# Sentencing juvenile offenders on indictment

**His Honour Judge Gordon Lerve***

*Sentencing juvenile offenders on indictment is uncommon and involves the application of different principles to those applied to adult offenders. Sentencing juvenile offenders involves the application of the Children (Criminal Proceedings) Act 1987 (the Act) as well as the various common law principles regarding rehabilitation. An important consideration is whether the offence is a children's serious indictable offence or whether s 18(1A) of the Act applies and a determination needs to be made whether to deal with those offences according to law or in accordance with Pt 3 Div 4 of the Act. Other differences in sentencing juvenile offenders from adult offenders are: not recording a conviction; the inadmissibility of previous criminal record; the requirement for a background report if a custodial sentence is being imposed; service of a custodial sentence in a juvenile justice institution; the application of the R v Henry guideline judgment for robbery offences and a discretion not to include a juvenile on the Child Protection Register.*

Sentencing is part of the routine work of a judge. However, sentencing juvenile offenders on indictment is relatively uncommon. The short decision of the Court of Criminal Appeal in *LD v R* [2016] NSWCCA 217 highlighted a number of issues so far as sentencing juvenile offenders is concerned, particularly on indictment in the Supreme and District Courts. The principal reason why the appeal was upheld is because at first instance the relevant provisions of the *Children (Criminal Proceedings) Act* 1987 were not applied. Particular care needs to be taken when sentencing juvenile offenders on indictment. One particular aspect is whether the offence is a children's serious indictable offence.

## Children's serious indictable offences

Almost all criminal offences committed by juveniles are dealt with to finality in the Children's Court. However, there are a number of offences which are defined within s 3 *Children (Criminal Proceedings) Act* as children's serious indictable offences that are not justiciable in the Children's Court. Those matters are:

(a) homicide,

(b) an offence punishable by imprisonment for life or for 25 years,

(c) an offence arising under s 61J (otherwise than in circumstances referred to in subs (2)(d) of that section) or s 61K of the *Crimes Act* 1900 (or under s 61B of that Act before the commencement of Sch 1(2) to the *Crimes (Amendment) Act* 1989),

(c1) an offence under the *Firearms Act* 1996 relating to the manufacture or sale of firearms that is punishable by imprisonment for 20 years,

(d) the offence of attempting to commit an offence arising under s 61J (otherwise than in circumstances referred to in subs (2)(d) of that section) or s 61K of the *Crimes Act* 1900 (or under s 61B of that Act before the commencement of Sch 1(2) to the *Crimes (Amendment) Act* 1989), or

(e) an indictable offence prescribed by the regulations as a serious children's indictable offence for the purposes of this Act.

Section 61J(2)(d) *Crimes Act* provides for the circumstance of aggravation of the complainant being under 16 years of age.

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* Judge of the District Court of NSW.

Section 17 *Children (Criminal Proceedings) Act* provides that "children's serious indictable offences must be dealt with according to law". "According to law" in s 17 means "according to the principles of sentencing ordinarily applied by the courts, without reference to those provisions in Pt 3, Div 4 of the *Children (Criminal Proceedings) Act* which are otherwise applicable only in the Children's Court. Part 3, Div 4 comprises ss 32–38, wherein available penalties are prescribed".[1]

## Other offences — need for determination whether to deal with according to law

Often when dealing with a children's serious indictable offence, there will be other offences which the court will need to pass sentence that are not children's serious indictable offences. Although any children's serious indictable offence must be dealt with according to law, in respect of any other indictable offence which the court is passing sentence, s 18(1A) *Children (Criminal Proceedings) Act* will need to be considered and a determination made whether to deal with those offences according to law or in accordance with Pt 3 Div 4 of the Act.

Section 18(1A) relevantly provides:

> In determining whether a person is to be dealt with according to law or in accordance with Division 4 of Part 3, a court must have regard to the following matters:
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> (a) the seriousness of the indictable offence concerned,
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> (b) the nature of the indictable offence concerned,
>
> (c) the age and maturity of the person at the time of the offence and at the time of sentencing,
>
> (d) the seriousness, nature and number of any prior offences committed by the person, and
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> (e) such other matters as the court considers relevant.

