



## DISCRETION IN SENTENCING

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The majority of Canadians believe that judges should have at least some degree of discretion and flexibility when deciding a sentence.

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### What we also found

- The overwhelming majority of Canadians (95%) felt that the best approach for determining fair and appropriate sentences for offenders involves giving judges at least some degree of discretion. Seven in ten (71%) Canadians thought the best way was to give judges some sort of guideline or range of sentences to choose from, with the option of going outside those ranges if they deem it necessary. About one-quarter (24%) of Canadians believed that the best way to determine a fair and appropriate sentence was to give judges full discretion (deciding on the sentence after looking at how the offence happened, why the offender did it and what sentences were given in other similar cases). Only 4% thought that there should be no judicial discretion for sentencing (give everyone who commits the same offence the same sentence).
- Many focus group and interview participants talked about the need for sentencing guidelines or ranges to help judges maintain consistency. They thought that guidelines should be based on research and evidence.
- Contrary to the current practice where discretion is limited, the majority of Canadians (82%) believed that judges should have greater discretion to consider using conditional sentences when there is low risk to public safety.<sup>1</sup>
- The top goal for the criminal justice system (CJS), according to Canadians, is to treat everyone fairly by taking into account her/his individual circumstances (40% of respondents chose this as one of their top three goals for the CJS).
- Canadians thought that the top three considerations in sentencing should be 1) the harm done to the victim (45%), 2) the number of past offences the person has committed (41%), and 3) assisting in rehabilitating offenders (35%).
- Eighty-six percent of Canadians indicated that it was at least moderately important that the CJS consider the particular circumstances of those who are vulnerable and marginalized (71% important and 15% moderately important).
- Many focus group participants believed that when deciding on a sentence, judges should be allowed to consider offender characteristics (such as mental health or cognitive difficulties, criminal history, poverty or addiction) and offence characteristics (e.g., context, intent, seriousness and degree of responsibility taken by the offender).
- The majority of Canadians (81%) also believed that judges should be allowed to consider personal circumstances such as brain damage and mental health problems when deciding on a sentence.





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- Almost three quarters of Canadians (72%) believed that judges should be allowed to consider personal circumstances such as if the offender is the sole breadwinner or caregiver and the harm that restrictive sentences can cause for young children relying on the offender.

## In more depth

Almost all (95%) Canadians noted that it is important that judges consider the seriousness of the offence (e.g., circumstances surrounding the crime, if there was a victim) when deciding on a fair and appropriate sentence. Almost three quarters (72%) thought it important that judges consider the degree to which the offender is responsible for his/her behaviour (an additional 15% thought it moderately important). About one third (32%) of respondents thought that giving judges and police more discretion would help reduce overrepresentation of Indigenous persons and persons with mental health and cognitive disabilities in the CJS.

Women were more likely than men (75% vs 66%) to believe that the best approach for determining fair and appropriate sentences for offenders is giving judges some sort of guideline or range of sentences to choose from with the option of going outside those ranges if they deem it necessary. This sort of structured discretion was more likely to be supported by persons aged 55-64 years (76%) compared to those aged 18-24 years (61%), persons with a higher level of education (74% with a university education<sup>2</sup> vs. 68% with high school or less) persons with a higher household income (69%-75% for those in categories over \$40,000 vs. 65% with income under \$40,000). Support for allowing judges full discretion in sentencing was strongest for men (28% vs. 20% women) and persons 25-34 years of age (29%) compared to those 55-65 years of age (21%).

Women (84%) were more likely than men (77%) to believe that judges should consider personal circumstances such as brain damage, mental health problems or other such conditions in deciding on a less restrictive sentence, even when there is a required minimum sentence. Those in Ontario (83%) compared to Alberta (72%) were more likely to believe that personal circumstances should be considered. Support for considering these sort of personal circumstances was higher among respondents with a university education (84% compared 78% of those with high school or less), and a higher household income (89% of those with \$120,000-150,000 income versus 78%-82% of those at all other income levels).

Persons aged 65+ years were more likely than those aged 18-24 years (79% vs. 63%) to believe that judges should be allowed to consider family circumstances such as the harm to young children and if the offender is the sole breadwinner or caregiver when deciding on a less restrictive sentence (e.g., less time in custody or other less restrictive sentences), even if there is a required minimum sentence.

There were some differences in those who thought it important that judges have more discretion when considering a conditional sentence if there is a low risk to public safety. Persons aged 35 years and over compared to those aged 18-24 years (83%-86% vs. 74%), and those in the Atlantic Provinces (89% compared to 76% in Alberta) were more likely to think it was important that judges have discretion in this situation.

## Method





# Research at a Glance

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The Department of Justice conducted National Justice Surveys (NJS) in both 2016 and 2017. Each NJS included several public opinion research projects with Canadians 18 and over from across Canada. The 2016 NJS included two surveys (surveys 1 and 2), six in-person focus groups and three online discussions. The 2017 NJS included two surveys (surveys 1 and 2), twelve in-person focus groups and twenty one-on-one telephone interviews. Survey samples were drawn randomly and the surveys were completed online or via paper. The data were weighted on age, gender, geographic region and education to match the Canadian population.

**NJS 2016:** The first survey (N=4,200) explored Canadians' goals, objectives and perceptions of the CJS, their views on what considerations should be important in sentencing, as well as sources of information on the CJS and the best way to share it. The second survey (N=1,863) included a sample of Canadians who had completed survey 1. For this survey, questions were accompanied by information and statistics to provide context. Canadians views on four key objectives<sup>3</sup> for the CJS were sought. Additionally, they were asked their views on specific aspects of the CJS including community based responses to crime, how to handle overrepresentation of Indigenous persons and those with mental health or cognitive functioning issues, the role of crime prevention in the CJS, rehabilitation and restorative justice. Focus groups and online discussions focussed on delving deeper into the issues covered by both surveys. In survey 1 respondents were asked about the importance of certain goals for the CJS as well as the factors judges should consider in deciding on a sanction for an offender and important sentencing considerations. In survey 2 they were asked about use of discretion in conditional sentences, and the role of discretion in reducing overrepresentation of certain vulnerable populations in the CJS.

**NJS 2017:** The first survey (N=2,019) focussed on discretion, sentencing and mandatory minimum penalties (MMPs). This survey included information (e.g., statistics and definitions of concepts such as sentencing guidelines) and three scenarios depicting offences that carry MMPs in order to provide context for responses. The second survey (N=2,027) focussed on specific criminal justice system topics including restorative justice, problem-solving justice, administration of justice offences, diversion, performance measurement, and confidence in the criminal justice system. Focus groups discussed the issues covered in the two surveys in more depth. Survey and focus group/interview respondents were asked about the importance of discretion in sentencing, and what factors judges should consider in sentencing.

**For further information on the findings and/or surveys mentioned in this document please contact the Department of Justice Canada Research and Statistics Division ([rsd.drs@justice.gc.ca](mailto:rsd.drs@justice.gc.ca))**

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<sup>1</sup> A conditional sentence is an alternative to incarceration that allows an offender to live and work in the community under certain conditions such as serving community service hours, attending a rehabilitation program and following specified restrictions on behaviour.

<sup>2</sup> University education includes those with a certificate, an undergraduate degree or higher.

<sup>3</sup> The four objectives were drawn from results of the 2016 survey and from discussions with experts: 1) safety and long term protections; 2) ensuring responsibility and accountability; 3) providing opportunities for reparation and restoration of relationships; and 4) providing support to help offenders deal with the root causes of their criminal behaviour.

