# THE PLACE OF REHABILITATION IN THE SENTENCING OF CHILDREN FOR SERIOUS OFFENCES

## I. INTRODUCTION

This article examines the role of rehabilitation in the sentencing of children for serious offences, whether these offences are dealt with in the Children's Court or in higher courts.

## II. SENTENCING PRINCIPLES RELATING TO CHILDREN

Rehabilitation is one of the purposes of sentencing.[1] It is the primary purpose in sentencing children, and assumes a greater role than other sentencing principles, such as punishment and deterrence.[2]

In *R v Smith*[3] it was held:

> 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. The difficult task of the court is to determine what treatment gives the best chance of realising that object. That realisation is the first and by far the most important consideration.

[1] Section 3A *Crimes (Sentencing Procedure) Act 1999* (NSW).
[2] *R v GDP* (1991) 53 A Crim R 112.
[3] [1964] Crim LR 70, quoted in *R v GDP* (1991) 53 A Crim R 112 at 116 per Matthews J.

In *Wilcox*[4] it was remarked during the course of sentencing that:

> 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.

In *C S & T* [5] Gleeson CJ accepted a submission that:

> In sentencing young people ... the consideration of general deterrence is not as important as it would be in the case of sentencing an adult and considerations of rehabilitation should always be regarded as very important indeed.

These principles have been applied in a number of other cases.[6]

The leading case in relation to the sentencing of children is *R v GDP.*[7] *GDP* involved an appeal to the Court of Criminal Appeal against the severity of sentence imposed in the District Court. Matthews J, in approaching the task of sentencing the appellant, summarised the position in relation to sentencing principles that apply to children as:

> However, it is generally accepted that in sentencing young offenders considerations of general deterrence are not as significant as in the sentencing of an adult. This reflects an accepted norm that the community interest reflected in the sentencing of a child is not advanced by using him or her as an example but rather in seizing the opportunity to direct the child into rehabilitative efforts.[8]

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[4] Unreported, Supreme Court, NSW, 15 August 1979.
[5] Unreported, Court of Criminal Appeal, 12 October 1989.
[6] *R v Bellavia* Unreported, Supreme Court, 26 August 1980; *R v Phillips* Unreported, Supreme Court, 17 December 1985; *R v Wade* Unreported, Supreme Court, 5 September 1986, *R v Ford* Unreported, Supreme Court, 22 March 1988; *R v Pelosi* Unreported, Court of Criminal Appeal, 28 September 1988.
[7] (1991) 53 A Crim R 112.
[8] Ibid at 116.

There have been different formulations of the principles that rehabilitation is the primary purpose in sentencing children, being that these other purposes of sentencing are "not of the same importance"[9] and, as noted above, "not as significant", "largely discarded", and "not as important".

However, punishment and general deterrence remain relevant considerations in the sentencing of children.

For example, in *R v Broad*[10] considerations of deterrence were not displaced by considerations of the rehabilitation of a child.

In *R v Robinson*[11] Badgery-Parker stated that:

> There may ... be cases where the objective gravity of the offence is such and the effects on the victim are such and the community's interest in deterrence of such conduct is such that notwithstanding the youth of the offender and the desirability of considering his rehabilitation custodial sentences must be imposed.

## III. WAYS THAT REHABILITATION HAS BEEN GIVEN LESSER WEIGHT WHEN SENTENCING CHILDREN FOR SERIOUS OFFENCES

In a number of cases the weight given to rehabilitation in sentencing children according to law has been qualified in the following ways.

[9] *R v XYJ* Unreported, Court of Criminal Appeal, 15 June 1992.
[10] Unreported, Supreme Court, 30 March 1984.
[11] Unreported, Court of Criminal Appeal, 15 September 1989.

A. When conduct has been characterised as that of an adult as opposed to that of a child

Youth cannot be used as a 'cloak of convenience' for a child continually committing offences.[12]

In *R v Bus & AS*[13] the appellants were sentenced for a number of serious sexual assaults involving the same victim. The victim had gone to a party at the house of one of the appellants, where she was sexually assaulted in company.