A situation can also arise where sentence is to be passed in respect of a serious children's indictable offence and there are related matters attaching to a Certificate pursuant to s 166 *Criminal Procedure Act* 1986 that are not children's serious indictable offences. Although it would be preferable for a determination to be made whether to deal with those matters according to law or in accordance with Pt 3 Div 4 *Children (Criminal Proceedings) Act*, it has been held by the Court of Criminal Appeal that it is permissible for summary and table offences attaching to a s 166 Certificate to be dealt with at the same time, and in the same manner, as the serious children's indictable offence.[2]

## Section 6 Children (Criminal Proceedings) Act

In passing sentence on a juvenile offender, reference should always be had to s 6 *Children (Criminal Proceedings) Act*, and preferably should be set out in full within the reasons. The section relevantly provides:

> A person or body that has functions under this Act is to exercise those functions having regard to the following principles:
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> (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,

1 *R v WKR* (1993) 32 NSWLR 447 at 449; *R v AR* [2022] NSWCCA 5 at [14].
2 *DJ v R* [2017] NSWCCA 319 at [68]–[73], [86]–[88] per Johnson J (Macfarlan JA, Hulme J agreeing).

(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,

(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,

(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,

(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

Justice Yehia said recently in *R v KS (No 1)* [2023] NSWSC 696 at [122]:

> As was noted by Hamill J in *Paul Campbell v R* [2018] NSWCCA 87 at [27]–[29] it is significant that paragraph (h) provides that the effect of the crime on the victim (or victims) is to be considered but that this is "subject to" the principles set out in paragraphs (a)–(g). The fundamental principles set out in s 6 remain relevant where the offence is to be dealt with according to law.

## Principles to be applied according to the authorities

The aspect of rehabilitation attains a much greater emphasis in a sentencing exercise involving a juvenile offender. However, the objective criminality and other aspects of the sentencing process are not overlooked merely because the offender is a juvenile, particularly where the offending is serious. Chief Justice McClellan in *R v KT* [2008] NSWCCA 51 at [21]–[26] succinctly summarised the authorities relating to sentencing juvenile offenders. His Honour was in dissent on the ultimate issue, however, with unfeigned respect, the judgment is an excellent summary of the relevant principles. His Honour said:

> [22] The principles relevant to the sentencing of children have been discussed on many occasions. Both considerations of general deterrence and principles of retribution are, in most cases, of less significance than they would be when sentencing an adult for the same offence. In recognition of the capacity for young people to reform and mould their character to conform to society's norms, considerable emphasis is placed on the need to provide an opportunity for rehabilitation. These principles were considered in *R v GDP* (1991) 53 A Crim R 112 at 115–116 (NSWCCA), *R v E (a child)* (1993) 66 A Crim R 14 at 28 (WACCA) and *R v Adamson* (2002) 132 A Crim R 511; [2002] NSWCCA 349 at [30].
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> [23] The law recognises the potential for the cognitive, emotional and/or psychological immaturity of a young person to contribute to their breach of the law. Accordingly, allowance will be made for an offender's youth and not just their biological age. (*R v Hearne* (2001) 124 A Crim R 451; [2001] NSWCCA 37 at [25]). The weight to be given to the fact of the offender's youth does not vary depending upon the seriousness of the offence (*Hearne* at [24]). Where the immaturity of the offender is a significant factor in the commission of the offence, the criminality involved will be less than if the same offence was committed by an adult. (*Hearne* at [25]; *R v MS2* (2005) 158 A Crim R 93; [2005] NSWCCA 397 at [61]).
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> [24] Although accepted to be of less significance than when sentencing adults, considerations of general deterrence and retribution cannot be completely ignored when sentencing young offenders. There remains a significant public interest in deterring antisocial conduct. In *R v Pham and Ly* (1991) 55 A Crim R 128 Lee CJ at CL said (at 135):
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> > "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 *Williscroft* (1975) 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 ie coercive action is fundamental to correctional treatment in our society."

