



**Te Tari Ture  
o te Karauna**  
Crown Law

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# Sentencing

## Te whiu

*As at 1 January 2025*

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## **Introduction | Ngā kupu whakataki**

1. The Sentencing Act 2002 sets out a detailed legislative regime relating to sentencing.

## **Roles | Ngā tūnga**

2. It is the court's role to sentence defendants.
3. Defence lawyers (or the defendant themselves if they are self-represented) make submissions on sentence, including informing the court about mitigating factors such as relevant personal information about the defendant.
4. The prosecutor's role is to assist the court to determine an appropriate sentence according to law, based on the evidence and information available to them. While this guideline recommends prosecutors take into account a wide range of information in making submissions, that is limited to information the prosecutor is personally aware of. Prosecutors are not required to make further enquiries about matters such as a defendant's personal background and circumstances.
5. Victims and their whānau have a strong interest in the sentencing process. Victims have a right to provide information to the sentencing court about the impact the offending has had on them. They also have rights in relation to the sentencing hearing and the right to be informed of the sentence imposed. These rights are set out in the guideline on Victims | Ngā pāturenga and prosecutors should be familiar with them.

## **Scope | Te korahi**

6. This guideline sets out the role of the prosecutor in relation to sentencing. It does not cover prosecution appeals against sentence. Guidance for appeals is set out in the guideline on Appeals | Ngā pīra.

## **Guideline | Te aratohu**

7. Prosecutors involved in sentencing are expected to be familiar with the Sentencing Act, the Criminal Procedure Rules 2012 and any practice notes relating to sentencing issued by any court.

### **The prosecutor's submissions**

8. Prosecutors should place all proven or agreed facts before the court for sentencing.
9. The Criminal Procedure Rules set out information that must be included in sentencing memoranda in certain situations.<sup>1</sup> The information prosecutors should consider providing the court for sentencing is set out below, as well as more detailed guidance on some of the matters set out in the Criminal Procedure Rules. Where relevant, the prosecutor should assist the court by:

- 9.1. Referring the court to relevant authorities, including guideline judgments.

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<sup>1</sup> Criminal Procedure Rules 2012, r 5A.5.

- 9.2. Drawing the court’s attention to any statutory presumptions for sentence and the prosecution’s assessment of factors relevant to whether or not the presumption is displaced.
- 9.3. Setting out any relevant mitigating factors personal to the defendant that the prosecutor is aware of.
- 9.4. Setting out relevant aggravating factors.

*Commentary*

Prosecutors’ submissions on aggravating factors should be thoughtful, nuanced and reflect the full context. For instance, while previous convictions are an aggravating factor,<sup>2</sup> prosecutors should place less weight on this if significant time has elapsed between the previous conviction and the current offending, or where the previous conviction is for a completely different or minor offence.

- 9.5. Providing information on the impact of the offending on any victims and their whānau. Where relevant, prosecutors should alert the court to factors that indicate the defendant poses a risk to a victim, their whānau or the community and the types of sentences that would adequately mitigate this risk.

*Commentary*

Such information is not confined to content in victim impact statements. For instance, where a victim impact statement has not been provided, it may assist the court to know whether a victim has engaged with the prosecution process, or any views a victim has expressed about the defendant, the offending or the prosecution. This information may be available in another form, such as the victim’s formal statement or evidence at trial. Such information may also inform the court of a victim’s interest in certain sentencing outcomes such as reparation.

- 9.6. Providing the prosecution’s position on the available sentencing range for the final sentence, including whether a sentence of imprisonment is appropriate. In doing so, prosecutors should not press for a specific term of imprisonment.
- 9.7. Highlighting cases where a discharge without conviction, or a sentence with a rehabilitative focus, might be available, whether or not this has been sought by the defendant.

*Commentary*

A sentence with a rehabilitative focus may, for instance, be a sentence of community work and supervision with a training or education component, or a sentence of home detention with conditions that allow completion of a residential drug rehabilitation programme.

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<sup>2</sup> Sentencing Act 2002, s 9(1)(j).

- 9.8. Alerting the court to any other mandatory or discretionary consequences of conviction applicable to the offending.

*Commentary*

This could include registration on the Child Sex Offenders Register; the making of a Firearms Prohibition Order; the making of a Protection Order; or orders under the Land Transport Act 1998, Misuse of Drugs Act 1975 or Arms Act 1983.

### **Defendant's background factors**

10. There may be information about a defendant's background that can shed light on a defendant's culpability or play a role in their offending. The judicial discretion in sentencing a defendant has long required consideration of relevant aspects of their background. This is now codified in the Sentencing Act.<sup>3</sup> These factors may relate to poverty; a lack of education opportunities; addiction; or displacement from whānau or community support. In particular, prosecutors should be aware that victims and defendants are not mutually exclusive groups. Some defendants have previously been victims of crime (whether reported or not) and that may be a relevant factor in their own offending.
11. Where prosecutors are aware of relevant information about a defendant's background, they should acknowledge this in their sentencing submissions. The defendant's background may be particularly relevant where the potential sentence is at the margin between imprisonment and a non-custodial sentence. This approach is about tailoring the prosecutor's submissions to the defendant's individual circumstances and culpability so that sentencing is individualised for the defendant and the offending while taking into account the public interest.

*Commentary*

Prosecutors may be aware of information about past offending connected to the defendant that is relevant to sentencing. This includes information that may be in past sentencing notes or reports that provide details of any previous offending by the defendant. It may also include information about past offending *against* a defendant that provides useful context about the defendant's background (such as suffering abuse in care as a child). Prosecutors may, for instance, be able to confirm or elaborate on statements in sentencing memoranda or sentencing reports that the defendant has been a victim of previous offending. Prosecutors should consider drawing the court's attention to this information where appropriate and relevant.

