I may be showing my age but it is a long, long time since I appeared in a sentence matter in the Children’s Court. You, I am sure, have significantly more, and more recent experience, than I.

It is a well-known trait of barristers to give an impression of expertise that they don’t really possess. They then present a case that often merely illustrates their lack of expertise. I hope to avoid this sin. Although I will touch on sentencing proceedings in the Children’s Court I will focus on sentencing at law and the problems that arise you leave the cosy confines of the Children’s Court.

The vast majority of criminal charges against young people are heard in the Children’s Court for that Court has jurisdiction over all offences except certain driving offences and “serious children’s indictable offences”.

“Serious children’s’ indictable offences” include homicide and other offences which attract the most severe penalties, imprisonment for life, 25 years or more and a number of sexual offences (see Children’s (Criminal Proceedings) Act 1987 (C (CP) Act) section 3, 7, 28). In addition some indictable matters can be referred by the Children’s Court to be dealt with “at law” (C (CP) Act s.18).

**Sentencing in the Children’s Court**

The Children’s Court must sentence young offenders under the C (CP) Act s.33. The range of penalties under the C (CP) Act include cautions, good behaviour bonds, fines, probation, community service orders and detention.

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1 An updated version of a paper presented to the Legal Aid Commission’s Conference: “Children and the Law Practical Issues for Lawyers” in November 2002
Dismissal & caution: A significant number of young offenders are cautioned under s.33 (1)(a). The courts also have power to caution young offenders under the Young Offenders Act 1997 (s.31).

Good Behaviour Bond: the maximum period for a bond is two years. There are a number of compulsory conditions sets out in s.33 (1) (a) of the C (CP) Act. Although there is a power in s.24 for the Court to order a child to pay compensation, monetary penalties are not to be a condition of a bond.

Fine: The maximum fines courts can impose is $1,100 or the maximum available at law (s.33 (1)(c)).

Probation: The maximum period of probation is two years (s.31 (1)(e)).

Community Service: Children under the age of 16 can receive a maximum of 100 hours community service. Offenders aged 16 or over can get up to 250 hours (s.13 and s.33 (1) (f) Children’s (Community Service Orders) Act 1999). Community Service Orders are restricted to offences and situations where the Court can sentence a young person to detention.

Detention: The maximum period of detention is two years (s.33 (1)(g)). Detention can be suspended or combined with a bond (s.33 (1B)). Courts cannot sentence a young offender to detention unless satisfied all other sentencing options available under the C (CP) Act are inappropriate (s.33 (2)).

Rehabilitation: The courts can adjourn a hearing up to 12 months and release a young person on bail to assess their suitability for rehabilitation or allow their participation in rehabilitation program (s.33 (1)(c2)).

Youth Drug Courts: These now operate out of Campbelltown, Cobham (St Mary’s) and Bidura Children’s Courts. The program’s drawing area takes in the Eastern Suburbs to Katoomba. Unlike the Adult Drug court there is no separate Act or regime. The program operates using the Bail Act and C (CP) Act.

Youth Justice Conferencing: Courts can also refer a young offender to a Youth Justice Conference (s.33 (1)(c1)) or pursuant to the Young Offenders Act 1997.
License disqualification: Young people found guilty of driving offences can be disqualified from holding a license s 25(1) *Road Transport (General) Act 1999*. The debate about whether disqualification can be ordered for a child under the age of 16 was resolved by Dunford J in *HA & SB v DPP* (2003) 57 NSWLR 653. Although the Children’s Court does not formally convict a child under 16 (s.14 *C (CP) Act*) the finding of guilt is enough to trigger the power to disqualify.

**Dealing with matters at law**

The *C (CP) Act* deals in different ways with three categories of offences:

- Serious children’s indictable offences,
- Other indictable offences, and
- All other offences.

Serious children’s indictable offences must be dealt with according to law (s.17), they cannot be finalised in the Children’s Court.

Adults who were children when the offence was committed can be dealt with under the *C (CP) Act* if they were under the age of 21 when charged before the Court with the offence s16 *C (CP) Act*.

