctions previously imposed
- the impact any orders will have on the youth's chance of finding or retaining employment or attending education and training.

What is culpability?

Culpability is the extent to which an offender is held accountable (responsible) for the offences they commit. Culpability means how much blame the offender has for the offence, and for the harm they cause. A court may find that an offender has a high degree of culpability for an offence. More culpable offenders usually get more severe sentences.

In assessing an offender's culpability, judges and magistrates consider the offender's intention, awareness and motivation for committing the offence. For example, the court considers factors such as whether an offence is:

- committed by someone in complete control of their own actions (or, for example, suffering from mental impairment)
- committed with the offender's knowledge of its consequences (or likely consequences), or in negligent (careless) disregard of the possible consequences
- provoked or unprovoked
- planned or opportunistic (spontaneous)
- carried out while the offender is in possession of a weapon
- incited, encouraged or paid for by another person

- motivated by hatred for the victim, based on the victim's gender, race or other personal characteristic.

Culpability is relevant in deciding on the type of offence with which to charge a person. The police may consider whether an offence has been committed intentionally, recklessly, negligently or dangerously:

- **Intentionally** – the person has the intention to cause a particular outcome, not just the intention to do the act that caused the outcome.
- **Recklessly** – the person foresees the consequences (or likely consequences) but is indifferent to whether or not the consequences come about.
- **Negligently** – the person falls short of the standard (level) of care that a reasonable person would have in the circumstances. The risk of serious injury is so great that the negligent act or omission justifies or deserves punishment under the law.
- **Dangerously** – the person behaves in a way that is dangerous to the public.

Why do different offenders get different sentences for the same type of offence?

Sentencing law requires judges and magistrates to consider the circumstances of each offender and their offence when deciding on a sentence. Sentences differ because no two offenders or offences are the same. There is no mathematical formula for deciding on a sentence. The weight (importance) a judge or magistrate places on different sentencing purposes, principles and factors changes from case to case, according to its circumstances.

Mitigating and aggravating factors

Mitigating factors are facts about the offender and their offence that may reduce (lessen) the severity of their sentence. Aggravating factors are the reverse — they are details about the offence and the offender that tend to increase their culpability and the sentence they receive.

In sentencing, mitigating and aggravating factors can act a bit like a tug of war: mitigating factors tend to pull towards a lighter sentence, and aggravating factors tend to pull towards a heavier sentence. Some factors can be either aggravating or mitigating, depending on the particular circumstances of the offence and the offender.

A matter that may be raised in sentencing hearings is that the crime was committed under the influence of drugs and alcohol. Rarely will this be considered mitigating but can sometimes be taken into account to show that an offence was out of character. More commonly, it is considered to be aggravating (for example when a person knows that intoxication or taking drugs may lead to criminal behaviour) or not relevant to the

sentence imposed. A person's addiction to drugs or alcohol may be relevant to the type of sentence given (such as a drug treatment order) or the conditions given as part of a sentence (such as a requirement to take part in treatment and counselling). It may also be relevant to the importance of rehabilitation as a sentencing factor.

The following factors can **mitigate** a sentence:

- the age of the offender (for example, some sentences, like imprisonment, may not be appropriate for young or elderly offenders)
- the background of the offender (for example, a person who grows up surrounded by alcohol abuse and violence may think this behaviour is 'normal')
- the previous good character of the offender (except for certain sexual offences where the court is not to take into account the offender's good character or lack of previous convictions if the court is satisfied that the offender's alleged good character or lack of previous convictions was of assistance to the offender in the commission of the sexual offence)
- the effect of prison on the offender (for example, whether going to prison would be particularly hard on the offender or whether a person has a medical condition that would be hard to manage in prison).

The following factors can **aggravate** a sentence:

- pre-planning the crime (premeditation)
- committing the crime as part of a group against an outnumbered victim
- use of a weapon, including a pretend weapon
- a breach of trust by the offender towards the victim (for example, where a teacher commits a crime against a student).

