The nexus between sentencing and rehabilitation in the Children's Court of NSW

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The nexus between sentencing and rehabilitation in the Children's Court of NSW

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Foreword

Although the Children's Court stands at the very foot of the hierarchy of criminal courts, its contribution to the administration of justice in New South Wales is of vital significance. Now, with a 100 years of history and experience behind it, the Children's Court—a specialist court—provides formal recognition that, in the main, young offenders (children who commit offences when they are aged from 10 to under 18 years) should not be treated in the same way as their adult counterparts. Generally, they should be helped rather than punished, rehabilitated rather than deterred.

The need for such a court grew out of late nineteenth century thinking that, having regard to the age (immaturity) and often poor health and socio-economic status of young offenders, care and protection, rehabilitation and reform, rather than the application of deterrent and retributive sanctions, provided the best prospects of saving young offenders from a life of crime.

Under the sentencing powers of the Children's Court, magistrates can either impose a sanction that facilitates the young person's rehabilitation, or pursue a more punitive course. The challenge for the magistrate is to treat young people who have committed offences in a way that is both humane and in their best interests, while paying due regard to the rule of law, the principles of natural justice and the need to protect the community from crime. More so than for adults, the emphasis or focus in sentencing the young is on the individual offender rather than the individual offence, on the offender's needs rather than on his or her deeds. Yet this emphasis is not always appropriate, and the opposing purposes of punishment that inform sentencing decisions in this and other courts continue to jostle one another for paramountcy.

A century of experience has taught us that there is no easy answer to the juvenile crime problem and that excessive interventions into the lives of the young can often be counter-productive. In 1994, the NSW Bureau of Crime Statistics and Research published a study showing what others had found previously; namely, that the majority of offenders who appear before the Children's Court for the first time do

not re-offend.[1] Two years later, a large recidivism study by the Department of Juvenile Justice also showed that seven out of every ten juvenile offenders did not reappear before the Court on a second proven offence.[2] An even more recent Queensland study tracked, over a seven-year period, a cohort of 1500 young offenders who had received supervised orders and found that the vast majority of these people progressed to the adult criminal justice system.[3] It further found that half of them had been sentenced subsequently to at least one term of imprisonment.

With such outcomes, it is little wonder that in recent years there has been increased emphasis on the principles of restorative justice and on alternative or diversionary options for handling young offenders, such as the use of warnings, cautions, youth justice conferences and the introduction of the Youth Drug Court. At the same time we have experienced a steady decline in the use of juvenile detention, the numbers decreasing from 370 on 30 June 1994 to 222 on June 2003.[4] Improvements in understanding risk factors, and what works and what does not work, are contributing to new initiatives in the administration of Juvenile Justice.

Ivan Potas

Director, Research and Sentencing
May 2005

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1. Coumarelos, C, *Juvenile Offending: Predicting Persistence and Determining the Cost-Effectiveness of interventions*, New South Wales Bureau of Crime Statistics and Research, Sydney, 1994.
2. Cain, M, *Recidivism of Juvenile Offenders in New South Wales*, Department of Juvenile Justice Sydney, 1996.
3. Lynch, Buckman and Krenske, "Youth Justice: Criminal Trajectories" in *Trends and Issues*, No 265 Australian Institute of Criminology, Canberra, September, 2003. A further study, tracking some 5500 young offenders over a period of eight years after contact with the criminal justice system, is soon to be published by the NSW Bureau of Crime Statistics and Research. This study is likely to provide insights into how young offenders are faring under recent reforms in the criminal justice system.
4. Source: Australian Institute of Criminology, *Technical and Background Paper 10, Statistics on juvenile detention in Australia: 1981-2003* at Table 5(e).

Introduction

> *If we are to lower the crime rate in New South Wales, surely it must be addressed at the juvenile level.*[5]

> *The protection of the community is 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.*[6]

Preamble

The Children's Court of New South Wales (the Court) was established nearly a hundred years ago by the *Neglected Children and Juvenile Offenders Act* 1905. In the century of its existence, its jurisdiction over young offenders has evolved considerably. In more recent times, this evolution has been guided in part by shifts in 'law and order' initiatives juxtaposed against a growing emphasis on the rights of young people. This has produced a range of reforms that have attempted, with varying success, to find the appropriate balance between meeting young offenders' needs (as youth offences have been found to result from, in part, neglect and/or social disadvantage) and punishing their 'deeds' (that is, offences) through sentencing. The level of importance given to the goal of rehabilitation at sentence has been an intrinsic part of finding this balance. This monograph explores this aspect of sentencing.

'Rehabilitation' is a problematic term because of its multiple meanings, the multiple contexts in which it is used—social, medical, legal, etc—and, most importantly, the lack of clarity as to the intended meaning each time the word is used. In the forensic context, rehabilitation is the declared intent by the NSW Parliament. The NSW Children's Court executes this intent and 'reforms' individuals who appear before the Court.

5 The Hon Mr Armstrong, Deputy Leader of the National Party, Member for Lachlan, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 6 May 1987, p 11352.

6 King, CJ in *Yardley v Betts* (1979) 22 SASR 108, cited with approval by Wood, CJ in *R v Blackman and Walters* [2001] NSWCCA 121.

Section 6 of the *Children (Criminal Proceedings) Act* 1987 does not make express reference to rehabilitation but does imply its importance in sentencing. The common law declares that rehabilitation is paramount, certainly for youth offences on the lower end of the offence spectrum.[7] Rehabilitation, however, does not always receive primacy in sentencing, nor should it overshadow the other purposes of sentencing.

The purpose of this monograph is to highlight the means available to the Court to achieve the goal of rehabilitation at sentence, which throughout this document we will refer to as the nexus between rehabilitation and sentencing. It is an exposition of the way in which rehabilitation could be facilitated by the sentence and sentencing process.

The criminal jurisdiction of the Children's Court

The Children's Court has jurisdiction over both care matters and youth offending. While a link has been found between care and youth offending (such that wards of the state are over-represented among offender groups), this monograph will only consider youth offending.

The *Children (Criminal Proceedings) Act* is the governing sentencing legislation of the Children's Court and it stipulates the age parameters of the Court's jurisdiction over young offenders. Section 3 defines a child to be a person under the age of 18 years.[8] Section 5 of the *Children (Criminal Proceedings) Act* provides that there is a conclusive presumption that no child under the age of 10 years could be guilty of an offence. The Children's Court, therefore, has criminal jurisdiction over people between the ages of 10 and 18 years, who shall henceforth be referred to in this monograph as 'young people', in keeping with the latest legislative terminology.

Section 28 of the *Children (Criminal Proceedings) Act* provides that the Children's Court has jurisdiction to hear and determine:

- proceedings in respect of any offence (whether indictable or otherwise) other than a serious children's indictable offence, as defined in s 3(1) of the Act, and
- committal proceedings with respect of any indictable offence (including a serious children's indictable offence), if the offence is alleged to have been committed by a person who was a child when the offence was committed, and who was under the age of 21 years when charged before the Children's Court with the offence. The exceptions are traffic offences.[9]

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7 *R v GDP* (1991) 53 A Crim R 112.

8 A person attains the age of 18 years at the beginning of the person's birthday for that age (s 37, *Interpretation Act* 1987).

9 Unless this traffic offence arose out of the same circumstances as another offence that is alleged to have been committed by the person and in respect of which the person is charged before the Children's Court; or unless, when the offence was allegedly committed, the person was not old enough to obtain a licence or permit under the *Road Transport (Driver Licensing) Act* 1998 or any other applicable Act authorising the person to drive the motor vehicle to which the offence relates.

Section 31 of the *Children (Criminal Proceedings) Act* states that a person charged before the Children's Court with an offence, whether indictable or otherwise, other than a serious children's indictable offence, shall be dealt with summarily. With indictable offences, other than offences that are punishable summarily without the consent of the accused, the young person can elect to be dealt with according to law in a higher court: s 31(2). Serious children's indictable offences—such as sexual assault, homicide and various forms of armed robbery—are heard before the District or Supreme Courts. Some types of offences—armed robbery, for example—can be dealt with either in the Children's Court or according to law in the District Court. This discretion is exercised by either the Children's Court magistrate: s 31(3) or a judge of the District Court: s 18. Appeals from decisions in the Children's Court are heard by the District Court or, more rarely, by the Supreme Court.[10]

Since 1997, the *Young Offenders Act* 1997 has permitted police to formally divert some young people from the Children's Court.[11] The aim of this pre-Court diversion[12] is to prevent less serious offenders from moving deeper into the juvenile justice system, thereby forestalling their contact with more serious young offenders and reducing the possibility of stigmatisation that comes from being dealt with by the Court.[13]

The existence of pre-Court diversion, coupled with the fact that the Court does not have jurisdiction over serious children's indictable offences, means that offences that do come before the Court are not found at the higher end of the offence severity scale. That is, they are deemed serious enough to appear before the Court,[14] but not so serious that the young person is considered to have 'behaved like an adult'[15] and tried according to law.

The purposes of sentencing

These offence parameters, together with the age parameters specified above, mean that the Children's Court has the imprimatur, and arguably the obligation, to be attuned to the stage of developmental maturity of the offender, as well as address his or her misdeed/s

10 *Crimes (Local Courts Appeal and Review) Act* 2001, s 11(1).

11 Police diversion from the Children's Court did occur before this time, but it was not formalised until the *Young Offenders Act*.

12 'Diversion' is a term that is used variably in the literature. In this monograph, it is used to mean diversion away from the Children's Court; that is, pre-Court diversion or police diversion, since it is the police who are responsible for overseeing the pre-Court diversion process.

13 C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia*, 2002, Oxford University Press, Melbourne.

14 As will be discussed in Chapter 2, pre-Court diversion occasionally fails or is bypassed for one reason or another, and by doing so, puts less serious offences and offenders before the Court.

15 Commentators, such as F Zimring ("Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity and Diminished Responsibility", in T Grisso and R G Schwartz, *Youth on Trial: A Developmental Perspective on Juvenile Justice*, 2000, University of Chicago Press, Chicago), have questioned the possibility that any young person, given their developmental maturity, could ever be considered to 'behave like an adult', especially the more serious offenders, who have been found to be less developmentally mature than less serious counterparts or even non-offenders; however, it is the accepted received wisdom of the courts in Australia that more serious offenders behave like adults and should be punished as such.

(through individualised justice). So while the Court is not in a position to abandon its primary sanctioning consideration — to address the young person's offending retribution should never be the primary purpose of Children's Court sanctioning. This ideal found resonance in the views of some of the legislators who formulated the justice-oriented *Children (Criminal Proceedings) Act* in 1987. For example, the Hon Dr Refshauge, Member for Marrickville and a member of the government at the time, said:

> "… the department is serious in ensuring that punishments are directed to changing the behaviour of children, not to retribution. Punishment is…aimed at the long-term benefit of the children …"[16]

This position on retribution can be traced back to the movement that led to the establishment of a separate court for children in 1905. This movement, in turn, was informed by the late nineteenth century ideal in England and the United States of America that young offenders require special and separate treatment, not reprisal. While parliament in the last 20 years has somewhat departed from the welfare approach to youth offending that underpinned early Children's Court sentencing legislation in favour of the justice model, this position on retribution remains unchanged.

The ultimate purpose of sentencing, however, is to reduce the incidence of crime; sentencing serves a utilitarian purpose (the Kantian view of punishment as punishment for its own sake has not achieved legitimacy within the recent history of the common law). Some, however, have questioned the ability of court-based sanctions more generally, not just in the Children's Court, to exercise the type of social control that crime reduction implies. Ashworth, for example, has suggested that "[s]entencing is no more than one aspect or stage in the criminal justice system"; in itself it cannot produce social change".[17] Nonetheless, he concedes that the power of sentencing cannot be overlooked: "it has considerable social significance in its own right, [and quoting Durkheim] 'the best punishment is that which puts the blame … in the most expressive but least costly [way]'".[18] This, Ashworth believes, is the inherent worth of sentencing. While providing opportunities for rehabilitation is one way by which the Court is able to produce social change, its capacity to facilitate the amount of rehabilitation necessary for social change is arguably limited. This is because rehabilitation could be seen to be intrinsically tied with the welfare of the offender, and the Court's armoury to deal with young offenders' welfare needs is limited by both time and resources, and other factors that we shall mention and discuss later.

Nonetheless, the common law and parliament have held fast to young offenders' welfare being at least partly catered for by sentencing. Even the 1987 legislative reforms, which departed significantly from earlier welfare-based Children's Court sentencing legislation, acknowledged that the welfare of the offender could not be ignored by the Court, nor should it be unduly harmed by the sentence. Statements made by a member of the opposition party during the 1987 legislative debates reflected the general attitude to young offenders at the time:

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16 *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 6 May 1987, p 11278.

17 A Ashworth, *Sentencing and Criminal Justice*, 2nd Edition, 1995, Butterworths, London, p 59.

18 ibid.

> "In the interpretation of legislation affecting children, it has always been held that the welfare of the child is paramount. That should be the bottom line in every decision made in the courts in respect of children. Anyone who has appeared in any of the jurisdictions that deal with children and has grappled with that situation will realize how difficult it often is, based on the material that is placed before the court, to determine what is in the best interests of the child … the basic legal tenet that the interests of the child are paramount and that every child who errs in childhood should be given a chance to rehabilitate and expunge any slur on his or her name and go on to lead a responsible life as a fully mature adult and responsible member of the community."[19]

Catering for the welfare needs of the offender, however, does not always translate into the successful facilitation of rehabilitation through sentencing. This is not only because the current justice-based sentencing legislation places limits on the Court's interference in the lives of young people. The successful facilitation of rehabilitation through sentencing is also dependent on a comprehensive understanding of the mental and emotional capacity of young people, the Court's jurisdiction as circumscribed by more than just sentencing legislation, and the prevailing attitudes towards law and order.

The Court's relationship with young offenders

Young people

It is redundant to suggest that age considerations lie at the heart of the Children's Court; it is this Court's key distinguishing feature. Nonetheless, while the Court's jurisdiction over people of a certain age who commit certain offences is rigidly defined by legislation, the concept of a young person is incompletely understood, not just by the law, but more generally. The term 'young people' refers to all of the following things and to none of them in particular: chronological age; developmental maturity; unformed moral values requiring guidance; a type of innocence that nonetheless accommodates a capacity to commit offences, but not always criminal culpability; etc.[20] Such factors are not mutually exclusive. They do, however, refer to the different aspects of young people that distinguish them from their adult counterparts. Which of these factors distinguishes them for differential treatment for sentencing purposes has not, however, been made clear. Nonetheless, the views of legislators (reported in part in Chapter 2) seem to reflect the literature of developmental psychology—that most young people have limited decision-making capabilities "to consider options, weigh consequences, and make choices"[21] as a result of the biological, psychological and social challenges created by the stage of life that

19 Hon Mr Rozzoli, Member of the Opposition for Hawkesbury, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 6 May 1987, p 11281.

20 F Zimring, "Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity and Diminished Responsibility", in T Grisso and R G Schwartz, *Youth on Trial: A Developmental Perspective on Juvenile Justice*, 2000, University of Chicago Press, Chicago.

21 A E Kazdin, "Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youth", in T Grisso and R G Schwartz, *Youth on Trial: A Developmental Perspective on Juvenile Justice*, 2000, University of Chicago Press, Chicago, p 33.

they are in.[22] Much has been written about this. Our aim here is not to provide a precis of the literature, merely to mention that there is sufficient material to suggest that the individuals represented by the nebulous terms 'youth' and 'young people' are recognised to require adult guidance. Legislators and law-makers seem to acknowledge that young offenders who appear before the Children's Court need to be offered guidance coupled with a period of grace, so to speak, during which time they can demonstrate that they are able to mend their ways and not graduate into a life of crime as an adult. These rehabilitative opportunities have the potential to operate as catalysts to maturity. They also hopefully enable the young person to side-step the negative effects of stigmatisation while serving out their sentence. This is the theory. Without a comprehensive understanding of youth, however, whatever the good intentions of legislators, their efforts to facilitate rehabilitation through sentencing might not achieve its intended goal.

Parens patriae and the Court's jurisdiction

The Court's jurisdiction could be said to be informed by the jurisdiction of *parens patriae*. In NSW, *parens patriae* formally describes the Supreme Court's jurisdiction over wards of the state. This jurisdiction was derived from the historical jurisdiction of the English Court of the Chancery.[23] Lord Eldon LC, in *Wellesley v Duke of Beaufort*, defined the English jurisdiction as the King's domain over young people who were not able to care for themselves. There was some obligation placed on lawmakers to ensure that some care was "thrown round them".[24] The jurisdiction was initially concerned with protecting the property of a minor in instances when the parents were dead or unable themselves to protect the property of their child. *Parens patriae* was later expanded to accommodate the protection and welfare of children more generally.

The spirit of *parens patriae* seems to have governed the formation of the Children's Court in NSW in 1905, in relation to both care and offending matters. The conditions of society—including widespread poverty and child neglect—meant the Court was placed in the position of assuming the role of parent, protector and ultimate punisher. This, in practice, meant that state intervention into young people's lives—both wards and offenders—was deemed necessary to save them from a lifestyle of vice and to turn them into model citizens, according to the morals of the time. The quote below, while taken from the Pennsylvania Supreme Court in 1938, nonetheless epitomises this thinking:

> "The object … is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influences of

22 Studies have shown that regions of the brain responsible for complex and integrative tasks, such as decision-making tasks, are underdeveloped in young people compared to their adult counterparts (e.g. N Gogtay, J N Giedd, L Lusk, K Hayashi, D Greenstein, A C Vaituzis, T F Nugent III, D Herman, L S Clasen, A W Toga, J L Rapoport and P M Thompson, "Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood" in *Proceedings of the National Academy of Sciences* (PNAS), 25 May 2004, Vol 101, no. 21).

23 *DOCS v Y* [1999] NSWSC 644.

24 ibid, at 85.

> improper associates. To this end, may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the parens patriae, or common guardian of the community? … The infant has been snatched from a course which must have ended in confirmed depravity; and not only is the restraint of her person lawful, but it would have been an act of cruelty to release her from it."[25]

In line with this thinking, the New South Wales Children's Court had, and continues to have, the implicit authority to impose sanctions that will lead to greater consequences than those imposed by parental or school discipline, or in the case of more serious offences, than any type of punishment that it is within the remit of the police to enforce (that is, warnings, cautions, referrals to youth justice conferencing, infringements notices and fines). The Court's purpose, therefore, is to encourage and elicit the kind of behaviour that would befit a model citizen in much the same way as a caring parent would over an errant child.

This conforms to recommendations made by international instruments (for example, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 and the Convention on the Rights of the Child 1989). Such instruments recognise the special status of young people that results from their lack of maturity, and the need for the Court to respect this at the same time as it holds young offenders accountable for their misdeeds.

For at least the last 20 years, the paternalism of the Court seems to have evolved from paternal intrusiveness to variations of benevolent paternalism. Nonetheless, its guardianship role remains. The pendulum swing in the criminal jurisdiction of the Court, away from a welfare-type model towards a justice-oriented one, has not diminished this overarching philosophy. What the pendulum swing has done, however, has affected the nexus between rehabilitation and sentencing.

The tension between welfare and justice

It is an arguable claim that each wave of sentencing reform in the Court has contained elements of both the welfare and justice models, although some support does exist for such a claim.[26] The balance between welfare (saving young offenders) and justice (punishing their deeds), however, has shifted with each new reform (this will be described in greater detail in Chapter 1). This has affected the nexus between rehabilitation and sentencing in the following way. Under the welfare-oriented sentencing legislation that survived in the Children's Court for several decades, rehabilitation meant that a significant proportion of young offenders were removed from their home environments for what was seen to be their own good. An outcry about this being an infringement of young people's rights shifted legislators' thinking away from welfare towards a justice approach to sentencing

25 This quote from the ex parte case of *Crouse* was reproduced in L Steinberg and RG Schwartz "Developmental Psychology Goes to Court", in T Grisso and R G Schwartz, *Youth on Trial: A Developmental Perspective on Juvenile Justice*, 2000, University of Chicago Press, Chicago, p 11.

26 C Cunneen and R White, op. cit., n 13.

in the 1980s. This, in turn, led to a shift in focus away from the offender towards the offence. Despite this, the justice model did not dispense with providing opportunities for rehabilitation through sentencing. Young offenders' developmental maturity, their need for adult guidance, the role of formal education and family in their lives, and the importance of their contact with other agencies within the juvenile justice system (namely welfare agencies) were all, and continue to be, acknowledged and respected. Has, however, the justice model contributed enough to the Court's armoury to sufficiently enable the Court to facilitate the rehabilitation of offenders through sentencing? This is explored in Chapter 2.

Sentencing legislation

The two most significant pieces of legislation for Children's Court sentencing are the *Children (Criminal Proceedings) Act* and the *Young Offenders Act*. The former was a result of the move away from the welfare approach to sentencing and is the more significant of the two. Section 6 of this Act contains the best legislative indication of the form that the nexus between rehabilitation and sentencing should take.

Children (Criminal Proceedings) Act

The *Children (Criminal Proceedings) Act* was introduced as part of a suite of legislative reforms in 1987 that also included:

- *Community Welfare Act* 1987
- *Children's Court Act* 1987
- *Children (Care and Protection) Act* 1987
- *Children (Community Service Orders) Act* 1987
- *Children (Detention Centres) Act* 1987.

This suite of legislation formally created separate Acts for neglect and for delinquency which, from 1905 to 1987, were contained in the one piece of legislation. Together with this separation of neglect and delinquency, 1987 saw the separation of the welfare and justice approaches in relation to young people. In 1987 it seemed that the decision was made to reserve the welfare model for care-related issues only. The legislation dealing with criminal behaviour, in keeping with the justice approach, largely assumed that young people make rational decisions about their offending and should be dissuaded from further offending through punishment of the offence. That is, in direct contrast to the welfare-based sentencing legislation that preceded the *Children (Criminal Proceedings) Act*, young people were no longer to be 'saved' from a life of crime and institutionalised. While opportunities for rehabilitation were not jettisoned by the *Children (Criminal Proceedings) Act*, they were seemingly attached to sentences, rather than seen to form the sentence per se.

At the inception of the *Children (Criminal Proceedings) Act*, opportunities for rehabilitation largely took the form of new programs aimed at increasing individual, family and community responsibility, thereby limiting dependence on resource-intensive state intervention into behaviour:

> "The focus of the changes has been to … facilitate the development of new programs, such as child protection and young offender support teams; give enhanced recognition to the rights of parents and children; improve community access and participation; provide better safeguards against and limit coercive intervention in the lives of children and families …"[27]

This emphasis on programs seems to have diminished over time. This was perhaps correctly assumed to be too ambitious but nonetheless inadequate. Despite this, the underlying message of this statement still holds true. Offences would be punished; however, given that it is acknowledged that the period of 'childhood' and 'adolescence' is arguably considered by the Children's Court to be a period of grace,[28] sentences would make provision for rehabilitation. This would largely result, however, in what we call 'passive rehabilitation'. By this we mean that something is applied to the young person to help facilitate his or her rehabilitation. Typically, this involves the imposition of a penalty and there ends the matter.

This is contrasted with 'active' rehabilitation, where the outcome requires that the offender demonstrate that he or she is working towards his or her own rehabilitation.[29] Opportunities for active rehabilitation are available through court-based sanctioning. One example of this is the Youth Drug Court program, which will be discussed in greater detail in Chapter 3. Youth justice conferencing is also available as a sanction in the Children's Court, but it is infrequently used by the Court.[30]

Young Offenders Act

Other reforms to juvenile justice have taken place subsequent to the *Children (Criminal Proceedings) Act* and its cognate Acts. The most notable is the *Young Offenders Act* 1997. This piece of legislation, with its emphasis on restoration, requires the more active participation of the young offender in his or her rehabilitation. The cornerstone of the Act is youth justice conferencing, which encourages the participation of the victim and/or the victim's representative, and by so doing encourages the offender to account for his or her offence, learn about its effects on others, and make amends to the victim.

While this monograph largely focuses on the *Children (Criminal Proceedings) Act*, the *Young Offenders Act* is also important. It consolidates the rehabilitative approach to Children's Court sentencing on the one hand, and creates a debate about the appropriate balance

27 The Hon Mr Aquilina, Minister for Youth and Community Services and Assistant Minister for Ethnic Affairs, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 8 April 1987, p 10354.

28 Insofar as sentences for the predominantly 'minor' offences that appear before the Children's Court would be allowed (in theory) to have minimal to no long-term repercussions for the young offender.

29 The terms 'passive' rehabilitation and 'active' rehabilitation, and their definitions, are imperfect; however, their use enables us to distinguish and highlight the features of the Youth Drug Court program and youth justice conferencing.

30 This data was taken from the Judicial Information Research System, which is a database managed by the Judicial Commission. It is available on subscription.

between rehabilitation and restoration on the other. Or, more accurately, given the timing of the *Young Offenders Act* in relation to the *Children (Criminal Proceedings) Act*, the debate has been about how to appropriately segue restoration into the long-existing rehabilitative model, while observing the key principles of justice, such as due process, parity, proportionality, accountability for one's behaviour and minimal state intervention in the offender's life. This will be discussed in greater detail in Chapter 3.

The *Young Offenders Act*, like another piece of legislation enacted in the same year the *Children (Protection and Parental Responsibility) Act*, is largely a juvenile crime prevention measure. Its aim is to divert less serious offenders and offences from the more formal part of the juvenile justice process, the Children's Court. Under both the *Young Offenders Act* and the *Children (Protection and Parental Responsibility) Act* 1997, the police and parents/guardians are given the discretion to exercise, or are encouraged to take responsibility for, crime prevention measures and sanctions. For the police, this includes warnings, cautions and youth justice conferences. This formalising of pre-court police diversion has contributed to fewer offenders—particularly first time offenders—appearing before the Children's Court.

Commentators[31] suggest that the broadening of juvenile justice by the *Young Offenders Act* to include police-imposed sanctions means that, more so than before, sentencing in the Children's Court is affected by what happens in pre-Court diversion. More specifically, the knock-on effects on sentencing of the early stages of the juvenile justice system—which rarely comes under the glare of public scrutiny—are greater than they were in the past.

The *Young Offenders Act* has also enabled restorative justice principles to permeate the Children's Court in a number of ways (albeit haphazardly).

- Firstly, they inform outcomes available in the Children's Court, such as youth justice conferencing and Court-based cautions, which require the young person to actively contribute to their rehabilitation through, for example, formal apologies. These types of sentences, however, are few and are less frequently used by the Court.
- Secondly, the formalising of pre-Court diversion means that a significant proportion of young people who appear before the Court would have been dealt with by the police in pre-Court diversion. For the sake of continuity and sentencing consistency, the Children's Court would need to decide whether to take into account how these young people were dealt with in pre-Court diversion and what expectations this might have created in the young people about how they would be dealt with by the Court.
- Thirdly, Juvenile Justice officers, whose influence on sentencing in the Children's Court is significant, might be encouraged by the existence of the *Young Offenders Act* to favour the use of sentencing conditions that are restorative in approach, without necessarily recommending the use of the specific restorative justice

31 Reported in NSW Law Reform Commission, *Issues Paper 19: Sentencing: Young offenders* 2001; H Strang, *Restorative Justice Programs in Australia: A report to the Criminology Research Council*, Australian Institute of Criminology, Canberra.

outcomes. So, for example, while bonds might be the most utilised sentencing option, the conditions of the bond could take the form of formal or informal apologies to victims, reparation, the reintegration of the young person into their family or community, increased parental responsibility, etc. These last few conditions would also be encouraged by the existence of the *Children (Protection and Parental Responsibility) Act*.[32] The problem, if this creates one at all, is that reparative-type conditions would not be consistently attached to outcomes.

The existence of the *Young Offenders Act* therefore influences, in quite a few ways, the nexus between rehabilitation and sentencing as it plays out in the Children's Court. This will be discussed in greater detail in Chapter 3.

Aims of this monograph

The aim of this monograph is to explore the means that are available to the Children's Court to achieve the goal of rehabilitation at sentence. The monograph also discusses sentencing practice and describes in practical terms what measures magistrates employ to facilitate rehabilitation through the sentencing process.

