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## SENTENCING IN WESTERN AUSTRALIA – COMPARATIVE STUDY TEACHER RESOURCE

### Principles of Sentencing

The Sentencing Act WA (1995) states that “A sentence imposed on an offender must be commensurate with the seriousness of the offence.”<sup>1</sup>

There are a number of principles in sentencing:

- To punish the offender;
- To try and persuade the offender to stop their bad behaviour;
- To show others what will happen if they do they same;
- To condemn the offence;
- To protect the community; and
- To provide an opportunity to repair the damage.

“The seriousness of an offence must be determined by taking into account —

- a) the statutory penalty for the offence; and
- b) the circumstances of the commission of the offence, including the vulnerability of any victim of the offence; and
- c) any aggravating factors; and
- d) any mitigating factors.”<sup>2</sup>

‘Aggravating’ and ‘mitigating’ factors are factors that affect the culpability of the offender. Aggravating factors make the offence more serious. Mitigating factors reduce the culpability of the offender.

Read the following case scenarios and complete the activity below.

### CASE SCENARIO ONE

1. Name: George Manning
2. Age: 35 years
3. Offence  
Count 1: possession of a prohibited drug with the intent to sell or supply  
Count 2: possession of a prohibited drug with the intent to sell or supply  
Count 3: possession of a prohibited drug with the intent to sell or supply
4. Particulars of the offences  
**Count 1:** The police had been investigating George for suspicion of drug offences. On 4 June 2008 they did a search of George’s home in Canning Vale. George was also searched and the police found a plastic make-up jar containing 5.97g of methyl amphetamine in the pocket of the jeans he was wearing.

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<sup>1</sup> Sentencing Act 1995 (WA) s6(1).

<sup>2</sup> Ibid. s6(2).

**Count 2:** The police searched George's car. They found a wallet with George's driver's licence in it in a backpack which contained \$765 cash. The backpack had a false bottom and police found a bag which contained 19.55g of methyl amphetamine.

**Count 3:** Under the front passenger seat of George's car police found a tennis ball can, also with a false bottom. In the tennis ball can was a number of bags which contained a total of 112.16g of methyl amphetamine.

George pleaded guilty to Count 1. He went to trial over Counts 2 and 3 and was found guilty by the jury.

5. Mitigating factors
  - a) George pleaded guilty to Count 1. (The courts recognise a plea of guilty as a mitigating factor as it is an indication that the offender has taken responsibility for their behaviour, has shown remorse and is willing to assist the course of justice. In this case, it is a partial plea of guilty (Count 1 only) and thus, though mitigating, less weight would be given to it.)
  - b) In the pre-sentence report it was shown that George has a weakness of character with a long history of blaming others for his offending behaviour. He believes he is unfairly treated by people, he has poor problem solving and coping skills. He blamed his partner at the time, stating that she continued to spend his money, which meant he had to deal more drugs to compensate for the money his partner had spent.
6. Aggravating factors
  - a) George showed a lack of remorse and refused to take responsibility for his actions in Counts 2 and 3. He blamed his friends for the drugs found in his car.
  - b) George has a long criminal record commencing in 1991. This included a conspiracy to sell or supply drugs in 1993 for which he receive a 12 month term of imprisonment. In 2004, he was convicted of possession of amphetamines with intent to sell or supply and was sentenced to 4 years imprisonment.
  - c) The current offences were committed whilst he was on parole for the 2004 offences.
  - d) George has been using drugs for over 17 years. He has failed the drug court twice and has many other failed attempts at rehabilitation. He told the psychologist that he intended to continue to use drugs when released. (The [Drug Court](#) is a specialised court that makes treatment for drug addiction as part of the court process. To 'fail' the drug court is to not complete the treatment according to the programme requirements.)

