SENTENCING CHILDREN - everyday practice and recent updates

It is inevitably difficult to cater for an audience of ALS solicitors where the levels of experience range from several months on the job to years of service and suffering. This paper aims to provide something for everyone. For solicitors who have had limited experience with juveniles, we have outlined the broad jurisdiction of the Children's Court, the range of sentencing options available and the different emphasis on the principles applicable on sentence.

The paper also explores recent decisions relating to the disqualification of children for driving matters, dealing with children "according to law" and the applicability of guideline judgements to young offenders.

INDIGENOUS CHILDREN IN THE JUVENILE JUSTICE SYSTEM

The fact that indigenous children are grossly over-represented in NSW's juvenile justice system, and particularly in detention centres, is not news to ALS solicitors. However, it is worth pointing out some recent figures which highlight the extent of the problem.

As of 2 June 2003, there were 291 detainees in juvenile detention centres in NSW. Total numbers in detention have been relatively stable in the past year or two, after a gradual decline over several years. Sadly, Aboriginal and Torres Strait Islander over-representation has not improved, and if anything has worsened.

As at 2 June 2003, ATSI young people represented:

- 43% of all detainees (this percentage has gradually increased over the past 3 years, from 36% in mid-2000)
- 52% of detainees on less serious offences (defined as drug, property damage, public order, justice and traffic offences)
- 57% of all under-15-year-olds admitted to detention centres
- 42% of all detainees on remand
- 44% of all detainees on control

JURISDICTION OF CHILDREN'S COURT

The two main Acts that govern sentencing are the *Children (Criminal Proceedings) Act* 1987 (CCPA) and the *Young Offenders Act* 1997 (YOA).

The Children's Court has a broad jurisdiction to enable it to hear the vast majority of criminal matters young people are charged with.

The only matters that are not heard in the Children's Court are:

- "serious children's indictable offences" (s.17, CCPA)

- indictable offences that are dealt with "according to law" after an election by the defendant or a decision by the magistrate to commit to a superior court (s.18, CCPA)
- certain driving offences (s.28, CCPA)

Serious Children's Indictable Offences

Serious children's indictable offences include murder, manslaughter, robbery armed with a dangerous weapon, robbery with wounding and a number of sexual offences. We have included a complete list in Appendix A.

Other indictable offences

The broad jurisdiction of the Children's Court enables it to deal with all other indictable offences. Section 31(1) of the CCPA states that there is a presumption that indictable offences (other than serious children's indictable offences) will be dealt with summarily.

For certain indictable offences (all except Table 2 offences), the defendant may elect to "take his or her trial according to law" (CCPA s31(2)). However, unlike the adult jurisdiction, there is no provision for the prosecution to elect. Instead, the magistrate, after the close of the prosecution case, may commit the child for trial or sentence if of the opinion that the charge may not properly be disposed of in a summary manner (CCPA s31(3)).

A child will be dealt with "according to law" in a superior court, only in exceptional circumstances, and ordinarily the defence will argue strenuously to keep the matter in the Children's Court. The factors to be taken into account and the relevant case law governing the decision to deal with matters at law are discussed later in this paper, as are the sentencing options in superior courts.

Traffic offences

The Children's Court will not have jurisdiction over traffic matters, unless:

- At the time of the alleged offence the young person was not old enough to obtain a licence or permit to drive the relevant vehicle (usually, it means the child is under 16).
- The traffic offence arose out of the same circumstances as a criminal charge which is to be dealt with by the Children's Court.

In other situations, Local Courts have sole jurisdiction over traffic matters, although the magistrate may exercise the sentencing options in the CCPA and is prohibited from imposing a sentence of imprisonment on a child (*Justices Act* 1902 s84A, to be replicated as *Criminal Procedure Act* 1986 s210 as of 7 July 2003).

Licence Disqualification for juveniles

Section 25(1) of the Road ***Transport (General) Act 1999*** makes it clear that young people convicted of driving offences can be disqualified from holding a licence. However, if there is a finding of guilt without a conviction (as is often the case in the Children's Court) there has been some uncertainty as to whether the court has the power to disqualify.

In the recent case of ***HA & SB v Director of Public Prosecutions*** [2003] NSWSC 347, handed down on 28 April 2003, Dunford J dismissed an appeal against orders disqualifying two juveniles from holding a licence, even though they had not been formally convicted of driving charges they were found to be guilty of. Since both young people were under the age of 16 when they were sentenced by the Children's Court, the Magistrate could not proceed to a conviction, by reason of s.14 of the CCPA (see later discussion).