Methodology

We address these aims by discussing:

1. the evolution of Children's Court sentencing legislation
2. the rehabilitative components of the *Children (Criminal Proceedings) Act* and some of its cognate Acts, namely, the *Children (Community Service Orders) Act*, the *Children (Detention Centres) Act* and the *Children's Court Act*. This analysis will also make reference to relevant parliamentary second reading speeches
3. the *Young Offenders Act* and its impact on court-based sanctioning. Again, this analysis will also make reference to relevant parliamentary second reading speeches
4. the Youth Drug Court program and its legislative framework
5. sentencing practice, by examining and analysing data collected from Court files. Eighteen cases from specialist children's courts were purposefully chosen—one to three cases for each of the ten most common offences (the ten most common offences make up approximately three-fifths of all offences in the Children's Court). For each case, the following information was obtained from Court files and records:
   (a) bail conditions (if relevant)
   (b) conditions attached to the penalty (if relevant)
   (c) list of prior offences (if relevant)

32 The latter is an example of a piece of legislation which, while not specifically about sentencing, is nonetheless in the position to exercise influence at the fringes of sentencing.

(d) list of previous penalties (if relevant)
(e) whether a Court Alternatives History report was requested
(f) contents of the Court Alternatives History report (if requested)
(g) whether a Juvenile Justice report was commissioned
(h) contents of the Juvenile Justice report (if commissioned)
(i) magistrate's reasoning for choice of penalty (if mentioned in sentencing remarks)
(j) magistrate's additional statements to the young person (if mentioned in sentencing remarks).

The cases were chosen to help us illustrate the challenge of achieving the goal of rehabilitation at sentence, and are not intended to be representative.

Structure of the report

This monograph is in four chapters. In the first chapter, we explore the history of sentencing in the Children's Court, with the aim of showing how this history sheds light on the nexus between rehabilitation and sentencing. In the second chapter, we discuss the 1987 suite of legislation and the components in this suite that inform the nexus. In the third chapter we discuss initiatives that came out of the 1990s, which aimed to address youth crime through crime prevention initiatives, rather than through traditional forms of sentences, and what this means for the nexus. These initiatives include the *Young Offenders Act* and the Youth Drug Court program. In the fourth chapter we discuss sentencing practice with reference to 18 cases chosen for this discussion and identify the measures that some magistrates employ to achieve the goal of rehabilitation at sentence.

1

History of sentencing in the Court

> *A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.*[33]

To understand the modern manifestation of the nexus between rehabilitation and sentencing, we need to trace the evolution of sentencing young people in New South Wales.

1.1 — Pre-twentieth century

Colonial times

The treatment of juvenile offenders in the colony of New South Wales reflected the system of criminal law inherited from England,[34] of which it has been said, "[t]he concept of the young offender, with all that it implies for penal policy, is a Victorian creation".[35] With respect to deterrence, juveniles were treated no differently from their adult counterparts. They were liable to the same harsh penalties. For example, one English judge, after condemning a 10 year old boy to death, described him as "a proper subject for capital punishment" and five children aged between eight and 12 years were hanged for petty larceny in England on one day in 1815.[36]

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33 Sir Walter Scott, *Guy Mannering*, 1815, p 270, quoted by Gaudron ACJ, McHugh, Hayne and Callinan JJ in the High Court in *Conway v The Queen* (2002) 76 ALJR 358.

34 J Seymour, *Dealing with Young Offenders,* 1988, Law Book Company Ltd, Sydney, pp 3–14.

35 L Radzinowicz and R Hood, *A History of English Criminal Law and its Administration from 1750: Vol 5—The Emergence of Penal Policy,* 1986, Steven and Sons, London, p 133, quoted in Seymour, op. cit., n 34, p 3.

36 A Morris and H Giller, *Understanding Juvenile Justice,* 1987, Croom Helm, London, p 6; cited in C Cunneen and R White, op. cit., n 13.

Young people were transported to Australia as criminal offenders alongside adult offenders. Between 1812 and 1817, 349 male convicts aged 17 or younger were sent to Australia.[37] (Girls were also sent, but accurate figures are not readily available.) Young people were executed, flogged, sentenced to work on road gangs and transported to penal settlements at Port Macquarie and Van Diemen's Land. The following examples indicate the harshness with which young offenders were dealt: in 1788, a young person of teenage years was executed after a theft conviction and in Western Australia in 1844, a 15 year old boy was hanged following a murder conviction.[38]

The hazards and hardship of colonial life exacerbated this draconian treatment of young offenders. The high rates of maternal mortality during childbirth, accidental deaths and deaths from early, untreatable terminal illnesses left substantial numbers of children without one or both parents, and therefore without any adult supervision. A significant number of children were also under the care of a single parent, because a large proportion of women were deserted by their husbands. In New South Wales in 1891, there were 23,915 wives not living with their husbands. There were furthermore no social security payments or child maintenance provisions, only charitable and church-based organisations providing some measure of support.[39] This resulted in an inordinate proportion of children being supported by charitable institutions. To illustrate the severity of the problem, when comparable children-in-care groups are considered, it was found that in 1870 when the population of the colony was only 500,000 some 2,500 children were looked after by charitable institutions; a far greater proportion than in 1995, for example. In 1995, when the population of New South Wales was 6,068,900, there were approximately 3,000 children in alternative care, of whom 2,488 were state wards.[40]

The evolution of a juvenile justice system

Prior to the passage of the *Juvenile Offenders Act* 1850 in New South Wales, adults and young offenders were subjected to the same laws. The second half of the nineteenth century, however, saw the development of a distinct system for dealing with juvenile offenders. This separate juvenile justice system coincided with legislative measures relating to child labour and compulsory schooling, and the recognition that child offenders needed to be separated from the pernicious influence of adult criminals.[41]

The purpose of the *Juvenile Offenders Act* was also "to ensure more speedy trial and avoid the evils of their long imprisonment". An offender under 14 years of age who was sentenced for simple larceny could be dealt with by a summary hearing in a police court, imprisoned for no more than three months or fined three pounds, or have the charge dismissed on finding sureties for good behaviour. These penalties were much more lenient than those for which adult offenders were liable, which included transportation for up to seven years

37 J Seymour, op. cit., n 34.

38 ibid, p 8.

39 R Blackmore, *Finding History in 200 Years of Child Care,* 1995, prepared for the Hornsby Historical Society.

40 ibid.

41 J Seymour, op. cit., n 34, pp 35–48.

or imprisonment for two years if found guilty in the Supreme Court. The *Juvenile Offenders Act*, however, also included a range of offences not previously regarded as criminal, which were now specifically directed at young offenders. These included indecent exposure and the use of obscene language.[42]

Child-saving statutes of the second half of the nineteenth century

The *Juvenile Offenders Act* was offset in the following decade by legislative measures enacted in 1866[43] that were directed at preventing neglected children from falling into a life of crime. This legislation came out of a report, published in 1860 by the NSW Parliament, entitled *The Report of the Select Committee on the Condition of the Working Classes of the Metropolis*. This report showed that high rents, overcrowding and a lack of sanitation created abysmal urban living conditions,[44] which in turn led to child neglect. *The Act for the Relief of Destitute Children*, also known as the *Industrial Schools Act,* while intended to ameliorate some of the effects of the social crisis identified in the 1860 Report, was in practice drastic legislation that imposed a system of detention in industrial schools until the child reached 18 years of age or was apprenticed. Offences that could incur such harsh penalties included begging, loitering, having "no visible means of support" and "sleeping in the open air".

The *Act to Establish Juvenile Reformatories*, referred to as the *Reformatory Schools Act*, was a similarly harsh piece of legislation which provided that a child aged under 16 years, sentenced to at least 14 days imprisonment, could be sent to a reformatory for between one and five years. Those who absconded from the reformatory could be imprisoned for three months in separate detention before being returned to the reformatory.

In reality, reformatories and industrial schools frequently combined similar practices, beginning what was to become the longstanding blurring of the distinction between neglected children and young offenders.[45]

While the *Industrial Schools Act* and the *Reformatory Schools Act* sought to address the problem of roaming bands of neglected children engaging in criminal activity, they were arguably less effective as crime prevention measures than the *Public Schools Act*, enacted the same year. The system of compulsory primary schooling established under the *Public Schools Act* was instrumental in taking children off the streets and providing a basis for social progress to follow, as well as the beginnings of an emphasis on the rehabilitative benefits of schooling.

Occurring concurrently with these legislative changes was the 'child-saving' movement that developed in the latter part of the nineteenth century in England and the USA. The basis of this movement was the view that juveniles lacked both maturity and a

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42 J Wundersitz, "Juvenile justice" in K M Hazlehurst (ed), *Crime and Justice: An Australian Textbook in Criminology,* 1996, Law Book Company, Sydney.

43 The *Act for the Relief of Destitute Children* and the *Act to Establish Juvenile Reformatories*.

44 G D Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900,* 2003, Federation Press, Sydney, pp 207–209.

45 C Cunneen and R White, op. cit., n 13.

fully-fledged sense of responsibility. 'Saving the child' was therefore considered to be of greater importance than punishing the criminal.[46] Public structures, such as the Court, were therefore expected to act in *loco parentis* to juveniles who appeared before them. For the remainder of the nineteenth century, NSW legislation governing the treatment of delinquent children developed in line with this thinking. Such legislative changes, however, were piecemeal and were not always completely consistent with the new ideology in relation to young people. So while amendments in 1883, 1892 and 1900 allowed younger children who were placed in industrial schools to be adopted out or apprenticed, severe penalties, including whipping, were still on the statutes and were not repealed until 1974.

1.2 — 1905–1987: The welfare model perpetuated

The establishment of the Children's Court, 1905

Changes in ideology about the role of the state in relation to children, together with a need to find resource-saving measures to deal with offenders, eventually led to the creation of a separate court for children in New South Wales. From its inception in 1905, however, the NSW Children's Court has been beset by changes, initially in terms of its purpose and subsequently in terms of its philosophy.

Set up by the *Neglected Children and Juvenile Offenders Act* 1905, the Court had jurisdiction over children between the ages of five and 16. The purpose of the Court was to attend to juveniles who had strayed beyond the confines of what was then deemed either to be acceptable behaviour or acceptable conditions. The preamble to the 1905 Act described it as an:

> "Act to make better provision for the protection, control, education, maintenance, and reformation of neglected and uncontrollable children and juvenile offenders; to provide for the establishment and control of institutions and for contribution by near relatives towards the support of children in institutions; to constitute children's courts and to provide for appeals from such courts and to provide for the licensing and regulation of children trading in streets and in certain places open to the public."

The 1905 Act therefore represented significant legislative reform, not only because it created a special court for children, but also for combining what had been, until then, separate criminal and welfare jurisdictions. This legislative measure reflected reforms introduced in the USA that were designed to introduce an informal character into proceedings previously described as "the severity, formality, and possibly terrorism of the ordinary courts of the land".[47]

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46 J Wundersitz, op. cit., n 42.

47 The Hon Mr Wade, Attorney General, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 5 July 1905, p 608611, cited in *Shales v Lieschke* (1985) 3 NSWLR 65 at 73, per Kirby P.

In the late nineteenth century, societal strictures on juvenile behaviour seemed to be based on the implicit belief that a young person should be under the guidance of an adult—either a parent or close relative, or in the instance of apprentices, the person to whom they were legally bonded. Such guidance seemed to border on ownership. In the absence of such adult ownership and supervision, the young person was considered to come under the guidance of the state. The basis of this standpoint was not dissimilar to the standpoint on juveniles in the half century prior to the inception of the Children's Court that juveniles, if left to their own devices, could potentially cause mischief to the detriment of both themselves and their community. They therefore required supervision of a kind not deemed necessary for adults. The aim and purpose of the Court was therefore to protect society from the 'antics' of some young people and assist those who required it.[48]

The creation of a separate court for children, however, did not diminish or end the practice of juvenile detention, either for children found wanting in appropriate care and adequate control or for delinquents who needed to be punished for their digressions. Section 31 of the Act stated that "a child charged with an indictable offence, such committal may be made to a reformatory school, and if so made, shall be for a period named, being not less than one nor more than five years". Section 34 of the Act stated that:

> "All children committed to or inmates of an institution shall, subject to the directions of the Minister, be in the custody and under the control of the superintendent of the institution until they attain the age of eighteen years, or are discharged, removed from the institution, or apprenticed."

Detention was therefore seen to have multiple purposes, much like the 1905 Act itself. While the Act contained sentencing options such as fines and bonds (involving the closest relative or an employer for those children old enough to be apprenticed), it was the use of detention and remand for both neglect and minor offences that denoted the philosophical underpinning of the Act. The role of the state was to remove particular children from their surroundings, place them under its constant surveillance and provide them with adequate education, training, care and nourishment for the dual purpose of deterring them from a life of crime and restoring them into the community as law-abiding citizens once rehabilitation had been completed.

Another feature of the legislation was the use of probation. This became an important sentencing option carried out by honorary probation officers, who prepared background reports and supervised the young offenders. There were 250 such officers by 1909. In the 12-month period ending in April 1911, 46 per cent of the 873 children found guilty of an offence were released on probation. This reliance on welfare officers continues to the modern day. Today, the Juvenile Justice officer informs the sentencing process when detention or community service orders (CSOs) are being considered by the magistrate, and young offenders who incur a bond or probation order are released into the supervision of a welfare officer.

48 "The common law long recognised the right of the State to intervene in the parent–child relationship where this was necessary to protect the rights of minors who were being abused or neglected. The Crown's power to protect those subjects who were unable to protect themselves, including children, was asserted on the basis of *parens patriae* at least after the 18th century": ibid.

1923 and 1939

The *Neglected Children and Juvenile Offenders Act* 1905 had been criticised from the time of its formulation.[49] A large part of the criticism was reserved for its provisions for neglected children, specifically the practice of institutionalisation. Many of the institutions to which children were sentenced or sent were found to be deficient in fundamental ways. Firstly, such institutions failed in practice to draw distinctions between neglected children and delinquents. Secondly, and almost paradoxically, in the instances of youth offending it was also felt that the sentencing process gave too much emphasis to the juvenile's welfare, to the detriment of law enforcement.[50]

Little, however, was done to improve the provisions of the Act until the 1920s. This decade saw momentous, paradigmatic shifts in juvenile justice, which expanded on the philosophy that 'delinquent' children required 'saving'. To this end, much emphasis was placed on the newfound interest in, and respect for, the social sciences and empirical accounts of the causes of youth offending. There was also a search for informal alternatives to court, although this search failed to produce tangible alternatives to the Children's Court.

Paradigmatic shifts in juvenile justice, together with the criticism of the 1905 Act, eventually culminated in legislative changes in 1923. The *Child Welfare Act* 1923 more than upgraded the 1905 legislation; it consolidated the relationship between the Court and the welfare agencies.[51] Significantly, the *Child Welfare Act* of 1923 extended the definition of a neglected child to one who, in the Court's opinion, was under incompetent or improper guardianship.[52]

The 1923 Act was further amended in 1939, in part to lift the age of criminal responsibility to eight years, to expand the definition of 'neglected child' to include those not attending school regularly, and to make new provisions "relating to establishments, mentally defective children, maintenance of children by their relatives, discipline in institutions and transfer of persons from prison to an institution".[53]

The formulation of the 1939 Act also introduced new debates about the adequacy and training of magistrates in the Children's Court. It was the opinion of some that magistrates were poorly equipped for their task. They were not considered to be adequately schooled in psychiatry, psychology or sociology, nor were they considered to have a specialised knowledge of child welfare.[54] Such criticisms, in part, resulted in the suggestion that 'lay women' should preside over the Children's Court in some formal way, given their knowledge of child rearing. This idea was later abandoned. Seemingly in its place, a greater emphasis was given to welfare officers. The welfare theory underpinning juvenile justice therefore seemed to shift and expand to accommodate the types of professionals required for the successful functioning of the Court.

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49 J Wundersitz, op. cit., n 42.

50 J Wundersitz, op. cit., n 42.

51 J Seymour, op. cit., n 34.

52 Section 5(k).

53 R Blackmore, *The Children's Court and Community Welfare in New South Wales*, 1989, Longman Professional, Melbourne, p 6.

54 J Seymour, op. cit., n 34.

In 1923 and 1939, therefore, the Court was no longer merely a parent, but rather a benevolent (even if firm) parent. This thinking was seemingly accompanied by a slow process of disentangling neglect from delinquency and, in relation to delinquents, redressing the balance between the punishment of culpability and the promotion of rehabilitation.

The welfare model under attack

The welfare-based approach of the *Neglected Children and Juvenile Offenders Act* 1905, and the subsequent *Child Welfare Acts* of 1923 and 1939—notwithstanding what appeared to be their laudable aims of processing young offenders more informally, and expediting proceedings by dealing with all but the most serious offences summarily—was finally discredited for a number of deficiencies:[55]

- The distinction between neglected children and young offenders continued to be blurred in practice. Punitive measures continued to be used in relation to needy children. For example, s 19 of the *Neglected Children and Juvenile Offenders Act* 1905 provided that "[a]ny child apprehended as a neglected or uncontrollable child or juvenile offender shall be taken to a shelter and there detained pending the determination of the court".
- A child's status alone—such as being in moral danger or being uncontrollable—could be used as a reason for institutionalisation.
- There was no provision for children or their parents to be legally or otherwise represented in the Children's Court.
- It was common practice for children to be removed from their families and institutionalised, despite the availability of probation.
- There was a large degree of arbitrariness in the wide powers available to the Minister to administer certain provisions of the legislation. For example, s 21 of the *Child Welfare Act* 1923 empowered the Minister "on due cause being shown" to "take a boarded-out child or a child who has been placed in an asylum, and place him in an institution".
- There was an inordinate amount of power given to the state to interfere in the lives of young offenders, out of proportion to the seriousness of offences that they were alleged to have committed.

A momentum for reform to sentencing legislation was created by the advocates of 'law and order', who regarded the welfare model as too lenient. They received support from those who believed that the legal rights of juvenile offenders could be best protected by a model that contained certain procedural safeguards. These safeguards included the right to be heard, the right to plead not guilty and the obligation of the prosecution to prove its case beyond a reasonable doubt.[56] These were the features of the justice model.

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55 J Wundersitz, op. cit., n 42.

56 J Wundersitz, op. cit., n 42.

The movement for reform was further fuelled by the emergence of international instruments such as the United Nations Declaration on the Rights of the Child in 1959. This General Assembly resolution, to which Australia acceded, articulated a number of principles, including the minimal use of institutionalisation for children. Such principles influenced legislative changes to Children's Court sentencing and led, for example, to the *Child Welfare Act* 1969. This Act removed the provision that allowed a neglected child to be committed to an institution. This important amendment, however, was unfortunately overshadowed by other more contemporaneous events,[57] which are not of sufficient consequence to mention here.

Also noteworthy, in 1977 the age of criminal responsibility was lifted from eight to 10 years.[58]

In total, the 1939 Act was amended some 25 times during its 48-year history; however, there were few other noteworthy changes.[59]

1.3 — *Children (Criminal Proceedings) Act* 1987

Legislation introduced in the 1980s produced the most significant reform to Children's Court sentencing for some decades. These reforms began with a Bill in 1981 that was later abandoned. A second attempt was made in 1982; this time the Bill was enacted, but largely unproclaimed.

The watershed year was 1987. A suite of legislation was enacted and proclaimed that formally separated neglect from delinquency. These legislative changes have survived into the modern day. The *Children (Criminal Proceedings) Act*, *Children (Detention Centres) Act* and the *Children (Community Service Orders) Act* all pertain to juvenile offending. The *Children (Care and Protection) Act*, as its name suggests, is concerned with the care and protection of young people. The suite of legislation comes under the umbrella of the *Community Welfare Act*, partly in recognition that meeting the welfare needs of families and individuals contributes to community well-being. Collectively, this legislation emphasised "the commitment of the Government to the support of the family as the basis of community well-being",[60] and included the *Children's Court Act*, which provides for the appointment of specialist children's magistrates and a senior children's magistrate. Section 7(2)(b) of the *Children's Court Act* stipulates that to qualify as a children's magistrate a magistrate needs, in the opinion of the Chief Magistrate, "such knowledge, qualifications,

57 R Blackmore, op. cit., n 53.

58 ibid.

59 ibid, n 57.

60 The Hon P Sheahan, Attorney General, Second Reading Speech, Child Welfare Bill; Children's Court Bill; Children (Care and Protection) Bill; Children (Criminal Proceedings) Bill; Children (Community Service Orders) Bill; Children (Detention Centres) Bill; Miscellaneous Acts (Community Welfare) Repeal and Amendment Bill, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 8 April 1987, p 10354.

skills and experience in the law and the social and behavioural sciences, and in dealing with children and young people and their families … necessary to enable the person to exercise the functions of a Children's Magistrate".

The 1987 suite of legislative changes seemed to take the dual approach of carrot and stick. On the one hand, structures were set up to provide welfare for families and children in need of care—namely, adequate accommodation and education—and on the other, sanctions were imposed that were sufficiently severe to act as a deterrent for those young people who offended despite the provisions for care afforded by this new legislation.

The *Children (Criminal Proceedings) Act* furthermore reinforced the utilitarian view of punishment. Children were seen as rational beings who made rational decisions about their offending. They were therefore to be punished for their digressions alone and not rescued. The offender alone was accountable for the offence, not his or her context.

The rehabilitative intention of the *Children (Criminal Proceedings) Act* is alluded to in s 6 of the Act. Further to this, the inclusion of a new penalty community service orders (CSOs) also reflects a commitment to rehabilitation. CSOs were set up by a distinct piece of legislation within the 1987 suite of legislative changes—the *Children (Community Service Orders) Act*—and make provision for children to repair the damage of their offending through community service work. It is significant that the CSO was intended to be an alternative to detention for those serious and/or serial offenders who were judged by a Juvenile Justice officer to be unsuited for detention. The 1987 legislative reforms provided a formal acknowledgment of the stigmatising effects of detention.

Deferred and suspended sentences

The inclusion of deferred and suspended sentences in the *Children (Criminal Proceedings) Act* has given the Court yet more sentencing options to help facilitate rehabilitation through sentencing.

Section 33(1)(c2) enables the Court to refer young offenders to a suitable rehabilitation program to attend to the underlying causes of the offending. The sentence would be deferred until the young person's completion of this program. From 2000, this penalty was being used to refer young offenders with addiction problems to the Youth Drug Court program. The Youth Drug Court was a recommended initiative of the 1999 Drug Summit which, in turn, was informed by crime prevention trends in the USA. The Summit gave formal recognition to the trend that a large part of youth offending resulted from drug abuse.

In 2000, s 33(1B) was inserted into the *Children (Criminal Proceedings) Act* to include the suspension or deferral of an order for detention subject to compliance with a good behaviour bond. Suspended control orders are considered to be serious enough to act as

a denunciation of the offence.[61] The conditional release of the young person, however, could sometimes, and in part,[62] contribute to the offender's rehabilitation.

1.4 — *Young Offenders Act*

The introduction of the *Young Offenders Act* 1997 provided the Court with additional sentencing options, which again contributed to the Court's armoury to facilitate rehabilitation through sentencing. While the *Young Offenders Act* "provides an alternative process to court proceedings for dealing with children who commit certain offences",[63] some of its sanctions can also be utilised by the Children's Court.

In Court, youth justice conferences and court-based warnings can be used even when no plea is entered by the young person (although he or she is required to admit to the offence). This has important positive consequences for the young person's criminal record. Of course, as with the sanctions under the *Children (Criminal Proceedings) Act*, sanctions under the *Young Offenders Act* can also be used by those who plead, or who are proven, guilty.

Influences around the edges?

Since 1997, other pieces of legislation have also exerted their influence around the edges of sentencing in the Children's Court. The *Children (Protection and Parental Responsibility) Act* was enacted in 1997, the same year as the *Young Offenders Act*, and was created to encourage parents to work with formal state structures, such as the police, to stem what was perceived to be the growing prevalence of serious youth offending. This particularly applied to Indigenous areas, where female elders requested that they be given the liberty to formally adopt and control crime prevention measures in their areas to promote the rehabilitation of young offenders.

Like the *Young Offenders Act*, however, the *Children (Protection and Parental Responsibility) Act* can also be invoked in the Children's Court, insofar as the sentencing contract could sometimes involve the parent/s. Examples of parental involvement in the sentencing

61 NSW Law Reform Commission, *Sentencing*, 1996, Discussion Paper 33.

62 In *Dinsdale v The Queen* (2000) 202 CLR 32,1 Kirby J, at 81 stated: "A number of attempts have been made to resolve this tension and to provide guidance concerning the circumstances in which a sentence of imprisonment should be suspended. There is a line of authority in Australian courts that suggests that the primary consideration will be the effect such an order will have on rehabilitation of the offender…which will achieve the protection of the community which the sentence of imprisonment itself is designed to attain. But most such statements are qualified by judicial recognition that other factors may be taken into account…The point is therefore largely one of emphasis." Kirby J at 84 goes on to add: "In my view, to limit the exercise of the discretion to suspend a sentence of imprisonment by reference wholly, mainly or specially, to the effect which suspension would have on rehabilitation of the offender would constitute an error. There is nothing in the grant of the power, as expressed in the applicable legislation, to justify confining its availability in such a way. Had the legislature intended to limit the discretion to suspend by reference to such a consideration, it could have done so."

63 Section 3.

contract include their enforcement of curfew provisions or geographical restrictions that are attached to a bond. Curfews and geographical restrictions are permitted to be breached if the young person is in the company of a parent. In instances where parents have allowed the conditions of a bond to be breached illegally, through neglect or poor supervision, under the *Children (Protection and Parental Responsibility) Act*, the parents rather than the young person could be held accountable for the breach; the young person may not incur further penalties for the breach. The *Children (Protection and Parental Responsibility) Act*, like the *Young Offenders Act* and unlike the *Children (Criminal Proceedings) Act*, recognises and locates the young person within his or her environment and does not view his or her offending independently of the context in which he or she lives. In this sense, its efforts at rehabilitation are somewhat welfare-based.

1.5 — Welfare v justice

One of the main issues that arise from this historical exposition of sentencing legislation in the Court is the swing from welfare- to justice-oriented models of juvenile justice. Each paradigm suggests a different role for, and manifestation of, rehabilitation. Each has also been criticised for its practical limitations. It must be borne in mind, however, that the pendulum swing between welfare and justice in the Children's Court has never, in the Court's history, quite reached the extreme of either (although earlier welfare type legislation did lead to disproportionately harsh sentences). Each sentencing reform effort has arguably included components of both models.

Welfare

More than one welfare model has informed sentencing legislation in the NSW Children's Court. The qualitative differences among these welfare models have been significant, and are set out below.

- The Parkes and subsequent welfare models, including the 1905 model, tried to ensure that young people had sufficient 'moral fibre' to conduct themselves properly as citizens. Punishment as a utilitarian ideal was a key aspect of this a nexus was drawn between hard work, discipline and moral fibre. The punishment, however, did not just extend to the offence, but sometimes resulted in the removal of the child from his or her surrounds. The *Neglected Children and Juvenile Offenders Act* 1905 was designed "to secure a special class of treatment for these children. The idea of the treatment is that it is to be somewhat of a parental, informal character rather than the severity, formality, and possibly terrorism of the ordinary courts of the land".[64]
- The 1923 and 1939 legislative reforms revealed a welfare model that was more therapeutic in nature. It was the first time psychology and the medical sciences were appealed to for solutions to juvenile crime. Saving children was about attending to their needs and recognising limitations in their intellectual and emotional

64 The Hon Mr Wade, Attorney General, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 5 July 1905, p 611.

development. Importantly, this welfare model recognised the difference between chronological age and maturity. During the debates over the Child Welfare Bill of 1923, it was observed that:

> "… there is an opportunity for this House to deal in a very liberal way with the problem of juvenile delinquents … At the present time there is an agitation, which is well founded, for some more modern, more effective, and better system to be applied to juvenile delinquents …"[65]

> "[T]his bill will not attain the object we ought to have in view—namely, the establishment of an up to date and scientific system for the treatment of juvenile delinquents—if it lays down the hard-and-fast rule that because a person is under the age of 18 years that person is to have the benefit of its treatment, whereas if he or she is above the age of 18 years, regardless altogether of his or her mental growth or development, that person is to be treated in accordance with the ordinary criminal law which is in force in the State."[66]

- In the 1987 suite of legislative reforms, the *Children (Criminal Proceedings) Act* was effectively a justice approach that fell under an umbrella legislation that was welfare-based—the *Community Welfare Act*. Parliament decided to invest a fixed proportion of resources into so-called 'hand-outs', to help people help themselves, so to speak. If offences were committed despite these welfare provisions, then the state's only recourse was punishment. There was little requirement to attend to the needs of perpetrators, beyond allowing for their passive rehabilitation through sanctions. Their needs had already been addressed by others parts of the suite of legislation, largely the *Children (Care and Protection) Act* for those young offenders who were in care. When speaking about the 1987 suite of legislation more generally, the Hon Mr Aquilina in his second reading speech stated:

> "The proposed community welfare legislation contains many initiatives designed to strengthen the family. These will give effect to the stated policy of supporting the wellbeing of the family as the basis of community wellbeing … Family problems are often better resolved through the provision of various types of assistance than by intervention … Intervention often exacerbates problems, stigmatizes children and prevents any process of constructive resolution. The reasons also include the fact that official intervention can be arbitrary and unduly severe, with parental rights being too easily abrogated and that it is better to enhance the resourcefulness, dependence and self-sufficiency of families. Accordingly, the bills emphasize family autonomy, promote reconciliation where a child is not in the care of its family, provide for a more preventive approach to circumstances involving vulnerable families, provide for flexible and responsive service, facilitate the coordinated provisions of a range of welfare services, place

65 The Hon Mr McTiernan, Member for the Western Suburbs, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 10 October 1923, pp 1436, 1437.