Section 31(1) of the *C (CP) Act* notes that if a person is charged before the Children’s Court with an offence other than a serious children’s indictable offence, the proceedings for the offence shall be dealt with summarily. However there is an exception. Section 31(3) notes that if the Children’s Court is of the opinion, after all the evidence of the Prosecution has been taken that having regard to all the evidence before it, the evidence is capable of satisfying a jury beyond reasonable doubt the person has committed an indictable offence and that the charge may not properly be disposed of in a summary matter the proceedings for the offence shall be dealt as if it were a committal for trial or sentence.

It is most important to note that s31 (3) only operates after the prosecution has put its case. A Magistrate cannot decide to proceed at law until the prosecution case is presented. Where (as sometimes occurs) Magistrates attempt to pre-empt a hearing of the prosecution case in the Children’s Court,
usually to avoid cross-examination of witnesses they, in my opinion, have fallen into appealable error.

Section 18 (1) C (CP) provides a guide to the matters a Magistrate should consider when deciding whether a matter should be dealt with at law (see Bendt [2003] NSWCCCA 78 and Kirby J in JIW v DPP [2005] NSWSC 760).

Obviously, it would rarely be in a child’s interest to have the matter dealt with at law. Applications that the matter proceed at law are generally made by the DPP. However the Magistrate can make the decision without prompting. The factors, which are to be taken into account in making such determination, are set out in R v WKR (1993) 32 NSWLR 447:

- The nature and incidents of the offence
- The age, maturity and personal circumstances of the offender, and
- The nature of the penalty that would be appropriate.

They were recently considered in JIW v DPP.

In WKR Sully J sought to bring to the decision questions about the morality of the offenders conduct although the majority did not accept that this was appropriate. He also made the extraordinary statement:

“In order to fix a fair and objective view of the true level of personal responsibility …the offender should not be allowed to shelter behind the accident of age so as to have the quite extraordinary advantages that flow from the application of … the Act.” (At page 460C - emphasis added.)

Principles of Sentencing

Section 6 of the Children (Criminal Proceedings) Act 1987 sets out the significant principles that courts must take into account when dealing with children and as.3 notes a “Child” is defined as “a person who under the age of 18 years.” There is a tendency, particularly in the higher courts, to ignore or

- Children have the same rights and freedoms before the law as adults including the right to be heard and to participate in processes leading to decision that affect them.
- Children who commit offences need to bear responsibility for their actions but because of their dependency and their immaturity they require guidance and assistance.
- It is desirable, whenever possible, not to interrupt the education or employment of a child.
- It is desirable, wherever possible, to allow a child to reside in his or her home.
down play both s.3 and s.6 (For example, in AD [2005] NSWCCA 208 the court held that the sentencing judge's failure to refer to section 6 did not indicate the judges sentencing discretion had miscarried).  

Australia is a signatory to international conventions relating to the rights of children including the United Nations Convention on the Rights of the Child (CROC) and the International Covenant on Civil and Political Rights (ICCPR). These conventions are relevant to sentencing young offenders:

- The best interests of the child is paramount, consideration in all actions concerning young people including legal proceedings (CROC Article 3)
- No child should be subject to cruel, inhuman or degrading punishment and a child who is imprisoned must be treated with humanity and dignity, taking into account the needs of a person of their age (CROC Article 37, ICCPR articles 7 and 10).
- Imprisonment of children must be a measure of last resort and a variety of other appropriate proportionate penalties should be available to children found guilty of criminal offences, with a focus on rehabilitation (CROC articles 37 and 40, ICCPR Article 10).
- Children are entitled to privacy at all stages of criminal proceedings (CROC article 37).  

The United Nations Convention on the Rights of the Child (CROC) has been declared a relevant human rights instrument under the Human Rights and Equal Opportunity Act (Comm) 1986. However, access to the complaints process via the Human Rights and Equal Opportunity Commission does not mean provisions or decisions that infringe the CROC can be struck down. At

☐ The penalty imposed on a child should be no greater than the penalty imposed on an adult who commits the same offence.

Howie J at [27] referring to the s 6 principles said, “Without seeking to detract from their importance, they are hardly controversial nor did they have such peculiar or particular relevance to the sentencing exercise before her Honour that the failure to refer to them might have made a significant difference to the ultimate sentence to be imposed upon the applicant.” His comments, of course, had the effect of dismissing the importance of the principles.