[25] The emphasis given to rehabilitation rather than general deterrence and retribution when sentencing young offenders, may be moderated when the young person has conducted him or herself in the way an adult might conduct him or herself and has committed a crime of violence or considerable gravity (*R v Bus*, unreported, NSWCCA, 3 November 1995, Hunt CJ at CL; *R v Tran* [1999] NSWCCA 109 at [9]–[10]; *R v TJP* [1999] NSWCCA 408 at [23]; *R v LC* [2001] NSWCCA 175 at [48]; *R v AEM Snr, KEM and MM* [2002] NSWCCA 58 at [96]–[98]; *R v Adamson* (2002) 132 A Crim R 511 at [31]; *R v Voss* [2003] NSWCCA 182 at [16]). In determining whether a young offender has engaged in "adult behaviour" (*Voss* at [14]), the court will look to various matters including the use of weapons, planning or pre-meditation, the existence of an extensive criminal history and the nature and circumstances of the offence (*Adamson* at [31]–[32]). Where some or all of these factors are present the need for rehabilitation of the offender may be diminished by the need to protect society.

[26] The weight to be given to considerations relevant to a person's youth diminishes the closer the offender approaches the age of maturity (*R v Hoang* [2003] NSWCCA 380 at [45]). A "child-offender" of almost eighteen years of age cannot expect to be treated substantially differently from an offender who is just over eighteen years of age (*R v Bus*, unreported, NSWCCA, 3 November 1995; *R v Voss* [2003] NSWCCA 182 at [15]). However, the younger the offender, the greater the weight to be afforded to the element of youth (*Hearne* at [27]).

The Court of Criminal Appeal also extensively reviewed the issue of sentencing juvenile offenders in *R v BP* [2010] NSWCCA 159. Justice Johnson said in that decision:

[98] The authorities make clear that the youth and immaturity of a young offender are matters to be taken into account in passing sentence. Emphasis is given to this issue by s 6(b) *Children (Criminal Proceedings) Act* 1987, which requires a sentencing court to have regard to the principle that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance (see [73] above). The fact that youth and immaturity may be relevant to sentence may serve to explain why the standard non-parole period system does not apply to juvenile offenders. The weight to be given to an offender's youth and immaturity will depend upon the circumstances of the particular case.

[99] The applicable principle is that where 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: *R v Hearne* [2001] NSWCCA 37; 124 A Crim R 451 at 458 [25]; *KT v R* at 577 [23].

[100] Factors such as youth and immaturity do not have automatic consequences in the exercise of sentencing discretion. A process of individualised justice is involved in which a sentence is passed having regard to the circumstances of the offence and the offender: *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252 at 276 [147]. This process involves an assessment of the role of youth and immaturity in the particular case. In making this assessment, a sentencing court should take into account what the evidence reveals concerning the significance of youth and immaturity, including the degree of learning, experience and understanding of the young offender of relevant legal rules and the consequences of breaking those rules.

[101] It may be taken that the Applicant had the maturity of a person aged 16 years, 11 months and three weeks at the time of the commission of the sexual assault on 6 March 2008. However, the Applicant possessed as well by that time, the considerable experience, learning and understanding which he had acquired from his involvement with the criminal justice system following his earlier sexual assault offence and the process of sexual assault counselling which he had received whilst in custody and

after his return to the community. In my view, a practical and concrete assessment of the role of the Applicant's youth and immaturity in the commission of this offence requires these aspects of the Applicant's makeup (which are known to the Court) to be taken into account. An assessment of the role of youth and immaturity on sentence is not an abstract process.