66 The Hon Mr McTiernan, Member for the Western Suburbs, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 17 October 1923, pp 1622–1623.

> strict limits on coercive State intervention, allow families greater participation in the process where decisions affecting them are made, and make those who make decisions more accountable to families through rights of independent review … We aim to give it the flexibility and support to ensure that children continue to be able to live in a family environment and, where that is impossible, are given every support to reunite them to the family at a later stage."[67]

The welfare model in its various forms, especially in its earliest incarnations in the NSW Children's Court, recognised that sentencing that rests on culpability alone ignores the social disadvantage that may be at the root of offending.[68] Nonetheless, this model, by assuming that criminality is a symptom of either social or psychological pathology from which the young person needed to be saved,[69] has been criticised for ignoring the young person's rights and, by doing so, of contravening international human rights guidelines from the 1950s to the modern day.

In more recent times, the welfare model has also been criticised for being unduly paternalistic and, even worse, dangerous. By trying to find the cure for the underlying social causes of offending, it led to the unnecessary institutionalisation of many young people. In some instances, such institutionalisation led to further abuse and neglect and furthermore failed to find the cure for the offending. Similar practices in the US led the Supreme Court, in *Gault et al* (1967),[70] to question why the rights afforded to adults were not available to juvenile offenders. Gault was a 15 year old boy who was taken into custody as a result of a complaint by a neighbour that he had made lewd calls to her. After hearings at a juvenile court, he was committed to a State Industrial School until he reached his majority at the age of 21. Commenting about the excessiveness and inappropriateness of this punishment when it went to appeal, Mr Justice Fortas delivered the opinion of the US Supreme Court:

> "From the inception of the juvenile court system, wide differences have been tolerated indeed, insisted upon between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld to juveniles. In addition to the specific problems involved in the present case, for example, it has been held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to a trial by jury. It is a frequent practice that rules governing the arrest and interrogation of adults by police are not observed in the case of juveniles."[71]

These remarks by the US Supreme Court in the case of *Gault* found resonance in Australia, and buttressed an existing position in Australia that welfare-based legislation led to dangerous and harmful sentencing practices.

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67 Minister for Youth and Community Services and Assistant Minister for Ethnic Affairs, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 7 May 1987, p 11455.

68 A Ashworth, op. cit., n 17.

69 N Naffine, J Wundersitz and F Gale, "Back to Justice for Juveniles: The Rhetoric and Reality of Law Reform", in *Australian and New Zealand Journal of Criminology*, Vol 23, 1990, pp 192-205.

70 In Re Gault, 387 US 1 (1967).

71 ibid, p 6.

Justice

In recent times, the justice model has been conceived as an antidote to the ills of the welfare model.

Integral to the modern justice model are concepts such as due process, parity, proportionality of punishment and accountability. These, in part, reflected international conventions, such as the 1989 Convention on the Rights of the Child. Article 40.2 of this convention states:

> "Every child alleged as or accused of having infringed penal law has at least the following guarantees … To be presumed innocent until proven guilty according to law … Not to be compelled … to confess guilt … To have his or her privacy fully respected at all stages of the proceedings."

One of the key principles of the justice model is proportionality. It is assumed that proportionality reduces the incidence of discrimination while providing an appropriate amount of punishment. Proportionality is "the link between independence, impartiality and procedural justice".[72]

Despite the strengths of the model, however, the justice model has sustained similar criticisms to its welfare counterpart. An ideological gap exists between the rhetoric of the model and how juvenile justice plays out in practice. That is, access to impartial and independent decision-making is not always available to every young person, despite the recommendations of the model. This could be due to some young people's legal representatives encouraging their juvenile clients to plead guilty. Naffine, Wundersitz and Gale[73] maintain that due process is not observed in practice because children rarely choose not to plead guilty or even to not offer a plea; they rarely invoke their rights. This has led to greater weight being placed on police accounts of offending and police control over the young person's fate in court.[74] This, in itself, allows for greater state intervention into the lives of young people than the justice model would regard as necessary or beneficial:

> "… in reality the children's courts play a relatively minor role in testing evidence and in determining the innocence or guilt of the defendant. Most children plead guilty to the offence with which they have been charged …"[75]

Other criticisms have been levelled at the theories of juvenile offending that inform the justice model. Such theories assume that young offenders have the capacity to engage in "a rational cost-benefit analysis and choose the behaviour of perceived net utility".[76]

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72 A Ashworth, "Responsibilities, rights and restorative justice", in G Johnstone, *A Restorative Justice Reader: Texts, Sources and Context*, 2003, Willan Publishing, Devon.

73 N Naffine, J Wundersitz and F Gale, op. cit., n 69.

74 As Naffine et al have argued (op. cit., n 69), if a young person pleads guilty as a matter of course, he or she fails to take advantage of the presumption of innocence which forces the prosecution to establish guilt beyond a reasonable doubt. It also reduces the Court's role to only determining the sentence.

75 C Cunneen and R White, op. cit., n 13.

76 I O'Connor and M Cameron, "Juvenile Justice in Australia" in A Graycar and P Grabosky, *The Cambridge Handbook of Australian Criminology*, Cambridge University Press, Cambridge, 2002, p 215.

Such theories fail to draw a distinction between criminal capacity and culpability,[77] and assume that young people are mature enough to learn positively from their experiences in the Court. In fact, in trying to apportion punishment in accordance with the seriousness of the offence, the justice model neglects to consider the repercussion of dealing purely with the offence it comes at the expense of accurately finding a sanction from which the offender could learn from his or her mistakes. The "privileging [of] equal punishment for offenders narrows us to concern for only one type of justice affecting one type of actor".[78] As Daly describes it, "[a] major tension in justice systems—the twin demand for 'individual' and 'uniform' response—cannot be satisfied in a single justice model".[79] She questions the meaning of 'equitable treatment' when for Aboriginal young people, for example, the equality standard is 'white-centred'.[81] "[W]e require a more critical reading of the statistics, which does not naively assume 'equality of outcomes' in an unequal society."[81]

Ultimately, the justice model, as it appears in juvenile justice discourse, seems more enigmatic than its welfare counterpart. It has sometimes been hijacked by a political discourse that needs to simplify quite complex concepts and reduce them into something palatable to the community. So while due process, accountability, proportionality of sentence and the rights of the child generally are mentioned by the model, what some of its advocates in the community seem to be emphasising is retribution.

What does this mean for the facilitation of rehabilitation through sentencing?

As suggested already, current sentencing legislation seems to combine elements of both the welfare and justice models, with arguably a greater emphasis on the latter. In terms of the facilitation of rehabilitation through sentencing, the problems inherent in each model could be addressed by the other. One model encourages the Court to exercise individualised justice, such that the sanction chosen attends in part to the context of the offending and facilitates rehabilitation in this way. The other model places limits on the Court's interference in young people's lives.

77 A Freiberg, "Abolish Children's Courts? Juveniles, Justice and Sentencing" in *Current Issues in Criminal Justice* (1993), Vol 4 No. 3.

78 J Braithwaite, "In Search of Restorative Jurisprudence" in L Walgrave (ed) *Restorative Justice and the Law,* Wilan Publishing, Devon, 2002, p 13.

79 K Daly, "Restorative Justice in Diverse and Unequal Societies" in *Law in Context*, 2001, 17(1), pp 167–190.

80 ibid.

81 op. cit., n 79.

2

Rehabilitation in the 1987 legislation

This chapter concerns itself with the sentencing reforms that were enacted in 1987, and which are still in force. The 1987 reforms, while appearing to be new, in fact could be said to have been built on the Court's sentencing history outlined in Chapter 1. Naffine, Wundersitz and Gale[82] argue that sentencing reforms result from a perceived need for change alone (perhaps to appease a misinformed electorate). Legislators, of course, have always maintained that reforms result from a groundswell of opinion that the current system is not working. Whatever the reasons for various reforms to sentencing in the Children's Court, a sufficient number of them have either directly or inadvertently contributed to achieve the goal of rehabilitation at sentence.

While it was never the specific intention of the 1987 suite of legislation to be prescriptive about the means by which the Court could achieve rehabilitation at sentence, it does contain signposts about the direction, shape and form of the nexus between rehabilitation and sentencing. Some of these signposts reflect long-standing practices of the Court. Others, however, represent an active departure from what was considered be a harmful focus on the young offender's rehabilitation at the expense of his or her rights.

To this end, some provisions of the 1987 suite directly allow for the facilitation of rehabilitation. Some provisions act as no more than catalysts for the facilitation of rehabilitation, primarily by ensuring, as far as it is possible, that the young person is not stigmatised by the Court process. This chapter identifies and discusses both types of provision.

82 N Naffine, J Wundersitz and F Gale, op. cit., n 69.

2.1 — The overarching purpose of the 1987 reforms

It is relevant, for our discussion of these provisions, to first locate the sentencing component of the 1987 suite in its welfare framework. During parliamentary debates about the 1987 reforms, there was a clear indication from the government of the time that the suite of legislation had multiple purposes, but that ultimately it aimed to attend to the welfare of the community:

> "I believe also that the proposed changes will strengthen the differentiation of the child welfare and criminal spheres; improve procedures for review and accountability; facilitate the development of new programs such as child protection, and the young offender support teams; give enhanced recognition to the rights of parents and children; improve community access and participation; provide better safeguards against, and limit, coercive intervention in the lives of children and families, and effect the multicultural character of our society by taking greater account of the unique characteristics and concerns of ethnic groups and Aboriginal communities. These are the aims demanded of us by the complex welfare needs of a modern democratic society … Though the provisions of the legislation are directed at assisting the disadvantaged, the whole community will gain from their operation. The bills will be seen to be a major element in the pursuit of social justice …"[83]

Comments from opposition parties of the day did, however, question whether the Labor Government's new bill had departed sufficiently from the welfare model of sentencing that the 1987 legislative reforms were purporting to replace. To this end, a member of the opposition did caution the government about allowing the continued practice of making the young offender's welfare paramount in the sentencing process.

> "These days particularly, the courts would rather err on the side of undue leniency than on harshness, but they do have to take a number of factors into consideration: first, the welfare of society as a whole; second, the rights of the victims of crime; third, the juvenile involved and his welfare. In all those considerations it is not right to say that the welfare of the child committing the offence is paramount."[84]

In the end, the goals of sentencing were not specified; the *Children (Criminal Proceedings) Act* is silent on the matter. This is in keeping with the Court's implicit commitment to individualised justice, such that the magistrate is provided with sufficient flexibility to determine how the goals of sentencing should be balanced in the sentencing of each individual offender. This level of flexibility is presumably aimed at facilitating the young offender's rehabilitation.

83 The Hon Mr Christie, Member for Seven Hills for the Government, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 6 May 1987, p 11337.

84 Mr Peacocke, Member for Dubbo for the National Party, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 7 May 1987, p 11452.

2.2 — Sentencing goals for offences dealt with on indictment

In 2002, the *Crimes (Sentencing Procedure) Act* 1999 was amended to include a list of sentencing purposes under s 3A of the Act. Section 3A identifies seven purposes of sentencing (punishment, deterrence, community protection, rehabilitation, accountability, denunciation, and recognition of the harm done to the victim and the community), only one of which is rehabilitation. For youth offences dealt with on indictment, however, s 3A(d) the goal of rehabilitation is considered to be especially important, as illustrated in these comments by Spigelman CJ in *R v Boga*:

> "The Court, the Crown submitted, must be concerned with promoting future rehabilitation of the offender as 3A(d) of the *Crimes (Sentencing Procedure) Act* 1999 sets out. The factor is particularly significant when offences are committed by juveniles."[85]

Nonetheless, while s 3A is applicable to young offenders dealt on indictment, it is significant that it does not apply to the Children's Court, and only this Court. Section 3A of the Act states that "[t]he purposes for which a court may impose a sentence on an offender are as follows … "; however, "court" is defined in the Act as being:

> "(a) the Supreme Court, the Court of Criminal Appeal, the Land and Environment Court, the Industrial Relations Commission, the District Court or a Local Court, or
>
> (b) any other court that, or person who, exercises criminal jurisdiction,
>
> but, subject to the *Children (Criminal Proceedings) Act* 1987, does not include the Children's Court or any other court that, or person who, exercises the functions of the Children's Court."

That the Children's Court has been isolated in this fashion accentuates the Children's Court's primary purpose—individualised justice aimed at attending to the individual needs of the young offender to facilitate his or her rehabilitation.

The common law provides a tradition of giving rehabilitation primacy in the sentencing of young offenders. Admittedly, the cases to which it refers are cases that are dealt with on indictment. Nonetheless, it provides significant pointers as to how youth should be viewed at sentence.

The first, oft quoted case on this matter is *R v Smith* [1964] Crim LR 70, in which the Court stated:

> "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."[86]

85 *R v SB* [2005] NSWCCA 76.

86 *R v Smith* [1964] Crim L R 70.

Adopting these remarks, Yeldham J, in *Wilcox* (Supreme Court (NSW), remarked:

> "... 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, directed to his rehabilitation."[87]

Mathews J further reinforced the primacy of rehabilitation in the most significantly quoted case on the purposes of sentencing of young offenders, *R v GDP*.[88] In this case, the applicant was a 15 year old boy who, together with his co-offenders, caused an estimated $1,500,000 worth of damage to buildings and their contents. The applicant admitted to his offences and had never been in trouble with the law prior to these offences. With reference to both *Smith and Wilcox*, Mathews J drew attention to the specific needs of young people by juxtaposing the purposes of sentencing adults against those of young people:

> "Had it been an adult who had committed these offences, then the principles of retribution and, more importantly, general deterrence, would have demanded a custodial sentence of considerable length. But rehabilitation must be the primary aim in relation to an offender as young as this applicant."[89]

Nonetheless, she cautioned against sacrificing the other goals of sentencing, particularly deterrence, by giving attention to rehabilitation that is overly disproportionate:

> "Subsequent decisions of this Court, however, suggest that considerations of general deterrence should not be ignored completely when sentencing young offenders. In *Broad* (unreported, 30 March 1984), Street CJ referred to 'the necessity to deter anti-social conduct ... commonly manifested by vandals in this city in current times' but also was 'concerned that for a young man of 19 with a clear earlier record and a supportive family background, importing as it does the prospects of real confidence in rehabilitation, a custodial sentence does not reflect the appropriate approach to be taken'."[90]

Decisions of the Court of Criminal Appeal subsequent to *GDP* expand on the point that considerations of general deterrence should not be ignored, especially for those young offenders who have perpetrated grave and violent offences. The recent case of *R v DSW* illustrates the point. In *DSW* the appellant was a 16 year old Indigenous male at offence. After drinking a large amount of alcohol one night, he approached the victim on a street and jumped on his head several times until he was pulled away by another man. The victim suffered cognitive impairment, was doubly incontinent, required care and supervision 24 hours a day, and suffered short-term memory loss. The offence was committed while the appellant was on a bond. He expressed no remorse, rather satisfaction from his violent behaviour. He did not complete high school, and had a history of violence and alcohol and drug abuse. Citing *R v Pham* (1991),[91] *R v Hawkins* (1993)[92] and *R v Gordon* (1994),[93] Barr J in

87 Unrep, 15 August 1979, NSW Sup Ct.
88 *R v GDP* op. cit., n 7.
89 *R v GDP* op. cit., n 7.
90 *R v GDP* op. cit., n 7.
91 55 A Crim R 128.
92 67 A Crim R 64.
93 71 A Crim R 459.

R v DSW[94] accepted a submission by the Crown, "that the need to protect the community requires that deterrence and retribution remains significant elements even in sentencing youthful offenders".

In *R v Pham and Ly*[95] the importance of deterrence was stated more explicitly. In this case, the two offenders and two or three others were involved in armed robberies and robbery in company. The two offenders were aged 17 and 19, respectively, and were both unemployed. One offender was on bail and the other on probation, and both had previously committed property-related offences. Both were Vietnamese; one a refugee who had had a deprived upbringing and spent five years in a refugee camp before arriving in Australia, the other a refugee who had "experienced great hardship there" and who had spent a year in a refugee camp before arriving in Australia. Lee CJ at CL stated:

> "It is true that Courts must refrain from sending young persons to prison, unless that course is necessary, but the gravity of the crime and the fact that it is a crime of violence frequently committed by persons even in their teens must be kept steadfastly in mind, otherwise the protective aspect of the criminal Court's function will cease to operate. In short, deterrence and retribution do not cease to be significant merely because persons in their late teens are the persons committing grave crimes, particularly crimes involving physical violence to persons in their own homes. It is appropriate to refer to the decision of *Queen v Williscroft* [1975] 75 VR 292 at 299 where the majority of the full Court of Victoria expressed the view that notwithstanding the enlightened approach that is now made to sentencing compared to earlier days, the concept of punishment, i.e., coercive action is fundamental to correctional treatment in our society."[96]

This sentiment is echoed in *R v AEM Snr; R v KEM; R v MM*[97] (a case of multiple aggravated sexual assault on two 16 year old girls committed by two 16 year old males and one 19 year old man) and in *R v Voss*[98] (a case of break, enter and steal in circumstances of special aggravation by an offender aged 17 years, who showed remorse, had not been previously imprisoned, had a history of drug and alcohol abuse, and who made attempts at rehabilitation in custody). In both these cases the young offenders were considered to have committed grave offences. The prominence usually given to principles applicable to youthful offenders were therefore overshadowed by the necessary emphasis on general deterrence and denunciation. In such cases, the rehabilitation of young people who commit serious and/or grossly violent offences is considered to be less important than the protection of the public.

This latter view could arguably be said to ignore the distinction between criminal capacity and culpability in juveniles. This has the potential of jeopardising the differential treatment of young offenders at sentence, and even of having a separate court for them.

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94 [2003] NSWCCA 322 at [24].
95 (1991) 55 A Crim R 128 at 135.
96 (1991) 55 A Crim R 128 at 135.
97 [2002] NSWCCA 58.
98 [2003] NSWCCA 182.

As suggested by Zimring,[99] the arguments for giving rehabilitation primacy in the sanctioning of youth offending is largely dependent on all young people being recognised as having limitations (which Zimring likens to mental illness) resulting from their lack of developmental and biological maturity. As such, the emphasis on rehabilitation should not be reserved for the "relatively good". "Diminished responsibility is either generally applicable or generally unpersuasive."[100] In fact, Zimring believes that the seriousness of the offending is a poor illustration of maturity; the correlation between the seriousness of the offence and the level of maturity of the young offender might in fact be negative. A system that believes that young people who commit serious offences behave like, and therefore should be dealt with as, adults assumes that such young offenders are more sophisticated and mature than their peer group. "The problem with withdrawing the protections of juvenile justice only when the subject is mature and sophisticated is that the most serious cases are not the most mature offenders."[101]

Determining the relative balance between rehabilitation and the other goals of sentencing most notably deterrence and community protection is not just an issue in the sentencing of young people. It also pertains to the sentencing of adults, as illustrated in *Veen v The Queen* (No 2).[102] Here the majority Mason CJ, and Brennan, Dawson and Toohey JJ made the following observations about sentencing:

> "… sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions."[103]

A significant number of leading cases lean on the side of giving rehabilitation some level of importance. The possible exceptions to the rule are offences committed by young people at the extreme end of the offence spectrum. While this creates the conundrum that Zimring refers to, it arguably does not affect the sentencing of young offenders in the Children's Court. Further to this, the applicability of the common law to Children's Court matters could be said to be limited by the lack of cases at common law that pertain to these matters. For this reason, some attention does need to be given to Children's Court sentencing legislation for an informed approach to achieving the goal of rehabilitation at sentence.

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99 F Zimring, "Toward a Jurisprudence of Youth Violence" (1998) in *Crime and Justice: A Review of Research*, Vol 24, pp 477-501.

100 ibid, p 493.

101 Zimring, op. cit., n 99, p 484.

102 (1988) 164 CLR 465 at 477.

103 ibid.

2.3 — The *Children (Criminal Proceedings) Act*

The *Children (Criminal Proceedings) Act* provides the main set of pointers to the shape, form and importance of the nexus between rehabilitation and sentencing in the Children's Court.

Section 6

Section 6 stipulates the principles relating to the exercise of the criminal jurisdiction of the Children's Court.

> **Section 6, *Children (Criminal Proceedings) Act***
>
> A court, in exercising criminal jurisdiction with respect to children, shall have regard to the following principles:
>
> (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 the 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.

The rehabilitative ideal is somewhat unsatisfactorily captured in the provisions of this section. For example, although the intentions of both s 6(c) and s 6(d) are praiseworthy, there is a significant impediment to their realisation. The employment and/or education of a young person proceeding without interruption, in itself, would not result in the young person's rehabilitation if the young person misbehaves while in employment or at school. It places the onus on employers and teachers to supervise the young person's behaviour when they might not have the resources to do this. The desire to allow a young person to reside in his or her own home where possible overlooks the fact that the young person's home environment may comprise neglect or abuse, or offer insufficient supervision, all of which might have contributed to the young person's criminal behaviour in the first place.

By contrast to s 6(c) and s 6(d), the provisions under s 6(a) and s 6(b) lack any specificity. They represent a form of grand theory, and thereby contain at least one problem that requires solving to satisfy the multiple demands of its users, as identified by Jokisch.[104] This is the difficulty it creates for the user of connecting the generalisms espoused in the statements with specific concrete situations, and the emptiness of the central concept. In *R v GDP*,[105] Matthews J stated, "[s]ome of these guidelines consist of sentiments and admonitions which are so general as to be of little assistance in the sentencing of young offenders".

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104 http://www.tu-berlin.de/~society/Jokisch_SocialSystems_DistinctionsTheory.htm.

105 *R v GDP*, op. cit., n 7.

Sentencing options: s 33

Other pointers to the form that the nexus between rehabilitation and sentencing should take are contained in some of the wide-ranging sentencing options available under s 33 of the *Children (Criminal Proceedings) Act*.

Section 33, *Children (Criminal Proceedings) Act*

(1) If the Children's Court finds a person guilty of an offence to which this Division applies, it shall do one of the following things:

(a) it may make an order dismissing the charge, or it may make an order dismissing the charge and may administer a caution to the person,

(b) it may make an order releasing the person on condition that the person enters into a good behaviour bond for such period of time, not exceeding 2 years, as it thinks fit,

(c) it may make an order imposing on the person a fine, not exceeding:

(i) the maximum fine prescribed by law in respect of the offence, or

(ii) 10 penalty units,

whichever is the lesser,

(c1) it may make an order releasing the person on condition that the person complies with an outcome plan determined at a conference held under the *Young Offenders Act*,

(c2) it may make an order adjourning proceedings against the person to a specified date (being an adjournment for a maximum period of 12 months from the date of the finding of guilt), and granting bail to the person in accordance with the *Bail Act* 1978:

(i) for the purpose of assessing the person's capacity and prospects for rehabilitation, or

(ii) for the purpose of allowing the person to demonstrate that rehabilitation has taken place, or

(iii) for any other purpose the Children's Court considers appropriate in the circumstances,

(d) it may do both of the things referred to in paragraphs (b) and (c),

(e) it may make an order releasing the person on probation, on such conditions as it may determine, for such period of time, not exceeding 2 years, as it thinks fit,

(f) it may, subject to the provisions of the *Children (Community Service Orders) Act*, make an order under section 5 of that Act requiring the person to perform community service work,

(g) it may, subject to the provisions of the *Crimes (Sentencing Procedure) Act* 1999, make an order committing the person for such period of time (not exceeding 2 years) as it thinks fit to the control of the Minister administering the *Children (Detention Centres) Act* 1987.

The hierarchy in which the penalties have been placed could also point to the rehabilitative properties of each sentencing option and its suitability for different types and severity of offences. According to the Hon Mr Aquilina, Minister for Youth and Community Services and Assistant Minister for Ethnic Affairs,

> "…the penalties that the Children's Court may impose on persons found guilty of offences have been consolidated. They have been set out in order of severity, and written reasons for the penalty selected shall be given to assist the courts to reach appropriate penalties in consistent fashion."[106]

106 *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 8 April 1987, p 10357.

The sentence hierarchy was therefore intended to assist the Court choose the least restrictive sentence in accordance with the principle of parsimony.[107] The Court is furthermore obliged to justify the use of a more severe sentence, thereby controlling its application of sentencing options at the top end of the hierarchy. Together, these obligations are intended to promote the use of non-custodial sentences and to reinforce the use of detention as a last resort.[108]

Despite these intentions, what is significant about s 33 is that it comprises a range of unlike penalties that are, in fact, not easy to place in a hierarchy. Some penalties are largely retributive, others serve as a deterrent, some are largely rehabilitative, and some represent a combination of these aims. In practical terms, there is little evidence to suggest that offences at the lower end of the hierarchy are less onerous than offences further up. For example, attending youth justice conferencing could be more onerous for some young offenders than undergoing community service, and yet the former appears below the latter.

While the hierarchy of s 33 is somewhat problematic, the breadth of penalties available to the Court complies with recommendations under Article 40.4 of the 1989 Convention on the Rights of the Child,[109] which states that:

> "[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."

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107 K Warner, "Family Group Conferencing and the Rights of the Offender", in C Alder and J Wundersitz, *Family Conferencing and Juvenile Justice: the way forward or Misplaced Optimism?* 1994, Australian Institute of Criminology, Canberra.

108 C Cunneen and R White, op. cit., n 13.

109 Of course, it must be noted that the Convention itself has been criticised by Cunneen and White (op. cit., n 13), largely for encompassing too many contradictory principles, which it furthermore fails to prioritise. These include:

- proportionality
- equality (consistency—like cases are treated alike)
- specificity (that is, the offender is made aware of the precise nature of the offence)
- determinacy (that is, the offender is made aware of the nature and duration of the sentence in advance)
- general and specific deterrence
- frugality (that is, the least restrictive sentence imposed given seriousness of offence, role of offender, offender's age and prior record)
- rehabilitation.

To these could be added the Australian Human Rights and Equal Opportunity Commission's recommendations for juvenile justice (Cunneen and White, op. cit., n 13):

- participation
- best interests
- community protection
- prohibition on cruel, inhumane and degrading punishment
- availability of a range of options
- availability of review
- detention as last resort
- detention for the shortest period
- freedom from arbitrariness.

Other rehabilitative provisions within the *Children (Criminal Proceedings) Act*

The rehabilitative components of the 1987 legislation are further bolstered by other components of the *Children (Criminal Proceedings) Act*. These components do not create rehabilitative opportunities in themselves, but instead act as catalysts for rehabilitation. They include the constraints placed on the use of convictions; destroying the records of those not found guilty, dismissed or dismissed with a caution; and the intended minimal use of arrest.

Recording and using convictions

14 Recording of conviction

(1) Without limiting any other power of a court to deal with a child who has pleaded guilty to, or has been found guilty of, an offence, a court:

- (a) shall not, in respect of any offence, proceed to, or record such a finding as, a conviction in relation to a child who is under the age of 16 years, and
- (b) may, in respect of an offence which is disposed of summarily, refuse to proceed to, or record such a finding as, a conviction in relation to a child who is of or above the age of 16 years.