☐ Summary taken from the NSW LRC Issues Paper 19 “Sentencing Young Offenders” para. 3.28.
present the High Court has left unresolved the question of whether the CRoC has any significance in the interpretation and application of Australian laws. CROC has not yet been held to be enforceable in Australian Courts. For the moment it looks doubtful it will be, although the point has yet to be finally determined (see *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20 at [108] –[110]).

**Applying the principles:** The Court of Criminal Appeal has said that the principles in s. 6 apply whenever a court sentences a young offender whether the sentencing according to law or under the C (CP) Act (see *GDP* (1991) 53 A. Crim.R. 112).

Section 6 has however been read down and significantly qualified by a number of subsequent decisions of the NSW Court of Criminal Appeal. At times it appears to be completely ignored by the higher courts. That a judge did not even refer to the section has not been held to be an error (*AD* [2005] NSWCCA 258).

Over the last 15 years there has developed an approach, which says that if a young offender conducts themselves “as an adult” or engages in “grave adult behaviour” the principles applicable to sentencing young offenders which stress rehabilitation will have less weight given to them. Correspondingly, more weight will be given to the objective seriousness of the offence and principles such as retribution and deterrence.

The notion that young offenders conducting themselves as adults deserve greater punishment came to prominence after the decision of the Court in *Pham & Ly* (1991) 55 A Crim R 128 at 135, a case of a young adult and a child just short of his 18th birthday who committed a premeditated home invasion style robbery with violence. For a while it was argued that the exception applied only to children who were almost adults or young adults,

6 AEM Senior & Other [2002] NSWCCA 58 at [97]
7 MHH [2001] NSWCCA 161
however the exception was extended to a 16 year-old sex offender in **Bus & S**, unreported, CCA NSW 3 November 1995.8

The focus on the conduct of the child and its possible characterisations as grave adult behaviour is now almost universal. In any case involving a child committing a serious indictable offence the question now has to be asked “Can the behaviour here be characterised as grave adult behaviour or even as adult behaviour? The problem with this type of analysis however is that in most serious cases the crime can be so characterised, if only because of the nature of the offence. It wouldn’t be in the higher courts if it were not serious!

The question forces the court to look first at the objective circumstances of the crime and the public or judicial reaction to it, not at the child who commits the crime.

Both adults and children commit sexual offences. If the objective circumstances of the crime are the same is that sufficient reason for not considering the special circumstances of the child offender? Should the circumstances of the crime dictate whether the same sentencing principles apply?

That sentences must be individual is one of the essential features of our justice system. It is also fundamental that there are a competing factors which

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8 **Bus and S** (unreported CCA NSW 3/11/1995) involved rape of a young woman by Bus, (who had an intellectual disability but was an adult), and S (then aged sixteen). Hunt CJCL, with whom Grove and Allan JJ agreed, noted so far as S was concerned that notwithstanding that he was dealt with “at law” section 6 of the Children’s (Criminal Proceedings) Act applied. His Honour said (at page 8) said of section 6 “those are very important principles”. His Honour went on to say:

“In any event it is obvious that the relevance of the principles stated in s6 to each individual case depends to a very large extent on the age of the particular offender and the nature of the particular offence committed. An offender almost eighteen years of age cannot expect to be treated according to law substantially different to an offender just over eighteen years of age.”

“Rehabilitation plays a more important role and general deterrence a lesser role... [reference is made to GDP] but that principle is subject to the qualification that, where a youth conducts himself in a way an adult may conduct himself and commits a crime of considerable gravity, the function of the courts to protect the community requires deterrence and retribution to remain significant elements in sentencing”
must be taken into account, and that there is no correct balance of those factors.\(^9\)

It must be recognised however that for very serious crimes that arguments which stress the rehabilitative needs of the offender over punitive punishment rarely succeed (see for example Voss [2003] NSW 182 MA [2004] NSWCCA 92 and AD [2005] NSWCCA 258).