Hunt CJ at CL stated:

> Rehabilitation plays a more significant role and general deterrence a lesser role. But that principle is subject to the qualification that, where a youth conducts himself in the way an adult might conduct himself and commits a crime of considerable gravity, the function of the courts to protect the community requires deterrence and retribution to remain significant elements in sentencing him.[14]

Similarly, in *R v Hawkins*[15] Hunt CJ at CL stated that:

> Where a youth conducts himself violently in the way an adult might conduct himself and commits a crime of considerable gravity the protective function of criminal courts would cease to operate unless deterrence and retribution remain significant considerations in sentencing that youth.

[12] *R v Webb* Unreported, Court of Criminal Appeal, 12 September 1997, per Sully J; *R v Biggs* Unreported, Court of Criminal Appeal, 5 March 1997.
[13] Unreported, Court of Criminal Appeal, 3 November 1995.
[14] Ibid at 11.
[15] Unreported, Court of Criminal Appeal, 15 April 1993.

A number of cases have applied the principle that when a child conducts herself/himself like an adult and commits serious offences, that rehabilitation will be given less weight than general deterrence.[16]

There has been limited guidance as to what it means for a child to conduct herself/himself as an adult, and what actually constitutes an adult offence. It appears that leniency for an offence arises out of the offender's immaturity contributing to the offence.[17]

This guidance is not always clear. For example, in *R v Bus & AS*, Hunt CJ at CL accepted that the sexual assaults that took place were not as serious as other sexual assaults which would have required the qualification in relation to offences that are similar to adult offences.

B. When the prevalence of the offence among children leads to the need for general deterrence

In a number of cases, the emphasis given to rehabilitation has been reduced because the prevalence of certain offences among young people demonstrates a need for public deterrence.[18]

For example, in *R v Pham and Ly* Lee CJ at CL stated that:

> 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

[16] *R v Pham and Ly* (1991) 55 A Crim R 128 at 135; *R v BCG, MBH and DMP* Unreported, Court of Criminal Appeal, 15 December 1992; *R v Wightman* Unreported, Court of Criminal Appeal, 2 November 1998; *R v Huynh and Phung* [2001] NSWSC 357.
[17] *R v Kama* (2000) 110 A Crim R 47; *R v TVC* [2002] NSWCCA 325 at [12]; *R v CK* [2002] NSWSC 942 at [23].
[18] *R v Nguyen* Unreported, Court of Criminal Appeal, 14 April 1994; *R v Townsend & Cooper* Unreported, Court of Criminal Appeal, 14 February 1995; *R v Tran* [1999] NSWCCA 109; *R v AEM* [2002] NSWCCA 58; *R v Voss* [2003] NSWCCA 182; *R v MHH* [2001] NSWCCA 161.

> 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 homes.[19]

Some of the types of offences committed by children where this qualification has taken place include:

- Driving offences under s 52A *Crimes Act*, where it has been held that the prevalence of this offence amongst young drivers and the need for public deterrence mean that the youth of an accused is given less weight as a subjective matter than in other types of cases.[20]

- Armed robberies committed by children[21], which is an offence often committed by children and which is of the kind in which the leniency otherwise attracted by youth may be diminished.[22]

C. When lesser weight has been given to rehabilitation depending on the proximity of the child to 18 years of age

In a number of cases, the fact that a child may be close to the age of 18 has been given as a reason for less weight to be accorded to rehabilitation in sentencing. For example, in *R v Nguyen* Blanch J stated that:

> *R v GDP* . . . held that considerations of punishment and general deterrence have less significance than in the case of adult offenders and individual treatment aimed at rehabilitation has greater significance than

[19] (1991) 55 A Crim R 128 at 135.
[20] *R v McIntyre* (1988) 38 A Crim R 135; *R v Slattery* (1996) 90 A Crim R 519.
[21] *R v Marsters and Nolan* Unreported, Court of Criminal Appeal, 30 September 1994; *R v Allam* Unreported, Court of Criminal Appeal, 13 April 1994.
[22] *R v SDM* [2001] NSWCCA 158 at [47] per Simpson J.