(2) Subsection (1) does not limit any power of a court to proceed to, or record such a finding as, a conviction in respect of a child who is charged with an indictable offence that is not disposed of summarily.

15 Evidence of prior offences and other matters not admissible in certain criminal proceedings

(1) The fact that a person has pleaded guilty to an offence in, or has been found guilty of an offence by, a court (being an offence committed when the person was a child) shall not be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence if:

- (a) a conviction was not recorded against the person in respect of the firstmentioned offence, and
- (b) the person has not, within the period of 2 years prior to the commencement of proceedings for the other offence, been subject to any judgment, sentence or order of a court whereby the person has been punished for any other offence.

(2) Subsection (1) or (3) does not apply to any criminal proceedings before the Children's Court.

(3) The fact that a person has been dealt with by a warning, caution or youth justice conference under the *Young Offenders Act 1997* (being in respect of an alleged offence committed when the person was a child) is not to be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence.

16 Application

This Division applies to a person:

(a) who has pleaded guilty to an indictable offence in, or has been found guilty or convicted of an indictable offence by, a court other than the Children's Court,

(b) who was a child when the offence was committed, and

(c) who was under the age of 21 years when charged before the court with the offence.

Constraints are placed on the recording of convictions to minimise the 'labelling' of the young person. 'Labelling theories' suggest that this is important because they regard stigmatisation as harmful and counter-productive to the process of rehabilitation.

As such:

> "…deviancy itself can be the result of the interactive process between individual juveniles and the criminal justice system…Public labelling, it is argued, may affect an individual's self-identity and transform them so that they see themselves in the light of the label. The process of labelling is tied up with the idea of the self-fulfilling prophecy."[110]

Convictions are therefore not recorded for those under the age of 16 years. For those over the age of 16 years, convictions are largely confined to those offenders who have committed an offence serious enough to warrant a control order, and who furthermore have incurred a long record of offences. A conviction is therefore a last resort measure, seemingly intended to address not so much the seriousness of an offence, but often the serial offending that has led to a serious offence. While the serious offence that earns a conviction is not serious enough to be tried according to law, it is nonetheless indicative of an offender who, as yet, has not made a sufficient effort to modify his or her criminal behaviour and make attempts at rehabilitation. The consequences of incurring a conviction include being barred from certain forms of employment for the duration of the period for which the record lasts. Adult courts—for those young people who graduate to these courts as adult offenders—also take into consideration juvenile convictions that have not been spent.

These provisions of the *Children (Criminal Proceedings) Act* are further extended by the *Criminal Records Act* 1991. Section 10 of this Act allows for convictions made by the Children's Court to be spent if, for three consecutive years, the person has not been:

(a) subject to a control order

(b) convicted of an offence punishable by imprisonment

(c) in prison because of a conviction for any offence and has not been lawfully at large.

Destroying documents

In line with the minimal use of spent convictions, s 38(1) of the *Children (Criminal Proceedings) Act* enables the Children's Court to destroy any photographs, fingerprints and palm-prints, and any other prescribed record (other than the records of the Children's Court) that relates to an offence that was either not proven, dismissed or dismissed with a caution. Section 38(2) of this Act allows for a similar destruction of material for offences that incur penalties under s 33, if the Court is of the opinion that the circumstances justify such a destruction of materials.

110 C Cunneen and R White, op. cit., n 13, pp 57-58.

During parliamentary debates about the Child Welfare Bill and its cognate Bills, the inclusion of this section was justified by the government of the time on the following grounds:

> "It is hardly an inducement for the rehabilitation of juveniles to have that sort of threat hanging over their heads. When a juvenile has reached the age of eighteen years, and has not repeatedly offended, he or she should not be pre-judged ... If this provision had not been included in the legislation, the lives of many juveniles who, in their tender years may have committed some minor misdemeanour, would be affected and their ability to secure suitable employment, or to become a justice of the peace, would be restricted."[111]

Such provisions therefore promote rehabilitation by allowing many young offenders to start their adult life with a so-called 'clean slate'.

Intended minimal use of arrest

Section 8 of the *Children (Criminal Proceedings) Act* suggests that the commencement of criminal proceedings against a young person cannot take place other than by a summons (now abolished) or a court attendance notice. The exceptions to this are serious indictable offences; indictable offences under Pt 2, Div 2 of the *Drug Misuse and Trafficking Act* 1985; if there are reasonable grounds to assume the young person will not comply with either a summons or a court attendance notice or is likely to commit further offences; or if the violence of the offence or offender is such that the young person should not be allowed to remain at liberty.

The aim of these provisions is to remove one impediment to the young person's rehabilitation. As suggested in *DPP v CAD*,[112] the use of arrest in relation to young people who commit minor offences is "uncontroversial":

> "Arrest should be reserved for circumstances in which it is clearly necessary: *Lake v Dobson Supreme Court of New South Wales*, Court of Appeal, 19 December 1980 unreported. It is inappropriate to arrest when service of a summons will suffice: *Fleet v District Court* [1999] NSWCA 363. It is inappropriate for powers of arrest to be used for minor offences where the defendant's name or address are known, where there is no risk of his departing and where there is no reason to believe that the summons will not be effective: *Daemar v Corporate Affairs Commission* Supreme Court of New South Wales, Court of Appeal, 4 September 1990 unreported; *Director of Public Prosecutions v Carr* [2002] NSWSC 194."

Despite the provisions of the legislation, the NSW Law Reform Commission reported that the statutory preference for court attendance notices (and what was then summons) is not always observed in practice.[113] Further to this, they reported that arrests were considered

111 The Hon Mr Christie, Member for Seven Hills for the Government, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 6 May 1987, p 11336.

112 [2003] NSWSC 196 at [7].

113 New South Wales Law Reform Commission, op. cit., n 31.

to lead to an escalation of conflict between police and young people, sometimes resulting in the young person being charged for a 'trifecta' of summary offences (offensive language, resist arrest and assault police) on top of the offence for which they were being arrested. This is particularly true for Indigenous offenders.

The effects of these catalysts on rehabilitation

The minimal use of convictions, the destruction of unfavourable documents and the minimal use of arrest each removes obstacles to the young offender's rehabilitation. These measures are necessary but they are not sufficient on their own to bring about the young offender's rehabilitation.

2.4 — Detention as a last resort and the *Children (Detention Centres) Act*

The use of detention as a last resort, together with the provisions of the *Children (Detention Centres) Act*, acts as the corollary to the importance given to rehabilitation in sentencing in the Children's Court.

> "To incarcerate these persons, in the main, would bring forth only resentment and hatred leading to acts of retaliation and, no doubt, in many cases, further prison terms…"[114]

Guidelines are therefore contained within the *Children (Criminal Proceedings) Act* that require Juvenile Justice background reports to be commissioned when control orders are being considered for any given offence, to assess the young person's suitability for detention.[115]

> **25 Background reports**
>
> (1) This section applies to a person:
>
> (a) who has pleaded guilty to an offence (other than contempt of court) in, or has been found guilty or convicted of an offence (other than contempt of court) by, a court,
>
> (b) who was a child when the offence was committed, and
>
> (c) who was under the age of 21 years when charged before the court with the offence.
>
> (2) A court shall not sentence a person to whom this section applies to a term of imprisonment, or make an order under section 33 (1) (g) in respect of the person, in connection with an offence unless:

114 The Hon Mr McManus, Member for Heathcote for the Government, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 7 May 1987, p 11443.

115 Although s 25 of the *Children (Criminal Proceedings) Act* 1987 is in accordance with the international human rights conventions, the fact that background reports do not extend to all offenders and all types of penalties could suggest that the obligation to undertake background reports only when control orders are being considered is contrary to the philosophy of having a separate court for young people. Implicit within this philosophy is that all penalties considered onerous and/or potentially disruptive to a young person's education, employment and/or home life—which include more than just control orders—should be assessed for their suitability. Accordingly, there should be an obligation to commission background reports when any type of penalty is being considered.

(a) a background report, prepared in accordance with the regulations, has been tendered in evidence with respect to the circumstances surrounding the commission of the offence, and

(b) copies of the report have been given to the child and any other person appearing in the proceedings, and

(c) the court has, subject to the rules of evidence, taken into account the matters contained in the report and any submissions made in relation to those matters by the persons referred to in paragraph (b).

If a control order is chosen, either because or in spite of the Juvenile Justice report (we will return to this point later), the magistrate is further required to justify this decision in writing.

35 Reasons for decision to be given

When the Children's Court deals with a person under section 33 (1) (g), it shall record:

(a) the reason for which it has dealt with the person under that paragraph, and

(b) the reason for which it considered that it would have been wholly inappropriate to deal with the person under section 33 (1) (a)–(f).

These legislative requirements are also in keeping with the Convention of the Rights of the Child, Article 37(b) of which states:

> "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."

Attitudes toward detention have therefore moved apace since the inception of the Children's Court. As mentioned in Chapter 1, under the welfare-type sentencing legislation of the Children's Court prior to 1987, detention and rehabilitation were considered to be synonymous. Institutionalisation was initially perceived to offer the possibility of rehabilitation through hard work and discipline, as well as liberation from an undisciplined or debauched environment. It was subsequently seen to be a child-saving measure, offering the young person the opportunity to receive guidance and support in the shape of therapy, etc.

Since the inception of the *Children (Criminal Proceedings) Act*, detention and rehabilitation have been somewhat disentangled. Or, more accurately, recognising the importance of rehabilitation does not preclude the use of incarceration in certain cases; however, incarceration is only to be used as a last resort, and only if there is no other way of dealing with the offence. and if furthermore the community requires protection. It is reserved for serious, repeat offenders and/or for serious offences.[116]

116 Further, s 19(1) of the *Children (Criminal Proceedings) Act* allows the Court to direct the whole or any part of a sentence of imprisonment to be served in a detention centre for those young people who were under the age of 21 years at the time of sentencing for an indictable offence. Other provisions under s 19 allow for young people who are over the age of 21 years at the time of sentencing in the adult jurisdiction, and/or young people who commit serious children's indictable offences, to serve the whole or parts of their imprisonment in a detention centre if certain criteria are met. These provisions recognise that adult imprisonment is more harmful than youth detention centres and could severely hinder the young person's rehabilitation.

To this end, guidance around the nexus between detention and rehabilitation does not stop at the provisions of the *Children (Criminal Proceedings) Act*. The sins of the past—where the reality of institutionalisation was very far removed from the child-saving ideal it was intended to be—mean that conduct within children's detention centres now receives clearer guidance and closer scrutiny than in the past. A separate piece of legislation, the *Children (Detention Centres) Act*, exists to ensure detainees' human rights are not violated in detention centres.

Section 4 of the *Children (Detention Centres) Act* seeks not only to ensure that persons on remand or subject to control take their places in the community as soon as practicable. It also seeks to preserve or develop satisfactory relationships between persons subject to control (or on remand) and their families.

Another significant feature of the *Children (Detention Centres) Act* is its restriction on the use of punishment in detention centres. This is intended to eliminate the excessively harsh methods that were previously used to discipline those confined in juvenile institutions. To this end, Section 22 stipulates that there is a prohibition on:

- the use of physical violence
- forcing detainees to adopt constrained or fatiguing positions
- depriving detainees of food or drink
- subjecting them to treatment detrimental to their physical, psychological or emotional well-being.

These provisions alone, however, cannot produce the young person's rehabilitation. Absent from this legislation is any guidance on what form rehabilitation should take in detention. It is usually left to the individual detention centre to decide this, and to decide whether rehabilitation programs are even made available. Furthermore, neither decision is open to public scrutiny to determine the efficacy of such programs.

Other provisions in the *Children (Detention Centres) Act*, however, address these limitations at least for some offenders. Section 24 of the Act allows the Director-General of the Department to discharge or grant leave to offenders in detention centres for the purposes of rehabilitation.

24 Persons subject to control may be granted leave, discharged etc

(1) Subject to the regulations the Director-General may, by order in writing:

(a) grant a person subject to control leave to be absent from a detention centre for a purpose specified in subsection (1A),

(b) remove a person subject to control from a detention centre and place the person in the care of such person as may be specified in the order, or

(c) discharge a person subject to control from detention if the Director-General has made arrangements for the person to serve the period of detention by way of periodic detention or made suitable arrangements for the supervision of the person during the period of detention.

(1A) The purposes for which leave may be granted under subsection (1) (a) are as follows:

(a) attending the funeral of a close relative,

(b) visiting a close relative who is seriously ill,

(c) applying for employment or being interviewed in relation to an application for employment,

(d) engaging in employment of a kind specified in the order,

(e) applying for enrolment in a course of education or vocational training or being interviewed in relation to an application for enrolment in such a course,

(f) attending a course of education or vocational training at a place specified in the order,

(g) any other purpose that the Director-General thinks proper, being a purpose which the Director-General considers to be directly associated with the welfare or rehabilitation of the person concerned.

The Court, however, does not have the discretion to exercise the powers mentioned under s 24. Instead, it can do no more than comment on the young offender's prospects for, and commitment to, rehabilitation. This is illustrated in *R v XYJ*.[117] The applicant in *XYJ* was a 16 year old boy who pleaded guilty to the charges of committing of robbery in company, being armed with a weapon with intent to commit armed robbery, possessing a prohibited weapon and allowing himself to be carried in a stolen car. Clarke, JA remarks on a young offender with a lengthy criminal history of serious offending, who has nonetheless made attempts at rehabilitation:

> "[W]hile there were many subjective features which supported the view that there were very good prospects that the respondent would be rehabilitated, the seriousness of the charges and the prior record of the respondent required, at the least, that he be placed under supervision … On the other hand I am not persuaded that the imposition of a sentence of full time custody would be the course most likely to lead to the rehabilitation of the respondent … it is no part of this Court's function to direct the Director-General as to the manner in which he exercises his powers. A recommendation can be made but, as I see it, that is all that can be made."[118]

Juvenile Justice officers

As mentioned in Chapter 1, welfare officers were given a significant role to play in the Children's Court for the first time in 1939, in recognition of their specialist knowledge. Even prior to this, the 1905 legislation that set up the Children's Court recognised the importance of parole officers, into whose care and supervision some young offenders were released. The role of welfare officers in the Court has not diminished over time. Today they also take the form of Juvenile Justice officers and, as mentioned above, they are currently brought in when magistrates consider imposing a control order. The Juvenile Justice officer, who prepares the appropriate report informing the Court of the young person's suitability for detention, might be guided to do one of the following:

- prepare a full report (according to Regulation 6)
- assess the young person's suitability for a CSO and/or the Railway Reparation Scheme
- provide information about the young person's schooling and employment only
- provide information about the young person's behavioural characteristics alone.

117 NSW CCA 15 Jun 1992 (unreported).

118 ibid.

Regulation 6 of the *Children (Criminal Proceedings) Regulation* 2000

For the purposes of section 25(2)(a) of the Act, a background report must be in such form as the Attorney-General may from time to time approve and must deal with such of the following matters as are relevant to the circumstances surrounding the commission of the offence concerned:

(a) the person's family background,

(b) the person's employment,

(c) the person's education,

(d) the person's friends and associates,

(e) the nature and extent of the person's participation in the life of the community,

(f) the person's disabilities,

(g) the person's antecedents,

(h) such other matters as the Children's Court may require,

(i) such other matters as the prosecutor considers appropriate to include in the report.

While the use of Juvenile Justice reports is laudable, it does have the potential to introduce a degree of inconsistency in the sentencing process, particularly as it relates to the nexus between rehabilitation and sentencing. The Juvenile Justice officer, who is working outside the legal context, forms his or her own views about the young person's rehabilitative capabilities and includes whatever information and/or interpretation of this information that is made available to him/her. Although the Juvenile Justice officer could be called to give evidence and be cross-examined in the Children's Court, this rarely seems to happen.[119] Within each of the topic headings that the Juvenile Justice officer is requested to cover, he or she exercises discretion as to what level of detail is covered, as well as what information to include and exclude. The officer is further constrained by the availability or willingness of the young person and significant family members to provide the necessary information. As such, different Juvenile Justice officers could draw different conclusions about the same offender's ability to rehabilitate and the suitability of various penalty options. By mentioning the constraints on the usefulness of Juvenile Justice reports for the purposes of imposing either a community service or detention order, our intention is not to be dismissive of such reports. Instead, it is to illustrate the difficulty of the task undertaken by Juvenile Justice officers, and the possible impact of this on the Court.

2.5 — *Children (Community Service Orders) Act*

In 1987, the Community Service Order (CSO) was a new penalty conceived as an alternative to imprisonment, but by its nature rehabilitative, in that it gave young people the opportunity to make amends to the community for their offending. It was justified in parliament on the grounds of being:

> "…a strict alternative to imprisonment or committal. Further, clause 8 requires that in relation to a child under 14 years, the court have regard to the capacity of the child, to reflect the fact that a community service order is a serious option and one which requires considerable maturity in order to complete it…"[120]

119 New South Wales Law Reform Commission, op. cit., n 31.

120 The Hon Mr Aquilina, Member for Minister for Youth and Community Services and Assistant Minister for Ethnic Affairs, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 8 April 1987, p 10358.

The Hon Miss Machin, Member for Gloucester (speaking on behalf of the Opposition Party of the day), added that, "[CSOs] might bring home to young offenders the damage they have done".[121]

The CSO did, nonetheless, spark debates in parliament at the time of its consideration. The Opposition questioned reserving CSOs only for those over 14:

> "It would seem extraordinary that what is deemed to be a more lenient approach in respect of a child of fourteen years and over will be denied to children of more than tender years."[122]

Such comments raise two important points. Firstly, that different age groups of young offenders were considered to benefit from different rehabilitative attempts. This, in turn, led to an artificial bifurcation of young offenders into 'older' or 'younger', with no reference to developmental maturity. Secondly, sentencing options that have a strong rehabilitative intention were, quite mistakenly, perceived by some especially in the Opposition at the time as being more lenient than other sentencing options.

There were also other disagreements about the use of the CSO. Some questioned the application of a CSO only in lieu of detention, preferring instead to treat it as a sentence in its own right:

> "Community service orders should not be given only in lieu of detention. There should be another arrow in the quiver of ways of dealing with offenders. Such orders are a positive as much as a negative form of penalty, because many children who end up before the courts come from fractured families which have poor adult role models. I believe if that community service orders are thought through carefully and well supervised, they can put a child who has never had a decent role model from an adult in a situation where he or she is with a group of people who can provide that role model and get beside the offender and provide him or her with positive encouragement to follow a more useful and productive lifestyle."[123]

The assumption made here is that reparation to the community could place young offenders under the guidance of an adult and that this, in turn, would successfully facilitate the young person's rehabilitation. This may not always prove to be true.

Parliamentary debates aside, the legislation is very specific about the parameters guiding the use of the CSO. Like the control order, the Court's use of the CSO is dependent on the assessment of a Juvenile Justice officer. Section 9 of the *Children (Community Service Orders) Act* stipulates that the Court is not able to impose a CSO unless it has been notified by an officer that there are opportunities for community service in the area in which the young

121 The Hon Miss Machin, Member for Gloucester for The National Party, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 6 May 1987, p 11324.

122 The Hon Mr Rozzoli, Member of the Opposition for Hawkesbury, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 6 May 1987, p 11299.

123 The Hon Mr Yeomans, Member of the Opposition for Hurstville, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 6 May 1987, pp 11341-2.

person resides and that the young person is sufficiently mature to perform this work. The Juvenile Justice officer prepares a formal report about the young person and the young person's circumstances to address these issues. Such reports are, of course, subject to the same inconsistencies as reports prepared for the purposes of assessing the suitability of detention (mentioned above).

2.6 — *Children's Court Act*: The selection and training of magistrates

The parliamentary debates that culminated in the 1939 sentencing reforms were the first to allude to the importance of magistrates' training for the purposes of effective sentencing. It was implied that the nexus between the facilitation of rehabilitation and sentencing in part resided in the magistrate (we take this up in Chapter 4). The 1987 suite of legislation seemed to depart a little, but not completely, from this view.

Section 7 of the *Children's Court Act* requires that the Chief Magistrate of the Local Courts select a Children's Court magistrate according to the latter's knowledge, qualifications, skills and experience in the law and the social and behavioural sciences, and in dealing with children and young people and their families.

Section 7(3), Schedule 1 stipulates that a Children's Court magistrate shall hold office for a period not exceeding three years but is eligible for reappointment. During his/her appointment, however, the Children's Court magistrate is subject to training and education on, and is required to meet regularly to discuss, issues affecting young people. Section 16(1) of the *Children's Court Act* requires the Senior Children's Magistrate to convene, at least every six months, a meeting of Children's Court magistrates and other people that the Senior Children's Magistrate thinks would contribute to the magistrate's knowledge of young people. The Senior Children's Magistrate is also required to confer regularly with community groups and social agencies on matters involving young people and to communicate the outcomes of these meetings to other Children's Court magistrates; develop practice directions and recommendations for rules; and oversee the training of current and prospective Children's Court magistrates. All these provisions would presumably inform the individualised justice of the Court.

In all, a balance needs to be struck between providing magistrates with enough knowledge and skills to know when and how to effectively facilitate rehabilitation through sentencing, and gently pushing them to embrace more of a social service role. An over-emphasis on the social consequence of sentencing is inimical to judicial functioning. Certainly, Children's Court magistrates need to be made aware of the social needs of the young offenders who appear before them, to ensure that the penalty is suitable to the offence, and that the young offender is able to fulfil the conditions of the penalty (hence the importance of Juvenile Justice officers). The judicial officer, however, is not a social worker. The limits and function of the Court are such that it cannot be the intention of the judicial officer to create broader social change through sentencing; this lies outside the Court's purposes. In terms of the nexus between rehabilitation and sentencing, however, this prompts the question: is it possible to effectively facilitate the rehabilitation of offenders without intending to create broader social change?

Conclusion

This chapter aimed to highlight the rehabilitative provisions contained within the 1987 suite of legislation. In the absence of a body of cases that pertain directly to Children's Court matters, the 1987 suite provides some pointers about the shape, form and importance of the nexus between rehabilitation and sentencing in this Court. Some of these pointers, however, are somewhat deficient and may have to be dealt with care if the facilitation of rehabilitation through sentencing is to have the best prospects of success.

3

Expanding the rehabilitative framework: the *Young Offenders Act* and the Youth Drug Court

This chapter makes a distinction between what we call 'passive rehabilitation' and 'active rehabilitation'. The majority of outcomes listed under s 33 of the *Children (Criminal Proceedings) Act* seem to provide for passive rehabilitation. By this we mean that the rehabilitative opportunities are made available to the young offender—through CSOs, dismissals with cautions or some of the conditions attached to a bond, for example—but the young person is not required to *demonstrate* any measure of rehabilitation during or after fulfilling these penalties.

This could be contrasted with outcomes that require the active participation of the young offender in his or her rehabilitation. These include youth justice conferencing and the Youth Drug Court (YDC) program. The nature of these outcomes are such that the young person is only able to fulfil the penalty by, for example, demonstrating contrition and/or making demonstrable attempts to change his or her behaviour. The terms 'passive' and 'active' rehabilitation, and their definitions, are imperfect; however, their use enables us to distinguish and highlight the features of the Youth Drug Court program and youth justice conferencing.

Both outcomes were borne out of initiatives in the 1990s. This period in New South Wales was marked by its emphasis on crime prevention in the juvenile justice area and, arguably, a move away from a reliance on court-based sanctions to address youth offending. Arguably, greater emphasis was also given to criminal justice interventions that involved non-legal professionals.

In this chapter, we describe both youth justice conferencing and the YDC program, and discuss what these outcomes mean for the nexus between rehabilitation and sentencing. We also briefly cover how the *Young Offenders Act* more generally and the *Children (Protection and Parental Responsibility) Act*, both enacted in 1997, impact on sentencing in the Children's Court.

3.1 — Youth Drug Court program

Description

The Youth Drug Court program is aimed at young people whose offending is a consequence of a drug addiction. The YDC program provides these offenders with the opportunity to wean themselves off drugs and learn appropriate life skills.

The Youth Drug Court program was one of the outcomes of the Drug Summit, convened by the NSW Government in May 1999 in response to public concern about illegal drug use and its relationship with crime.[124] The two-year pilot program for the Youth Drug Court commenced in July 2000. The program is integrated within the existing Children's Court so as to be cost effective and also to encourage referrals. As with the Drug Court for adults, it operates within a framework of therapeutic jurisprudence.

Therapeutic jurisprudence

It is well established that youth offending is often closely related to drug use, and that such offenders have higher recidivism rates than offenders without substance abuse problems.[125] In addition, these offenders, probably like many juvenile offenders, have a multiplicity of personal, educational and family problems that may include physical and sexual abuse, a history of family substance abuse and longstanding mental health issues.[126]

Therapeutic jurisprudence employs the tools of the behavioural sciences to explore the impact of the legal process on both the physical and mental well-being of those participating in the process.[127] While it has a broad application, it has most often been employed in dealing with offending behaviour such as domestic violence and drug-related crime. Within these parameters, the role of the law as a therapeutic agent addresses various facets of an offender's behaviour through a multi-agency approach.[128] This method targets, for example, not only the substance abuse of offenders but factors such as their mental and physical health problems, learning difficulties and deficiencies in education, which conspire to put an offender at risk of recidivism. This holistic approach seeks to promote the total rehabilitation of an offender, not just to address what might be regarded as the primary and most obvious cause of offending behaviour. The Youth Drug Court's challenge is to balance the primary concerns of the juvenile justice system, specifically the purposes of criminal punishment, and the psychological well-being of the young offender.

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124 T Eardley, J McNab, K Fisher, S Kozlina, J Eccles and M Flick, *Evaluation of the Youth Drug Court Pilot Program*, 2004, New South Wales Attorney-General's Department, Sydney.

125 S Belenko and R Dembo, "Treating adolescent substance abuse problems in the juvenile drug court", 2003, 26 *International Journal of Law and Psychiatry* 87.

126 ibid.

127 M King, "Applying therapeutic jurisprudence from the Bench: Challenges and opportunities", 2003, 28(4) *Alternative Law Journal* 159 at 172.

128 D B Wexler, "Introduction to the Therapeutic Jurisprudence Symposium" (1999) 41 *Arizona Law Review* 263; B J Winick, "The jurisprudence of therapeutic jurisprudence" (1997) 3 *Psychology, Public Policy, and Law* 184.

Legislative framework[129]

While the NSW (Adult) Drug Court is governed by its own legislation (the *Drug Court Act* 1998), the Youth Drug Court operates within the existing *Children (Criminal Proceedings) Act*.

Section 33(1)(c2), of the *Children (Criminal Proceedings) Act*

(1) If the Children's Court finds a person guilty of an offence to which this Division applies…

(c2) it may make an order adjourning proceedings against the person to a specified date (being an adjournment for a maximum period of 12 months from the date of the finding of guilt), and granting bail to the person in accordance with the *Bail Act* 1978:

(i) for the purpose of assessing the person's capacity and prospects for rehabilitation, or

(ii) for the purpose of allowing the person to demonstrate that rehabilitation has taken place, or

(iii) for any other purpose the Children's Court considers appropriate in the circumstances.

Section 50B Special provision relating to drug rehabilitation programs

(1) This section applies to any program for the rehabilitation of persons affected by alcohol or other drugs in which a child is required to participate as a result of an order or a condition of an order of the Children's Court in connection with criminal proceedings against the child.

(2) The Children's Court may, as a condition of any such order, require the provision of information about the child's participation in any such program to be given to a member or officer of the Children's Court by a person who is involved in the administration of, or who provides services in connection with, the program.

(3) The following provisions apply to and in respect of any information provided for the purposes of this section (*"protected information"*):

(a) the provision of the information does not constitute a breach of professional etiquette or ethics or a departure form accepted standards of professional conduct,

(b) no liability for defamation is incurred because of the provision of the information,

(c) the provision of the information does not constitute grounds for civil proceedings for malicious prosecution or conspiracy,

(d) the information is not admissible in evidence in any proceedings before a court, tribunal or committee,

(e) a person is not compellable in any proceedings before a court, tribunal or committee to disclose the information or to produce any document that contains the information.

(4) The provisions of subsection (3) (d) and (e) do not apply to or in respect of the provision of protected information in proceedings before the Children's Court or any court hearing an appeal from a decision of that court.