Defence lawyers cannot presume leniency will be extended or rehabilitative approach preferred just because the offender is a child. The onus has in effect passed to the defence. Where immaturity is a significant contributing factor to an offence the criminality involved is less than where the offence was a premeditated act of violence. This point was clearly made in Hearne (2001) 124 A Crim. R 451 at [24] where it was also said that the weight to be given to the element of youth does not vary depending on the seriousness of the offence.

A useful example is TVC [2002] NSWCCA 325 which involved a robbery committed by a 15 year old at Fairfield Railway Station. Despite the seriousness of the offence (TVC had a knife and a loaded gun) the Court drew on authorities which stressed rehabilitation and youth citing Wood J in Hoai Vinh Tran [1999] NSWCCA 109:

“In coming to that conclusion his Honour made reference to the well known principle that when courts are required to sentence a young offender considerations of punishment and general deterrence should in general be regarded as subordinate to the need to foster the offender’s rehabilitation: Wilkie (Court of Criminal Appeal New South Wales 2 July 1992 unreported), XYJ (Court of Criminal Appeal New South Wales 15 June 1992 unreported). That is a sensible principle to which full effect should be given in appropriate cases. It can have particular relevance where an offender is assessed as being at the cross roads between a life of criminality and a law abiding existence”. (At [13])

The Courts however are far from consistent. For example in JDB [2005] NSWCCA 102 Mason P citing GDP said of a 13-year-old sex offender:

\(^9\) Veen v The Queen No. 2 (1988) 64 CLR 465 at 478. “Sentencing is ... a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour to the mathematics of units of punishment usually expressed in time or money.” Weininger v The Queen (2003) 211 CLR 629 at [23].
“... For an offender of this age, facing his first time in custody, extreme youth should have meant that rehabilitation and not deterrence was the primary focus of attention.”

In contrast in DM [2005] NSWCCA 181, Simpson J when dealing with another 13 year old sex offender, held that the general principle that, in the case of an extremely young offender, more emphasis can be given to questions of rehabilitation, even at the expense of deterrence was not universal and did not mean that, in an appropriate case, issues of general deterrence are not of significance (at [61]). This case illustrates two significant shifts in sentencing children. The first is that the general principle is applied to only “extremely young offenders’. The second is that the general principle is not “universal”.

Do not be too despondent. There is still authority that can be relied on to mitigate the sentences imposed on children.

In Blackman & Walters [2001] NSW CCA 121 Wood CJ at CL referred, with approval, to the following passage from the judgement of King CJ in Yardley v Betts (1979) 22 SASR 108 at 112-113:

“The protection of the community is also contributed to by the successful rehabilitation of offenders. This aspect of sentencing should never be lost sight of and it assumes particular importance in the case of first offenders and others who have not developed settled criminal habits. If a sentence has the effect of turning an offender towards a criminal way of life, the protection of the community is to that extent impaired. If the sentence induces or assists an order to avoid offending in future, the protection of the community is to that extent enhanced. To say that the criminal law exists for the protection of the community is not to say that severity is to be regarded as the sentencing norm...”

Even for older offenders and heinous crimes, youth must remain a significant factor in sentencing. In Webster, Unreported CCA NSW 15/7/1991 (the murder by a young man of a teenage girl) while the court accepted there was a need for a punitive element Justice Allen for the Court also said:

“The protection of the community does not involve simply the infliction of punishment appropriate to the objective gravity of the crime. There are other considerations as well - principally although by no means only, the deterrence of others... and the rehabilitation of the offender. The community have a real interest in rehabilitation. The interest to no small extent relates to its own protection...The community interest in respect to its own protection is greater where the offender is young and the chances of rehabilitation for almost all of the offender’s adult life, unless he is crushed by the severity in sentence, are high. In the
balancing process of the elements of sentencing, in the case of a young offender with good prospects, will weigh highly with a relative decreasing of the effective weight of the element of the need to deter others." (At pages 11 and 12. Emphasis added).

In SDM [2001] NSWCCA 158 the Court stressed that there must be a balance of factors:

“16 There will always be cases where little allowance needs to be made for this fact, e.g. when the offence is one where the offender conducted himself or herself like an adult: Tran (1999) NSW CCA 109 and Townsend & Cooper NSW CCA 14 February 1995; or where there is a pattern of serious repetitive offending: Biggs NSW CCA 5 March 1997; or where the offender is close to legal adulthood and properly to be regarded as mature: Nguyen.