12. The weight prosecutors should place on a defendant's background in their sentencing submissions will always depend on the specific facts relevant to the defendant and the offending. A defendant's disadvantaged background will have greater weight when it has a greater causative link to the offending.
13. Prosecutors should be aware that vulnerable and disadvantaged defendants, including defendants with disabilities or experiencing significant mental health issues, may not have the financial means or access to support systems that commonly exist for other members of the community. This can mean that sentencing options that are at the

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<sup>3</sup> Sentencing Act 2002, ss 8 and 9. See also *Berkland v R* [2022] 1 NZLR 509.

lower end of the sentencing hierarchy, such as fines and reparation payments, are not viable for such defendants.<sup>4</sup>

### **Defendants with dependent children**

14. Prosecutors should be aware that the defendant's personal circumstances include the impact imprisonment would have on that defendant's dependent children.<sup>5</sup> The weight to be placed on this factor will depend on the type of offending and the circumstances of the child or children.

### **Discharges without conviction**

15. Prosecutors should be aware that some defendants may not be able to point to specific consequences of a conviction because of background factors such as those referred to in this guideline. They should take this into account when forming an overall position on whether the consequences of a conviction would be out of all proportion to the gravity of the offence.<sup>6</sup>

#### *Commentary*

Young defendants and other defendants affected by the background factors in this guideline are more likely to have difficulty setting out specific consequences of conviction precisely because of their circumstances. For instance, they may be less likely to be able to show that a conviction would stop them from pursuing or continuing to work in a specific profession they are currently studying towards or employed in. But the general impact of a conviction (for example on travel or employment) may still be relevant to a prosecutor's assessment of the consequences of a conviction.

### **Adjournments under s 25 of the Sentencing Act 2002**

16. Section 25 of the Sentencing Act enables a court to adjourn proceedings in specified circumstances prior to sentencing. The adjournment may be to allow the defendant to complete a rehabilitation programme or course of action, or a restorative justice process, among other things.
17. The defendant's conduct during the adjournment period informs the court's sentencing process.<sup>7</sup>
18. Prosecutors should generally not oppose an adjournment to allow a defendant to attend or complete a rehabilitation programme or course of action if:
  - 18.1. there is independent evidence that suggests the offending was caused by the factor(s) the proposed programme or course of action is designed to target;
  - 18.2. the defendant's performance on bail indicates they are likely to comply with bail conditions and engage in the proposed programme or course of action; and

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<sup>4</sup> Sentencing Act 2002, s 10A.

<sup>5</sup> Sentencing Act 2002, ss 8(h) and (i).

<sup>6</sup> Sentencing Act 2002, s 107.

<sup>7</sup> Sentencing Act 2002, s 25(1)(e).

- 18.3. there is a genuine plan in place indicating that the defendant is ready and willing to complete the proposed programme or course of action and that it is likely to be effective.

#### *Commentary*

In most instances, this will include confirmation that the defendant has committed to the programme, such as written confirmation of enrolment. By contrast, if a defendant has requested an adjournment for this purpose on multiple occasions but failed to complete it without any reasonable excuse, that may suggest a defendant is not ready and willing to complete a relevant programme or course of action.

19. Prosecutors should also consider the impact of the delay on any victim (and their whānau) and may seek their views on the adjournment.
20. An adjournment will usually require the defendant to be on bail to be able to complete the programme or course of action. Prosecutors should apply general bail considerations, including the guideline on Bail | Peira, when considering whether to oppose or support an adjournment.

#### **Sentence indications**

21. Prosecutors should make submissions for sentence indications in the same way as they would for sentencing hearings. Prosecutors should be familiar with the provisions in the Criminal Procedure Act 2011 and Criminal Procedure Rules relating to sentence indications, as well as any relevant practice notes issued by any courts.

#### **Statutory presumptions**

22. Some offences have statutory presumptions for a particular type of sentence. Some presumptions are set out in the Sentencing Act while others are incorporated into a specific offence provision.
23. Prosecutors should identify any statutory presumption for the court but are not required to develop a clear position on whether or not it is displaced. However, if prosecutors make submissions favouring a sentence range for the final sentence that involves displacing a statutory presumption, they should outline for the court why they consider the presumption is displaced. Prosecutors should carefully consider the statutory elements required to displace the presumption. Statutory provisions that use language such as “exceptional circumstances” and “manifest injustice” provide guidance about the threshold required to displace the presumption.
24. Prosecutors should consider the mitigating and aggravating factors set out in the Sentencing Act when evaluating whether a statutory presumption is displaced for the purpose of developing sentencing submissions.

#### *Commentary*

It is not possible to set out comprehensive guidance on the displacement of all statutory presumptions given the different statutory language used. By way of example only, persistent and repetitive offending against multiple victims is a factor likely to weigh heavily against displacement of the statutory presumption that

defendants convicted of sexual violation will be sentenced to imprisonment.<sup>8</sup> Another example is where youth and mental or intellectual impairments are likely to weigh heavily against the imposition of a severe sentence, even if a presumption applies.

## **Other relevant guidelines | Ētahi atu aratohu e whai pānga ana**

Victims | Ngā pārurenga

Prosecuting sexual violence | Te aru i te taitōkai

Making unbiased decisions | Te whakatau rītaha-kore

Bail | Peira

Appeals | Ngā pīra

Self-represented defendants | Te kaiwawao ka whakakanohi i a ia anō

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<sup>8</sup> Crimes Act 1961, s 128B(3)(b).