[102] The need for the law to avoid an abstract or automatic response to the youth and immaturity of an offender is illustrated by sentencing cases in Victoria and New South Wales for the offence of dangerous driving causing death. The laws of these States permit persons aged 17 years to obtain a driver's licence with the attendant obligations and responsibilities attaching to that privilege. The youth, immaturity and inexperience of an offender who kills or seriously injures persons whilst driving dangerously play a limited and subordinate role on sentence: *Director of Public Prosecutions v Neethling* [2009] VSCA 116; (2009) 22 VR 466 at 474–475 [40]–[44], 477 [53]–[55]; *SBF v R* [2009] NSWCCA 231 at [141]–[160]; *TG v R* [2010] NSWCCA 28 at [33].

[103] Hodgson JA identified certain factors at [6] which were to be taken into account. To these factors, I would add the learning, experience and understanding of the Applicant concerning this class of offence. As *KT v R* makes clear at 578 [25], in determining whether an offender has engaged in adult behaviour, a sentencing court will look at a range of matters including the existence of an extensive criminal record, as well as the type of factors referred to by Hodgson JA. This reflects the fact that a repeat offender, such as this Applicant, may have acquired a level of knowledge, understanding and insight into his offending behaviour, but nevertheless committed a further offence.

Hodgson JA said:

[4] First, statements that, in relation to young offenders, principles of retribution may be of less significance and considerations of rehabilitation may be of more significance, may tend to obscure the point that even in relation to retribution the youth of an offender may be a mitigating circumstance. In my understanding, considerations of retribution direct attention to what the offender deserves; and in my opinion, where emotional immaturity or a young person's less-than-fully-developed capacity to control impulsive behaviour contributes to the offending, this may be seen as mitigating culpability and thus as reducing what is suggested by considerations of retribution: see *TM v R* [2008] NSWCCA 158 at [33]–[36].

[5] Second, while I agree with the statements in *KT* at [26] that the weight to be given to considerations relevant to a person's youth diminishes the closer the offender approaches the age of maturity, and that a "child offender" of almost 18 years cannot expect to be treated substantially differently from an offender who is just over 18 years of age, it does not follow that the age of maturity is 18 (albeit that for certain purposes the law does draw a line there: *Children (Criminal Proceedings) Act* 1987). In my understanding, emotional maturity and impulse control develop progressively during adolescence and early adulthood, and may not be fully developed until the early to mid twenties: see *R v Slade* [2005] 2 NZLR 526 at [43], quoted by Kirby J in *R v Elliott* [2006] NSWCCA 305; (2006) 68 NSWLR 1 at 27 [127]. As shown by *R v Hearne* [2001] NSWCCA 37; (2001) 124 A Crim R 451, youth may be a material factor in sentencing even a 19 year old for a most serious crime.

[6] Third, I do not think courts should be over-ready to discount the relevance of an offender's youth on the basis that the offender has engaged in adult behaviour or acted as an adult. In the present case, the offence is a very serious one; but it did not involve significant planning or reflection, or any other indicia of mature decision-making. The applicant was 16 years old, and in my opinion the circumstances of the offence suggest rather that emotional immaturity and less-than-fully-developed capacity to control impulses were likely to be contributing factors.

On the issue of rehabilitation, Hodgson JA said:

[84] This Court has observed that there can be rehabilitation without confession, and that offenders found guilty after trial are not to be automatically deprived of a finding of good prospects of rehabilitation unless they acknowledge their guilt: *Alseedi v R* [2009] NSWCCA 185 at [65]; *Ali v R* [2010] NSWCCA 35 at [48]. Nevertheless, it has been said that remorse will be a major factor in determining whether an offender is unlikely to reoffend and has good prospects of rehabilitation and that, without true remorse, it is difficult to see how either finding could be made: *R v MAK* [2006] NSWCCA 381;

> 167 A Crim R 159 at 169–170 [41]; *Ali v R* at [47]. A particular difficulty for the Applicant in this respect is that his denial of guilt concerning the 2003 sexual assaults is accompanied by the fact that he reoffended, in a similar way, in 2008 (and again denies his guilt) despite custodial and community sex-offender counselling in the intervening period. This element of recidivism does not bode well for the Applicant's prospects of reoffending.
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> [85] It is desirable that children who commit offences accept responsibility for their actions and consideration should be given to the effect of the crime on the victim: s 6(g), (h) *Children (Criminal Proceedings) Act* 1987. The purposes of punishment include the making of the offender accountable for his actions and the recognition of harm done to the victim of the crime and the community: s 3A(e), (g) *Crimes (Sentencing Procedure) Act* 1999. The lack of contrition and remorse on the Applicant's part means that no act or statement on his part serves these purposes.