(5) The child participating in any such program is taken to have authorised the communication of protected information between anyone referred to in subsection (2).

(6) A provision of any Act or law that prohibits or restricts the disclosure of information does not operate to prevent the provision of information for the purposes of this section.

129 This legislation is supplemented by Practice Direction 18, issued on 30 April 2001, which sets out the conditions that apply to a referral to the Youth Drug Court pilot program, as well as general procedural matters. Practice Direction 19, issued on 12 March 2002, deals with compliance with Youth Drug Court programs.

Admission into the program

After an initial screening assessment conducted by a Department of Juvenile Justice counsellor, the results of which are reported to the Youth Drug Court at the young person's first appearance, the magistrate determines the offender's legal eligibility for the program. A young person may be ruled ineligible, for example, if a caution or youth justice conference is regarded as a more appropriate diversionary measure. Once the Youth Drug Court magistrate formally accepts the young person into the program, an order is made under s 33(1)(c2) of the *Children (Criminal Proceedings) Act*. The young person is required to sign an undertaking to comply with the conditions of the program plan and the sentence is deferred for a minimum of six months, with a possible extension for another six months if required.

The eligibility criteria for admission to the Youth Drug Court program are as follows:

- The young person must be between the ages of 14 and 18 years (although an offender under the age of 14 years may be admitted into the program if assessed as being suitable by the Youth Drug Court magistrate).
- The young person is ineligible for a caution or conference under the *Young Offenders Act*.
- The offence is one that can be finalised in the Children's Court; that is, the young person is under the age of 18 years at the time of the referrable offence, and the offence is not a serious children's indictable offence, a sex offence or a traffic offence.
- The young person has a demonstrable substance abuse problem.
- The young person pleads guilty or expresses an intention to plead guilty if admitted into the program.

Referral and entry to the program are no longer voluntary. This is because, prior to November 2002, it was observed that significant numbers of young persons who could have benefited from the program were refusing referral and serving custodial sentences instead.[130]

The program

The rehabilitative focus of the program is its multidisciplinary approach. This is reflected both in the make-up of the Youth Drug Court team, and in the activities that the young person is required to undertake to achieve his or her own rehabilitation. In addition to the children's magistrate, the Youth Drug Court Team comprises the police prosecutor, a Legal Aid solicitor, the Youth Drug Court Registrar and a representative of the Joint Assessment and Review Team (JART). The JART is made up of representatives from the Departments of Juvenile Justice, Health, Community Services, and Education and Training.

130 S Eardley et al, op. cit., n 124.

The JART prepares a comprehensive assessment report, following an initial assessment of the offender. The next phase involves the formulation of a Youth Drug Court program plan which usually requires a young person to reside as directed, accept supervision by the Department of Juvenile Justice and accept case management from a Youth Drug Court case manager. Participation in counselling, education programs, vocational assessments, health-related assessments and recreation/leisure programs is also required.

Emphasis is placed on developing a personal rapport with the young person and the facilitation of informal and frank discussions during report back sessions. This relationship building "encourages the young person to assume responsibility for their actions and to actively contribute to the ongoing development and adherence to their program plan".[131]

A young person is discharged from the program when there are continuous or serious breaches of program conditions. While the sentence takes into account time spent in the program, the sentence imposed can be no more severe than one that would have been given if the program had not been entered into.

Upon successful completion of the program, the young person could be sentenced to a bond, probation, have the offence dismissed or have the charges withdrawn.

Impact of the YDC program on the nexus

Like the CSO introduced in 1987 and the youth justice conference introduced in 1997, referral to the Youth Drug Court is specifically aimed at facilitating the young person's rehabilitation. More importantly, the Youth Drug Court arguably contains many of the ingredients that best facilitate rehabilitation:

- an assessment of the young person
- the requirement that the young person actively participate in his or her own rehabilitation, by discussing and accounting for his or her offending and showing contrition
- an interagency team, including a Children's Court magistrate, which is evaluated for its efficacy.

Further to this, the rapport built between the team and the young offender enables the team to obtain enough information about the young person to effectively assist the young person towards his or her own rehabilitation. In addition, the after-care support upon completion of the formal Court proceedings was also found to provide the young person with sufficient resources to ensure their continued rehabilitation.[132]

131 R Dive, M Killen, D Cole and A Poder, *New South Wales Youth Drug Court Trial*, paper presented at the Juvenile Justice: From the Lessons of the Past to a Road Map for the Future Conference, 1-2 December 2003, p 5.

132 S Eardley et al, op. cit., n 124.

3.2 — The *Young Offenders Act*

Description

As mentioned in Chapter 1, while the *Young Offenders Act* is ostensibly about diverting less serious and first-time offenders from the Children's Court, it also adds to the range of outcomes available to the Court. The Court is now able to caution a young person under the *Young Offenders Act*, as well as send them to youth justice conferencing.

Cautions

While the Court is able to issue cautions under the *Children (Criminal Proceedings) Act*, cautions under the *Young Offenders Act* impact differently on the young offender. Under the latter, the young person does not incur a record.

For the Court, the difference between a caution under s 33 of the *Children (Criminal Proceedings) Act* and one under s 31 of the *Young Offenders Act* is procedural. The Court is obliged to notify the Local Area Commander of the area in which the offence occurred of the Court's decision to impose a *Young Offenders Act* caution and its reasons for doing so. The provisions for Court-cautioning under the *Young Offenders Act* are as follows:

Cautions: s 31, *Young Offenders Act*

(1) A child may be given a caution by a court if:

(a) the offence is one for which a caution may be given under this Part, and

(b) the child admits the offence.

(2) This Part (other than this section and sections 32 and 33) does not apply to a caution given by a court.

(3) Nothing in this Part affects the power of a court to give a caution under section 33 of the *Children (Criminal Proceedings) Act*.

(4) A court that gives a caution under this section must notify, in writing, the Area Commander of the local police area in which the offence occurred of its decision to give the caution and must include the reasons why the caution was given.

(5) Despite any other provision of this section, a court may not give a caution to a child in relation to an offence if the child has been dealt with by caution on 3 or more occasions:

(a) whether by or at the request of a police officer or specialist youth officer under section 29 or by a court under this section, and

(b) whether for offences of the same or of a different kind.

Youth justice conferences

The principles and purposes of a conference are set out in s 34 of the Act.

34 Principles and purposes of conferencing

(1) The principles that are to guide the operation of this Part and persons exercising functions under this Part, are as follows:

(a) The principle that measures for dealing with children who are alleged to have committed offences are to be designed so as:

(i) to promote acceptance by the child concerned of responsibility for his or her own behaviour, and

(ii) to strengthen the family or family group of the child concerned, and

(iii) to provide the child concerned with developmental and support services that will enable the child to overcome the offending behaviour and become a fully autonomous individual, and

(iv) to enhance the rights and place of victims in the juvenile justice process, and

(v) to be culturally appropriate, wherever possible, and

(vi) to have due regard to the interests of any victim.

(b) The principle that sanctions imposed on children who commit offences are:

(i) to be of a kind most likely to promote the development of such children within their family or family group, and

(ii) to take the least restrictive form that is appropriate in the circumstances, and

(iii) to assist children to accept responsibility for offences.

(c) The principle that any measures for dealing with, or sanctions imposed on, children who are alleged to have committed offences take into account:

(i) the age and level of development of any such children, and

(ii) the needs of any children who are disadvantaged or who are disconnected from their families, and

(iii) the needs of any children with disabilities, especially those with communication and cognitive difficulties, and

(iv) the gender, race and sexuality of any such children.

(2) The purpose of a conference is to make decisions and recommendations about, and to determine an outcome plan in respect of, the child who is the subject of the conference.

(3) In reaching decisions at a conference, the participants are to have regard to the principles set out in this section and the following matters:

(a) the need to deal with children in a way that reflects their rights, needs and abilities and provides opportunities for development,

(b) the need to hold children accountable for offending behaviour,

(c) the need to encourage children to accept responsibility for offending behaviour,

(d) the need to empower families and victims in making decisions about a child's offending behaviour,

(e) the need to make reparation to any victim.

There are also some procedural differences between referrals to youth justice conferencing by the Court and referral by the police. Unlike the police, the Court is able to refer a matter to conferencing whether or not the young person consents to the conference being held, and also after finding a young person guilty of an offence: s 40. The provisions for referrals to conferencing by the Court under the *Young Offenders Act* are as follows:

Conferences: s 40, *Young Offenders Act*

(1) The Director of Public Prosecutions or a court may refer a matter involving a child who is alleged to have committed an offence to a conference administrator for a conference if:

(a) the offence is one for which a conference may be held, and

(b) the child admits the offence, and

(c) in the case of a referral by the Director of Public Prosecutions, the child consents to the holding of the conference, and

(d) the Director or court is of the opinion that a conference should be held under this Part.

(2) An offence may be referred under this section even though the offence was not dealt with by an investigating official.

(3) A court may refer a matter at any stage in proceedings, including after a finding that a child is guilty of an offence.

(4) The Director of Public Prosecutions or a court must notify the Commissioner of Police in writing of the particulars of any referral after making a referral under this section.

(5) In determining whether to refer a matter for the holding of a conference, the Director of Public Prosecutions or a court is to take into account the following matters:

(a) the seriousness of the offence,

(b) the degree of violence involved in the offence,

(c) the harm caused to any victim,

(d) the number and nature of any offences committed by the child and the number of times the child has been dealt with under this Act,

(e) any other matter the Director or court thinks appropriate in the circumstances.

(6) Unless it is impracticable to do so, the Director of Public Prosecutions must consult with the investigating official (if any) before making any decision as to whom the matter is to be referred.

The impact of 1997 legislation on court-based sentencing

Young Offenders Act

Allowing the diversionary penalty of youth justice conferencing to be replicated in court-based sanctioning may have led to conferencing being overused by the Children's Court and underused in pre-Court diversion.[133] Anecdotal data in the NSW Law Reform Commission report[134] attributes this finding to the police being too understaffed or under-resourced to institute diversionary processes, preferring instead to institute court-based procedures. If the latter explanation is correct, this raises the issue of whether the Court is doing the work of the police, rather than the police diverting young people from the Court. This, in turn, raises another problem. An observation was submitted to the NSW Law Reform Commission in 2001 that magistrates were using conferencing for first time offenders when a caution would have been more suitable.[135] Again, if this observation is correct, this would mean that certain young offenders are working harder towards their own rehabilitation than the offence warrants. Alternatively, it would suggest that greater opportunities for rehabilitation are offered to those offenders who are in the least need of them (that is, first time or less serious offenders).

To be eligible for pre-court youth justice conferencing, young people are required to admit to the offence for which they have been caught. Such a provision is in line with human rights conventions; however, practical difficulties could arise from this application. It could encourage some young people to admit to offences that they have not committed —thereby abandoning their right to due process—because they, or their families, assume

133 NSW Law Reform Commission, op. cit., n 31.

134 ibid.

135 ibid, n 133.

that adjudication by the Court would result in a record for the young person. This makes the so-called choice between entering diversionary schemes and going to Court a potential Hobson's Choice for a young person looking to avoid a criminal record (which has the obvious long-term repercussions).[136]

In a reverse predicament, some young people might be encouraged by their legal representatives to elect to have their matters brought before the Court to be adjudicated by a magistrate. This is said to be particularly true of Indigenous young offenders. Anecdotal evidence reported by the NSW Law Reform Commission suggests that Legal Aid advisers make recommendations to their Indigenous clients to deny the charges brought by the police.[137] This enables them to default to court processing, which is arguably subject to greater public scrutiny. The NSW Law Reform Commission purports that such legal advice is particularly given to Indigenous offenders because, as a group, they are considered to have an uncomfortable relationship with the police.[138]

Both these inadvertent patterns could lead to the same offences being dealt with differently,[139] thereby introducing a lack of parity into the sanctioning process, which magistrates have no power to rectify. Alternatively, in the former instance, it could lead to the Children's Court modifying its practices to take into account the type of rehabilitation that would have been otherwise available to the young person in diversion if relations with the police had not broken down.[140]

There are benefits to going to court; in particular, the investigation and adjudication of the offence is open to public scrutiny. By contrast, diversionary programs have the potential to expose young people to the "full weight of coerciveness of the juvenile justice system without benefit of advice or proper legal representation".[141] This in turn could mean that, contrary to its goal of preventing recidivism, diversion could have no effect on recidivism. There is, however, no publicly available evidence to show that this is happening.

Others have also suggested that diversion results in 'net-widening'[142] that is, it puts a greater proportion of young people in formal contact with the justice system who, by virtue of this alone, may then graduate to more serious crimes and eventually appear

136 C Alder and J Wundersitz, "New Directions in Juvenile Justice Reforms in Australia", in C Alder and J Wundersitz, *Family Conferencing and Juvenile Justice: the way forward or Misplaced Optimism?* 1994, Australian Institute of Criminology, Canberra.

137 NSW Law Reform Commission, op. cit., n 31.

138 ibid.

139 C Adler and J Wundersitz, op. cit., n 136.

140 Certainly the reference to the Court Alternative History reports suggest that some importance is given by magistrates to what happens in pre-Court diversion. Admittedly, there is limited guidance available in the legislation about how the magistrate should best use this information. It is, however, enough to make the point here, that magistrates not only choose to find out what happened in pre-Court diversion, they also give it some weight.

141 K Polk, "Family Conferencing: theoretical and evaluative questions", in C Alder and J Wundersitz, *Family Conferencing and Juvenile Justice: the way forward or Misplaced Optimism?* 1994, Australian Institute of Criminology, Canberra.

142 ibid.

before the Children's Court. Diversion is said to bring police, and perhaps over time the Court, into contact with new kinds of clients—younger offenders, less serious offenders and girls, including girls brought in for various kinds of so-called sexual misconduct.[143] Again, there is no publicly available evidence to show that this is happening.

If, however, it is happening, despite the lack of evidence (and also despite the best efforts of the scheme) pre-Court conferencing has the potential to add an extra layer[144] in the judicial process.[145]

Children (Protection and Parental Responsibility) Act

Legislative attempts to ensure the active participation of some parents in their children's rehabilitation constitutes not so much an active form of rehabilitation on the part of young offenders, but an active effort by parents to take responsibility for guiding their children. This is thought to reduce recidivism, and the failure of parents to take responsibility for their child as directed by the Court incurs penalties for the parents.

Parental responsibility for the behaviour of young people in their care, and the rehabilitative value of this, takes many different forms in sentencing legislation affecting young people. For example, the justification for the greater use of non-custodial sentences was, in part, based on a belief that to separate parents and children, even if temporarily, by the removal of children to detention centres, would be harmful. That is, any measure that threatened to split the family in this way would have an adverse effect on the young person's rehabilitation. This, in turn, suggests that rehabilitation is dependent on the young person's contact with their parents, and moreover, a certain degree of family stability. During parliamentary debates about the use of the CSO, the Hon Mr Refshauge, from the Government, advocated keeping young people with their families:

> "In almost every case they [CSOs] have a greater rehabilitative effect than incarceration … children can be maintained within their families while they are undertaking what is more a rehabilitation than a punishment … In that way the family can be protected and maintained rather than being broken up by putting people away …"[146]

Parents featured in parliamentary debates in 1987 in relation to the Children (Criminal Proceedings) Bill as well. Mr Rozzoli, Member for Hawkesbury, then from the Opposition, sought to amend Clause 36 of this Bill to force parents and guardians to pay compensation for their children's offences, in recognition that the child's offending may have been caused by "the dereliction of the parent or guardian in their duty of care towards the behaviour of the child". Or alternatively:

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143 K Polk, op. cit., n 141.

144 Warner, op. cit., n 107.

145 Warner, op. cit., n 107: Warner believes this could be viewed as double jeopardy, especially given the potential for diversionary schemes to be quite onerous.

146 The Hon Mr Refshauge, Member for Marrickville for the Government, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 6 May 1987, p 11277.

> "The court could well say, on the other hand, 'The conduct of the parent in this case is a direct cause of this child's committing this offence which has caused damage, and therefore it is appropriate not only to penalize the child but also … the parent … '… It reinforces the responsibility of the family to bring up the children of the family with a proper understanding of the codes of behaviour that society accepts … "[147]

This amendment to s 36 of the *Children (Criminal Proceedings) Act* was not adopted; however, 10 years later, the flavour of the recommendation that parents be held responsible for the criminal behaviour of a child in their care took shape in the form of the *Children (Protection and Parental Responsibility) Act*. As mentioned in the Introduction, this Act, like the *Young Offenders Act* that was enacted in the same year, was largely about crime prevention and formalising the roles of both the parent and the police for the purposes of ensuring this end. The *Children (Protection and Parental Responsibility) Act*, however, also suggests a role for parents in the Children's Court, with the aim of involving parents to facilitate the rehabilitation of the young persons in their care.

Section 7 of the *Children (Protection and Parental Responsibility) Act* enables the Children's Court to specify the attendance of one or more parent when it exercises criminal jurisdiction with respect to a young person in the parent's care. Section 8 of this Act provides that the Court may release a young person found guilty of an offence on the condition that the young person submits to parental supervision, resides with his or her parent(s) or undertakes other similar provisions that are specified by the Court. Section 9 of this Act sets out what is required of the parent(s) whose child the Court releases into their care. This includes either giving the required undertaking, or security in the form of a deposit of money or otherwise, to refrain from certain acts, to undertake specified action to ensure their child's development, to ensure their child's compliance with specified conditions, or to ensure their child's good behaviour. The Court is not able to take action against a young person as a result of the failure of his or her parent(s) to comply with these undertakings.

Section 10 of the *Children (Protection and Parental Responsibility) Act* allows the Court, if it finds a young person guilty of an offence, to exercise the option of sending a young person and his or her parent(s) to counselling if the Court thinks it would assist the rehabilitation of the young person. Such a provision recognises the culpability of the parent, as does s 11 of the Act, which stipulates that if the wilful default of the parent(s) contributes—either directly or in a material respect—to the offending of the young person in their care, this will incur punishment for the parent(s).

Clearly, therefore, in some instances parents are seen to play an integral part in their child's offending and/or their rehabilitation, and the young person's developmental maturity (or lack thereof) is deemed to require adult guidance. The points to be taken from the provisions of the *Children (Protection and Parental Responsibility) Act* are that the state is not in a position to take sole or full responsibility for this guidance. Therefore, facilitating the young person's rehabilitation in some cases requires ensuring, in the case of young people who have parents, that these parents take responsibility for their child's upbringing.

147 The Hon Mr Rozzoli, Member of the Opposition for Hawkesbury, *New South Wales Parliamentary Debates* (Hansard), Legislative Assembly, 6 May 1987, p 11294.

4

Rehabilitation in sentencing practice

Eighteen cases were chosen for this monograph to illustrate the many ways that rehabilitation manifests itself in the sentencing practice—one to three cases for each of the 10 most common offences (which make up approximately three-fifths of all offences) in the Children's Court. These case studies are described in Appendix 1. In this chapter, we report and discuss the themes highlighted by the cases.

The sentencing remarks from each case will form the main, but not sole, focus of this chapter, and excerpts from sentencing remarks will be reproduced where relevant. Sentencing remarks were available for 14 of the 18 cases; the remaining four cases were dealt with in chambers.

These 18 cases were deliberately chosen to highlight particular issues, not because they are representative of sentencing in the Court. Nonetheless, insofar as they highlight that the nature of youth offending is such that a significant proportion of offenders commit more than one offence at a time and commit offences in company,[148] these case studies are representative.

Our aim is not to recommend the strategies adopted by magistrates in each of the 18 cases, or to suggest that they be emulated under the banner of 'best practice'. Rather, our purpose is to distil from the sentences and the accompanying sentencing remarks the components that go towards facilitating rehabilitation.

We do this under the following four headings:

- Section 6 considerations
- The rules of thumb of sentencing
- The application of the *Young Offenders Act*
- Juvenile Justice officers.

148 What defines 'in company' has, however, been a topic of debate. In *R v Button; R v Griffin* (2002) 129 A Crim R 242, it was suggested that the coercive force of the group would operate over the young offender's offending if there was a sufficient degree of proximity between the group and the young person. A 'degree of proximity' between the young offender and others could amount to the physical presence of the latter in relation to the former to satisfy the requirement of 'in company', although the definition of the term itself is not fixed.

4.1 — Section 6 considerations

As mentioned in Chapter 2, s 6 of the *Children (Criminal Proceedings) Act* is sufficiently general and non-directive as to leave to the discretion of the magistrate decisions about the suitability and form of rehabilitation. The magistrate may foster rehabilitation by adopting a particular position in relation to the young person, which we call 'benevolent paternalism'. Alternatively, the rehabilitative component of the sentence could emerge from the magistrate balancing the objective and subjective features of the case, such that the penalty meets the offender's individual needs as much as it reflects the nature and seriousness of the offence. Of course, depending on the seriousness of the offence and the extent of the offender's needs, such a balance might be difficult to achieve. The magistrate could also attach conditions to outcomes to facilitate the rehabilitation of the young person that the outcome alone is not able to do. Further to this, the magistrate could attempt to achieve continuity in the Court decision-making process by ensuring some degree of congruence between decisions made in the early stages of the Court process—for example, with respect to the bail conditions in instances where bail is granted—and the outcome. Such congruence between the early and latter stages of the Court process could have the effect of reinforcing to the young offenders that their rehabilitation is dependent on certain things being adhered to, such as remaining with their parent(s) and recognising their parent(s)' authority.

Benevolent paternalism and communication with the young offender

As mentioned above, the rehabilitative component of sentencing in some cases could be intrinsically linked to the magistrate's interaction with the young person in Court. This is best illustrated with sentencing remarks. The sentencing remarks—which provide the magistrate with an opportunity to show his or her concern for the young person, and also to provide some explanation of the proceedings and/or set boundaries around what the Court considers to be acceptable conduct—could be integral to the building of the rehabilitative framework within which the Children's Court operates. We have labelled this 'benevolent paternalism' because it reinforces the magistrate's authoritative role, which is nonetheless tempered by a concern for the young person's welfare. Magistrates take the form of 'super parents', whose effectiveness in this role is a consequence of having the full weight of the state behind them. As such, from the possible viewpoint of some young offenders, they are not so much appearing before a court of law as before a parental figure who has greater authority than their own parents or guardians. (The latter, for one reason or another, may not have been effective in setting boundaries and/or setting an example of appropriate behaviour.[149] This, in turn, could have contributed to the young person's offending.)

149 D Weatherburn and J Baker, "Transient Offenders in the 1996 Secondary School Survey" in *Current Issues in Criminal Justice*, Vol 13, No 1, 2001.

Benevolent paternalism in the Children's Court seems to be a modern manifestation of the jurisdiction of *parens patriae* of latter day English courts.[150] Today, in accordance with the growing acknowledgment of young people's rights, benevolent paternalism largely takes the form of advice and boundary setting. This is best illustrated by the sentencing remarks from case study K (see page 97). This is a case of common assault, which the magistrate considered to be sufficiently serious to warrant a six-month good behaviour bond with conditions. Despite this, the magistrate's comments indicate that the aim of the punishment is not retribution:

> "Nothing that the Court does in this jurisdiction is designed to make your life a misery; it's all designed to stop you from re-offending. So, please, accept the supervision that they can give you and that will help put in place some strategies so that you don't find yourself coming back before this, or any other court. That's the name of the game."

Remarks such as these reproduce parental advice at a higher authority, but could also reinforce the authority of the young person's parents. In case study O (assault occasioning actual bodily harm: see page 101), the magistrate casts the parents in the role of people whom the young person should choose not to disappoint. The magistrate's role is to reinforce to the young person that the day-to-day management of, and accountability for, the young person still lies with the parents or guardians of the young person.

> "All right [O] that's it now. We are finished with you. Hopefully you are finished with courts. But again, I sound like a cracked record. It's all about choices. You make the good choices or the bad choices. I suppose it's like … there used to be a cartoon … I can't remember if it was Bugs Bunny or somebody, and they had the angel and the devil and there were always these messages. Always walk around thinking whoever it is that you admire the most, whether it is Mum or Dad, or whoever it is. Would Mum or Dad be proud of the decision I am about to make? Would this be the right decision?… If you step a foot out of line you will go in for a long time. So it is important that you get the message. Good luck to you. I hope we never cross paths in this situation again."

These remarks also highlight that while the magistrate's words may indicate a concern for the young person, one can never be certain that the magistrate's choice of words will succeed in communicating the message he or she intends to convey.

Explaining the sanction to the offender

Benevolent paternalism is arguably of greatest rehabilitative value when it takes the form of the magistrate making intelligible to the offender the reasoning behind the sentence. In case study C (break, enter and steal: see page 91), the magistrate explains the rationale for the sentence and, by doing so, alerts the offender to the fact that they are being given an opportunity to rehabilitate:

150 It is no accident that the magistrate's role in relation to the young person is paternalistic, rather than maternalistic or merely parental, in keeping with the jurisdiction and historical evolution of *parens patriae*.

> "Just stand up please [C]. I think that the greatest stroke of luck for you in this matter is that you were caught. What was done was a poorly executed, but nevertheless fairly serious, effort to steal quite a lot of property from [a department store]. The next good thing to focus on is the fact that you have not been in any strife since, apart from travelling on a train without a ticket which I am not at all concerned about and don't take into account. So what I am proposing to do is place you on a 12-month good behaviour bond. That means if you get into more strife in the next 12 months there is a chance you will be getting an extra whack for this. It won't involve any supervision. All that it will require is that you be of good behaviour. So, please continue to stay out of strife. Put this behind you."

Case study K (common assault: see page 97) provides a more comprehensive explanation of the ingredients that went into determining a sentence. Of interest here is that the seriousness of the offence is juxtaposed against the degree of contrition shown (and, incidentally, what is considered to be a measure of contrition in the sentencing remarks is revealing), such that this contrition is permitted to act as an early display of a commitment to rehabilitation.

> "[K] was dealt with for offences committed prior to this offence in October and received the benefit of two cautions under s 33(1)(a). [K] has made a journey from Victoria, so obviously [K] considers this to be a serious matter and again that shows a degree of contrition on his part. There has been prepared an extensive background report. I am concerned about the circumstances of this particular offence and as [[K's] legal representative] has properly pointed out, no two people live their life the same way and that's what makes Sydney, and Australia, such an interesting place because there are many and varied people living in this part of the world, doing all sorts of things. The secret to living harmoniously is accepting people for who they are and allowing them to get on with their life. It's unfortunate, [K], on this occasion you didn't express and exhibit some greater maturity, but I trust, in time, that will come…Having a look at the facts and your record perhaps it is appropriate for supervision and I will be ordering as part of a good behaviour bond. I don't know what your co-accused's record was. Whilst you have a limited record there are still some concerns that the Court has about [this type of] offending."

While the young person's personal circumstances are referred to, they are not permitted to be used as an extenuating factor leading to a more lenient sentence; merely to suggest what conditions should be attached to the order of a bond. The Court's message thus seems to be that there are no acceptable excuses for offending. At the same time, the Court recognises that certain features of the young person's life require urgent attention to maximise the deterrent value of the sentence. It is a tacit recognition that deterrence and rehabilitation need to be coupled effectively in a sentence with certain offenders, if recidivism is to be successfully addressed.

Recognising the young person's strengths and providing guidance

The magistrate's acknowledgment of the young person's strengths could also provide an impetus for rehabilitation. Juvenile Justice reports commissioned by the Children's

Court show that, in addition to the absence of boundaries, some young offenders do not receive support from significant adults in their lives. The magistrate's ability to usefully acknowledge the young person's strengths, however, is dependent on being provided with a correct and thorough understanding of the young person. It is the task of the Juvenile Justice officer to provide such information to the Court. Such information is predominantly obtained from either face-to-face or telephone interviews with the young person and/or family members. However, as we mentioned in Chapter 2, the Court is only obliged to commission such a report when it considers imposing a control order or a CSO. Therefore, not all young people who appear before the Court are subject to Juvenile Justice assessment. For those who are not, the magistrate only has the facts of the case to rely on, a prior criminal record,[151] or such evidence of character and conduct provided by the young person's legal representative.