> with adult offenders. Such considerations are relevant in this case. The fact the applicant was almost 18 is a factor which is relevant in reducing the significance of those considerations.[23]

In *R v Bus & AS* Hunt CJ at CL observed that:

> In any event, it is obvious that the relevance of the principles stated in section 6 to each individual case depends to a very large extent upon the age of the particular offender and the nature of the particular offence committed. An offender almost eighteen years of age cannot expect to be treated according to law substantially differently to an offender just over eighteen years of age.[24]

In *R v Williams*[25] a child aged 17 years and 11 months was sentenced for aggravated dangerous driving occasioning death. Sully J, who gave the leading judgment in the Court of Criminal Appeal, referred to the "misconception" that "necessarily entails that a young person of 17 years and 11 months who commits a serious criminal offence is to be dealt with as though he were a child in the colloquial understanding of that description".

D. A combination of matters

Some cases have even had a combination of the qualifications mentioned above. In *R v JB, R v RJH* the appellants appealed against the severity of sentence imposed following their pleas of guilty to felony murder. Stein JA in the Court of Criminal Appeal remarked that:

> Finally, it is submitted that the sentence was manifestly excessive having regard to the youth of the offender. I am unable to agree. His Honour noted the age of the applicant and that he was just 2 months short of

[23] *Nguyen* Unreported, Court of Criminal Appeal, 14 April 1994. See also *R v Huynh and Phung* [2001] NSWSC 357; *R v Voss* [2003] NSWCCA 182.
[24] Unreported Court of Criminal Appeal, 3 November 1995 at 11.
[25] Unreported, Court of Criminal Appeal, 17 December 1996.

> being considered an adult for sentencing purposes. The judge also had regard to the prevalence of this type of crime and the need for strongly deterrent sentences 'even for young persons'. His Honour closely examined the subjective factors, including the youth of the applicant and his prospects of rehabilitation. While the sentence was a heavy one, I cannot conclude that it was manifestly excessive. It was certainly within the judge's discretion.[26]

All of the cases mentioned in this part are examples of where the centrality of rehabilitation as a sentencing principle has been displaced when children have been sentenced for serious offences.

## IV. SUBMISSIONS THAT CAN BE MADE IN RELATION TO THE PROPER PLACE OF REHABILITATION IN SENTENCING CHILDREN FOR SERIOUS OFFENCES

There are different policy considerations in the sentencing of children as opposed to the sentencing of adults, even for serious offences.[27] For this reason, it is important for advocates to make submissions on the proper place for rehabilitation in the sentencing of children for serious offences. The following outlines submissions that advocates can make.

### A. The proper role for general deterrence

The role of general deterrence in sentencing children is questionable.[28] It is beyond the scope of this article to examine in detail what role general deterrence should play in the sentencing of children. However, the law as it stands makes it

[26] [1999] NSWCCA 93 at [38].
[27] *R v Marsters and Johnson* Unreported, Court of Criminal Appeal, 30 September 1994; *R v Harborne* Unreported, Court of Criminal Appeal, 12 October 1994; *R v XYJ* Unreported, Court of Criminal Appeal, 15 June 1992.
[28] Australian Law Reform Commission *Sentencing Young Offenders*, Sentencing Research Paper Number 11 (1988).

clear that general deterrence still plays a role in the sentencing process, even where children under the age of 18 are being sentenced.[29] Both specific deterrence and general deterrence are now identified in sentencing legislation in New South Wales as purposes of sentencing.[30]

The following points can be made in relation to locating a proper place for general deterrence:

- The role of general deterrence in the sentencing of children has to be put in its proper context in each case.

- The extent to which regard will be paid to general deterrence depends upon the particular circumstances of each case.[31]

- The preferred role of general deterrence is that, in accordance with the authorities mentioned earlier, that general deterrence can have *some* recognition, although not undue weight in any particular sentencing exercise. A simplistic invocation that 'general deterrence is to be given greater weight' is to be avoided.