In the Supreme Court appeal, it had been argued by counsel for the appellants that if the court could not convict the young offenders, there could not be a consequential disqualification. The argument was not accepted by Dunford J, who held that a finding or plea of guilt, followed by the imposition of a penalty, is sufficient. This would mean that disqualification may accompany the imposition of any Children's Court sentencing option other than a s33(1)(a) dismissal.

At this stage, there does not appear to be any talk of an appeal from this decision of a single Justice of the Supreme Court.

PRINCIPLES OF SENTENCING

Traditionally, the primary focus in the Children's Court has been on rehabilitation rather than punishment or general deterrence.

Section 6 of the CCPA sets out the principles which courts are required to have regard to when sentencing children. They are as follows:

(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard and a right to participate in the processes that lead to decisions that affect them;
(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance;
(c) that it is desirable, wherever possible, to allow education or employment of a child to proceed without interruption;
(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home;
(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.

It is often appropriate to specifically refer to these principles on sentencing. Even specialist Children's Court magistrates sometimes need to be reminded where the emphasis should lie, but it is particularly important when dealing with Magistrates

and Judges who are unfamiliar with sentencing children. It has been held that the even in cases where the child is dealt with "at law", proper consideration **must** still be given to the principles in section 6 (***R v SDM*** [2001] NSW CCA 158, at par 18).

Lawyers should also be aware that the **United Nations Convention on the Rights of the Child**, to which Australia is a signatory, sets out important principles that should be taken into account by decision makers. The relevant articles are:

- **Article 37(b)**: No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

- **Article 40.1**: Young offenders must be treated in a manner "consistent with the promotion of the child's dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

- **Article 40.4**. A variety of dispositions, such as care, guidance and supervision orders; counselling, probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Hopefully, you will have some idea about whether stressing Australia's international obligations to the child will impress or distress the particular judicial officer you are dealing with, but the point must be made that both section 6 and the Convention articles show that Parliament intends rehabilitation to the primary focus.

Case Law stressing these principles

Although there is a wealth of case law on sentencing children, practitioners tend to focus on the subjective features of the defendant's life and don't often refer to precedent, unless facing a District Court.

Yet in many cases where a judicial officer needs convincing of the appropriateness of a particular penalty, reference to a recent case or two can make them go your way.

There is certainly value in drawing attention to decisions where Judges have stressed that rehabilitation is particularly important, or even the primary focus, when dealing with children. In ***R v GDP*** (1991) 53A Crim R 112, the Court of Criminal Appeal held that the sentencing principles applicable to children are different to those applied to adults. Although it was recognised that general deterrence could not be completely ignored, Mathews J (with whom Gleeson CJ and Samuels JA concurred) reiterated the importance of rehabilitation.

> "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".

A similar approach has been taken in cases such as ***XYJ*** (CCA, unreported, 15 June 1992) and ***R V DAR*** (CCA, unreported, 2 October 1997).

"Grave adult behaviour"

There is an exception to this general rule where a young offender can be said to have conducted themselves "as an adult" (***AEM Senior and Others*** [2002] NSWCCA 58 at 97), or to have "engaged in grave adult behaviour" (***MHH v R*** [2001] NSWCCA 161). Thus, for example, in the case of ***Pham & Ly*** (1991) which involved a premeditated home invasion at a time when the occupants were known to be inside, the need to protect the community was given greater emphasis than the goal of rehabilitation.

In ***R v Huynh and Phung*** [2001] NSWSC 357, 3.5.01, Wood CJ at CL said: "youth cannot be used as a cloak of convenience to enable an offender to shelter from accepting proper responsibility for his or her criminal behaviour". However, he went on to cite the cases of ***Kama*** (2000) NSWCCA 23 and ***Hearne*** (2001) NSWCCA 37, pointing out that emotional immaturity is properly to be taken into account in mitigation of sentence.