Case study Q (robbery in company: see page 104) was subject to an assessment by a Juvenile Justice officer, and the magistrate made it clear to the young person that his knowledge of her capabilities was furnished by this report. In fact, the content of the report informed the following remarks:

> "… the report says to me that you are a young woman with a lot of potential. Even though life has been difficult … obviously school has been difficult in recent times but you have managed to hold down a part-time job. And I think in jobs like that if someone is slack or unreliable they get kicked out fairly quickly. So it shows that you are somebody who has a capacity to work and probably in a job that's not always fun. If you're frying fish and chips then you'll get the burns on the forearm and all of those things that come with it. So please use the abilities you have, the potential you have, use the capacity to stick at things that you have to fashion something good for your life. [The Juvenile Justice officer] and others will be able to assist you with that. Hopefully you will also see that your mum could make a positive contribution to your life. You don't really have to agree with her faith or her values or her perspective on Australian culture. But you should at least do her the respect of listening and understanding rather than completely ignoring [what she tells you] … Hopefully if you do that for her she might in time be able to respect your position and understand where you are coming from and perhaps even appreciate your approach to life. You'll be sad if you are distanced from your mum. I encourage you not to do that. So, lecture's over."

By mentioning the young person's relationship with her mother within the context of discussing the young person's strengths, the magistrate seems to adopt an interesting rehabilitative device—it identifies the parent as another perceived strength in the young person's armoury, which could be harnessed towards the young person's rehabilitation.

This also illustrates that magistrate's remarks are often exhortatory, encouraging the young person to listen to others and make choices accordingly. This, in turn, might be what facilitates their rehabilitation.

151 Either from a court-based prior offence history record, or pre-court diversion history record obtained from the police, called the Court Alternative History report.

Warning

In the case mentioned above (case study Q, robbery in company: see page 104), the sentencing remarks also contained a warning against further mischief, thereby classically conforming to the authoritative purpose of the Children's Court. Warnings could form the best example of the overlap between deterrence and rehabilitation. Such warnings were found to be typical of the cases that we chose for this monograph:

> "… if you don't comply with the program you'll be back here and [you'll] come back and see me. I'll read these papers and particularly if you are involved in any further violence I may have to think about locking you up. OK?"

This raises an interesting question about whether warnings on their own have limited rehabilitative value in some cases, unless coupled with other measures.

Exasperation

A few magistrates were unmistakably exasperated by the offender's conduct and prior offending history. It cannot be discounted that a feature of working in this Court is that magistrates think that some young people are beyond rehabilitation and are incapable of learning from their mistakes or taking heed of the warnings from the Court. In case study L (common assault: see page 98), the penalty of a good behaviour bond may have been proportionate to the offence committed; however, the penalty alone may not have communicated to this repeat offender the Court's view of her. This was left to the sentencing remarks:

> "It's not much fun being locked up, is it? I don't know what got into you last night. You behaved appallingly. It must have been a sight to behold. Throwing packets of sugar, salt [inaudible] and containers they were in and when you were asked to stop, no doubt because you were considered to be not only childish but dangerous, you set upon the staff member there, punching him to the right side of his face and body. You have been locked up. Where did you spend last night? [Detention Centre X], out with the girls. That would have been entertaining. I take it you've never been locked up before. You have?!. Well, you will continue to get locked up if you don't do something about the way you treat other people. What I will do in relation to this matter is that I take into account your early plea. I take into account also your desire to leave New South Wales and I wish you well on your journey back to Victoria. You are 16 about to turn 17. In relation to this matter, I will, without a conviction, release you on a good behaviour bond under the provisions of s 33(1)(b) for a period of nine months. For the next nine months be of good behaviour. Don't come back to New South Wales please. It's not a condition of your bond, but once you go back don't come back."

Concurrence between bail and bond conditions

As mentioned earlier, there may be a concurrence of bail and bond conditions, providing the offence and process by which the young person is initially dealt with by the police necessitates both. That is, not all young people would incur bail, let alone conditional bail

by the Court; this only happens if the offence is of a serious nature or if the offender is likely to abscond before being dealt with by the Court. Similarly, not all offenders receive a bond, let alone a bond with conditions. Where conditional bail has been set, and the offender dealt with by a bond with conditions, some concurrence between the bail and bond conditions would reinforce to the young person that there are aspects of their lives that are essential to their rehabilitation, and if adhered to, would result in discouraging them from further offending. In case study P (see page 102), both the bail and bond conditions required the young person to reside with parents and to not go within a 1 km radius of his place of offending. In many cases, both the bail and bond conditions include a requirement to not fraternise with co-offenders or criminal associates.

Meeting individual needs

Synthesising the 'facts' and 'features' of a case

The relative weight given to the 'facts' and 'subjective features' of a case for the purposes of facilitating rehabilitation through sentencing would justifiably vary from case to case, depending on the circumstances of the offence and the needs of the young person. If the needs are particularly great—because, for example, adult supervision is limited or absent—the sentence may allow the facilitation of rehabilitation to play a greater role.

The subjective features of the offender could also militate against the objective facts of the case, as illustrated by case study A (see page 89). A had repeatedly committed similar offences, with the same group of offenders, and had already incurred a number of like-type penalties (in A's case, probation). A had also incurred a number of bonds over a five-year period, many of which he breached. The rehabilitative opportunities of such a penalty had clearly not been taken by A, nor did this penalty seem to have much deterrent value for this young offender. He was therefore sentenced for the latest matter to a suspended control order for six months. Nonetheless, the sentence was suspended because of the young offender's attempts at rehabilitation. His recent good behaviour and the support of his family were both indicators of this. If the penalty was breached, however, the consequences would be greater than for past breaches—the young offender would serve time at a detention centre.

> "[A] if you can just stand up please. To use the vernacular you have really been cruising for a bruising and I presume that you understand that, otherwise you wouldn't have changed your behaviour. People shouldn't have to have their mobile phones pinched and their cars damaged and all of that sort of stuff. I suspect that I don't need to lecture you too much about that because you've already worked all of that out. If you haven't then there's more grief in store for you yet I'm sure. It is good the stuff that I read in the JJ report. Your sister can say that you've changed your behaviour, you've changed the mates that you hang around with, that you've got work. I'm sure that particularly on hot days, being a packer in a factory can be pretty warm work and you might wish you'd be somewhere else. Ultimately I'm sure there'll be some value to you in having some honestly earned money in your pocket, that hopefully you can enjoy spending some starch. You should thank your family for the support that they have given you. I hope you already have. And if you

can stay on the track that you are on then hopefully I won't need to see you again, nor will any other magistrate. You've still got a few problems down at [another court] but whatever the outcome is there if you can show the same sort behaviour in March as you have in January I hope that things won't go too badly for you. As I said before, I think a custodial penalty was appropriate for these, not because they've been the most serious offences in themselves, but because you lose absolutely any chance of sympathy because you've had so many chances before. But, given that your performance has been good in recent times, then it is quite appropriate for me to suspend the sentences. So in each matter—and this will be with conviction, it won't be without conviction—in each matter you are convicted and in each matter I am sentencing you to a control order for a period of six months … the conditions are that you accept the supervision and guidance of the probation and parole service, obey all their reasonable directions. OK? They say you do something there's got to be a damn fine reason not to. There are also the statutory conditions that you have to be of good behaviour, that you appear in court for sentence at any time if required to do so, and that you notify the registrar of this court of any change of address. Understand? … Keep up the recent good work."

Again this illustrates the desire of the Children's Court to keep offenders out of the custodial setting and provide alternative, more achievable, opportunities for rehabilitation.

A wide breadth of sentences handed out for the same offences may reflect not only the seriousness of the offence, the number of prior offences and the frequency of offending, but significantly also the low rehabilitative (and deterrent) value of some sentences for a given offender.

In other cases, the sentences seem to reflect other aspects of the offender's circumstances. For example, in case study H (see page 95), a fine was chosen for the homeless offender who failed to appear before the Court. Perhaps the Court was unconvinced that the offender, if apprehended again, would be able to fulfil any undertaking imposed by the Court. The fine, however, although perhaps the most suitable sanction given the nature of the offence and offender, would arguably have limited or no rehabilitative value.

Drug offences

Drug taking, together with mental health issues and developmental disabilities, are the hidden features of a significant amount of youth offending.[152] While drug possession is not the most common offence in the Children's Court,[153] there is sufficient anecdotal evidence and research findings to suggest that drug offences co-occur with non-drug offences. Drug-taking was known to be at the heart of two of the 18 case studies chosen for this study where the principal offence was something other than drug possession.

152 D Weatherburn and J Baker, op. cit., n 149.

153 This data was taken from the Judicial Information Research System, which is a database managed by the Judicial Commission. It is available on subscription.

As for drug possession offences themselves, they highlight the importance of facilitating rehabilitation through sentencing and the reduced efficacy of punitive penalties. Punishing an offender is not likely to remove the drug problem that led to the offending behaviour. The existence of the Youth Drug Court validates this.

In the three cases of drug possession reported in Appendix 1, the possession and consumption of drugs were viewed by the Court to be serious. Of these three cases, only in the case of R (see page 106) were the sentencing remarks kept brief. Some time had elapsed since R had committed the offence of drug possession for which he was being dealt. R was also facing far more serious charges for another matter in another court. These factors may account for the brevity of sentencing remarks in his case.

In case study S (possession of prohibited drugs: see page 107), the magistrate spoke to the offender at length about the consequences of taking drugs. An excerpt of this is reproduced below, where the magistrate warned the offender about both the legal and health implications of drug-taking:

> "The possession and use of drugs in this state is a crime. I appreciate that you are 16 years of age and you are spreading your wings and you are having a go at all these things. No doubt you have tried smoking. No doubt you are trying drinking and it seems that everyone's smoking dope and everyone's taking 'eccies'. Only fools do … You've had one night locked up. If you don't give it away and make some changes you'll spend more than one night locked up. You'll spend many nights locked up. Taking drugs like ecstasy—ecstasy is just a compound of toxic chemicals. Now unless you live under a rock you would be aware that people die from taking ecstasy and it would be a tragedy for that to occur to your family, let alone yourself at age 16. The use of cannabis has shown there's some links between cannabis use and mental illness. And smoking cannabis to excess is bad for your health. It is just like smoking cigarettes to excess, except worse … I'm dealing with you today for two possess prohibited drug matters, but it is set against a backdrop of you having some problems with drugs and their possession."

The comments made by the magistrate in case study T (possession of prohibited drugs: see page 108) were even starker:

> "If you've got an interest in experimenting with drugs, don't. It's dangerous. It has all sorts of terrible consequences, not only for your own risk of being arrested if you have drugs in your possession, but you run the risk if you continue to use it of being hooked on it and the consequences of being hooked on drugs are pretty grim. It only takes you to two places: death or gaol."

Counselling

Counselling per se is not an outcome available to the Children's Court, although it may be attached as a condition to other sanctions. In case study O (assault occasioning actual bodily harm: see page 101), the Court referred the young offender to a three-month program called the Program for Adolescent Life Management (PALM), which is a residential program catering for young people aged between 14 and 18 years with

serious alcohol or drug-related difficulties.[154] The rationale behind the program is that the reduction or elimination of drug use goes only some way to addressing the young person's fundamental problem. The program therefore also covers employment, training, relationship building, mood management, personal growth and development, and relapse prevention.

The successful completion of this program would have led to a dismissal for an offence that O had committed prior to the offence that is discussed below. The young person's enrolment in, and positive response to, PALM, however, was seen to act in the young person's favour even in his subsequent Court appearance. It was perceived to be an illustration of his responsiveness to rehabilitation.

> "I wouldn't be the first one to tell you [O] that you are a very lucky young boy to have the opportunity to walk the streets … I'm pleased to see in the report that has come through from PALM that tells me that [O] is finally starting to respond and participate, not just turning up to these counselling sessions, and that's great. Because all these changes have got to come from you, [O]. People are just there to support you, but you are the one who has got to drive the bus through this whole rehab process. There are lots of people there who support and want to help you. It will only work if you are prepared to work with them. So, I was delighted to read that part of your report that says that there are changes being made and that you are finally starting to exhibit some maturity. That will happen as you get older. That is what is expected of you. And it seems that of the problems that you have had at PALM with other people, you have had enough good sense to be able to work through those problems with the benefit of the counsellors and that shows me that you are maturing and hopefully with that increased maturity you won't come back before the courts."

Here, the young person's responsiveness to counselling alone was not seen to be the only indication of his commitment to his own rehabilitation. His choice of friends (in his case, co-offenders) was also deemed important: "[y]our choices of friends is a big factor in whether you will get back into trouble or not".

In the same way that drug possession highlights the importance of the nexus between rehabilitation and sentencing in the Children's Court, so too do other offences borne out of other forms of addiction. In case study D (break, enter and steal: see page 92), D was found to have "committed these offences whilst suffering from a gambling addiction". In the following remarks, the magistrate juxtaposes the value of counselling with punitive sanctions:

> "… gambling is a disease not dissimilar to alcoholism or drug dependency. It motivates those who labour under that disability and causes those people to commit serious crimes to feed their addiction, and in relation to the matters before this Court, [D] has made admissions to offences that carry 14 years imprisonment.

154 http://www.noffs.org.au/programs/palm.shtm.

> Certainly … if these offences had been committed by you now, you could expect to be facing either a trial or sentence at the District Court, given the number of charges involved and the serious nature of the charges as viewed by our community. Fourteen years in prison is a long time to be locked up. Now, of course, rarely are maximum penalties imposed, but it does reflect how we as a community view this sort of behaviour … So it just puts it a little bit in perspective for you … Now, if [D] didn't have a gambling problem we wouldn't see [D] before this Court. So the solution seems to rest in [D] doing something about his gambling problem before [D's] gambling problem overtakes his life and sees him locked up and that's what will happen if you continue to break the law because of this addiction … as a result of today's appearance I will be putting you in touch with people who can help you, but help has got to come from within … It is a destructive lifestyle you have set up for yourself and it's important that you do something to make some changes and the changes have got to be made in here … I see you have got some support with your family and that's terrific. You're in a far better position than many of the young people I see that come before this Court. Harness all those supports and make it work for you, and if you can you won't be back before courts again in the future …"

Again, counselling alone was not seen to facilitate rehabilitation. As with case study Q (see page 104), family support was also considered to be integral.

Intolerance of violence

Violent crimes that cause personal injury or threaten to cause personal injury incur harsher penalties than either property or drug offences.[155] In the sentencing remarks in case study Q (robbery in company: see page 104), the magistrate further eschews the path of violent criminal behaviour:

> "… it is frightening that somebody who is apparently … a decent young woman can get involved. Not only that you took the wallet but that you failed to do a more important thing which is stop your friends from hurting this person and that you yourself used violence against her. That is not the way to sort out your problems. And your life will be tragic if that happens. If you wish to be a mother you will not be a good mother if one of the first things you do is use violence. If you wish to have a relationship with another adult, if you resort to violence that would be a tragic relationship. If you wish to have friends but when you disagree with them you resort to violence then you won't have very many friends, or if you do, they will be the type of people who will make your life miserable as you will make their life miserable."

The implications of the comments above—that violence begets misery for both the individual and the community—mirror the purposes of the 1905 legislation that set up the Children's Court in New South Wales: the purpose of the Court was to ensure good

155 This data was taken from the Judicial Information Research System, which is a database managed by the Judicial Commission. It is available on subscription.

citizenry and a functioning community. While rehabilitation was not sacrificed in the sentencing process, it was given no higher status than deterrence and denunciation. In other cases involving violence, as in the case of A (see page 89), community protection was emphasised over and above rehabilitation for one offence.

The need for adult guidance

Even with violent crimes, the Children's Court does not necessarily dispense with rehabilitation in favour of either community protection or retributive justice. In the case of Q mentioned above, the sanction of a 12-month bond was accompanied by conditions that enabled the young person to have contact with adults "who could assist you" and act as suitable role-models for appropriate behaviour.

The magistrate was guided by the Juvenile Justice report into thinking that a lack of clear adult guidance stemming, in part, from a breakdown in the relationship between the young person and her parent, contributed to the young person keeping "bad company", which, in turn, led to her criminal behaviour:

> "Clearly your life has had a lot of difficulty with it, in terms of your relationship with your parents. And that's probably robbed you of some of the fun that is normally associated with being a young person. Hopefully there are ways and means of in some way making up … making that up so that your life is [sic] always affected by that. But you're going to have to be careful about the way in which your future goes because you don't have the support that everyone would hope would be provided by parents. You will need to identify people who can positively assist you rather than people who will get you into trouble. Now that is probably something that in your ongoing relationship with [the Juvenile Justice officer] on the probation order that I will impose is something that you can develop, that you can work at older people [sic], whatever might be able to give you guidance. Because no matter how old you are you need somebody who's wise to turn to from time to time and seek some support and use as a sounding board. OK?"

Bond conditions

Some of the conditions attached to bonds could sometimes offer excellent possibilities for rehabilitation, in addition to impressing on the young person the ingredients that the Children's Court believes would contribute to his or her continued good behaviour. In case study S (possession of prohibited drugs: see page 107), the magistrate chose not to convict the young person, thereby sparing him a record that would affect his employment prospects. Instead the magistrate imposed a six-month good behaviour bond with conditions that the young person "accept reasonable directions of your parents … They are there to help you and they know what is best for you." The young offender was also required to seek and remain in employment.

4.2 — 'Rules of thumb' in sentencing

The following are examples of sentencing rules of thumb:

- Dissuading/preventing young offenders from not completing their penalties
- Not applying penalties that have previously failed to rehabilitate the young offender or deter him or her from further offending
- Choosing a more lenient sentence for, and/or not convicting, offenders who have shown evidence of rehabilitation
- Recognising that some offenders are being dealt with concurrently for other offences in other courts/jurisdictions.

Completing the penalty

In case study A (larceny: see page 89), the young offender was sentenced to youth justice conferencing for a previous matter. The magistrate was informed by A's representative that A had obtained employment after it was decided at the conference that he would complete 70 hours of community service. The legal representative was of the view that the community service was interfering with A's laudable employment plans. The magistrate agreed that 70 hours of community service was considerable and commended A for commencing employment, but did not revoke the outcome of the conference. It was thought that the rehabilitative value of the sentence was dependent on its completion.

Attitude towards 'more of the same' penalty

Case study A (larceny: see page 89), as mentioned earlier, illustrates that magistrates may abandon a particular sentencing option if, in their opinion, a young person's criminal history demonstrates their immunity to either the rehabilitative or deterrent value of such an option. In such instances, a more severe sentence may justifiably be chosen:

> "… I don't see any point of placing him on further probation. It would effectively … just add quite a few months to probation that he's already doing and frankly the only practical impact it would have would mean that there would be a further three-month period where he could get into strife. He's likely to be recalled into court. I would presume that if [A] maintained a positive attitude then the Juvenile Justice Officer or the Probation and Parole Officer would … have said "well look I don't need to see you any more unless you need to see me". I would think given [A's] history a suspended sentence in these matters would be appropriate. But on the basis I would recommend no action be taken concerning the previous suspended sentence … Yeah. I would think that given [A's] history that this penalty is the most appropriate result because he's had a number of chances to change his mind and hasn't. However, the fact that he has now done something that shows some maturity and responsibility is a good reason to suspend a custodial penalty."

Choosing a more lenient sentence

As mentioned in Chapter 2, the *Children (Criminal Proceedings) Act* encourages the use of more lenient sentences, in part to facilitate rehabilitation. Ruth and Reitz in the USA refer to this as a "policy of forbearance":

> "A policy of forbearance rests chiefly on the premise that many juvenile offenders dip only lightly into criminal activity, and soon grow out of law-breaking on their own accord. The operative goal in such cases is to avoid disrupting the natural maturation process, and to preserve intact the life chances of the adolescent."[156]

Conviction

In the same way that more lenient sentences are seen to afford greater rehabilitative possibilities, the magistrate may choose not to convict a young over the age of 16 who has incurred a control order. In case study P (robbery in company: see page 102), the magistrate withheld conviction to prevent the young person from incurring a record. Such a record is considered to inhibit rehabilitation, which the magistrate had recognised the young person had already commenced:

> "… I know the supply came after the other matter but you pleaded guilty to the supply … what the law says is that somebody who pleads guilty or is found guilty of a supply charge, they should be going to prison. So by rights you should be walking out that door today … the court has to give reasons why it does not impose a prison sentence for this offence and these are the reasons that I'm giving … you pleaded guilty at an early stage for that matter. You also are not someone who comes before the court with a long record so that's in your favour. What's very much in your favour is that since August last year, you stayed out of trouble. You have your older brother here who is obviously very supportive of you and is hopefully … well I'd have to say apparently, because you have stayed out of trouble, is keeping an eye on you and providing some sort of guidance to you. And for those reasons, I am not going to lock you up today but I am going to place you on a good behaviour bond … I note that in just … under nine months time, you are going to be an adult. So I'm placing you on a nine-month good behaviour bond with these conditions. You are to accept Juvenile Justice supervision … They'll make appointments with you that you'll go and see them and they will help you—this is not just to keep an eye on you —but also they can help you with counselling, they can help you with training, help you get some training so that maybe you can keep up with TAFE and get a job down the track. You are to be of good behaviour, which means you are to commit no other offences. If you do … you also will be breaking this good behaviour bond and the court can re-sentence you. And it may well be that under those circumstances that you'll be walking out *that* door, is that clear?…You're to reside with your parents, and I note that in the eyes of the law that you're a child and that seems to help keep you out of trouble. You're to reside with your parents or as otherwise directed by

156 H Ruth and K R Reitz, *The Challenge of Crime: Rethinking our Responses*, Harvard University Press, Cambridge Massachusetts, 2003, p 273.

the Juvenile Justice service. You're to take part in counselling and/or other programs that could include training or TAFE as directed by Juvenile Justice service. You're to make best efforts to find and remain in employment and/or educational training programs. So you've got to really go out there and try and you're not to go within [the area of offending]. And I've put a map to be attached so there's no confusion about where you can and can't go."

It is significant that in this case, like others already discussed in this chapter, the conditions of the sanction also include parental supervision, employment and education—all of which are recommended by s 6 of the *Children (Criminal Proceedings) Act*—as well as counselling.

Relationships with other courts

The recognition by magistrates that the young person is being dealt with for other matters in other courts—especially the District Court—could affect the sentencing outcome. In case study O (assault occasioning actual bodily harm: see page 101), the magistrate indicated to the young person that matters for which the young person was being dealt in other courts would be taken into account in sentencing. Finding the least onerous sentence for the young person in this instance might contribute to the young person's rehabilitation, or if not, then at the very least not inhibit opportunities for rehabilitation:

"I take into account the period of time that you have spent in custody. I take into account also the fact that you are currently subject to orders of the District Court by way of parole. And quite clearly this Court takes account of that, as the District Court took account of these outstanding matters when it dealt with you in November. So we are not blind to one another."

4.3 — The application of the *Young Offenders Act*

Prior criminal record

In the same way that prior court appearances are taken into account in sentencing, some magistrates also make note of the young person's dealings with the police in pre-Court diversion. This was true of case study S (possession of prohibited drugs: see page 107). In this instance, the young person's prior diversion record had little impact on his sentence. The magistrate's comments, however, contain an implicit warning that suggests that future offending would result in the diversion record having increased relevance in the choice of sentence:

"I look at [S's] criminal record and there was a matter of referral to youth justice conferencing by the court, that being assault occasioning actual bodily harm. Apart from that matter, and there was a prohibited drug matter in November last year, [S] has had limited experience with the police and courts but that experience is becoming more and more extensive."

In case study T (possession of prohibited drugs: see page 108), although the young offender was appearing before the Children's Court for the first time, he had already come into contact with the juvenile justice system via police diversion. This was noted by the magistrate:

> "[T] has been skirting around the edges and he has been diverted one, two, three, four times."

Advantages and disadvantages of youth justice conferencing

While some may lament the minimal use of youth justice conferencing, given the rehabilitative opportunities it affords young offenders (less than 5% of matters are referred to YJC),[157] many of the offences and offenders who appear before the Children's Court might not be suited to youth justice conferencing.

The penalty of youth justice conferencing was imposed in four of the case studies chosen for discussion in this monograph, and was considered but abandoned for another two.

In case study J (common assault: see page 96), the conference was aborted because the offender felt that the person who had been identified and invited to attend the conference as the victim of his offence had, in fact, contributed to a retaliation assault on the offender. At the time of the conference, the offender not only feared further retribution from the victim and his friends, he also contested—given the subsequent assault on him—whether the victim could be identified as such. This highlights one of the difficulties of youth justice conferencing: its rehabilitative value resides in consensus about the role that each person plays in the conference. It is not always easy to identify the victim of some offences, yet the rehabilitative value of conferencing *might* be dependent on the offender making amends to the victim.

In addition, neither the offender nor the victim of the offence should be privileged above the other in the conference process or in the formulation of the outcome plan. This, however, might be particularly difficult to ensure for certain offences such as assault. It would add to the difficulty of the conference for the young person. As J's legal representative described in a statement with which the magistrate agreed, "[i]t certainly shows that, while there are other issues as well, the conference is not an easy option".

In case study H (goods in personal custody reasonably suspected of being stolen: see page 95), the conference facilitator reported that H's attitude during the conference was poor and that the young person apportioned significant blame for his offending to his parents. Again, this suggests that the rehabilitative value of youth justice conferencing is dependent on certain factors being in place—in this case, the young offender's willingness to show a certain degree of contrition. This case may be aberrant. An evaluation of the youth justice conference found that young offenders attending conferences recognised their wrongdoing and showed a willingness to take responsibility for their offending.[158] Nonetheless, case study H illustrates that conferencing is not a suitable option for all offenders.

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157 This data was taken from the Judicial Information Research System, which is a database managed by the Judicial Commission. It is available on subscription.

158 G Luke and B Lind, "Reducing Juvenile Crime: Conferencing versus Court" in *Contemporary Issues in Crime and Justice*, No. 69, April 2002, Bureau of Crime Statistics and Research, Sydney.

In case study E (joy riding: see page 93), the youth justice conference was more successful than with the two cases mentioned above. Of importance, the youth justice conference afforded the young person multiple forms of rehabilitative opportunities (both passive and restorative). The young offender was required to make a verbal apology to the victim, who was present at the conference, and also to offer reparation. The agreed conference plan required the young person to complete 30 hours of community service in lieu of the $300 of damages/insurance excess that the victim incurred.

In case study N (assault occasioning actual bodily harm: see page 100), the conference involved a member of a minority community facilitating a discussion between the young offender and his two victims, a relative and a community elder. The conference plan included a letter of apology to the victims and between one and 26 hours of community work at the community centre at which the offender had caused harm and damage. When asked to endorse the conference outcome plan, the magistrate indicated to the conference facilitator that she was not prepared to approve the outcome plan until she was supplied with a report detailing what took place at the conference "[b]ecause this matter is so complex but serious". The magistrate wanted some indication that the complexities that precipitated the offending had been suitably addressed in the conference. This suggests that the rehabilitative value of conferencing lies in some part in the possibilities for mediation between the young person and his or her victim.

In case study B (larceny: see page 90), it was the Court's opinion that the young person's addiction had precipitated her multiple offending. The conference plan required that she "work off" the amount she shoplifted from the store from which she stole to furnish her addiction. It is questionable whether an outcome that more directly addressed the young person's addiction could have had greater rehabilitative worth in this instance. Unfortunately, the young person's records revealed that she had been referred to drug and alcohol counselling for previous offences, and had absconded from these programs before their satisfactory completion. Another attempt at this might not have been seen to be worthwhile. The conference also gave B's father—a single parent—the opportunity to tell B in the presence of a dispassionate third party what he thought about her drug problem.

In case study K (common assault: see page 97), the offender was not sent to conferencing, although the magistrate did consider this possibility. As the comments reproduced below indicate, the magistrate was of the view that, had the young offender been referred to conferencing for previous offences, he would have had the benefit of hearing about the negative consequences of his offence from the victim(s) of the offences. His rehabilitation might have been facilitated by this process:

> "… for offences of common assault, of course, conferencing is something that this Court thinks is appropriate. But when I looked carefully at the facts I was concerned at some vilification issues which made me question the value of a conference in these circumstances. So it was one where I had concluded that unless I could be persuaded enormously it was one that was not appropriate in all the circumstances … I can see that [K] has passed through this jurisdiction, on the documents that I have before me, without the benefit of a conference, which is somewhat regrettable in many respects because it allows offenders to wear the shoes of the victim, albeit briefly."