## CASE SCENARIO TWO

1. Name: Simon Carter
2. Age: 48 years
3. Offence  
Count 1: possession of a prohibited drug with the intent to sell or supply

Count 2: possession of a prohibited drug with the intent to sell or supply

4. Particulars of the offences

**Count 1:** On 7 July 2006, Simon was a passenger in a vehicle being driven in a southerly direction on Monument St, Mosman Park. The vehicle was stopped by police. A search of the vehicle located a set of electronic scales and \$5,000 in cash. Simon was arrested and taken to Fremantle Police Station. He was searched and when he removed his socks a small metal tin fell to the ground. It contained a total of 5.04g of methyl amphetamine. Simon then removed his shirt and a package wrapped in black tape was found. It contained 82.7g of methyl amphetamine.

**Count 2:** On 9 May 2007, the police searched Simon's house in Mosman Park. When Simon was searched he produced a small container from his left tracksuit pocket. It contained a small bag containing 4.58 g of methyl amphetamine. A larger bag containing 6.49g of methyl amphetamine was found in the rear shed of the premises. The total weight of the methyl amphetamine seized was 11.07g. A large amount of cash was also found. It totalled \$8,070. There were also scales; numerous clip-seal bags; and a paper with numbers on it.

5. Mitigating factors

- a. Simon pleaded guilty to the two charges.
- b. A pre-sentence report revealed that Simon came from a good family and was a hard working person.
- c. Simon was identified as 'a level-headed individual' who has significantly minimised the impact his substance abuse has had on his life and, in particular, the contribution it was making to his offending behaviour. This was shown by the fact that he had not re-offended for two years.
- d. Since his imprisonment while waiting to be sentenced, he had performed well in different programmes.

6. Aggravating factors

- a. Simon's criminal record revealed 32 convictions between 1983 and 2005.
- b. Simon was on bail for the first offence when he committed the second offence.

## ACTIVITY

Using the sentencing options below, decide on what you think would be an appropriate sentence for both George and Simon. You must take into account the mitigating and aggravating factors, including the nature and seriousness of the offences, whether there was a plea of guilty, the previous criminal record, the risk of re-offending and rehabilitation options including the likelihood of success for rehabilitation.

You will need to decide on an appropriate sentence for each offence. You will then need to decide whether you want them to be served concurrently or cumulatively. (That is, at the same time or one after the other.) In deciding whether each sentence is to be served concurrently or cumulatively, you will need to consider the principle of totality.

There are two parts to the totality principle

1. A judge is required “to ensure that the total effective sentence bears a proper relationship to the overall criminality involved in all of the offences, viewed in their entirety and having regard to the circumstances of the case, including those referable to the offender personally.”<sup>3</sup>
2. “The court should not impose a crushing sentence. The word crushing in this context connotes the destruction of any reasonable expectation of a useful life after release.”<sup>4</sup>

In other words, the whole sentence must reflect the seriousness of the overall offending taking into account all the circumstances and it must not be too crushing so as to give the offender no hope of a useful life once the sentence is served.

Give reasons for your decisions.

Please note: according to section 9AA of the Sentencing Act WA (1995), if an immediate term of imprisonment is to be imposed, a plea of guilty at the earliest opportunity can mean the judge can give up to a 25% discount on the sentence. An early plea of guilty indicates the offender is taking responsibility for their offending, shows remorse and is willing to assist in the course of justice. It means that there does not have to be a trial thereby saving time, costs and further trauma to the victims.

### Maximum Penalty

The maximum penalty for these offences, according to the *Misuse of Drugs Act (1981)* s34 (1) (a) is a fine not exceeding \$100 000 or imprisonment for a term not exceeding 25 years or both.

### Sentencing options

1. Pre Sentence Order  
*A PSO is an order made by the court before sentencing that would allow an offender to complete a programme to address their behaviour, for example, a drug rehabilitation programme. Sentencing can be adjourned for up to two years in order for the offender to complete the PSO. This gives the offender the chance to prove to the court and the community that they can rehabilitate themselves and not re-offend. If they engage in their programmes and are successful, the judge may decide not to sentence them to prison.*
2. [Intensive Supervision Order](#) (click on the link to find a description of this sentence.)
3. Fine  
*A judge may choose to impose a fine for these offences so long as it does not exceed \$100,000. Under s34 of the ‘Misuse of Drugs Act (1981)’, the judge can impose both a fine and imprisonment.*
4. Immediate Imprisonment

<sup>3</sup> *Roffey v The State of Western Australia* [2007] WASCA 246 [24].