The seriousness of the offending is not irrelevant in sentencing juvenile offenders. Justice Hall in his remarks on sentence in *R v JP* [2014] NSWSC 698 at [130]–[131] said:

> [130] The weight of authority is that the seriousness of an offence is relevant to the emphasis that can be given to the youth of an offender. It has been observed, however, that that does not mean that youth is not an important consideration; but retribution and deterrence cannot, in a case as serious as the present case, give way entirely or even substantially to the interests of rehabilitation: *JM v R* [2012] NSWCCA 83 per Simpson J at [108] (dissenting but not on this point).
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> [131] In a case such as the present where there was a use of extreme violence occasioning death and occurring in the circumstances to which I have referred, general deterrence and retribution cannot be ignored.

What was said in *R v BP* have been followed many times. A recent example is the remarks on sentence of Rothman J in *R v Kovaleff* [2023] NSWSC 302. His Honour said at [124]:

> In dealing with youth crime, it is necessary to take into account the principles that apply to persons who have not yet fully developed maturity and, in that, not yet fully developed an appreciation of the full consequences of their actions. As made clear by Hodgson JA in *BP v R*, relying on earlier judgements of the Court and the Court's experience, emotional maturity and impulse control develop progressively during adolescence and early adulthood and are not fully developed until the early to mid-20's.

This was also cited with approval by Yehia J in *R v KS (No 1)*, above, at [123]ff. Her Honour sets out a number of authorities to the same effect including *JA v R* [2021] NSWCCA 10 at [56], *Miller v R* [2015] NSWCCA 86 at [96] per Schmidt J and *Sarhene v R* [2022] NSWCCA 79 at [25].

However, driving cases are generally an exception to where youth is a mitigating factor. Justice Howie in giving the judgment of the Court in *TG v R* [2010] NSWCCA 28 at [33] said:

> Thirdly, evidence from a psychiatrist as to the immaturity of young males of the age of the applicant was irrelevant. If a young male is old enough to be licensed to drive a motor vehicle, he is to be assumed to be mature enough to comply with its conditions and the traffic rules. In *SBF v R* [2009] NSWCCA 231; 53 MVR 438 Johnson J stated at [151]:
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> > Ms Francis referred in submissions to the Applicant "having little appreciation of his own mortality" (T5.35, 22 June 2009). The Applicant's counsel in the District Court had submitted that "it is also a fact of life that people at this tender age tend to — their brains tend to not allow them to deal with the responsibility that they sometimes demand so vocally" (T6.10, 5 August 2008). In a similar vein, the sentencing Judge in the Victorian County Court in *Neethling* at [51] had observed that the offender "like many young men ... saw [himself] as 'bullet proof'". The fact that young men (in particular) may have such perceptions is a significant reason for general deterrence to be a prominent factor in cases such as these. Inexperience and immaturity, in persons aged 17 years and over, cannot operate as mitigating factors where the offender commits grave driving offences, with fatal consequences, as exemplified by *Neethling* and this case.
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> The reference to "*Neethling*" was a reference *DPP v Neethling* [2009] VSCA 116; (2009) 52 MVR 422.

See also for example *R v AB* [2011] NSWCCA 229 at [101]; *WW v R* [2012] NSWCCA 165 at [68]ff; and the additional comments of Bell P (as the Chief Justice then was) in *Byrne v R* [2021] NSWCCA 185 at [5].