The *Sentencing Act 1997* (Tas) sets out certain aggravating factors for a number of sexual offences set out in the *Criminal Code* (Tas) (including sexual intercourse with a young person, allowing unlawful sexual intercourse with a young person on premises, maintaining a sexual relationship with a young person, indecent act with a young person, sexual intercourse with a person with a mental impairment, indecent assault, certain child exploitation offences, procuring (getting) by threats, fraud or drugs, incest, rape, as well as attempts to commit those crimes). These include:

- the victim being under the care, supervision or authority of the offender
- the victim being a person with a disability
- the victim being under the age of 13 years
- the offender committing the offence in whole or in part in the presence of any other person or persons, besides the victim
- the offender subjecting the victim to violence or the threat of violence

- the offender supplying the victim with alcohol or drugs with the intention of facilitating (making easier) the commission of the offence
- the offender making forced or uninvited entry into the victim's home or other premises
- the offender doing, in the course of committing the sexual offence, an act likely to seriously and substantially degrade or humiliate the victim.

The *Sentencing Act 1997* (Tas) also says that hatred or prejudice on racial grounds can be an aggravating factor.

Principles of sentencing

Judges and magistrates must follow certain principles when sentencing. These principles are used as guideposts that help judges and magistrates reach a decision on the sentence to impose.

Parsimony

To be **parsimonious** is to do no more than is needed to achieve an intended purpose. The principle of parsimony means that the sentence imposed must be no more severe than is necessary to achieve the purposes of sentencing.

Although not set out in legislation, it is accepted in Tasmania that imprisonment is a sentence of last resort.

For example, a court should not order imprisonment if the sentencing purposes (for that offender and for that offence) can be met by some other order.

Proportionality

Proportionality means that the severity of the sentence must fit the seriousness of the crime and there should be no excessive punishment without justification (reason). For example, a long community correction order cannot be imposed for a fairly minor offence, even if the court believes that the offender needs a long period of rehabilitation.

Parity

Parity means that co-offenders who are jointly involved in the same criminal behaviour usually receive similar sentences.

The principle of parity requires sentences for co-offenders to be generally consistent. However, it does not require the sentences to be the same. Co-offenders who are found guilty of the same offence can receive different sentences. This is because the courts take account of each co-offender's different circumstances and level of culpability.

Totality

When an offender faces more than one sentence, the total sentence must be just and appropriate to the offender's overall criminal behaviour. This is known as the principle of **totality**.

For example, the principle of totality would apply if an offender was being sentenced to:

- multiple individual sentences of imprisonment for three armed robberies committed on the same day
- imprisonment for an offence but was already in prison for previous offending.

Crushing sentences

A separate principle, related to totality, requires courts to avoid imposing a **crushing sentence**.

Courts must avoid imposing a sentence that is so severe that it crushes any hope of the offender leading a useful life after release from custody. However, in some circumstances, such a sentence may still be imposed if it is just and appropriate.

What is judicial discretion?

Discretion means choice. It is a key feature of sentencing in Tasmania. For most offences heard in Tasmanian courts, sentencing decisions are not automatic. This ensures that courts can impose the sentence that is most appropriate in each case. The court must choose the type of sentence (for example, a community correction order) and the length or amount of the sentence (for example, the length of a community correction order or the amount of a fine). When imposing a community correction order, the court chooses conditions such as unpaid community work, supervision, curfew or alcohol bans.

Single or Global sentences

When an offender is convicted of multiple offences, a judge or magistrate has the power to impose one sentence for all offences (a **global sentence**) or to impose separate sentences for each offence, (single count sentences) or a combination of global and single count sentences. In practice, particularly in the Supreme Court, when an offender is convicted of multiple offences, a global sentence is usually imposed.

Cumulation and concurrency

When sentencing an offender for multiple offences and the court imposes more than one sentence, the court must decide whether the sentences should be served concurrently (at the same time) or cumulatively (separately/one after the other). This question also arises where the offender is subject to other uncompleted sentences. In doing so, the court applies the principle of totality and avoids a crushing sentence.