17 Equally, there are cases where the converse is true and where special allowance will need to be made for the offender's emotional immaturity: Kama 2000 NSWCCA 23, or for his or her deprived background, and so on.”

In Summary: In the case of a youthful offender considerations of punishment and of general deterrence of others may properly be largely discarded in favour of individualised treatment of the offender and directed to his rehabilitation. Wilcox NSW SC 15 August 1979, Yeldham J relying upon what was said in R v Smith [1964] Crim LR 70 said:

“In the case of a young offender there can rarely be any conflict between his interest and the public’s. The public have no greater interest than that he should become a good citizen”.

In Roper v Simmons 543 US 2005, the US Supreme held that the death penalty could not be imposed on children. In doing so they made the following important points that could, and hopefully will, be explored in NSW courts to the advantage of juvenile offenders:

- As any parent knows and as the scientific and sociological studies tend to confirm a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.
- Even the normal 16-year-old customarily lacks the maturity of an adult. It has been noted that adolescents are overrepresented statistically in virtually every category of reckless behaviour
- Juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.
- Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to
psychological damage.. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. As legal minors, juveniles lack the freedom that adults have to extricate themselves from a criminogenic setting..

- The character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.
- The susceptibility of juveniles to immature and irresponsible behaviour means their irresponsible conduct is not as morally reprehensible as that of an adult.
- Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.
- The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.
- For most teens, risky or antisocial behaviours are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behaviour that persist into adulthood.

It is important to appreciate that it is not simply that the seriousness of the crime requires that the principle of consideration of youth must give way in the public interest. Rather one needs to identify the point:

“At which the seriousness of the crime committed by [a young man] is of such a nature, is so great, that that principle [the consistently pointed out need to give young offenders a chance and to refrain from sending them to gaol or dealing heavily with them if that course can be avoided] must, in the public interest, give way.” Hulme J in JL C-H [2004] NSWCCA 70 at [25].

It must be asked in each case:

- How did the child offender’s youth impact on his offending?
- Did it play any role in diminishing his criminality?
Have the Crown put forward any evidence to suggest that rehabilitation should not be the paramount consideration of the sentencing process?

What was said by Mathews J in *GDP* (1991) 53 A Crim R 112, is still good law:

“Had it been an adult who had committed these offences, then the principles of retribution, and more importantly, general deterrence, may have demanded a custodial sentence of considerable length. But rehabilitation must be the primary aim in relation to an offender as young as this.”

This simple submission should always be made in any case involving sentencing of a child.

Of course children commit horrendous crimes but that is no reason to treat them in the same way as adults who commit serious offences. Different factors must be brought into the sentencing equation. The fact that the offender is a child demands it. Judges must be persuaded not to presume that children behave or respond to punishment in the same way as adults. If the US Supreme Court can show some understanding, so too can the Supreme and District Courts of NSW.

In any sentencing submission, stress must be placed not on punishment or retribution but on the positive benefits to the community of rehabilitation and reform as opposed to the temporary “benefit” of removal and incapacitation.

**Custody arrangements**

That a child is dealt with at law does not mean that they must go to gaol or be detained. Obviously they can plead not guilty and be acquitted. If they are found or plead guilty all adult sentencing options are available to them.\(^\text{10}\)

If the court sentences a person under the age of 21 years for an indictable offence committed while a child, the court may direct that the whole or part of the sentence be served in a detention centre (s.19). Until a change to the section in 25 January 2002 it was generally assumed that if you only had juvenile matters you would go to detention.

\(^\text{10}\) See the various papers on Sentencing available on the PD website http://www.lawlink.nsw.gov.au/publicdefenders
The 2002 amendments to s.19 apply to all those sentenced to imprisonment for a “serious children’s indictable offence”. They are specific, such a person is not eligible to serve a sentence of imprisonment after they have attained the age of 18 years unless the sentencing court is satisfied there are special circumstances justifying the detention of the person in a detention centre or their fixed term or non-parole period will end within six months after they turn 18.