## Recording a conviction

Section 14 *Children (Criminal Proceedings) Act* relevantly provides:

> (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—
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> (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
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> (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.

"Disposed of summarily" means disposed of in the Children's Court. In *R v AR* [2022] NSWCCA 5 at [17] the Court of Criminal Appeal (Meagher JA, Wright and Fagan JJ) said:

> We respectfully disagree with that interpretation. When the District Court is dealing according to law with a serious children's indictable offence, subs (2) of s 14 does not confer a discretion upon that court to record or not to record a conviction. The subsection is not expressed in the language of conferring a discretion and it does not have that effect. The clear words of the subsection confine its effect to that of negating a limitation prescribed elsewhere, namely in subs (1)(a). With that limitation removed, the question whether his Honour had power to refrain from recording a conviction when imposing a Community Correction Order was to be answered, in Hunt CJ at CL's words, "according to the principles of sentencing ordinarily applied by the courts". Those principles, relevantly, include that under s 8 of the *Crimes (Sentencing Procedure) Act*, a Community Correction Order may only be imposed upon a person who has been convicted.

A little later the Court said at [19]:

> The respondent contended that, where a charge against a child is "not disposed of summarily", the District Court's power to record or not to record a conviction is wider than the power, in that respect, that is applicable to all adult offenders pursuant to the general law of sentencing. The respondent submitted that the source of the wider discretion is s 14(2). In support of that interpretation the respondent appealed to "section 18, and the scheme of the Act, permitting 'other indictable offences' to be dealt with by a higher court as if sentenced by the Children's Court". The respondent submitted that when subs (2) is read "in context with the purpose and scheme of the Act", it is amenable to interpretation as the source of a discretion, independent of the general law, not to enter a conviction in the case of any child who is dealt with for an offence "according to law". We are not able to find in the Act any definitive scheme or context that points to such an interpretation and that would thereby contradict the straightforward language of s 14(2).

## Criminal history or record

Section 15 *Children (Criminal Proceedings) Act* provides:

> (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—
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> (a) a conviction was not recorded against the person in respect of the first mentioned 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.

In *Dungay v R* [2020] NSWCCA 209 at [92], Adams J (Bell P (as the Chief Justice then was), Davies J agreeing) said:

> The practical effect of s 15 is that if a child is found guilty in the Children's Court but without any conviction entered and the offender is not subject to any other judicially-imposed punishment for a period of two years then the finding of guilt is not admissible in any subsequent criminal proceedings.

This is also something of which judges of the District Court should be aware when dealing with appeals from the Children's Court. Depending on the length of the history tendered it can be somewhat laborious to determine whether there is in fact that period of two years.

## Requirement for a Juvenile Justice Background Report if a sentence of custody is being considered

In the event that the court is contemplating imposing a custodial sentence on a juvenile offender, that is, either according to law or in accordance with Pt 3 Div 4 *Children (Criminal Proceedings) Act*, it is necessary for the court to consider a Juvenile Justice Background Report. Section 25 *Children (Criminal Proceedings) Act* provides:

(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 s 33(1)(g) in respect of the person, in connection with an offence unless—

(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).

## Section 33 Children (Criminal Proceedings) Act

This section only applies to offences that are not children's serious indictable offences and the court is dealing with the juvenile offender pursuant to Pt 3 Div 4 *Children (Criminal Proceedings) Act*. The section sets out the penalties available.

## Offender over 18 may serve a sentence in a juvenile justice institution

Section 19(1) provides:

> If a court sentences a person under 21 years of age to whom this Division applies to imprisonment in respect of an indictable offence, the court may, subject to this section, make an order directing that the whole or any part of the term of the sentence of imprisonment be served as a juvenile offender.
>
> **Note:** The effect of such an order is that the person to whom the order relates will be committed to a detention centre (see subsection (6)). There he or she will be detained as specified in the order. In certain circumstances, he or she may subsequently be transferred to a correctional centre pursuant to an order under s 28 *Children (Detention Centres) Act* 1987.
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> **Note:** Section 9A *Children (Detention Centres) Act* 1987 provides that persons who are 18 years of age or older are not to be detained in a detention centre in certain circumstances.