Further in this paper there is discussion of the case of ***SDM*** [2001] NSWCCA 158, where the Court of Criminal Appeal determined that the guideline in ***R v Henry*** (1999) 46 NSWLR 346 is applicable to children. The Applicant in ***SDM*** was almost 17 years old when he participated in a robbery with four others, one armed with a shotgun and another with a golf club. The court acknowledged the special sentencing principles applicable to children, but highlighted examples where little allowance should be made for the defendant's age:

- Where the offender conducted himself or herself like an adult (citing ***R v Tran*** (1999) NSW CCA 109);
- Where there is a pattern of serious offending (citing ***Biggs***, NSW CCA 5 March 1997);
- Or where the offender is close to legal adulthood and properly regarded to be mature (citing ***Nguyen***, NSW CCA, 14 April 1994)

NSW Public Defender, Andrew Haesler, has stressed that practitioners confronted with a serious offence need to ask the question "Can the behaviour that is the subject of the charge really be characterised as "grave adult behaviour" or even adult?" (Haesler, A, "Sentencing and Children", Conference Paper, *Children and the Law; Practical Issues for Lawyers*, 1 Nov. 2002). There is a need to distinguish the consequences, which may be very serious, from the behaviour, which may still be childlike.

Thus, for example, the offence of break, enter and steal is commonly committed by children. Judicial commission statistics reveal that over 2546 such offences were before the NSW Children's Courts for sentence between July 1997 and June 2001 (see Appendix B). Where there is an **unplanned** escalation of violence during a break

and enter, these circumstances can and should be distinguished from the precedent of ***Pham and Ly***, where the offence was planned and the risk of running into victims was appreciated by the defendant.

Lack of consistency in courts' approach to sentencing children

It is evident that the higher courts are not consistent in their approach to sentencing children for serious crimes. Despite the emphasis on protection of the community in cases like ***SDM***, ***Tran*** and ***Nguyen***, the CCA has recognised that where immaturity is obviously a significant factor in the offence, the criminality is much less than where there is evidence of premeditation. In those circumstances, the weight given to the element of youth should **NOT** be affected by the seriousness of the offence (***Hearne*** (2001) 124 A Crim R 451 at para 24).

Hearne is also authority for the proposition that the younger the offender, the greater the weight that should be given to youth. However, sometimes even a very young child will not attract a great degree of leniency for youth. In ***R v AO*** [2003] NSWCCA 43, 4 March 2003, a young Somali refugee pleaded guilty to nine counts of armed robbery (with several other counts on a Form 1) in the District Court. He was sentenced to an effective term of seven years' imprisonment with a four-year non-parole period, on the basis that he was 16 at the time of the offence. On appeal, fresh evidence was tendered suggesting that the child was in fact two years younger. It was submitted on his behalf that the difference between 14 and 16 years of age was significant and called for a re-assessment of the sentence. However, the CCA declined to interfere. [For an alternative view, see the dissenting judgment of Shaw J.]

One very useful precedent for the defence, and a clear example of the inconsistency of the CCA's approach to sentencing principles for children, is ***R v TVC*** [2002] NSW CCA 325), a case involving a 15 year old offender who committed a robbery with a knife and a loaded gun, in circumstances where there was evidence of some degree of planning. Despite the obvious gravity of the offence, the Court relied heavily on authorities that emphasise rehabilitation and youth, over punishment and deterrence. The following quote, drawn from an earlier 1999 decision, encapsulates the CCA's approach (at para 13):

> "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 … 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".

Parity

Parity with co-offenders is a matter to be taken into account in sentencing young offenders. Where some co-offenders are juveniles and some are adults, the issue of parity is complicated by the differences in the sentencing regimes applying to adults and children.

It has been held that it is proper for the court to recognise that sentencing of adults and juveniles takes place in very different regimes (see ***R v Ho*** (unreported CCA 28.2.97) and ***R v Williams*** (unreported CCA 27.8.96)).

However, more recent authorities suggest that an adult who receives a significantly heavier sentence than a juvenile co-accused, may have a justifiable sense of grievance arising from the difference in the two regimes (see ***R v Govinden*** (1999) NSWCCA 118, ***R v Colgan*** (1999) NSWCCA 292, ***R v Boney*** [2001] NSWCCA 432 and ***R v Ellis & Carr*** [2002] NSWCCA 211, 17 May 2002).