If the court decides that an offender will receive the right amount of punishment by serving several sentences at the same time, these are known as **concurrent** sentences. The court also considers whether the offences are committed in the course of a 'single transaction' or a 'continuing episode', and if that is the case, generally concurrent sentences are appropriate.

Concurrency example: Matt has been given a ten-month prison sentence for one offence and a five-month prison sentence for another offence. The judge decides that Matt must serve these sentences concurrently (at the same time), so Matt goes to prison for 10 months.

In some cases, the court may decide that the offender will receive the right amount of punishment by serving several sentences one after the other. These are known as **cumulative** sentences.

Cumulation example: Emily has been given a one-year prison sentence for one offence and a two-year prison sentence for another offence. The judge decides that Emily must serve these sentences cumulatively (one after the other), so Emily goes to prison for three years.

The courts have the option of **partial cumulation**.

Partial cumulation example: Nick has been given a ten-month prison sentence for one offence and a seven-month prison sentence for another offence. The judge decides that two months of the second sentence should be served cumulatively and five months should be served concurrently, so Nick goes to prison for 12 months.

The court does not need to make an order about whether sentences are cumulative or concurrent if it imposes a **global sentence**.

Maximum penalties

A maximum penalty is the penalty set by Parliament as the most severe possible sentence that a court can impose for an offence. Maximum penalties are sometimes referred to as **statutory maximums** because they are set out in statutes — legislation such as the *Police Offences Act 1935* (Tas).

Maximum penalties have four important purposes in the sentencing system. The maximum penalty:

1. sets out the most severe consequences for an offender convicted of an offence
2. sets a clear limit on the power that courts have in achieving one or more of the purposes of sentencing (see '**The purposes of sentencing**')

3. expresses Parliament's views (on behalf of the community) about the seriousness of each type of offence
4. allows for the most severe punishment to be imposed on the worst example of an offence.

The Tasmanian *Criminal Code*, unlike the approach in other Australian jurisdictions, does not contain graduated penalties that would allow for a determination of the relative seriousness of the different offences. This is because there is a general maximum penalty for all offences (other than murder and treason). This is imprisonment for 21 years, or a fine or both. Although 21 years is the general maximum penalty in the *Criminal Code*, this does not mean that offenders who are sentenced for any offence under the Code will get the maximum penalty. The courts (rather than the legislature) have established a range of sentences for different offences.

Are maximum penalties ever imposed?

A number of offenders do receive the maximum penalty. For example, in the five-year period to 30 June 2018, two offenders convicted of murder in Tasmania received the maximum penalty of life imprisonment.

The maximum penalty for murder is life imprisonment. This is because the community considers that taking someone else's life is one of the most serious offences, causing the most serious level of harm, and that deliberately doing so is in the worst category of culpability. In contrast, the maximum penalty for a first offence of reckless driving is two years' imprisonment or a fine of 20 penalty units or both. This reflects the community's view that dangerous driving is less serious than murder.

The maximum penalty does not mean that courts must impose that penalty on offenders convicted of the offence. It means that courts may not impose a penalty *greater* than the maximum penalty set for the offence.

For example, the maximum penalty for manufacturing (producing/preparing) a controlled drug for sale is 21 years' imprisonment. This means that the court cannot sentence an offender to more than 21 years in prison for a single charge of manufacturing a controlled drug for sale. By comparison, the maximum penalty for possession of a controlled drug is 50 penalty units or two years' imprisonment. This means that the court cannot sentence an offender to more than two years in prison for a single charge of possession of a controlled drug.

The court has the power to impose the maximum penalty in the worst cases committed by the worst offenders. The worst example of an offence is one that is especially cruel, carefully planned or motivated by prejudice and hatred. The worst example of an offender is a repeat offender with no remorse (regret) who poses an ongoing threat to the community.