A case that illustrates the appropriate weight that can be given to general deterrence when a child is sentenced according to law is *R v NMTP.*[32] The child was sentenced after trial for malicious wounding with intent to inflict grievous bodily harm and discharging firearms in public.

[29] *R v O'Brien* Unreported, Court of Criminal Appeal, 29 April 1993.
[30] Section 3A(b) *Crimes (Sentencing Procedure) Act 1999* (NSW).
[31] *R v FQ* Unreported, Court of Criminal Appeal, 17 June 1998.
[32] [2000] NSWSC 1170.

Bell J referred to the following:

> The prisoner's past good character and the content of the Juvenile Justice report suggests that considerations of personal deterrence need not loom large in my task. However, accepting the principles in *GDP* guide the exercise of my discretion, I am nonetheless of the view that considerations of general deterrence must receive *some* recognition in the sentence which I impose having regard to the nature of these offences. The objective seriousness of the offences charged in counts three and four require, notwithstanding the principles to which I have made reference, that I impose custodial sentences.[33] (Emphasis added).

B. Giving full effect to the relevance of age

In some of the cases referred to earlier, greater weight was given to principles of punishment and deterrence because the child was close to 18 years old. This analysis does not take into account the actual maturity of the child and its relevance to the age of the child.

A preferable approach is that taken by Shaw J in *R v AO*.[34] Although Shaw J was in the minority in this case, his analysis is incisive. His approach was that considerations of the child's age affect the sentencing discretion in a number of ways, including these following ways which are taken directly from *R v AO*:[35]

- When assessing the appropriate penalty when making findings of fact about the relationship between the offender and co-offenders.

[33] Ibid at [31].
[34] [2003] NSWCCA 43.
[35] Ibid at [75].

- When making findings of fact about the culpability of the offender.

- When assessing of the objective gravity of the offences.

- When appreciating the subjective background of the offender.

- When considering the totality of the offender's criminality.

These aspects should be explored in each case, as:

> The seriousness of the offence cannot be the exclusive guiding factor in this respect and there is nothing in the case law that would put that proposition as authoritative. Rather, it is generally regarded as acceptable that '*the younger the offender, the greater the weight to be afforded to the element of youth*'.[36]

As Shaw J also stated in *R v AO:*[37]

> It is an established, and I think clearly correct principle, that in sentencing '*young people*' general deterrence is not as important as it would be in the sentencing of adults, and that in relation to a young offender considerations of rehabilitation should be regarded as '*very important*': *R v GDP*. It seems to me to be a reasonable application of that principle to conclude that the degree of youthfulness (that is, the age of the offender) is also relevant ...

An earlier example of how this approach was applied is found in *R v RAF*[38] where the child's "extreme youth" was one of the factors that was taken into

[36] *R v Hearne* [2001] NSWCCA 37 at [27].
[37] [2003] NSWCCA 43 at [56].
[38] *R v RAF* [1999] NSWSC 615.

account in imposing a section 558 bond for the offence of accessory after the fact to murder.

As Shaw J stated in *R v AO*[39] the age of the child is important:

- When fixing an appropriate term of detention.
- When considering whether there are special circumstances which justify the variation of the statutory ratio of the non parole period to the parole period, as a matter of fact or law.
- When fixing the minimum period of detention that is required.
- When assessing whether an order should be made that the offender be kept in a detention center (as opposed to being kept in an adult facility).

These are ways that the age of a child has a real bearing on the weight given to rehabilitation and the sentence to be imposed.

C. The seriousness of the offence

The following submissions can be made:

- The child's subjective circumstances and age of the child should not be largely ignored because undue weight is given to the seriousness of the offence(s). What is required in the sentencing of children is a balance of the seriousness of the offence with the circumstances of the offender.
- The principle of proportionality does not have as much significance with young offenders as it does with adults.[40]

[39] [2003] NSWCCA 43 at [75].
[40] Raymond R Corrado "The Need to Reform the YOA in Response to Violent Young Offenders: Confusion, Reality or Myth?" (1994) 36 *Canadian Journal of Criminology* 343, 358.