And finally …

Clearly most Magistrates and Judges will strive for a balance between the protection of the community and the need to invest in rehabilitation for the young offender. A practitioner is often asked to comment on how those competing objectives can be reconciled. In that case, it is useful to refer to this eminently sensible passage in the judgment of Wood CJ at CL in ***Blackman and Walters [2001] NSW CCA 121*** at para 44 (citing King CJ in the 1979 case of ***Yardley v Betts***):

> "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 had 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 *(sic)* 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 …**"(our emphasis)

SENTENCING OPTIONS IN THE CHILDREN'S COURT

There are many papers that detail the various sentencing options open to the Children's Court, but we outline them here for the sake of completeness so that this paper is as effective a reference tool as it can be.

[For further details about Children's Court sentencing options and procedures, see Redfern Legal Centre Publishing, *Lawyers' Practice Manual* (looseleaf service), Chapter 6.1, *Criminal Matters Involving Children*.]

Section 33(1) of the CCPA sets out that, upon a finding of guilt, the Children's Court may:

(a) dismiss the charge, or dismiss with a caution;
(b) release on a bond not exceeding two years;
(c) impose a fine not exceeding the maximum prescribed for the offence, or $1000, whichever is less;
(c1) release on a condition that the young person complies with a youth justice conference outcome plan determined at a conference held under the YOA;

(c2) adjourn the proceedings for up to 12 months from the finding of guilt to assess the child's rehabilitation prospects or progress;
(d) impose a bond and a fine;
(e) release on probation not exceeding two years;
(f) impose a community service order up to 250 hours (up to 100 if under 16);
(g) impose a control order in a detention centre for a period not exceeding two years.

Section 33(1B) holds that a custodial sentence may be **suspended** upon the offender entering into a good behaviour bond.

Options under the Young Offenders Act

Cautions - Providing the offence is a matter that may be dealt with under the *Young Offenders Act* (s.8, YOA), then the Magistrate may caution the child under that Act.

Youth Justice Conference (YJC) – Section 40 creates 3 different pathways to a YJC:

1. Where the child *admits* an offence
2. Where the child pleads guilty to an offence
3. After a finding of guilt at a hearing

Where there has been a finding of guilt, the court may make an order under s.33(1)(c1) of the CCPA releasing the child on condition that they comply with the outcome plan.

Where there is a choice between entering a plea of guilty and merely *admitting* the offence, it is preferable for the child to make an admission. If a plea of guilty is entered, it is possible that a conviction may be recorded. A finding of guilt without a conviction is treated as a conviction for certain purposes, including liability for restitution under the *Victims Support and Rehabilitation Act* 1997. If the child is referred to a conference after an *admission*, these problems do not arise.

Practitioners regularly dealing with children should take the opportunity to attend a YJC if it arises. Sitting in on the procedure provides a real insight into how useful, and how confronting they can be for the child. It also enables you to submit to a Magistrate that views the YJC as a 'soft option' that you have seen the procedure first hand and have explained to the child that they have to accept full responsibility, often in front of the victim. This requires significant maturity and a display of genuine remorse and is often much more difficult than abiding by the conditions of a bond or probation order.

Options under the Children (Protection and Parental Responsibility) Act 1997

Part 2 of this Act (which is rarely used) allows the Children's Court, instead of dealing with a child under the CCPA, to release the child on condition that the child give an undertaking to submit to parental or other supervision, to reside with a parent or other person; to participate in a specified program or to attend a specified activity centre, or to do such other thing as may be specified by the Court. Part 2 also provides for undertakings to be made by parents.

Some facts about control orders

For the most part control orders operate like terms of imprisonment, but there are some significant differences:

- As in a Local Court, the court may impose sentences that are cumulative up to three years (s.33A, CCPA)
- As in the Local Court, a control order of 6 months or less is to be served in full. A longer term will be split into a non-parole and parole period.
- Unlike adult sentences of imprisonment, there is a provision for early release before the expiry of either the fixed term or the non-parole period (s.24 (1)(c), *Children (Detention Centres) Act* 1987).
- A child serving a control order may be eligible for leave for purposes such as employment, education or family commitments (s.24(1)(a), *Children (Detention Centres) Act* 1987).
- A court may not impose a control order unless satisfied that it would be wholly inappropriate to give a less severe penalty (s.33(2)).
- The court must record reasons for imposing a control order rather than a less severe penalty.
- A control order may not be made unless a background report is obtained from Juvenile Justice (s.25).
- Breach of parole relating to a control order is dealt with by the Children's Court.