Some people argue that maximum penalties have a fifth purpose: people are deterred (stopped) from committing an offence because it has a high maximum penalty. However,

research shows that, for most offence types and most offenders, increasing the severity of punishment does not deter more people from offending.

Imprisoning people prevents them from offending against the community for the period that they are in prison (see '**Community protection**').

The maximum penalty can assist the court as a guide in determining sentence. However, the maximum penalty is only one of the many factors that a court must consider when sentencing.

Maximum penalties for many offences have changed over time as Parliament makes changes to legislation. For example, when the offence of negligent driving causing death was added to the *Traffic Act 1925* (Tas) in 2000, Parliament set the maximum penalty as one years' imprisonment (and a fine of not more than 10 penalty units) for a first offence. Since then, the maximum imprisonment sentence was increased in 2017 to two years' imprisonment (its current maximum penalty).

The maximum penalty that a court can impose is the maximum penalty for the offence on the date it was committed. For example, a person may be arrested and sentenced for an offence committed 20 years ago. This person may get a lesser sentence than someone who committed the same offence more recently, because the maximum penalty was lower 20 years ago.

How are sentences decided for offences that happened a long time ago?

Sometimes, an offender is sentenced for an offence that happened many years ago. This is common, for example, in cases involving sexual offences against children. There is a principle that there is a presumption against the retrospective application of a sentencing law or standard established, for example, by a decision of the Court of Criminal Appeal. However, a distinction needs to be made between an actual change in sentencing law or principle (which does not apply to past offending) and a more precise application of the established standards based, for example, on a better understanding of the factors relevant to the offending (which will apply to past offending)

Statutory minimum sentences

Statutory minimum sentences are penalties set by Parliament in legislation. They describe the minimum type of sentence, and/or length of sentence, that courts must impose for particular offences.

Statutory minimum sentences are not the same as **mandatory** minimum penalties, as the law allows for some exceptions (special reasons). The court can impose a lower sentence than the statutory minimum.

Statutory minimum imprisonment terms

A statutory minimum sentence of imprisonment means that the court must order a particular length of imprisonment on someone convicted of certain offences, unless there are **special reasons**. Only one offence requires a statutory minimum term of imprisonment in Tasmania.

This penalty arises where a person is convicted of an offence where serious bodily injury has been caused to a police officer when he or she was acting in the execution of his or her duty. Unless there are special reasons, the court must impose a minimum term of six months imprisonment.

Does life imprisonment really mean life?

Life imprisonment is the maximum penalty available for two offences in Tasmania: murder and treason. A term of life imprisonment means that the offender will be under sentence for the rest of their life. A non-parole period is usually (but not always) set for sentences of life imprisonment. This means that the offender can apply for parole when the non-parole period has been served. If parole is granted, the offender is released from prison to spend the rest of their life in the community under conditions (such as reporting requirements) set by the parole board.

As for anyone else on parole, if such an offender breaches the conditions of their parole, they may be returned to prison.

Offenders who are sentenced to life in prison without parole stay in prison until they die.

6. PAROLE

Parole is the conditional release of prisoners from prison after they complete their **non-parole period** but before the end of their prison sentence. The aim of parole is to supervise and support prisoners as they return to the community, and to reduce the chance that they will reoffend.

While living in the community, **parolees** (offenders on parole) must follow conditions set by the parole board (such as participating in treatment programs, being supervised and not reoffending). Parolees are still serving their sentence. If they do not follow the conditions of their parole, they may be returned to prison.

Non-parole period

When courts impose a sentence of imprisonment, they may set a **non-parole period**. This is the minimum time that offenders must serve in prison before they may be considered for release on parole.

There are rules about how courts must set a non-parole period. There is a **statutory minimum non-parole period** of one-half of the sentence and the Parole Board cannot release an offender on parole before the end of one half of the sentence or six months, whichever is greater unless there are special circumstances. The court can set a longer non-parole period.

A court may make an order that an offender is not eligible for parole or may make no order for parole (in which case an offender is not eligible for parole). This means that an offender cannot apply for parole and will serve all their sentence in prison.