- In sentencing children, punishment is not to be determined simply by reference to the objective facts, no matter how extreme they may be.[41]

In a number of cases referred to earlier, the seriousness of the offence led to less weight being given to rehabilitation and more weight being given to punishment and deterrence.

However, there have also been a number of other cases where the seriousness of the offence has *not* meant that the role of rehabilitation being diminished. Such cases include children being sentenced for:

- Malicious wounding, malicious wounding with intent to inflict grievous bodily harm and possess firearm.[42]

- Detain for advantage and conceal serious offence. [43]

- Manslaughter.[44]

- Accessory after the fact to murder.[45]

- Murder.[46]

This approach where the seriousness of an offence has not meant that the role of rehabilitation was diminished can be seen in the following two cases.

[41] *R v SK; R v OZ* [2001] NSWCCA 492 at [19] per Newman AJ.
[42] *R v Biggs* Unreported, Court of Criminal Appeal, 5 March 1997.
[43] *R v CQD* [2002] NSWSC 732, particularly at [20].
[44] *R v SMP* [1999] NSWCCA 318.
[45] *R v RAF* [1999] NSWSC 615.
[46] *R v TNT* [2002] NSWSC 537.

In *R v ANG*[47] in sentencing the defendant in the Supreme Court for manslaughter, albeit in very unusual circumstances, Ireland AJ stated that:

> The mitigating features of an early plea, together with genuine contrition and remorse, sound strongly in the offender's favour, however, in my view considerations of rehabilitation warrant *paramount emphasis*. In saying this I do not wish it to be thought that I am losing sight of the important part which the law is called upon to play in upholding the protection of human life and in the appropriate punishment of those who take it. (Emphasis added)

In *R v Mihailovic, Howard, Morgan & Young*[48] three young men were convicted of murder. In sentencing, the following was applied:

> There is always a tension between the purposes sought to be achieved by the imposition of a punishment for serious crime. The youth of the offenders and the importance of their rehabilitation necessarily plays a large part in the sentencing process but does not permit the court to disregard other important elements of punishment - where appropriate, personal deterrence of the offender; general deterrence, that is to say the need to dissuade others from similar conduct; and public vindication of the law. The sentences imposed must be such as will demonstrate with the utmost clarity that the community will not tolerate violence of this kind.

Therefore the seriousness of the offence does not automatically qualify the weight given to rehabilitation in individual cases.

[47] [2001] NSWSC 758.
[48] Unreported, Supreme Court, 15 April and 24 July 1991, per Badgery-Parker J.

D. The proper allowance to be given to the immaturity of youth

In *R v Hearne*[49] it was stated that:

> In none of the cases is it suggested that the weight to be given to the element of youth varies depending on the seriousness of the offence. Rather is the topic dealt with in materially the same way as it is in the case of lesser offences. Of course that is not to say that other factors such as deterrence or retribution may not have a relatively greater part to play in the more serious offences than they do in less serious ones.
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> However it is, we think, appropriate to look beyond the simple difference in facts and to address the principle which is involved. It lies in at least part of the rationale for making any allowance for youth, i.e. the immaturity which is usually involved. Where that immaturity is a significant contributing factor to an offence, then it may fairly be said that the criminality involved is less than it would be in the case of an adult of more mature years.

These are very important principles. They were echoed in *R v AO*[50] where Shaw J stated that:

> The notional idea that the criminality of an offender can be classified as '*childish*' or somehow '*adult*' is, at times, a difficult concept. In some cases, there must be allowance for a consideration that the seriousness of the offence is, in some respects, a *result* of the offender's immaturity and, accordingly, lack of social identity and loyalty. There are some cases in which age is not only a relevant consideration but rather the only consideration.

[49] [2001] NSWCCA 37 at [24] - [25].
[50] *R v AO* [2003] NSWCCA 43 at [76].