DEALING WITH CHILDREN IN SUPERIOR COURTS

As mentioned earlier, "serious children's indictable offences" cannot be dealt with to finality in the Children's Court.

Other indictable offences may be committed to a superior court at the election of the defendant (this election is not available for Table 2 offences) or at the discretion of the magistrate.

The magistrate may commit the child for trial or sentence at the close of the prosecution case, if of the opinion that the evidence is capable of satisfying a jury beyond reasonable doubt that the child has committed an indictable offence, and that the charge may not properly be disposed of in a summary manner (CCPA s31(3)).

The factors relevant to the magistrate's discretion have been considered by the CCA in cases including ***R v WKR*** (1993) 32 NSWLR 447, and ***R v DAR*** (unreported, CCA, 2.10.97). A recent amendment to the CCPA (proclaimed on 24 February 2003) effectively codified the case law, in the form of s18(1A), which provides:

> "(1A) In determining whether a person is to be dealt with according to law or in accordance with Division 4 of Part 3, a court must have regard to the following matters:
>
> (a) the seriousness of the indictable offence concerned,
>
> (b) the nature of the indictable offence concerned,

(c) the age and maturity of the person at the time of the offence and at the time of sentencing,
(d) the seriousness, nature and number of any prior offences committed by the person,
(e) such other matters as the court considers relevant."

In a matter heard in 2002 at Bidura Children's Court, the prosecution argued unsuccessfully that a child charged with robbery in company should be dealt with at law. The facts of that case involved a 16 year old Aboriginal boy who lost his temper and repeatedly punched another teenager on a bus when the victim refused to hand over his laptop computer. The defendant did not have a lengthy record, but had several offences related to a problem with anger management and alcohol abuse. In this situation, it was possible for the defence to argue that, although the consequences were serious for the victim, this was not "grave adult behaviour", but rather related to the defendant's immaturity and his inability to deal with intoxication and stress.

SENTENCING OPTIONS IN SUPERIOR COURTS

Serious children's indictable offences may only be dealt with according to law – ie using adult sentencing options. There are some limits on the use of adult sentencing options, which are discussed below.

For **other indictable offences**, the court may deal with the child:

- according to law (ie. using adult sentencing options) (CCPA s18(1));
- according to Division 4 Part 3 of the CCPA (ie. using children's sentencing options) (CCPA s18(1)); or
- if the child is still under 21 years of age, by remitting the child to the Children's Court for sentence (CCPA s20).

The factors listed in CCPA s18(1A), discussed above, are relevant to the judge's decision as to which sentencing regime is appropriate.

For a recent case where the CCA decided it was appropriate to deal with a child according to law, see ***R v Bendt*** [2003] NSWCCA 78 (14 March 2003). This was a Crown appeal against an 18-month suspended control order imposed by a District Court judge for two counts of robbery in company. The CCA decided that it was appropriate to deal with the matter according to law, and imposed a term of imprisonment of 18 months with a 12-month non-parole period. Meagher JA (with whom Barr and Dowd JJ agreed) relied on the "horrendous" circumstances of the offences (the respondent was in company with seven other males, some disguised, some armed with machetes), the fact that the respondent was aged 17 years and 9 months at the time of the offence, and he was intelligent and "had all his wits about him".

Sentencing children according to law

Sentencing a child "according to law" means the full range of adult penalties is available. This is subject to a few limits including:

- Maximum hours of community service are restricted by the *Children (Community Service Orders) Act* 1987, and the Children's Court is the supervising court;

- Sentences of imprisonment may be served wholly or partly in a juvenile detention centre (see discussion below);

- Mandatory life sentences do not apply to juvenile offenders (*Crimes (Sentencing Procedure) Act* 1999 s61).

Sentences of imprisonment

Where the court imposes a sentence of imprisonment on a person under 21, it may order that the whole or part of the sentence be served in a juvenile detention centre (CCPA s19).

This must be read in the light of amendments to s19 (which commenced in January 2002) to the effect that:

- A person is not eligible to serve a sentence of imprisonment in a detention centre after the person has turned 21, unless the non-parole of fixed term will end within 6 months after the person's 21st birthday (CCPA s19(2)).

- A person sentenced to imprisonment for a serious children's indictable offence is not eligible to serve a sentence of imprisonment in a detention centre after the person has turned 18, unless the non-parole period or fixed term will end within 6 months after the person's 18th birthday, or the sentencing court is satisfied that there are special circumstances justifying detention of the person in a detention centre after that age (CCPA s19(3)). 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 in custody, and any other matter that the court thinks fit (CCPA s19(4)).