4.4 — Juvenile Justice officers

Juvenile Justice officers play a significant role in determining the nexus between sentencing and rehabilitation in cases where the Children's Court requires their involvement. Juvenile Justice officers often make recommendations independently of legislative requirements for court-based outcomes. This creates an interesting tension for the Children's Court. It is bound by the law to punish offences in certain ways, but may find it difficult to ignore the sometimes compelling case presented by the Juvenile Justice officer for certain sentences.

Detention as a last resort

Detention as a last resort measure acts as an indirect catalyst for rehabilitation. It provides the young person with another chance to redeem themselves and suggests to young offenders that the Court has faith in their ability to achieve rehabilitation.

Detention as a last resort also requires the Children's Court to refer the young person to a Juvenile Justice officer to be assessed for their suitability to serve detention. The report produced by the Juvenile Justice officer after his or her assessment often contains significant information about the young person that is absent from any other document tendered before the Court. Its accuracy and thoroughness is therefore of considerable consequence.

Similar to case study Q, the background report was referenced in the sentencing remarks for case study D (break enter and steal: see page 92) and, as the magistrate's comments suggest, significantly influenced the magistrate's decision-making. The magistrate had taken on board the Juvenile Justice officer's recommendation not to sentence the young person to a control order:

> "I have read carefully the background report and this is a good background report. There are certain recommendations that have been made as to penalty and I take on board those recommendations. I'm not entirely 100 per cent persuaded by those recommendations, and I will be making orders for community service work and probation orders, given the subjective circumstances of the offence and the overall aggravation … In respect of offences one and three you will be ordered, without a conviction, to perform 100 hours community service work on each matter. They will be concurrent orders … Now, [D], my tariff 100 community service work is about six months in a detention centre. So that's the value I've put on this. A hundred hours, if you were to work full-time, would take you about six weeks. Now you won't have that opportunity to do it full-time, but I want you to understand that it's important that you do those hours. You only have to do 100 hours. I'm making two orders of 100 hours, but as you do one hour you are cutting out another one. It's important that you do those hours, otherwise you can be re-sentenced for those matters and the penalty only gets worse."

While the magistrate accepted the general points made by the Juvenile Justice officer that a control order would provide minimal rehabilitative opportunity and that the young person showed sufficient contrition during the assessment to deserve an opportunity for rehabilitation the magistrate chose not to adhere to all aspects of the Juvenile Justice

officer's recommendations, including the length and conditions attached to the penalty. Furthermore, while the Juvenile Justice officer had thought that the young person could suitably fulfil a CSO, s/he was of the opinion that a bond with conditions would be a better option. The magistrate also chose not to act on this recommendation.

Community service orders

The use of CSOs acts as a corollary to the minimal use of detention, which was the legislative intention in creating such an outcome. When the Children's Court considers imposing a CSO it also requires the services of a Juvenile Justice officer to determine the young person's suitability to complete such a sentence. Even amongst young people who are eligible to complete the sanction (an age criterion is attached to this penalty), some are not considered mature enough or sufficiently remorseful to make it a suitable penalty for them. Again, the Court is dependent on the Juvenile Justice officer making an accurate assessment of the young offender's suitability. Such an assessment led the magistrate in case study P (see page 102) to abandon a control order in favour of a CSO for the offence of robbery in company. This was in recognition of the young person's early plea and (what is not evident from the excerpt from the sentencing remarks reproduced below) from the Juvenile Justice report's indications of the young person's pre-emptive attempt at rehabilitation. In this instance the magistrate concurred with the Juvenile Justice officer that the CSO would usefully facilitate the young person's passage into adulthood, and provide him with the necessary ingredients to behave appropriately as an adult:

> "… I'll have to say, and I'll come back to that one, the level of violence and the level of injury to this poor man, [the victim], just looking at the photos and reading what the doctor says, is a very high level of violence and the community simply will not tolerate that sort of behaviour from anyone, is that clear? … Now the one that is before court today, you are given some credit for having pleaded guilty, shortened the matter, but that, of course, it wasn't at the first opportunity. I've already said that the level of violence involved, and I know what's been put to the court about your not being involved in any of the violence and certainly the court accepts completely that whoever kicked [the victim] it wasn't you. But [the victim] suffered very very serious injuries and again, by rights, you should be going out *that* door and it would appear that the two co-accused, the two adult co-accused will be going to prison for these offences and that sounds quite appropriate, in light of the fact that they've got, it would seem, much longer and more serious records than you. I'm not going to lock you up for that offence but it does seem to me that some community service would be appropriate. Community service is a direct alternative to being locked up. So under section 33(1)(f), 50 hours of community service. And hopefully you might learn some skills doing that as well as put something back into the community … We'll make that without conviction, so that at this stage you do not have what is known as a record. But I have to say to you [P] and I'll say it again, these are very, very serious offences. If you were in the adult court you would, and I have very little doubt about this, get locked up for these offences. It's up to you now. You are nearly an adult in the eyes of the law. You can either decide to do something valuable with your life or end up in adult gaol. Is that what you want for your future?"

It is interesting that in this case as well, a conviction is not recorded, despite the seriousness of the offence, again because it was considered to interfere with the young person's continued rehabilitation (that is, his ability to enter adulthood with a 'clean slate', so to speak).

Continued contact with the Juvenile Justice officer

Contact with the Juvenile Justice officer does not end with the Children's Court proceedings. The conditions attached to sanctions could include the young person's release into the care of the Juvenile Justice officer, especially when proper adult supervision is absent or limited in the young person's life. This was the case in case study O (assault occasioning actual bodily harm: see page 101):

> "In respect of that matter, without a conviction, you are released on a probation order for a period of 12 months and the conditions of your probation order are that you accept the supervision of Juvenile Justice or Probation and Parole whoever it is that is going to have responsibility for your supervision for as long as deemed necessary. You are to comply with all the reasonable directions of Juvenile Justice or Probation and Parole Officer."

The release of the young person into the care of the Juvenile Justice officer is interesting for the purposes of exploring the nexus between rehabilitation and sentencing, because the rehabilitative value of the sentence may lie in the nature of the relationship that develops between the two. Further to this, should the young person commit a subsequent offence, this Juvenile Justice officer could be brought in again to inform the adjudication process.

Summary

For some offenders, offending begets further offending. It therefore needs to be dealt with effectively by court-based sentencing for recidivism to be adequately addressed. Of course, court-based sentencing may not always prevent recidivism per se, but it might play a role in ensuring that recidivists do not graduate to more serious offending. Recidivism has become more of an issue for the Children's Court since the inception of the *Young Offenders Act* in 1997. One aim of the *Young Offenders Act* was to divert first-time offenders away from the Children's Court, thereby ensuring that a greater proportion of offenders who appear before the Court than before are recidivists. In terms of how the Court should deal with recidivists, *R v SLD*,[159] although in the context of a very serious indictable offence, highlights the difficulty of establishing the degree of certitude of a young person's future offending. If judicial officers unduly err on the side of deterrence and community protection, the young person's future liberty and capacity for reform are compromised, to the detriment of the young person and the community. Nonetheless, for crimes that appear at the higher end of the offence spectrum, such as murder, giving deterrence, punishment and denunciation primacy is considered also to be important for the protection of the community.[160] For the offences brought before the Children's Court, however, crime reduction and community protection are arguably best achieved through giving rehabilitation a large degree of weight at sentence.

The Children's Court is a summary jurisdiction, and hence has jurisdiction to hear and determine all but the most serious offences committed by young people. This, together with the age parameters of the Court, gives the Court the flexibility to exercise individual justice, in part to pursue the goal of rehabilitation at sentence. The Court's efforts to pursue this goal are informed by a range of factors. This monograph identifies and discusses these factors. They include the common law to some extent; the historical development of sentencing legislation in the Court; provisions in current sentencing legislation that came out of reforms to juvenile justice in the late 1980s and 1990s; parliamentary second reading speeches; and the patterns of sentencing practice in this Court.

159 (2003) 58 NSWLR 589.

160 For example, *R v DSW* [2003] NSWCCA 322 at [24].

Rehabilitation as the primary goal of sentencing young offenders

The importance of rehabilitation as a goal of sentencing in the Children's Court is self-evident. The youthfulness of offenders who appear before the Court, together with the nature of offences for which they are dealt with by the Court, make them appropriate candidates for a second chance or the type of opportunities provided by some sentencing outcomes available to the Court. An important consequence of rehabilitation is that it engenders "… the juvenile's appreciation of the deep wrongfulness of his past criminal activity",[161] while at the same time gives him or her an opportunity to correct errors of judgement before they become entrenched. Further to this, a disproportionate number of young offenders who appear before the Court are in care, have mental health problems and/or use drugs. For these young offenders, the goal of rehabilitation could empower the Court to help the young person address their specific needs within, of course, the limitations of the Court's power and authority.

Common law

Difficulties sometimes arise in determining the level of importance that should be given to the goal of rehabilitation at sentence, when community expectations sometimes run contrary to what the law might believe would be the best penalty for the young offender. For young people dealt with on indictment, the common law does point to the worthiness of rehabilitation as a sentencing goal; however, it also recommends that rehabilitation should not be given undue emphasis for serious offences, especially those that appear at the upper end of the offence seriousness spectrum, such as murder.

The most significant case on the topic of rehabilitation and youth offending is the oft-quoted *R v GDP*,[162] which, in turn, makes reference to two earlier and equally important cases, *R v Smith*[163] and *R v Wilcox*.[164] In *GDP* the applicant was a 15 year old boy who, together with his co-offenders, caused over an estimated $1,500,000 worth of damage to buildings and their contents. With reference to both Smith and Wilcox, Mathews, J drew attention to the specific status of young people:

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

Many cases subsequent to *GDP* have expanded on the comments by Mathews, J in *GDP*, including *R v XYJ*.[165] The latter case is of interest because it includes offences that could also be dealt with summarily in the Children's Court, but in this instance were dealt with

161 H Ruth and K R Reitz, op. cit., n 156.
162 *R v GDP*, op. cit., n 7.
163 *R v Smith*, op. cit., n 86.
164 *R v Wilcox*, op. cit., n 87.
165 *R v XYJ*, op. cit., n 117.

at law. The applicant in *XYJ* was a 16 year old boy who pleaded guilty to the charges of committing robbery in company, being armed with a weapon with intent to commit armed robbery, possessing a prohibited weapon and allowing himself to be carried in a stolen car. Despite the severity of these offences, Clarke, JA makes the following comments with reference to the offender's age:

> "I also approach the task bearing in mind that considerations of punishment and of general deterrence of others should, and may, properly be largely discarded in favour of individualised treatment of the offender, directed to his rehabilitation … This is not to say that considerations of general deterrence should be ignored completely when sentencing young offenders. They should not. But they do not have the same importance as they do in the sentencing of adults."

Admittedly, the usefulness of the common law for the purposes of sentencing in the Children's Court is limited by the fact that many of the principles emerge from cases that are dealt with on indictment. It is, however, illustrative of the law's view on the impact that youth has on the nexus between rehabilitation and sentencing.

History of the Children's Court: 1905–1987

Before a separate court was created for young people in New South Wales, juveniles were treated quite similarly to their adult counterparts. Punishment was the primary purpose of sentencing. By the late nineteenth century, however, in line with the child-saving movements of the UK and USA, New South Wales embraced the idea of catering for the welfare needs of young offenders. The aim was to save them from the squalor of their lives. Investing in the rehabilitation of young offenders in this way was seen to benefit the community and to protect it from future youth offending. In practice, however, the rehabilitation of young offenders manifested itself as state control of young people's lives, with arguably little benefit to young offenders. Many juveniles were removed from their homes and institutionalised.

The welfare movement continued apace and resulted in a series of legislative reforms that were aimed at differentiating young people from the their adult counterparts. This eventually culminated in the decision to set up a separate court for young people.

In 1905 this separate jurisdiction was set up, and was informed by its own distinct piece of legislation, the *Neglected Children and Juvenile Offenders Act* 1905. The Court was given jurisdiction over both care and offending. The justification for a separate court was made on both practical and ideological grounds. Juvenile offenders needed to be separated from the pernicious influences of their adult counterparts if their rehabilitation was to be ensured. Dealing with juvenile offences summarily would reduce the time and cost of processing the large number of juvenile offenders.

This new Children's Court, however, did not fundamentally change the practices of the late nineteenth century. The welfare approach to the sentencing of young offenders was perpetuated by the Court. Young offenders were often taken away from their environment, and given food and shelter, together with plenty of work, which was felt would contribute to their improved moral character.

This concept of rehabilitation did not transcend the advent of the professions that took an interest in young people's mental, emotional and social well-being—that is, psychology, psychiatry and social work. From 1923 onwards, rehabilitation meant assessing the offender's needs to enable the state to provide them with the necessary 'treatment'. In practice, however, this still meant the continued removal of young people into state institutions. For this reason, despite paradigmatic shifts in the welfare model and a number of legislative reforms until the 1980s, the welfare approach to sentencing continued to be criticised for infringing the rights of young people and also for producing no discernible changes to youth offending.

Reforms in the 1980s: The *Children (Criminal Proceedings) Act* 1987

It was not until the 1980s that the welfare approach to sentencing offenders was largely abandoned in favour of sentencing legislation steeped in the justice model. In 1987, legislative reforms to the Children's Court led to the separation of care and offending. Each was given its own distinct piece of legislation; however, both, together with other sentencing-related legislation, fell under the umbrella of the *Community Welfare Act 1987*.

The *Children (Criminal Proceedings) Act* formed the main sentencing legislation in the Children's Court. Rehabilitation was not completely jettisoned in this Act, and, as discussed in Chapter 2, is addressed by a number of provisions of the Act, most notably s 6.

Section 6

This section recognises the equal rights that young people share with adults, but also recognises that young people's state of dependence and maturity warrants adult guidance. Section 6 also reinforces the importance of the young person's continued employment and/or education, and that the young person reside in his or her own home as far as this is possible. Beyond this, the section does not thrown light on the sentencing goal of rehabilitation. In fact, the principles under s 6 have been criticised for being too vague (Mathews, J in *R v GDP)*. Guidance about the relative balance between rehabilitation and the other goals of sentencing is absent from this section.

Sentencing outcomes

Section 33 of the *Children (Criminal Proceedings) Act* provides the Court with a range of sentencing options; however, while some of these outcomes accommodate the facilitation of rehabilitation, they do so variably. Nonetheless, the breadth of sentencing options available to the Court complies with recommendations under Article 40.4 of the 1989 Convention on the Rights of the Child, which states that:

> "[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."

The sentencing options available to the Court have also been placed in a hierarchy, admittedly a little artificially. Nonetheless, the existence of this hierarchy allows for use of detention as a last resort. This is because detention—recognised to provide minimal opportunities for rehabilitation—has been placed at the top of the hierarchy and thus identified as the most severe outcome available to the Court. According to the principle of parsimony, the Court is required to justify the use of the more severe penalties. In the case of detention, juvenile justice reports are required to be commissioned when a control order is being considered.

To further encourage the minimal use of detention, a new sentencing option was also created for the Court in 1987—the Community Service Order. During parliamentary debates about the 1987 suite of bills, there was some consensus that the nature and seriousness of a CSO was such that it would bring home to young offenders the damage they had done, without the stigma that accompanied detention.

The sentencing options available to the Court and the instructions for their use do add to the Court's armoury for achieving the goal of rehabilitation at sentence. Most of the sentencing options that were listed in the *Children (Criminal Proceedings) Act* when it was enacted tend to allow for what we call 'passive' rehabilitation. By this we mean that the rehabilitative opportunities are made available to the young offender, but the young person is not required to demonstrate any measure of rehabilitation during or after fulfilling these outcomes.[166]

Juvenile justice reforms of the 1990s

The 1990s introduced penalties into the Court that allowed for what we call the 'active' rehabilitation of offenders. These are outcomes that require the active participation of the young offender in his or her rehabilitation, and include youth justice conferencing and the Youth Drug Court (YDC) program. The nature of these outcomes is such that the young person is only able to fulfil the outcome by, for example, demonstrating contrition and/or making demonstrable attempts at changing his or her behaviour.

Young Offenders Act 1997

Youth Justice Conferencing is part of the *Young Offenders Act* 1997. While this Act is ostensibly about diverting less serious and first-time offenders from the Children's Court, it nonetheless adds to the range of outcomes available to the Court. The Court is now able to caution a young person under the *Young Offenders Act*, as well as send them to youth justice conferencing. Section 34 of the Act sets out the principles and purposes of conferencing, and 34(3) outlines what conference participants should strive to achieve:

166 The terms 'passive' and 'active' rehabilitation, and their definitions, are imperfect; however, their use enables us to distinguish and highlight the features of the Youth Drug Court program and youth justice conferencing.

"In reaching decisions at a conference, the participants are to have regard to the principles set out in … [section 34] … and the following matters:

(a) the need to deal with children in a way that reflects their rights, needs and abilities and provides opportunities for development,

(b) the need to hold children accountable for offending behaviour,

(c) the need to encourage children to accept responsibility for offending behaviour,

(d) the need to empower families and victims in making decisions about a child's offending behaviour,

(e) the need to make reparation to any victim."

The purposes and principles guiding conferences arguably better facilitate the young person's rehabilitation than many of the penalties listed in s 33 of the *Children (Criminal Proceedings) Act*. As discussed in Chapter 4, however, conferencing is not an option that is suited to every offender or to every type of offence, especially those that appear before the Court. It is therefore arguable whether its use by the Court should proportionately match its use by police.

Youth Drug Court program

Referral to the Youth Drug Court is achieved through the application of s 33(1)(c2) of the *Children (Criminal Proceedings) Act*. This option enables the Court to refer offenders to a program—including the YDC program—and defer sentence until the young offender's completion of such a program. Once the program is successfully completed, the Court could sentence the young offender to a bond or probation order, dismiss the offender with a caution under s 33(1)(a) of the *Children (Criminal Proceedings) Act*, or simply withdraw the charge.

The YDC program addresses the factors that are at the heart of sentencing—not just drug use, but also its concomitant factors. For offences motivated by drug use, detention seems to fail to address the fundamental reasons for offending (that is, the addiction). Releasing the young person into their existing environment without any intervention is arguably not a useful alternative either. If released into their existing environment without some form of intervention, the young person may not possess the resources to give up their dependence on drugs, especially if they do not have the resources to deal with what might have caused the drug dependence in the first place—for example, neglect, poverty, abuse and educational difficulties.

The YDC program therefore allows the offender's needs to be addressed more so than the offence punished, and facilitates rehabilitation in this way. Given the common affiliation between drug use and youth offending, it serves a useful purpose. The Youth Drug Court, however, while containing the necessary ingredients to achieve rehabilitation, is only sufficiently resourced to cater to a few (according to its stated intention). Also, if it is more widely used, it is arguable whether it would push the Children's Court into a social service role.

The practice of sentencing

The emphasis on individual justice in this Court provides the Court with the tacit approval to use the process of sentencing to buttress the rehabilitative provisions contained in the *Children (Criminal Proceedings) Act* and its cognate Acts, together with other legislation enacted in 1997, including the *Young Offenders Act*. For example, the conditions that are attached to sentences could put young offenders in contact with possibly much needed adult guidance. The relationship that the magistrate establishes with the young person in Court could also contribute to the young offender's rehabilitation.

Adult guidance

It may be argued that the absence of adult guidance has contributed to a significant proportion of youth offending youth offending is often undertaken in company away from adult guidance.[167] One value of the rehabilitative component of sentencing is that it affords—through the use of bond conditions, for example—the introduction of an adult into the young person's life to provide appropriate guidance, at least for a period of time. Such an adult could be a welfare or Juvenile Justice officer. Or, alternatively, the Children's Court might apply pressure on existing adults in the young person's life to exercise greater responsibility over the young person.

Of course, for a significant proportion of young people, such remedies would have limited rehabilitative utility. Other facets of the young person's life may need to be attended to, to ensure the rehabilitative efficacy of such a remedy. This might be said to be true for some wards of the state. The level of instability that marks many of these young people's lives means that they might even be immune to the benefits of Court-appointed adult guidance. It would be seen as the introduction of yet another adult caretaker into their lives. Similarly, for a significant proportion of young people who offend as a consequence of a drug habit, developmental disabilities and/or mental illnesses, appropriate adult guidance might not be enough to facilitate rehabilitation. Other measures are also required.

The magistrate

The magistrate's role in relation to the young person in Court could be said to be that of what we call 'benevolent paternalism'. This has evolved from the jurisdiction of *parens patriae* that arguably informed the creation of the Court. The paternalism of the Court is therefore as old as the Children's Court itself, and is thus an integral part of the Court's facility to promote rehabilitation.

Magistrates in the early days of the colony were encouraged by the prevailing attitude of the time to exercise indifference towards the circumstances of young offenders, similar to the way in which adults who committed offences were treated—young offenders were treated as though they were reprobates in need of harsh handling, rather than guidance. Since the inception of the Children's Court, however, the attitude towards young

167 D Weatherburn and J Baker, op. cit., n 149.

offenders has been the antithesis of this indifference. Nonetheless, early forms of the Court's attitude—passing moral judgements rather than showing some understanding of the offender and his or her circumstances—are today considered to be inappropriate. Today, in accordance with the growing acknowledgment of young people's rights, it takes the form of advice on the one hand and boundary setting on the other.

Nonetheless, as Ruth and Reitz have suggested "[j]uvenile sanctioning choices ultimately call for moral judgements".[168] In practice this means that it is acceptable for magistrates' comments to embody society's moral values. The practice of individual justice in the Court, however, enables the magistrate to communicate society's moral values in a number of ways to the young offender ways that could go towards the young offender's rehabilitation. The handful of case studies reported on in this monograph illustrate that some magistrates seem to adopt useful rehabilitative measures, inviting the young offender to speak in Court, emphasising the role of the young person's parents, acknowledging the young person's achievements, and indicating to the young person that the Court is sympathetic to the difficulties that the young person might be experiencing in their lives. There are problems, however, with relying too heavily on the magistrates' remarks to buttress the facilitation of rehabilitative through sentencing. The rehabilitative efficacy of these remarks requires the magistrate to have a relatively comprehensive knowledge of the young person, which may not be available to them, except in the instances when a CSO or detention is being considered. In these instances, a Juvenile Justice officer is commissioned to produce a background report on the offender. The Juvenile Justice officer's ability to fully explore and report on the background of the offender is, however, sometimes hampered by the time limits and the limited availability of relevant information. This is through no fault of the Juvenile Justice officer, but rather of the sometimes constrained contexts in which these reports are prepared.

Is it enough?

This monograph does not attempt to exhaustively cover the topic of the nexus between sentencing and rehabilitation in the Children's Court. Instead, our purpose is to raise for discussion issues that are pertinent to this topic. To this end, it has shown that the Court does seem to have a considerable amount of scope in its armoury for addressing the goal of rehabilitation at sentence. Given the limitations of some of the factors in its armoury, the question then becomes, is this enough?

168 H Ruth and K R Reitz, op. cit., n 156.

Appendix 1 — Cases

A1.1 Property offences

Larceny: *Crimes Act* 1900, s 117

A

A was charged with:

1. Maliciously destroy or damage property ≤ $2000: *Crimes Act* 1900, s 195(a)
2. Larceny ≤ $2000: *Crimes Act* 1900, s 117.

Facts

Witnesses known to A and his co-offenders saw them smash the front passenger side window of an unattended vehicle. They then were observed to remove a mobile phone, mobile phone charger and headset, and a black wallet (containing a significant amount of cash as well as various cards). They then ran from the scene and were followed by the witnesses, who contacted the police. The police searched the two addresses at which the young people were seen to stop, then took them to the police station to be arrested. A's father was called to attend. A declined to participate in an electronically taped interview or to give a statement while at the police station. A eventually pleaded guilty to both offences when he appeared before the Court.

Features

A was aged 17 years at the time of the offence. His parents were not in the paid workforce; his father received sickness benefits. He had a long list of prior offences that included break and enter and goods in custody offences, malicious destruction of property, stealing, larceny, dangerous driving, and failure to comply with bail and/or bond conditions. He had been subject to probation orders with conditions, as well as a few community-based orders and, for one offence, a control order of four months that was suspended. He offended three times just three months prior to committing the offences being considered, and a further three times in the month after these offences.

Sentence

For each of the two matters, A was sentenced to a suspended control order for six months with conviction. The control order was suspended for each matter on the condition that A entered into a good behaviour bond of six months with supervision. The more lenient sentences for these types of offences were justified on the basis that A had, for at least a few months prior to sentencing, demonstrated improvement in his behaviour, changed his friends, and obtained and kept full-time work. His family support was also acknowledged.

B

B was charged with:

1. Larceny ≤ $2000: *Crimes Act* 1900, s 117.

Facts

B was seen by the Loss Prevention Manager of a department store placing items of clothing down the front of her pants and under her jacket, before walking out of the store without paying for them. B was arrested and taken to the police station, where her father was called. B refused to answer questions in relation to the allegations of stealing. She was released into the custody of her father. She was put on bail subject to conditions, including that she not enter the CBD as per a prescribed map. Bail conditions were justified on the basis of her priors for shoplifting and because she "ha[d] no reason to enter the Sydney CBD other than to commit offences".

Features

B was 15 years of age. At the time of this offence she was under a 12-month recognizance for a similar offence. She was therefore in breach of this penalty. At the time of the offence, she had already come to the attention of police some 76 times. She had been previously found guilty of shoplifting, larceny and committing assault. She had also already been cautioned by the police on three separate occasions and had attended youth justice conferencing. The Court had previously sentenced her to a 12-month recognizance. She had been found to have had drug-related "problems" since the age of 12 years, for which she had started treatment.

Sentence

B was dismissed with youth justice conferencing under the *Young Offenders Act*. Her conference plan indicated that, under the supervision of her father, she was required to undertake work experience on a part-time basis at the department store from which she stole. The conference was attended by B, her father and the victims of her offence.

Break and enter and commit serious indictable offence (steal): *Crimes Act* 1900, s 112(1)

C

C was charged with:

1. Break, enter and commit serious indictable offence (steal): *Crimes Act* 1900, s 112(1).

Facts

Police patrolling a suburban Sydney railway station stopped C and asked for a valid ticket, which he did not have. After conducting a radio check, police arrested C on a warrant under s 80AA(2) of the *Justices Act* 1902, for a break, enter and steal offence committed some three and a half years earlier.

Features

C was 17 years of age when he broke into a large department store in a shopping centre. He filled sports bags with clothing, shoes and electrical items, and rifled through cash registers. An alarm was activated and C was apprehended as he attempted to run from the store. He alleged that he was coerced into participating in the commission of the offence, but no co-offender was located. Neither did the video security surveillance disclose the presence of a co-offender.

Sentence

C was 21 years old at the time of sentence. He had no criminal record either before or after the offence. He had no dependants and resided in a caravan, although he had lived on the streets for considerable periods of time. He was employed on a temporary basis and was in receipt of a youth allowance. The sentencing magistrate declined to accept the defence solicitor's submission that the matter could be dealt with by way of a "small fine". The magistrate stated that the matter was "a bit more serious than a small fine" and disbelieved C's claim that there was a co-offender. The magistrate imposed, without entering a conviction, a good behaviour bond for 12 months, ordering that C should appear at any time before the Court for sentence if required and notify the Registrar of the Court of any change in his residential address.

D

D was charged with:

1. Four counts of break, enter and commit serious indictable offence (steal): *Crimes Act* 1900, s 112(1)
2. One count of break and enter with intent to commit serious indictable offence (steal): *Crimes Act* 1900, s 113(1).

Facts

D and his co-offenders had broken into various bowling, sporting and community clubs. Poker machines were damaged and smashed open. Cash and cigarettes were stolen.

Features

D was an Indigenous male with a gambling addiction. He was 17 years old at the time of the offences. He had a supportive family. His parents attended Court on each of the five occasions that he appeared. He had attained his Higher School Certificate. At the time of sentencing he was employed on a casual basis in a manual labouring position and resided at home with his parents and sister. He was also under contract to a local junior rugby league football team. He was on bail for assault and was also scheduled to attend a conference in relation to a similar break and enter offence. A Juvenile Justice report was prepared.

Sentence

D was 18 years of age at the time of sentencing. It was determined that there was a degree of planning and premeditation involved in the commission of the offences. He had pleaded guilty to the offences, accepted responsibility and expressed remorse. The sentencing magistrate, without entering conviction, imposed concurrent CSOs of 100 hours for each of two of the break and enter offences. The remaining matters were dealt with by way of probation for 12 months, again without conviction. D was directed to accept and undertake counselling for his gambling addiction. It was emphasised that the penalties were imposed in such a way as to enable D to address his gambling addiction, given the demonstrated support of his family.