In determining whether there are special circumstances, the court may have regard to:

- The degree of vulnerability of the person.
- The availability of appropriate services or programs at the place the person will serve the sentence, and
- Any other matter the court thinks fit (s.19(4)).

Section 19 has not to date been critically considered by a superior court, although s 19 orders were made in Voss and MA. However, the term “special circumstances” was considered in Simpson (2001) 53 NSWLR 704 at [59]:

“The words “special circumstances appears in numerous statutory provisions. They are words of indeterminate reference and will always take their colour from their surroundings”

Just as with s 44(2) Crimes Sentencing Procedure) Act 1999 Considered in Simpson a key focus for the finding must be the rehabilitation of the offender.

Prior to the amendment of s 19 careful consideration of even the worst of juvenile offenders often led to their sentences being served in a detention centre. See for example AEM Senior and LBK [2001] NSWCCA 248.

Generally one would expect that a court would find special circumstances, however, the evidence addressing each of the points in s.19(4) must be before the court.
Sentencing Guidelines

Since 1998 the New South Wales Court of Criminal Appeal has pronounced a number of guideline judgements in relation to sentencing at law. Guidelines have statutory recognition in the Crimes (Sentencing Procedure) Act 1999. Challenges to the constitutional validity of Guidelines were rejected in Whyte (2002) 55 NSWLR 252.

The Guidelines judgements apply to children. For example in Jurisic (1998) 45 NSWLR 209 and Whyte at 228, direct reference was made to the earlier decision of the court in Musumeci (Unreported), NSWCCA 30 October 1997. In Musumeci, Hunt CJ at CL observed that the need for public deterrence in dangerous driving cases meant that the youth of an offender is given less weight as a subjective matter than in other cases.\(^{11}\)

The guideline in Wong (1999) 48 NSWLR 340, since criticised by the High Court ((2001) 76 ALJR 79) on another point, noted that there was a statutory requirement in s.16A (2)(m) of the Commonwealth Crimes Act 1914 to take into account the age of the offender.

The fact that a large number of break and enter matters were dealt with in the Children’s Court was raised in argument in AG Application (No. 1): R v Ponfield (1999) NSWLR 327. The Court noted that:

> “The prominence to be given to rehabilitation of the young in determining sentence is recognised to the point of being almost axiomatic.” (At [38].)

Youth did not figure specifically as a matter to be taken into account in formulating the guideline for break enter and steal. The court did recognise that:

> “It will of course be requisite for a sentencing court to give appropriate weight to matters in mitigation as manifest in the particular case.” (At [49].)

\(^{11}\) In dangerous driving case reference is also often made to MacIntyre (1988) 38 ACR 135 at 139, “The lack of foresight in youth, the reckless spirit of youth will always be there and must always be recognised by courts, but that cannot, when punishment is under consideration, be recognised to the point of leading young drivers - who, regrettably, form a significant proportion of motor traffic offenders - to believe that an offence under section 52A resulting in death will lead to light punishment.”
The Guideline on armed robbery (*Henry* (1999) 46 NSWLR 346) referred to the fact that an offender was of a young age was a characteristic common to the sort offences to which the guideline applied (at [162]). Subsequently, a number of decisions of the Court of Criminal Appeal implied that the Guideline in was not to apply to young persons. That trend was reversed by the decision in *SDM* [2001] NSWCCA 158, where the court held the guideline judgements are relevant to the sentence of the children as they:

“Provide a benchmark for particular kinds of offence by way of guidance, while preserving the application of proper sentencing principle which is of general application, including that referrable to children or to those suffering from some form of mental incapacity, that might reduce the need for the sentence to reflect factors of deterrence, while requiring greater attention to be given to the interests of rehabilitation”. (At [10]).

The court noted however that the further an offender is from adulthood the more the reduction that should be made for his/her youth, immaturity and the reduced importance of general deterrence and retribution. The corollary however was also said to apply: The closer you are to 18 the more likely you are to receive an adult type penalty.

**Legislative Change**

Section 3A *Crimes (Sentencing Procedure) Act 1999* sets out for the first time in New South Wales the purposes of sentencing. The CCA has explained that the section provides,

“The framework upon which a court determines the sentence to be imposed upon a particular offender for any offence. The Act provides the sentencing practice, principles and penalty options that operate in all courts exercising State jurisdiction. The sentencing principles and practices derived from the common law also apply. They have been preserved by the provisions of the Act” (see *AG Application No 3* [2004] NSWCCA 303 - The Drink Driving Guideline).