Guideline judgments

As mentioned earlier in this paper, the Court of Criminal Appeal in ***SDM*** [2001] NSWCCA 158, held that the guideline in ***R v Henry*** (1999) 46 NSWLR 346 is applicable to children.

Wood CJ at CL held (at para 14):

> "There is nothing in *Henry* which would provide any direct, ie express support for the view that it was not intended to apply to children… Indeed, at para 162, Spigelman CJ included the expression "young offenders" among the characteristics of the category of cases which was "sufficiently common for purposes of determining a guideline"; and at para 170, his Honour expressly

> noted that, among the factors which might mitigate a sentence below the indicative range was that of "youth".”

Although in agreement with Wood J at CL on the ultimate outcome of the appeal, Simpson J disagreed in relation to the applicability of *Henry* to children. Her Honour said (at para 40):

> “As I interpret the judgment, the phrase "young offender" was not intended to include "children" so defined. Support for that view is to be derived from the fact that of the seven offenders whose cases were considered in conjunction with the guideline, only one was a "child" within that definition. All others were young adults. It was offenders in this latter category to whom the consideration of the court was principally directed. The reference to "young offender" has nothing to do with "children" as it appears in the Act. That does not mean that the guideline is of no relevance to offenders under the age of eighteen years. Like all guideline judgments, *Henry* is to be applied flexibly.”

Standard non-parole periods

Practitioners will be aware of recent amendments to the *Crimes (Sentencing Procedure) Act* 1999 (CSPA), which introduced “standard non-parole periods” for a range of offences set out in the Table to Part 4 Division 1A.

Standard non-parole periods do not apply to matters dealt with summarily (CSPA s54D). However, in superior courts they apply to children in the same way as they apply to adults. For an offence included in the Table, s54B requires the court to impose the standard non-parole period unless there are reasons to set a shorter or longer period, having reference only to the list of mitigating and aggravating factors listed in s21A.

The court must give reasons for any departure from the standard non-parole period (s54B(4)) or for imposing a non-custodial sentence (s54C(1)).

Section 21A lists a series of mitigating and aggravating factors. There is no express recognition of youth as a mitigating factor. However, mitigating factors applicable to young offenders may include:

- “the offender has good prospects of rehabilitation, whether by reason of the offender’s age or otherwise” (S21A(3)(h))

- “the offender was not fully aware of the consequences of his or her actions because of the offender’s age or any disability” (S21A(3)(j))

As a consequence of the introduction of standard non-parole periods, CSPA s44 (which provides for the ratio between the non-parole period and the head sentence) has been amended. The court must first set the non-parole period and then the head sentence. The balance of the term of the sentence must not exceed one-third of the non-parole period, unless there are special circumstances for it being more.

This could lead to the absurd situation where a young person (who has "special circumstances" in abundance) receives a longer total sentence as a result. We would argue that this is not what Parliament intended, and that a longer period of parole supervision warrants a corresponding reduction in the non-parole period. To the best of our knowledge, the interpretation of the amended s44 has yet to be decided by the Supreme Court or Court of Criminal Appeal.

Standard non-parole periods, and the amended s44, apply to offences committed on or after 1 February 2003.

RECORDING CONVICTIONS

Under s.14(1) of the CCPA, The Children's Court has no power to proceed to conviction against a child under 16 but has a discretion to do so for a child 16 or over. The legislation does not limit the use of this discretion, so that it is possible even for a court to impose a control order, but not record a conviction against a child.

Note that the Supreme or District Court has the discretion to record a conviction against a child of any age.

Obviously, the recording of a conviction is an indelible mark that may have a significant impact on the opportunities available to the young person in the future. It is therefore necessary to argue forcefully that the discretion should be exercised in the child's favour.

Most juvenile convictions become spent after a 3-year crime-free period (*Criminal Records Act* 1991, ss 8, 10). A conviction will not become spent if the offender received a sentence of imprisonment (not a control order) longer than 6 months, or the conviction was for a sex offence (s7).

When applying for certain types of employment (eg judicial office, working with children, firefighting) convictions that would otherwise be spent may still be taken into account (s15).