# V. RESTORATIVE JUSTICE PRINCIPLES AND SENTENCING CHILDREN FOR SERIOUS OFFENCES

Restorative justice principles and their effect on the sentencing of children for serious offences are very important.

Restorative justice has many different meanings.[51] Restorative justice is often used in the context of diversion from court, such as the scheme of youth justice conferencing under the *Young Offenders Act* 1997, and other alternatives to the traditional sentencing process.

In the sentencing process, restorative justice is:

> In general terms … an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime.[52]

Restorative justice is different to the traditional approach in sentencing, as:

> Restorative justice necessarily involves some form of restitution and reintegration into the community. Central to the process is the need for offenders to take responsibility for their actions. By comparison, incarceration obviates the need to accept responsibility. Facing victim and

[51] For a discussion of restorative justice principles, see for example Burt Galaway and Joe Hudson (eds) *Restorative Justice: International Perspectives* Monsey, NY, USA, Criminal Justice Press, 1996; Daniel Kwochka "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996) 60 *Saskatchewan Law Review* 153.
[52] Id at paragraph 71.

> community is for some more frightening than the possibility of a term of imprisonment and yields a more beneficial result in that the offender may become a healed and functional member of the community rather than a bitter offender returning after a term of imprisonment.[53]

Restorative justice principles underlie much of the juvenile justice legislation, and particularly the *Young Offenders Act 1997* (NSW). While restorative justice is most frequently encountered in court diversionary programmes, restorative justice principles are also applicable in sentencing in court. Recent legislative amendments introduced into the *Crimes (Sentencing Proceedings) Act*[54] formally include restorative justice sentencing principles into sentencing practice in this state.

Restorative justice principles have been introduced through the new purposes of sentencing contained in the Act. Very similar provisions to those in New South Wales that were introduced into the Canadian Criminal Code have been interpreted by the Supreme Court of Canada[55] as introducing these restorative principles into sentencing. These purposes of sentencing are relevant to all sentencing procedures and are therefore applicable to children.

The following changes will flow from a consideration of restorative justice principles:

- Restorative sentencing goals do not usually correlate with the use of prison as a sanction.[56]

- Through its reference to the community, restorative justice principles would lead Judges to consider whether imprisonment would actually serve

[53] Id at paragraph 72.
[54] The *Crimes (Sentencing Procedure) Act (Standard Minimum Sentencing) Act* 2002 inserted s 3A into the *Crimes (Sentencing Procedure) Act*.
[55] *Canadian Criminal Code* RS 1985 s 718(2) was interpreted in *R v Gladue* (1999) 1 SCR 688.
[56] *R v Gladue* (1999) 1 SCR 688 at paragraph 44.

to deter or to denounce crime in a sense that would be meaningful to the community from which an offender comes from. In many instances, more restorative sentencing principles will gain primary relevance because the prevention of crime as well as individual and social healing cannot occur through other means.[57]

- Sentencing Judges would have to consider the place of the offender within the community, and to enquire as to what understanding of criminal sanctions is held by the community, and what the nature of the relationship is between the offender and his or her community.[58]

These principles in relation to restorative justice should be made in appropriate cases.

## VI. CONCLUSION

Sentencing children is different to sentencing adults. The needs and requirements of children are different to the needs and requirements of adults.[59] The task of arriving at the right decision for a child is considerably more difficult and complex than for an adult, because of the special needs that children have and the kind of guidance and assistance that they require.[60]

The focus of this article has been on how the weight given to rehabilitation as the primary sentencing principle in the sentencing of children for serious offences. Relevant considerations that can be referred to have been suggested, which may assist advocates in directing the attention of the Bench, despite the seriousness of the offences for which children may appear, to give appropriate weight to

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[57] Id at paragraph 69.
[58] Id at paragraph 80. See also Daniel Kwochka "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996) 60 *Saskatchewan Law Review* 153.
[59] *R v M(JJ)* (1993) 81 CCC (3d) 487.
[60] *R v M(JJ)* (1993) 81 CCC (3d) 487

rehabilitation. In this way, appropriate sentences can be crafted in each individual case.

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