‘Joyriding’: *Crimes Act* 1900, s 154A

E

E was charged with:

1. Take and drive conveyance without consent of owner (‘joyriding’): *Crimes Act* 1900, s 154A.

Facts

E was seen by police to be driving and parking a vehicle that had been reported stolen. When the police approached E about the car, he ran from them. E was not caught on this occasion but the car was recovered. The vehicle had been damaged—the passenger door had been forced and the ignition barrel removed. Some days later, E was spotted again by police, who arrested and cautioned him and took him to the police station. No plea was recorded for this offence. E made no request for bail and bail was granted unconditionally.

Features

E was 15 years old at the time of the offence. While he had not been dealt with previously by police in pre-Court diversion, he had been before the Court on one occasion—for larceny and stealing a car. He received a recognizance for six months for this offence, as well as a $50 fine.

Sentence

E was dismissed after completing youth justice conferencing under the *Young Offenders Act*. The conference was attended by E, his mother, the owner of the car (the victim), and investigating and arresting police. His conference plan indicated that, under the supervision of his mother, he was required to make a verbal apology to the victim and undertake 30 hours of community work over a six-month period. He was referred to someone who could help him find places at which he could complete his 30 hours of service. The 30 hours community service was a suggestion made by the victim, in lieu of the $300 for her insurance excess that the victim originally requested from E. Upon hearing that paying her this amount would cause financial difficulty for E and his family, the victim instead suggested doing community service work that was equivalent to her $300 loss.

‘Goods in custody’: *Crimes Act* 1900, s 527C(1)

G

G was charged with:

1. Goods in custody reasonably suspected of being stolen: *Crimes Act* 1900, s 527C(1)(a)
2. Wilful use of offensive language: Rail Safety Regulation *repealed* S13(a)*rep*
3. Person under 18 enter restricted area without offering ticket.

Facts

G was seen by police in the restricted area of a railway station. When questioned about her ticket, she told police that she had thrown it away. When asked to produce identification, she removed a driver’s licence from her wallet that she claimed belonged to a friend. The police asked G to accompany them to the police station to make further inquiries about the licence. She began to swear at them and she was warned that further swearing would lead to a ticket. G continued to swear and she was then cautioned, placed under arrest and taken to the police station. Her bag was searched and further property in the name that appeared on the licence was uncovered. A police check revealed that all property in this name had been reported stolen. G was charged for all three offences because:

- of her criminal history
- she did not admit to any of the offences and refused to be interviewed about them
- she refused Legal Aid
- she had no contact with her family and no fixed abode
- she was uncooperative towards the police.

Features

G was 16 years old at the time of the offence. She had no fixed abode at the time. She had appeared before the Court eight times previously for stealing, larceny, maliciously destroying property, common assault, shoplifting and soliciting for prostitution. The penalties she had incurred ranged from bonds, fines, bonds of 12 months together with a fine, and probation with supervision. She had also been cautioned twice by police for possessing a prohibited drug, and for malicious damage and trespassing.

Sentence

As G did not appear in Court, the matter was dealt with ex parte. She was fined $50 for entering a restricted area, $50 for using offensive language and $100 for the offence of goods in custody. The magistrate noted that the maximum penalty for the last offence was $550. No order as to costs was placed on any of the offences.

H

H was charged with:

1. Goods in personal custody: *Crimes Act* 1900, s 527C(1)(a)
2. Goods on premises: *Crimes Act* 1900, s 527C(1)(c).

Facts

A sales representative of a clothing company from which clothing was stolen saw H and his co-offender walking down the street wearing this clothing. The items of stolen clothing were samples of a distinct brand that had not yet been distributed in Australia, and for which this company was the only Australian licence holder. The sales representative took H and his co-offender back to their offices and called the police, who took H to the Police Station. Their parents and Legal Aid were contacted. H and his co-offender refused to participate in an interview. H's mother gave permission for the police to search her home for the outstanding stolen clothing. The search took place in the presence of H and his mother, and was videotaped. The search uncovered the remaining stolen clothing. All property recovered and identified was returned to the sales representative, who also attended the search. H was charged for not admitting to all offences, the nature of his previous offences, and for refusing to be interviewed. He was released on bail on condition that he did not associate with the co-offender and that he remain at his place of residence between 9 pm and 7 am unless accompanied by, or with permission from, either one of his parents. Bail conditions were motivated in part by the opinion of the police that H "appears to be part of the local criminal element".

Features

H was 15 years old at the time of the offence, living with his parents and attending TAFE to complete his Year 10 studies. He had committed these offences while on bail for previous offences. His prior offences before the Court included possession of prohibited drugs, possession of equipment to administer prohibited drugs and custody of an offensive implement in a public place. He had previously been cautioned by the police three times—for larceny, shoplifting and malicious destruction of property. Under the pre-Court police diversion scheme, he had been sent to youth justice conferencing twice—for stealing an amount over $2000 and under $5000, and for goods in personal custody reasonably suspected of being stolen. When he missed a Court date for the current offences, his mother—a school teacher—wrote a letter of apology and explanation and took full responsibility for missing the date. She mentioned that she had difficulties balancing work and home demands, especially in light of the stress caused by her son's offending, but that her son took priority over everything else.

Sentence

The offence was dismissed after youth justice conferencing. The magistrate first requested a full background report. The conference was attended by H, H's parents, a youth liaison officer and a "support person for H". The victims listed for the offence chose not to be involved, "for fear of unknown repercussions" and because "[t]hey felt it would be unfair on H to have to become 'the face' of the several offences that have taken place on their premises". They did, however, request that H be made aware of the costs that resulted from such offences. It was reported that H's attitude during the conference was poor and that he criticised his parents for their poor parenting skills. The outcome plan of the conference was that, under the supervision of his mother, H was to write an essay on the implications of goods in custody offences, and to address the implications of the offence on the owners of the goods stolen. The youth liaison officer assisted H in finding facts and figures for his essay.

A1.2 Offences against the person

Common assault: *Crimes Act* 1900, s 61

J

J was charged with:

1. Common assault: *Crimes Act* 1900, s 61.

Facts

J approached the victim, who was walking along a street with a group of friends. Words were exchanged and J threw a beer bottle at the victim from a distance of about one metre. The victim was hit on the left side of the head, although he suffered no visible injury. J ran into a house nearby. Police attended and spoke to both J and the victim. The victim left the scene in the company of friends and went to a nearby police station, where he made a statement and photographs were taken. J was arrested the next day while playing sport. His mother was called. J declined to be interviewed and was charged with assault occasioning actual bodily harm, later withdrawn, and common assault. He pleaded guilty to the charge of common assault.

Features

J was aged 17 years at the time of the offence. His mother experienced great difficulty in dealing with his aggression and communicating with him. J had suffered a head injury in a car accident several years before and there was a possibility of some residual damage. His criminal record included offences of assault occasioning actual bodily harm, larceny and robbery in company. For the offences of assault occasioning actual bodily harm and larceny he was sentenced, without conviction, to probation for 12 months to be of good behaviour and subject to the supervision of the Department of Juvenile Justice. For the offence of robbery in company, committed some five months after these two offences, he received a CSO for 90 hours.

Sentence

J was referred to a youth justice conference by the magistrate under s 40 of the *Young Offenders Act*. The magistrate was subsequently notified that J elected not to proceed with the conference as he did not want the victim to attend. He was afraid of the victim and feared revenge by the victim's friends. He stated that he had been assaulted by the victim's friends following the incident and believed that they should have been charged. J had further issues that he did not wish to discuss with his legal representative. The sentencing magistrate, in referring to the "whole issue of confrontation", noted that conferencing was not an easy option. The magistrate, without conviction, sentenced J to probation for nine months to be of good behaviour and to notify the Court of any change in address. He was to appear to be further dealt with if called upon within the period of probation: *Children (Criminal Proceedings) Act*.

K

K was charged with:

1. Common assault: *Crimes Act* 1900, s 61.

Facts

K was with a group of males who approached a transsexual prostitute and, after spraying her in the face with an unknown liquid, kicked and punched her. K was seen to punch and kick the victim about six times in various parts of her body. K was arrested and cautioned at the scene and taken to the police station, where he declined to be interviewed or to make any admissions. The victim suffered bruising and swelling from the assault.

Features

K was approximately two weeks short of his eighteenth birthday at the time of the offence, and the second youngest of four children of a marriage that ended because of his father's gambling, drinking and long periods of unemployment. K attended a variety of primary and secondary schools but exhibited no behavioural problems while there. He had little supervision from his father—with whom he mainly lived—who was often absent for long periods. He spent some time with his mother in Melbourne, where her partner proved to be stricter than K's biological father. His previous offences included goods in custody and having an offensive implement (a slingshot) in a public place. He received a caution under s 33 for these offences. Other related offences included obtain money by deception and goods in custody. He received a s 10 bond for these offences with an order for compensation.

Sentence

K was 18 years old at the time of sentence. His mother was present at sentencing. K pleaded guilty, but disputed some of the police facts. He claimed to have acted in self-defence. The magistrate did not accept this claim and released K on a six-month good behaviour bond under s 33(1)(b) of the *Children (Criminal Proceedings) Act* without recording a conviction. The sentencing magistrate expressed the view that it was "somewhat regrettable" that K's previous contact with the jurisdiction had not included the conferencing option. Although K had demonstrated contrition, the offence was viewed as being serious. The magistrate questioned the value of a conference for this offence, given the vilification issues involved. The magistrate adopted the recommendation contained in the Juvenile Justice report, including the order that K seek and remain in employment and be subject to the adult parole service in the state where he intended to live with his mother.

L

L was charged with:

1. Two counts of common assault: *Crimes Act* 1900, s 61.

Facts

L and two co-offenders entered a café and began to throw packets of sugar, salt and pepper around. When the manager and a staff member intervened, L punched the staff member. When nearby security guards came to assist, L kicked, punched and swore at them until subdued. Police were called. L did not admit the offence and refused to be interviewed.

Features

L was almost 17 years of age at the date of this offence. L was unemployed, with no fixed place of abode. Her parents lived interstate. She had been living with her aunt but had run away after stealing money from her. She had a record for possessing a prohibited drug, being carried in a conveyance without the consent of owner, using a motor vehicle without consent of owner, and being unlicensed. These offences had been dealt with by way of dismissal with caution for the drug offence and bonds for 12 months for the remaining offences. She faced charges interstate for stealing, burglary, theft, theft from motor vehicle and possessing property that was the proceeds of a crime. She had failed to appear to be dealt with on these matters and warrants were issued.

Sentence

L was dealt with by the sentencing magistrate the day after the offences were committed. The early plea of guilty was taken into account, as was her desire to live interstate. A good behaviour bond for nine months under s 33(1)(b) was imposed, without conviction. L was to appear to be further dealt with if called upon within the period of the bond, and to notify the Court of any change of address.

Assault with intent to commit serious indictable offence on certain officers: *Crimes Act* 1900, s 58

M

M was charged with:

1. Three counts of larceny ≤ $5,000: *Crimes Act* 1900, s 117
2. Assault with intent to commit serious indictable offence on certain officers: *Crimes Act* 1900, s 58
3. Goods in custody: *Crimes Act* 1900, s 527C(1)(a).

Facts

Police stopped a taxi containing three young Indigenous people suspected of being involved in stealing offences that had occurred a short time before, including M. After alighting from the taxi, M had attempted to push past police officers. He was forced to the ground and restrained after attempting to break free from two police officers. Police took possession of two laptop computers, which M had attempted to hide under the seats of the taxi. He was charged and police bail was refused on the basis of his mother's fear of him and the likelihood that he would not attend Court. Subsequently, Court bail was granted subject to conditions.

Features

M was almost 15 years of age at the time of the offence. M had a lengthy record of shoplifting, larceny (which increased in value as he got older), stealing from the person, robbery, stealing property in dwelling/house, and failure to comply with bail conditions. The sanctions imposed included dismissal with caution and a recognizance for 12 months. He had been diverted by police on six occasions—three cautions for larceny and shoplifting, and three youth justice conferences for larceny. No Juvenile Justice report was commissioned.

Sentence

M pleaded not guilty to the goods in custody offence and this was subsequently withdrawn. He pleaded not guilty to the offence of resisting an officer in the execution of duty. He was found guilty and a good behaviour bond for 12 months was imposed, without conviction. The larceny matter was adjourned to be dealt with together with other matters awaiting finalisation. M was facing sentencing for more serious, unrelated matters at the time that he was sentenced for this offence.

Assault occasioning actual bodily harm: *Crimes Act* 1900, s 59

N

N was charged with:

1. Assault occasioning actual bodily harm: *Crimes Act* 1900, s 59
2. Maliciously destroy/damage property ≤ $2000: *Crimes Act* 1900, s 195(a)
3. Custody of a knife in a public place: *Summary Offences Act*, s 11(c)
4. Assault occasioning actual bodily harm: *Crimes Act* 1900, s 59.

Facts

N went looking for his older sister, armed with a baseball bat and knife, after being told that she had made a decision that did not please him. His mother had informed him of his sister's decision earlier in the day. His mother called his sister at work and told her to take refuge at their community centre. The mother also informed a family friend and an elder at the centre, who attempted to hide the sister when she arrived at the centre. N arrived at the centre soon after his sister and, once inside the building, ran around looking for his sister, all the while shouting out that he wanted to kill her. When he found her, he attacked her with the knife, causing a 3 cm laceration at the shoulder and bruising. When the elder came to the sister's defence, N struck the elder with the knife, causing a 1.5 cm laceration in the thumb region. When the priest wrestled the knife from N, N went to get a baseball bat from his car. Upon his return he found the front door of the centre locked. He smashed the entire glass door. By this stage the family friend and elder had called the police. When the police arrived, N left in his car. The police took statements from the witnesses and photographed the two victims' wounds. N's sister was taken to the police station and an apprehended violence telephone interim order was obtained to serve N at his home. N turned up at the police station on the following day in the company of his uncle. He was arrested and searched. He declined to be interviewed. He was charged with four offences because he did not admit to these offences, caused harm to the victim, refused to be interviewed, and because of the seriousness and violence of the offences. He was released on bail on condition that he not intimidate, harass, stalk or harm the victim directly or via a third party or damage her property. This was a response to the violence of the crime and for the protection of the victims.

Features

N was 17 years old at the time of the offence and was working as a bricklayer. He had not committed any previous offences.

Sentence

N was dismissed after completing youth justice conferencing under the *Young Offenders Act*. The conference was attended by N and his mother, the two victims, the youth liaison officer, a community representative and N's counsellor (nominated by N). His conference plan indicated that, under the supervision of his counsellor, he would be required to undertake between one and 26 hours of community service, over a six-month period, at the community centre. Under the supervision of his mother, he was required to write letters of apology to the two victims and to the police. When asked to endorse the conference outcome plan, the magistrate stated that s/he was "not prepared to approve the outcome plan" until s/he was supplied with a report detailing what took place at the conference "[b]ecause this matter is so complex but serious".

O

O was charged with:

1. Assault occasioning actual bodily harm: *Crimes Act* 1900, s 59
2. Goods in custody: *Crimes Act* 1900, s 527C(1)(a)
3. Use of offensive language: *Summary Offences Act*, 1988, s 4A(1)
4. Assault officer in execution of duty: *Crimes Act* 1900, s 60(2).

Facts

O and a co-offender chased and attacked a victim in the street, punching him a number of times before a security guard intervened. When caught shortly afterwards by the police, both offenders were too drunk to be interviewed. O was subsequently charged with assault occasioning actual bodily harm. Three days later O was observed by police standing at an inner city location well known as a point for the sale and distribution of drugs. He was taken to the police station and searched. On the way to the police station he swore at police continuously, despite being asked not to do so as there were women and children in the vicinity. When he was searched at the police station, a SIM card identified as having been stolen the day before was found concealed within the brim of his cap. While he was being fingerprinted he pushed his right hand into the face of a police officer, leaving a single ink handprint to the right side of the officer's face that required solvent to remove. He declined to be interviewed or to make any admissions. He was charged with goods in custody, use offensive language and assault officer in execution of duty. Some three weeks later O was with a group of young persons who were smashing bottles on the street. He was seen to smash a bottle and, when arrested, swung his closed fist at the police officer. The other young persons ran from the scene. His mother was spoken to by police about his arrest but declined to attend the police station. He was charged with break bottle in public place and attempt assault officer in execution of duty. Police bail was refused as O had been recently charged with a number of offences involving violence, many of which were against police.

Features

O was 15 years old at the time of the offences, and had an alcohol problem that was an underlying factor in his anti-social behaviour. His Court Alternatives History indicated that he had received two cautions—one for larceny and one for consumption of alcohol in a public place.

Sentence

O initially pleaded guilty to all offences except the two related to the broken bottle incident (attempt assault officer in execution of duty and break bottle in public street). He was almost 17 years old at the time of sentence. He was also on parole after being sentenced in the District Court to two and a half years for aggravated robbery with a dangerous weapon under s 97(2) of the *Crimes Act*, to be served in a juvenile detention centre. His legal representative had submitted a report, which indicated the good progress made in PALM and counselling sessions.

Robbery in company, s 97(1)

P

P was charged with:

1. Robbery in company: *Crimes Act 1900*, s 97(1)
2. Goods in custody: *Crimes Act 1900*, s 527C(1)(a)
3. Supply of prohibited drugs: *Drug Misuse and Trafficking Act 1985*, s 25(1).

Facts

P had committed two sets of offences on different dates, which were dealt with concurrently. In the first, he and his two co-offenders were seen by off-duty police to bash a man and then run from the scene. P and his co-offenders were all chased and apprehended by the police. A large amount of money was found on P. He was then strip-searched and taken to the police station. The victim was admitted to hospital with a closed head injury, facial abrasion and groin strain. It later transpired that P was not responsible for the violence, only the theft. The second offence was committed while P was on bail for the first offence. Two first instance warrants were issued for his arrest. When the police approached him to place him under arrest, he swallowed what police believed to be "deals of cocaine/heroin". He was taken back to the police station and charged by virtue of the warrants. P claimed he had not appeared in Court for the first set of offences because he had forgotten the Court date. He was granted bail on condition that he reside with his parents, report each Monday and Saturday to the police station, and not go within 1 km of the place in which he had been committing offences.

Features

P was 16 years of age at the time of the offence, unemployed and residing in the area in which he had been offending, although he returned to his parents' home on occasion. The police were of the opinion that he was entrenched in the local drug trade and was supplying heroin and cocaine. A Juvenile Justice report was commissioned, which mentioned that his mother cared for his father, who required 24-hour attention as a result of a brain tumour. It also mentioned that, although P pleaded guilty to the drug supply charge, he told the Juvenile Justice officer that when picked up by police for the second set of offences, he was not dealing but merely pointing out dealers to people he later found out were plain clothes police. He had appeared before the Court once before for larceny, for which he was dismissed with a caution and required to pay $280 in compensation. The Juvenile Justice report recommended a CSO "as a direct alternative to incarceration", although a fine together with recognizance (with or without conditions) was the preferred penalty option.

Sentence

P did not plead guilty to the offence of goods in custody and this offence was withdrawn and dismissed. He was sentenced to 50 hours of community service for the offence of robbery in company. The magistrate explained to P that, given the violence of the attack, he should receive a control order even though he was not responsible for the violence. Nonetheless, unlike his co-offenders, who were adults with long, serious records of offending (this contributed to their being sentenced to prison for this offence), his record was not too lengthy and he pleaded guilty to the offence (although, admittedly, not immediately). He was therefore sentenced to a nine-month bond with conditions for the penalty of supply prohibited drugs. A nine-month bond was chosen because

at the time of sentencing, P was due to reach adulthood in nine months' time. He was required to reside with his parents, take part in a Juvenile Justice counselling program, be of good behaviour, find and retain employment, and not go within 1 km of the area in which he offended. Again, the magistrate informed him that supply of drugs would commonly incur a control order; however, because he pleaded guilty at an early stage, he had a supportive older brother, he had not appeared before the Court too often and his recent behaviour was good, no control order would be imposed. He was not convicted for either offence, to spare him from incurring a criminal record.

Q

Q was charged with:

1. Robbery in company: *Crimes Act* 1900, s 97(1)
2. Affray: *Crimes Act* 1900, s 93C(1)
3. Assault occasioning actual bodily harm: *Crimes Act* 1900, s 59(1)
4. Common assault: *Crimes Act* 1900, s 61.

Facts

An argument arose between a group of between eight and 10 co-offenders and the victim. Soon after, the offenders started punching and kicking the victim in the head and body area. While the victim was down, Q was caught on CCTV removing a wallet from the victim's back trouser pocket, which the victim later claimed contained $100, some cards, and personal papers and photos. Q was seen distributing the contents of the wallet to others. Members of the public intervened and broke up the attack. The co-offenders dispersed and left the victim in the alleyway. CCTV operators directed police to the victim and some of the offenders, including Q. The victim and her friends gave evidence at the police station, where photographs were taken of her injuries. Q was positively identified and arrested at her home the next morning. When taken to the police station, she was shown the CCTV tape and declined to participate in an interview on advice from her sister. Q was released on bail on condition that she continue to reside with her mother, that she not leave this address between 5 pm and 8 am unless in the company of her mother, that she not associate with her co-offenders, that she not enter the area in which she offended, and that she not directly or through a third party contact, approach, harass or assault the victim. After being released, Q disputed police reports that suggested that CCTV showed Q was with her co-offenders when they approached the victim in an alleyway. Instead, Q claimed that she joined her co-offenders much later and did not participate in assaulting the victim, merely stealing her wallet, for which she later pleaded guilty. The charges for affray, assault and common assault were dropped when Q appeared before the Court.

Features

At the time of the offence, Q was a high school student residing with her family. She was a first time offender. The background report that was commissioned revealed that Q had very little contact with her father, and that both she and her mother claimed to have a difficult relationship with each other. Q thought her mother restricted her social life and retreated into her religion too much. The mother thought her children did not listen to her and claimed not to understand their "Australian way of life". She came to Australia as a refugee and, after many years of working long hours in a menial job to support them, she wanted time away from others to practice her religion. The Juvenile Justice officer thought that, in a number of ways, Q did not fit the profile that the offending behaviour suggested. For this reason, s/he recommended against a control order and instead suggested a probation order with supervisory conditions. Q's mother was at the Court when Q appeared before it, but did not go into the Court for religious reasons.

Sentence

Q was sentenced to a 12-month bond with conditions—to be of good behaviour, to accept supervision from the Department of Juvenile Justice, to participate in counselling and group programs, to attend school, and to reside with her mother unless recommended against by the Department of Juvenile Justice. The magistrate asked whether the mother was in Court, and was told that she was in her car outside the Court. The magistrate also asked Q's lawyer if s/he was required to read the whole Juvenile Justice report or just the recommendations made by the Juvenile Justice officer. S/he reprimanded Q for engaging in violent behaviour and warned her that if she continued to engage in such behaviour it would affect her ability, when she became an adult, to be a good parent and hold a worthwhile relationship with a partner or with friends. The magistrate recognised that her relationship with her parents was "difficult", that they had "robbed you of the fun that is normally associated with being a young person", and that "you don't have the support that everyone would hope would be provided by parents". Otherwise, it was thought that her school performance, together with her ability to hold down a part-time job, indicated that she was "a decent young woman…with a lot of potential". The magistrate recommended that she form relationships with older people "who could assist you", and was of the opinion that the conditions of the probation order imposed would assist her to do this. The magistrate also encouraged Q to show respect to her mother and thought this would encourage Q's mother to "understand where you are coming from and perhaps even appreciate your [Australian] approach to life". The magistrate warned Q that if she appeared before the Court again for a similar offence, "I may have to think about locking you up".

A1.3 Illicit drug offences

Possession of prohibited drugs: *Drug Misuse and Trafficking Act* 1985, s 10(1)

R

R was charged with:

1. Possess a prohibited drug: *Drug Misuse and Trafficking Act* 1985, s 10(1).

Facts

Police searched a group of males, including R, while conducting foot patrols at a suburban Sydney shopping mall. R's brother was found in possession of 0.5 g of cannabis hidden in a packet of cigarettes. R's brother claimed that he was unaware that the packet, which R had given him, contained cannabis. R went to the police station where his brother had been taken and informed the staff that the cannabis was his. He left before police could speak further to him. R was charged over a year later, while he was in custody at an adult correctional facility on unrelated matters, with possession of a prohibited drug (cannabis leaf). He pleaded guilty.

Features

R was 17 years of age at the time of the offence. His previous offences at the time included remaining on enclosed lands without lawful excuse, two counts of common assault and use offensive language. He had been dealt with by way of a s 33(1)(b) bond of the *Children (Criminal Proceedings) Act*, a Court administered caution under s 33(1)(a) of the Act and a police caution under the *Young Offenders Act.*

Sentence

At the sentencing hearing R was 18 years old and awaiting trial on armed robbery offences. The magistrate dismissed the drug matter with a caution under the *Young Offenders Act.*

S

S was charged with:

1. Two charges of possess prohibited drug: *Drug Misuse and Trafficking Act 1985*, s 10(1).

Facts

Patrolling police stopped a vehicle to randomly breath test the driver. The driver and the two passengers, one of whom was S, were unlicensed. Police noticed a smell of cannabis and searched the vehicle and its occupants. Police found a resealable bag containing one orange tablet. At the police station, S removed from his underwear resealable plastic bags containing 10.4 g of green vegetable matter and a quantity of cash. The co-accused were also in possession of drugs and money. S did not admit to all offences and refused to be interviewed. S was charged with supply of a prohibited drug, goods in custody and two counts of possession of a prohibited drug. He pleaded not guilty to the first two charges, which were subsequently withdrawn. He pleaded guilty to the two charges of possess a prohibited drug.

Features

S was 15 years of age at the time of the offences. He had previously been referred to a youth justice conference by the Children's Court for an offence of assault occasioning actual bodily harm. He completed the outcome plan. At the time of sentencing, his legal representative informed the Court that S was employed on a casual basis, but was seeking an apprenticeship and had appointments with government careers advisers. S/he emphasised that S had strong parental support.

Sentence

S was 16 years old at the time of sentence and was accompanied to Court by his mother and father. The sentencing magistrate noted that the weight of the drug was such that the matter could have been dealt with by way of a police caution. The magistrate sentenced S to a good behaviour bond for six months for both offences, without conviction. S was ordered to seek and remain in employment and accept the reasonable directions of his parents. The magistrate observed that S was "developing a real profile of a drug user and abuser and if that continues you can expect to go to a detention centre".

T

T was charged with:

1. Possess a prohibited drug: *Drug Misuse and Trafficking Act* 1985, s 10(1).

Facts

Plain clothed police observed T with other males while patrolling an inner city area well known as a place for the sale and distribution of drugs. As they approached T, he attempted to swallow what was found to be three coloured balloons with capsules inside. These balloons contained 1.03 g of cocaine. He was taken to the local police station and charged with possess prohibited drug. Police were unable to contact his parents. A relative was telephoned but refused to attend the police station. T was granted conditional bail on the basis that he not go within 1 km of the railway station in the vicinity of where he was arrested. He was shown a street map showing this area and signed a copy acknowledging this condition. When the matter came before the Children's Court the legality of the police search was challenged; however, after the evidence was heard, the sentencing magistrate was of the view that the police did have "reasonable grounds" and admitted the evidence.

Features

T was 15 years of age at the time of the offence. He was residing with his parents. He was neither attending school nor employed. He had previously been diverted by police on three occasions—receiving two cautions, and one youth justice conference for an offence of take and drive conveyance without consent of owner. The outcome plan involved 30 hours of community service, which he was in the process of completing when he came before the Court for sentencing for the drug matters.

Sentence

T was almost 16 years of age at the time of sentencing. The solicitor for T informed the Court that once the evidence of the search was ruled to be admissible s/he was instructed to enter a guilty plea on behalf of T. As this was the first drug matter on record for T, and there had been no breach of his bail condition, T was sentenced, without conviction, to a good behaviour bond for six months under s 33(1)(b) of the *Children (Criminal Proceedings) Act*. He was ordered to continue to attend school and obey all reasonable directions of his mother. There was no requirement for supervision.