Section 21A *Crimes (Sentencing Procedure) Act 1999* sets the aggravating and mitigating factors that must be taken into account when a person is sentenced. The list must be read in the light of principles established by the courts independently of the Act; that is the common law. So much should be
clear from what is said in s.21A (4) and has been endorsed by the CCA in Way (2004) 60 NSWLR 168 and Wickham [2004] NSWCCA 193.

Examples given in Way (at [104] and [105]) of additional matters that must be taken into account were, exceptional hardship to the offender’s family; unduly onerous conditions of custody, parity, totality, and the special considerations applying to the sentencing of children in the Children (Criminal Proceedings) Act 1987.

There are a number of common and reoccurring errors that can arise when applying the section. Defence counsel, prosecutors and judges make them. The errors, more often than not, operate to make worse the position of the person being sentenced.

There is a real danger that if a fact is taken into account both as an element of the offence and an aggravating factor for s.21A (2) purposes, such double counting will lead to an exaggerated view of the seriousness of the offence and double punishment.

Another example of how error can creep into the sentencing process is if a prior criminal record is taken into account on to make the offence more serious. The High Court’s decision in Veen v The Queen (No. 2) (1988) 164 CLR 465 at 477 is still the law. That case sets out the particular circumstances in which prior convictions become material to sentence: A prior record does not have the effect of aggravating an offence but it may either deprive the offender of leniency or indicate that more weight is to be given to retribution, personal deterrence and the protection of the community.

Section 21A (3) (h) includes as a mitigating factor, “the offender has good prospects of rehabilitation, whether by reason of the offender’s age or otherwise”. In RB [2005] NSWCCA 76 it was held that to properly apply subsection (h) and s 3A (d) Crimes (Sentencing Procedure) Act 1999 to children the court must be concerned with promoting future rehabilitation.

“[The court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so.]”

For a detailed review of these problems and the views of the CCA, see Robert Hulme’s paper, Standard Non-Parole Periods: A Way through the Mire, and mine Sentencing 2004 available on the Public Defender’s Webpage. Many of my comments here draw on Robert’s careful analysis.
Section 21A (3) (j) also states that, “the offender was not fully aware of the consequences of his or her actions because of the offenders’ age or any disability”. Subsection (j) is awkwardly worded. It may be suggested that the words “was not fully aware of the consequences of his or her actions” and the limitation in (h) to future rehabilitation mean that different and more restrictive principles than those that now apply to children. This cannot be correct.

It cannot be stressed enough that s 21A (2) and 21A (3) factors are additional too and not a replacement for matters required to be taken into account by other Acts and rules of law. This is explicitly set out in s21A (1) and s 21A(4).

**Standard Non-Parole Periods**

Division 1A of Part 4 of the *Crimes (Sentencing Procedure) Act 1999* applies to offences committed on or after 1 February 2003. It introduces the concept of a “standard non-parole period” - the non-parole period for an offence in the middle of the range of objective seriousness - for those offences listed in the Table to the Division (s.54A (2)). The Table sets out 22 offences. More may be added.

The most definitive consideration of Division 1A of Part 4 by the Court of Criminal Appeal to date are the judgment in *Way* and *Pellew* [2004] NSWCCA 434. The key question is: “Are there reasons for not imposing the standard non-parole period”? That question is answered by considering,

i. The objective seriousness of the offence and

ii. The circumstances of aggravation and mitigation both in S.21A and at common law.

The particular fact of the offenders use as set out in s 21A and the common law must be found a reason for not imposing the standard non-parole period.