<sup>4</sup> *Martino v The State of Western Australia* [2006] WASCA 162 [29].

*The sentencing range from previous cases for this type of offending is 6-10 years immediate imprisonment. The maximum penalty for possession of a prohibited drug with the intent to sell or supply is 25 years.*

5. Suspended Imprisonment

*A judge may choose to suspend a term of imprisonment if the term of imprisonment is for 5 years or less and must not be suspended for more than 2 years. If an offender commits another offence during the suspension period, the offender will be brought before the court to be re-sentenced. If, at the end of the suspended period, the offender has not re-offended, then the sentence has been served and the offender will not have to serve the time in prison. A judge may choose to impose this sentence to provide the offender with a chance to prove to the court that they will not re-offend and fully intend to work towards amending their behaviour. This type of sentence should not be given if the offender is at a high risk of re-offending.*

6. [Conditional Suspended Imprisonment](#) (click on the link to find a description of this sentence.)

7. Eligibility for parole

*If a judge has imposed a sentence of immediate imprisonment, s/he must then decide whether the offender is to be eligible for parole. Parole is where an offender can be released up to two years prior to the end of their sentence with certain conditions attached to their release. The benefit of parole is that an offender is provided with supporting programmes and supervision to help them re-integrate into the community. The decision as to whether a sentenced prisoner is granted parole is decided by the [Prisoners Review Board](#).*

Student's sentence (table on next page)

**When students have decided on an appropriate sentence, discuss with them the reasons for their decision and what factors led to their decision. You could also discuss the reasons for any differences between the two sentences.**

**Students should be encouraged to consider what other factors that they think they should know that would assist them with their decision. For example, more personal details of the offender or the purity of the drugs.**

**Real sentence:**

**George was sentenced to the following**  
**Count 1 – 18 months imprisonment**  
**Count 2 – 3 years imprisonment**  
**Count 3 – 8 years imprisonment**

**Each sentence was ordered to be served concurrently with specific attention being given to the total effective sentence – the principle of totality.<sup>5</sup> Thus, George was to serve a total of 8 years imprisonment and he was to be eligible for parole.**

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<sup>5</sup> Under the two parts of the principle of totality explained on page 4, the total effective sentence is the overall sentence: In other words, how many years in total the offender is required to serve.

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The judge noted that there were very few mitigating factors in George's favour. He also noted the significance of general and personal deterrence when dealing with offences of this nature. His Honour concluded that George was a user/dealer at the higher end. He found that George's motivation was primarily commercial gain but also the servicing of his and his ex-partner's drug use. Notwithstanding the criminal record and the rehabilitation issues, the judge considered that there 'ought to be some light at the end of the tunnel' and ordered that George be eligible for parole.

Simon was sentenced to the following  
Count 1 – 4 ½ years imprisonment  
Count 2 – 18 months imprisonment

These were to be served cumulatively giving a total effective sentence of 6 years with an eligibility for parole.

The sentencing judge observed that methyl amphetamine is the major curse in our community and a major cause of violent crime. After commenting that Simon's record revealed 32 convictions between 1983 and 2005, the sentencing judge considered that the seriousness of the offence for Count 1 called for a substantial term of imprisonment and imposed a sentence of 4 1/2 years. She then noted that for Count 2, because there was 11 grams and Simon was on bail, the starting point would be 18 months. Because of the fast-track plea, the sentence was to be 18 months.<sup>6</sup>

Please note: The nature and seriousness of these offences will usually result in a sentence of immediate imprisonment as a matter of practice.

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<sup>6</sup> The two case scenarios were modelled upon two different cases in WA: *Thank-Htay v The State of Western Australia* [2001] WASCA 68 and *Rigney v The State of Western Australia* [2008] WASCA 96.