In particular, note the restrictions in s 19(3) if met with this situation.

## Henry guideline applies to juveniles

The decision of *SDM v R* (2001) 58 NSWLR 530 is authority for the proposition that the guideline judgment of *R v Henry* (1999) 46 NSWLR 346 applies to juvenile offenders. Chief Justice Wood at [7] said:

> If the effect of these decisions was to construe *Henry* in a way that would entirely exclude its application to juvenile offenders, ie those who qualify as a "child" within the meaning of the *Children (Criminal Proceedings) Act* 1987, s 3(1), then that approach would, in my view, have been inappropriate, having regard to the nature and purpose of a guideline judgment.

Justice Giles at [4] specifically agreed with Wood CJ at CL. Justice Simpson (as her Honour then was) said at [40]:

> That does not mean that the guideline is of no relevance to offenders under the age of eighteen years. Like all guideline judgments, *Henry* is to be applied flexibly.

## SNPPs do not apply to juvenile offenders

Section 54D(3) *Crimes (Sentencing Procedure) Act* 1999 provides that standard non-parole periods to not apply to persons under 18 years at the time of the offending.

## Discretion not to have a juvenile on the Child Protection Register

Note carefully the provisions of s 3A(2)(c) *Child Protection (Offender's Registration) Act* 2000. Also note the decision of *Cmr of Police v TM* [2023] NSWCA 75 where the offence involved related to child abuse material. Each child depicted is a separate victim.

Relevantly s 3C *Child Protection (Offender's Registration) Act* provides:

(1) A court that sentences a person for a sexual offence committed by the person when the person was a child may make an order declaring that the person is not to be treated as a registrable person for the purposes of this Act in respect of that offence.

(2) While the order remains in force, the person is not a registrable person under this Act because of that offence.

(3) A court may make an order under this section only if:

  (a) the victim of the offence was under the age of 18 years at the time that the offence was committed, and

  (b) the person has not previously been convicted of any other Class 1 offence or Class 2 offence, and

(c) the court does not impose in respect of the offence
  (i) a sentence of full-time detention, or
  (ii) a control order (unless the court also, by order, suspends the execution of the control order), and
(d) the court is satisfied that the person does not pose a risk to the lives or sexual safety of one or more children, or of children generally.

(4) This section applies only if the sexual offence concerned is a registrable offence and does not limit s 3A(2)(c) as it applies to offences committed by children.

(5) If an order is made under this section, the order is taken, for the purpose of any provisions that enable the Crown or a prosecutor to appeal against a sentence imposed on the person, to be a part of the person's sentence.

(6) In this section:

**"control order"** means an order under s 33(1)(g) *Children (Criminal Proceedings) Act* 1987.

**"full-time detention"** has the same meaning as in the *Crimes (Sentencing Procedure) Act* 1999.

**"sexual offence"** means the following offences regardless of when the offence occurred:

(a) an offence under a provision of Division 10, 10A, 15 or 15A of Part 3 *Crimes Act* 1900 or under section 91J, 91K or 91L of that Act,
(b) an offence under a provision of that Act set out in Column 1 of Schedule 1A to that Act,
(c) an offence under section 233BAB *Customs Act* 1901 of the Commonwealth involving items of child pornography or child abuse material,
(d) an offence under Subdivision D of Division 474 of Part 10.6 of the *Criminal Code* of the Commonwealth,
(e) an offence of attempting to commit any offence referred to in paragraphs (a)–(d),
(f) an offence under a previous enactment that is substantially similar to an offence referred to in paragraphs (a)–(e).

## Conclusion

Juvenile offenders can commit very serious offences. However, sentencing juvenile offenders involves the application of principles that are markedly different to those applied to adult offenders. Particular care needs to be taken to apply the relevant provisions of the *Children (Criminal Proceedings) Act* as well as the various common law principles referred to within this article.