These rules do not apply to life sentences. When a court sentences a person to life imprisonment, a court must make an order about the person's eligibility for parole — either an order that a person is not eligible or an order setting out the non-parole period.

Offenders who are declared dangerous criminals are not eligible for parole until the declaration is discharged.

Parole boards

Release on parole is not automatic. When offenders have served their non-parole period, they can apply for release on parole. The application for parole will be considered by the Parole Board.

The Parole Board personally interviews prisoners who make an application for parole.

In considering whether to grant parole, the Parole Board considers many factors, including:

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- the likelihood of the offender reoffending
 - the protection of the public
 - the rehabilitation of the offender (this would include consideration of the offender's successful completion of programs in prison)
 - the comments by the Court when giving sentence
 - the likelihood of a person following parole conditions
 - the circumstances and seriousness of the offence for which the person was imprisoned
 - the behaviour of the offender in prison
 - the offender's parole history
 - reports that include information about social background, medical, psychological or psychiatric conditions
 - the statement by victims about the injuries suffered and the effects on them of the crime, as well as any conditions that the victim would like attached to parole.

In making its decision, the Parole Board will use a broad range of materials, which will always include:

- a pre-parole report prepared by a Probation Officer
- a report from the prison about behaviour in prison
- record of criminal history
- information about participation in courses in prison such as educational courses, parole awareness programs and sex offenders treatment program (if appropriate)
- information from the Director of Public Prosecutions
- comments when giving sentence.

The Parole Board may also look at other expert reports (such as medical, psychological, psychiatric reports, substance misuse reports).

Based on these factors, the Parole board may decide not to release an offender into the community, so parole is denied (not given) and the offender stays in prison until the end of their sentence, or until the parole board reconsiders the case.

The Parole Board must not to release a prisoner on parole if the Board is satisfied that the prisoner is a terrorism-linked prisoner or has promoted a terrorist act unless there are special circumstances.

Parole conditions

If a parole board grants parole, the parolee is released into the community under the supervision of Community Corrections. The parolee must follow the conditions set by the Parole Board and the instructions of Community Corrections staff.

The Parole Board has a wide choice as to what terms and conditions (rules) are included in a parole order. There are a number of standard conditions that are generally included for all parolees. Special parole conditions may also be imposed.

Conditions may include:

- not reoffending
- reporting to probation officers
- being supervised by probation officers
- following instructions about where to live
- following instructions about employment
- following instructions about going to counselling for gambling, alcohol or drug use
- following instructions about not associating with (spending time with/socialising with) certain people or going to certain places
- attending rehabilitation programs
- staying free of drugs and submitting to random drug testing
- not contacting certain persons or places, not loitering (lingering) in certain places, or restrictions in relation to contact with children
- staying free of alcohol or not consuming excessive alcohol, not going to licensed premises at all or at certain times.

Breach of parole

If a parolee breaks the conditions of their parole, the Parole Board may decide to cancel their parole and return them to prison.

If a parolee commits another offence and is sentenced to imprisonment while on parole, their parole is automatically cancelled and they are returned to prison.

7. CAN A SENTENCE BE CHANGED?

The sentence imposed by a court can sometimes be changed through a process known as an **appeal**. An appeal is a request to a higher court to review the original court's decision.

In Tasmania, the person sentenced, or someone acting on their behalf, may appeal against a conviction, against the sentence imposed or against both a conviction and a sentence. The Crown may appeal against an acquittal (a judgment/verdict that a person is not guilty of the crime) on a question of law (if the court gives permission) or against a sentence.

If either the prosecution or the defence believes that a court has made an error in sentencing, they can lodge an **appeal against sentence**, asking for the Court of Criminal Appeal to:

- review the original decision made by the sentencing court
- consider whether the sentencing court has made an error
- if an error has been made, consider whether the sentence should be changed.

There is a right of appeal which means that there is no need to get leave or permission from the higher court to appeal.