Student's sentence with appropriate justification

<b>Factors for consideration</b>	<b>George</b>	<b>Simon</b>
The Offence <i>Outline what the offences are for each offender</i>	<b>Three counts of possession of a prohibited drug with the intent to sell or supply</b>	<b>Two counts of possession of a prohibited drug with the intent to sell or supply</b>
Seriousness of the offence <i>Discuss what you think makes this offence so serious and identify the maximum penalty according to the 'Misuse of Drugs Act (1981)' (The maximum penalty tells us how serious the offence is according to law)</i>	<b>Very serious</b>	<b>Very serious</b>
Previous Cases <i>What is the usual sentencing range for cases of this nature? Judges are expected to use their discretion when sentencing according to the circumstances of the case but they are required to follow the examples of sentences in previous cases of a similar nature.</i>	<b>6-10 years immediate imprisonment</b>	<b>6-10 years immediate imprisonment</b>
Mitigating factors <i>Identify what factors reduce the offenders responsibility</i>	<b>The judge noted that there were very few mitigating factors in George's favour. He also noted the significance of general and personal deterrence when dealing with offences of this nature.</b>	<b>Simon pleaded guilty to the two charges.</b>  <b>A pre-sentence report revealed that Simon came from a good family and was a hard working person.</b>  <b>Simon was identified as 'a level-headed individual' who has significantly minimised the impact his substance abuse has had on his life and, in particular, the contribution it was making to his offending behaviour. This was shown by the fact that he</b>

		<p>had not re-offended for two years.</p> <p>Since his imprisonment while waiting to be sentenced, he had performed well in different programmes.</p>
<p>Aggravating factors <i>Identify what factors increase the offenders responsibility</i></p>	<p>His Honour concluded that George was a user/dealer at the higher end. He found that George's motivation was primarily commercial gain but also the servicing of his and his ex-partner's drug use.</p>	<p>Simon's criminal record revealed 32 convictions between 1983 and 2005.</p> <p>Simon was on bail for the first offence when he committed the second offence.</p>
<p>Rehabilitation <i>Discuss whether you think the offender might be successful or not if he were to do a drug rehabilitation programme.</i></p>	<p>Based on his failures in the past to rehabilitate himself a drug rehabilitation would seem to have a low chance of success.</p>	<p>Based on his previous failures to disassociate himself from the drug trade it seems unlikely that a drug rehabilitation programme would be successful.</p>
<p>Risk of re-offending <i>Is the offender at a low, medium or high risk of re-offending. This is important because, as the sentencing judge, you must consider the protection of the community.</i></p>	<p>Medium to high risk based on his previous drug convictions.</p>	<p>Medium to high risk based on his previous drug convictions.</p>
<p>Concurrent or Cumulative <i>If you are giving a term of imprisonment for each offence, do you want them to be served at the same time or one after the other?</i></p>	<p>The judge determined that the real sentences were to be served concurrently.</p>	<p>The judge determined that the real sentences were to be served cumulatively.</p>
<p>Eligibility for Parole <i>If you are giving a term of imprisonment, are you going to allow the offender to be eligible for parole towards the end of his sentence?</i></p>	<p>Notwithstanding the criminal record and the rehabilitation issues, the judge considered that there 'ought to be some light at the end of the tunnel' and ordered that George be eligible for parole.</p>	<p>Eligible for parole</p>

<p><b>Final Sentence</b> <i>Based on your analysis of all the factors above, what do you think would be an appropriate sentence for each offender and why?</i></p>	<p><b>George was sentenced to the following</b>  <b>Count 1 – 18 months imprisonment</b>  <b>Count 2 – 3 years imprisonment</b>  <b>Count 3 – 8 years imprisonment</b></p> <p>Each sentence was ordered to be served concurrently with specific attention being given to the total effective sentence – the principle of totality.<sup>7</sup> Thus, George was to serve a total of 8 years imprisonment and he was to be eligible for parole.</p>	<p><b>Simon was sentenced to the following</b>  <b>Count 1 – 4 ½ years imprisonment</b>  <b>Count 2 – 18 months imprisonment</b></p> <p>These were to be served cumulatively giving a total effective sentence of 6 years with an eligibility for parole.</p>
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<sup>7</sup> Under the two parts of the principle of totality explained on page 4, the total effective sentence is the overall sentence: In other words, how many years in total the offender is required to serve.