APPEALS

A practitioner regularly appearing only at Bidura Children's Court ends up with a skewed view that most Children's Court Magistrates are reasonable and will almost always take the option favouring rehabilitation over punishment, imposing control orders only as a last resort and for relatively short periods of time. We recognise, however, that these views are a long, long way away from the approach adopted by some members of the Magistracy in different areas of Sydney and broader New South Wales.

Although there are obviously exceptions in particularly serious matters, as a general rule it is appropriate to at least consider an appeal for any young person getting a control order for the first time. This is particularly relevant where the child has little or no record. Even for cases of robbery armed with an offensive weapon or robbery in

company, it should be rare for a child with limited antecedents to be given a control order.

Practitioners must be aware of the need to encourage children to lodge an appeal in any circumstances where the penalty imposed is too harsh, not only in cases where they have received a control order. At a recent conference, one experienced Legal Aid Commission lawyer drew attention to successful appeals she had lodged after Children's Court Magistrates refused to consider an outcome under the YOA. On several occasions where the Children's Court imposed a good behaviour bond under s.33(1)(b) of the CCPA, the District Court allowed the appeal, and imposed an alternative penalty under the Young Offenders Act (See D Maher, "Appeals from the Children's Court", Conference Paper, *Children and the Law; Practical Issues for Lawyers*, 1 Nov. 2002). The young person will probably need encouragement to lodge the appeal, but practitioners should recognise that children may end up in a detention centre a lot earlier if all of the non-custodial options are not first exhausted.

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APPENDIX A

Children's Court Matters
Serious Children's Indictable Offences

<u>These matters are prosecuted by the DPP</u>

Sect 19A	Murder
Sect 22A	Infanticide
Sect 24	Manslaughter
Sect 26	Conspiring to commit murder
Sect 27	Acts done to persons with intent to murder
Sect 28	Acts done to property with intent to murder
Sect 29	Certain other attempts to murder (eg: poison, drown, strangle, shoot)
Sect 30	Attempt to murder by other means
Sect 32	Impeding endeavours to escape shipwreck
Sect 33	Wounding etc, intent to do bodily harm or resist arrest
Sect 36	Causing a grievous bodily disease
Sect 37	Attempt to choke (eg: garrotting)
Sect 38	Using chloroform etc. to commit an offence
Sect 46	Causing bodily injury by gunpowder etc
Sect 47	Using etc. explosive substance or corrosive fluid etc
Sect 61J	Aggravated sexual assault (including attempt) except when the aggravation only arises because victim is under 16 years of age
Sect 61K	Assault with intent to have sexual intercourse, or Sect. 61B prior to the introduction of Sect. 61K
Sect 66A	Sexual Intercourse with child under 10 years
Sect 66B	Attempt or assault with intent to have sexual intercourse with child under 10 years
Sect 66C	Sexual Intercourse with child between 10 and 16
Sect 78H	Homosexual intercourse of male under 10 years
Sect 78I	Attempt to assault with intent homosexual intercourse with male under 10 years
Sect 80A	Sexual assault by forced self-manipulation, victim under 10 years
Sect 93IF	Aggravated circumstances, death or grievous bodily harm
Sect 96	Robbery with wounding
Sect 97(2)	Aggravated robbery
Sect 98	Robbery with arms and or in company with wounding or GBH
Sect 106(3)	Break and enter place of Divine worship (specially aggravated)
Sect 109(3)	Break out of dwelling house after committing or entering with intent to commit indictable offence (specially aggravated)
Sect 110	Breaking, entering and assault with intent to murder
Sect 112(3)	Breaking etc into any house etc and committing serious indictable offence (specially aggravated)
Sect 198	Maliciously damage property with intention of endangering life
Sect 204	Destruction of, or damage to, aircraft or vessel with intent or reckless indifference
Sect 208(3)	Threatening to destroy etc. to an aircraft, vessel or vehicle
Sect 211	Acts to railways with intent to cause death, bodily injury or endanger safety

Sect 349 Accessory after fact to murder

Drug Misuse and Trafficking Act
Offences involving "large commercial quantities" except cannabis or leaf

Firearms Act 1996
Sect 50A Unauthorised manufacture of firearms
Sect 51(1A) Selling firearms without inspection of purchaser's licence or permit
Sect 51(2A) Selling firearms other than through licensed firearms dealer
Sect 51B Selling firearms on an ongoing basis