The process for an appeal depends on the court that has imposed the sentence.

Appeals from the Magistrates Court

Offenders sentenced in the Magistrates Court may appeal against their sentence to the Supreme Court. The Crown may also appeal against a sentence given in the Magistrates Court to the Supreme Court. Appeals against sentencing decisions made in the Magistrates Court are called **motions to review**. A sentence imposed by a magistrate in the Youth Justice Division of the Magistrates Court can be appealed to the Supreme Court.

Appeals from the Supreme Court

Offenders sentenced in the Supreme Court may appeal a sentence, and the Director of Public Prosecutions may appeal a sentence.

The Director of Public Prosecutions can also appeal against such a sentence if the Director thinks that an error has been made in the original sentence, and that a different sentence should have been given.

The Court of Criminal Appeal

The Court of Criminal Appeal reviews sentences given by judges of the Supreme Court and decides if an error has been made in the sentencing process. In doing so, the Court of Criminal Appeal may also provide guidance to sentencing judges about the correct approach to sentencing.

An appeal in the Court of Criminal Appeal is normally heard by three judges.

In determining whether a sentencing error has been made, the Court of Criminal Appeal may consider such matters as:

- the maximum sentence available to the original sentencing judge
- how the original sentencing judge exercised their judicial discretion
- other sentences in similar cases
- the seriousness of the offence
- the personal circumstances of the offender.

The Court of Criminal Appeal may identify a specific error in the original sentence. For example, the sentencing judge did not have regard to a sentencing factor (consideration) required by the law. Alternatively, the Court of Criminal Appeal may assume an error has been made on the basis that the result is plainly unreasonable or unjust (manifestly excessive or manifestly inadequate).

The Court of Criminal Appeal allows the appeal if it decides that an error has been made, and that the offender should get a different sentence. The Court of Criminal Appeal can then set aside the original sentence and either give a new sentence or send the matter back to the original sentencing court for the offender to be resentenced.

Under the **instinctive synthesis** approach set out in **common law**, the sentencing judge must take into account all the factors that are relevant to the sentence, weigh the significance of each factor and then make a decision as to the appropriate sentence given all the facts of the case. Only at the end of this process does the judge determine the sentence.

The **instinctive synthesis** approach allows for a high level of individual **discretion** for sentencing judges. Under this approach, it is accepted that there is no one correct sentence for any particular case, but a range of sentences may be appropriate. However, this must also be balanced with the fundamental principle of achieving consistency in the approach to sentencing.

If the Court of Criminal Appeal imposes a new sentence, it must apply the same sentencing law that the original sentencing judge was required to consider, including sentencing principles, purposes and factors. Because the Court of Criminal Appeal sometimes considers aspects of sentencing law in great detail, the court's decisions (and sentencing remarks) are important contributions to sentencing law (**case law** or

common law). These decisions affect future, relevant sentencing decisions by other Tasmanian courts.

INFORMATION ON THE SENTENCING ADVISORY COUNCIL

The Sentencing Advisory Council was established in June 2010 by the Attorney-General and Minister for Justice, the Hon Lara Giddings MP. The Council was established, in part, as an advisory body to the Attorney-General. Its other functions are to bridge the gap between the community, the courts and the government by informing, educating and advising on sentencing issues in Tasmania. At the time that this Guide was concluded, the Council members were Emeritus Professor Arie Freiberg AM (Chair), Mr Scott Tilyard, Mr Peter Dixon, Ms Kim Baumeler, Ms Rochelle Mainwaring, Ms Jill Maxwell, Ms Rosalie Martin, Adjunct Associate Professor Terese Henning, Ms Kate Cuthbertson, Dr Isabelle Bartkowiak-Théron and Ms Linda Mason SC.

This Guide was prepared by Dr Rebecca Bradfield, with acknowledgement to the Victoria Sentencing Advisory Council for allowing the use of their Victorian Guide as the base for the Tasmanian Guide.

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