Once there are reasons for not imposing the standard non-parole period:

“…the Court should exercise its sentencing discretion in accordance with established sentencing practice and by reference to the matters identified in sections 3A, 21A, 22, 22A and 23 of the Act. The ultimate objective remains one of imposing a sentence that is just and appropriate, having regard to all of the circumstances of the offence and of the offender, and so as to give effect to the purposes mentioned in s 3A of the Sentencing Procedure Act.” (*Way* at [121])
“In this approach the standard non-parole period can properly take its place as a reference point, or benchmark, or sounding board, or guidepost, along with the other extrinsic aids such as authorities, statistics, guideline judgments and the specified maximum penalty, as are applicable and relevant. …The reference point has, in this sense, an important role to play in ensuring consistency in sentencing” (Way at [122] &[123]).

It is not a correct approach to start with the standard non-parole period and then to “oscillate about it by reference to the aggravating and mitigating factors”. The standard non-parole period is not to dominate the remainder of the sentencing exercise or fetter sentencing discretions. You don’t simply start at the standard point reduce for the plea of guilty and other mitigating features then add on time for any aggravating features.

The Juvenile Offenders Legislation Amendment Act 2004

The new Act effectively establishes an intermediate system of imprisonment for some offenders aged 16 to 18 and all aged 18 to 21 who committed their offences as children. It allows for the imposition of adult-type administrative punishments on these young persons and allows for the transfer to adult gaols of those aged over 18, at the almost unfettered discretion of the Commissioner for Corrective Services.

The amendments to s.41B and s.41C and 23 Crimes (Administration Sentences) Act 1999, effectively allow for a court’s s. 19 Children’s (Criminal Proceedings) Act 1987 order to be undermined.

Section 41C notes that the Commissioner can order a juvenile inmate of or above the age of 18 years to be transferred from a juvenile correction centre to an adult correctional centre. Sub-section 3 sets out the reasons for such a transfer. They include; the inmates wishes and behaviour, safety and security concerns and the “Good order and discipline within the juvenile correction centre”.

The powers given to the Commissioner are extensive. The Commissioner’s decision is not bound by any of the critical requirements in s.19 Children’s (Criminal Proceedings) Act 1987. As there is no provision for appeal of the Commissioner’s decision, the Commissioner can, in effect, do as he or she likes. This is simply not just.
My position can be briefly summarised.

- Those under 18 should never in an adult gaol at all.
- The juvenile justice system is better equipped philosophically and practically to deal with those who committed their offences as young persons, whether they are over or under 18 when serving their sentence.

Some other recent cases

**Hoang** [2003] NSWCCA 237: A Juvenile Justice Report must be obtained before sentencing of a person under 21 who was a child at time of charge. Section C (C P) Act is a mandatory provision.

**AN** [2005] NSWCCA 239: Sets out the procedure for the imposition of limiting term on juvenile offender with severe mental impairment.

**AD** [2005] NSWCCA 208: When sentencing a juvenile offender charged with serious sexual assault offence the judge’s sentencing discretion did not miscarry because of a failure to refer to s 6 of Children’s (Criminal Proceedings) Act 1987.

**Tran** [2005] NSWCCA 35: When considering parity of sentence with a juvenile co-offender that the children's court imposed a lesser sentence is not irrelevant however once relevance is accepted, it is still up to the judge to decide the effect the comparison should produce in a given case. **Diamond** CCA, unreported 18 February 1993, applies,

“…. There is, … a stage at which the inadequacy of the sentence imposed upon the co-offender is so grave that the sense of grievance engendered can no longer be regarded as a legitimate one”.

In **Tran** the sentence was not disturbed. However similar principles were applied in **Takau** [2003] NSWCCA 181 to reduce the sentence.

**Minister for Community Services & Another v Children's Court of NSW & 3 Others** [2005] NSWSC 154: A bond condition that a child reside where directed by DOCS was not beyond power but the condition did not in fact bind the Department.
Conclusion

The protection of the community does not involve simply the infliction of punishment appropriate to the objective gravity of the crime.

The community has a real interest in rehabilitation of offenders. That interest, to no small extent, relates to society’s own protection. The community interest in respect to its own protection is greater where the offender is young and the chances of rehabilitation greatest. No one benefits if a young person is crushed by the severity of the sentence. Too often “justice” is equated solely with just a criminal getting what the Daily Telegraph would say were their “just deserts”. As the Chief Justice has said “we live in a society which values both justice and mercy”.14 If we sacrifice the positive human attribute of mercy for wholly negative responses of retribution and revenge it diminishes us all