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"Working Together"

Sentencing People with Special Needs

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INTRODUCTION

> *"The core of the difficulty lies in the complexity of the sentencing task. A sentencing judge must take into account a wide variety of matters which concern the seriousness of the offence for which the offender stands to be sentenced and the personal history and circumstances of the offender. Very often there are competing and contradictory considerations. What may mitigate the seriousness of one offence may aggravate the seriousness of another. Yet from these the sentencing judge must distil an answer which reflects human behaviour in the time or monetary units of punishment."* **(Wong v The Queen (2001)** 207 CLR 584 at [77])

"Special needs" I take to be the inherent or environmental characteristics of the offender that arise from objective circumstances of the offence, or from the offender's subjective circumstances which, in the context of the wider purposes of sentencing to which reference is made elsewhere, may require specific attention of the Court in the determination of the appropriate sentence to be imposed. Either in relation to the selection of a particular sentencing option or as to the framing of the appropriate sentencing order.

Needs that are "special" may not be "exceptional" but will include those "specific" to the individual which are out "of the ordinary", or are of such a "particular character", as to warrant attention or consideration, to understand the nature, or reason for, the offending and/or require consideration in relation to rehabilitation. Occasionally the needs of an offender may speak of special deterrence or punishment, particularly where the offender presents as a danger to the public or to an individual.

The options available to a court when sentencing persons with “special needs” may be circumscribed, constrained, or enhanced by the jurisdiction in which the sentencing takes place, the character of the particular offence calling for sentence, the context in which the offence was committed (both objectively and subjectively), the over arching influence of relevant statutory provisions or judgments from superior courts (such as “Guideline Judgments”) and a host of other relevant considerations and influences many of which the judicial officer cannot control. Courts may be captive to public pressure and expectation, articulated through populist media reporting when sentencing.

Sentencing to address ‘special needs’ throws up a host of disparate, conflicting issues and problems many of which are irreconcilable, conflicting, uncontrollable, frustrating and/or difficult. The judicial officer is usually the ‘whipping boy or girl’ for the inadequacies of other participants in the process.

Even where sentencing has a constructive role to play for the individual to be sentenced, high minded statements of principle encouraging judicial intervention to sever the “gordian knot” of causes of offending, are, to some extent, undermined by the wider policies at work in sentencing, usually dictated by legislative policies across Australia calling for greater weight to retribution, deterrence and punishment or the absence of resources or facilities where they are needed, or which the judicial officer thought were in place. Ultimately the sentencing process, in its most conventional form, ends up being a snapshot, taken from what is in reality a motion picture, with a beginning, a development and an end over which few, if any courts, can have any directorial control.

The “special needs” of offenders have to be addressed at various points of the offender’s progress through the criminal justice system, in preparation for sentencing, at the sentencing hearing, whilst in custody or under supervision and after release. Not all the players that are involved have a common goal or are working in the same direction.

THE SCOPE OF THE ISSUE

The topic of sentencing offenders with “special needs” ordinarily involves, in the minds of uninformed but interested observers, the belief that only a very small

number of people fell within this category of offender. Sentencing should be about punishment some would say, not about meeting the interests of the prisoner. In most sentencing exercises nothing could be further from the truth. Even when imposing appropriate punishment, the needs of the prisoner will still require attention, whether fixing a non parole period, recommending a place of detention, or fixing conditions of supervision.

King CJ summed up the policy that lays at the heart of addressing the "special needs" of offenders, sometimes to the exclusion of retribution, punishment and deterrence, when he observed in **Yardley v Betts** (1979) 22 SASR 108 (at 112-3):

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

The day to day sentencing of offenders for a range of offences, from murder through to the most minor of offences, involves consideration of a vast variety of "needs" that might properly be regarded as "special", notwithstanding their frequency of occurrence. Sentencing law, both statutory and case law, recognises a large number of individuals or offenders from particular groups within the community that may properly be regarded as persons with "special needs". They include, in no particular order of importance or frequency, young offenders, Aboriginal people, offenders with mental disabilities or illness, victims and/or survivors of domestic violence and/or sexual abuse, first offenders, offenders with physical disabilities or other health problems, mothers of infant children, the drug addicted, the homeless, the unemployed, the uneducated, even paedophiles. The punishment imposed may need to address the needs of

the prisoner because he or she is an informer, was a police or corrections officer, or by reason of some other characteristic.

Each individual case dealing with these various categories of offenders (some of which overlap) throws up its own challenges for a Court when sentencing, to give full effect to the multitudinal purposes of sentencing recognised at case law and in legislation. However each sentencing exercise involves more than the best efforts of the sentencing officer. It requires effort, ingenuity, and/or resolve from legal representatives, correctional staff, supervisors of community based orders, the offender's family or supporters and, of course, the offender himself.

Increased legislative direction as to relevant factors in sentencing (such as ss.3A, 21A **Crimes (Sentencing Procedure) Act** 1999 (NSW)), not so long ago almost exclusively identified in the case law, has emphasised the struggle between the objectives of reformation, making the offender "a better citizen" for the "benefit of the community", and the need to give greater weight to retribution, denunciation, punishment and deterrence. Further, more active appellate intervention, in part cast by the almost bewildering complexity and ambiguity of sentencing legislation, has led to greater vigilance by sentencers at first instance, and, I regret to say, greater caution. 'Guideline judgments' operate to "structure" sentencing discretion as well in a way that sometimes inhibits the capacity of courts, or their willingness, to meet 'special needs'. Legislation seems now to emphasise the identification of aggravating factors and limiting mitigating factors, s.21A **Crimes (Sentencing Procedure) Act**, being a good example in New South Wales.

Although the High Court famously said twenty years ago that the various "purposes of sentencing" sometimes pointed in different directions, the sentencer who faces more towards the direction of rehabilitation will often, nowadays, be regarded as "weakly merciful" rather than being supported for giving effect to what Chief Justice King saw as an important aspect of sentencing.

As the treatment of some classes of offender with special needs are in the public domain, another factor that influences sentencing in this regard is the

influence of public perceptions of sentencing reflected by, or reflecting, ‘shock jock’ and populist media reporting. Once publicly ‘birched’, usually unfairly, the individual judicial officer may hesitate before meeting or addressing ‘special needs’. The fact is that media, unlike the judicial officer, have their interests in the present, the judicial officer is required to look to the future.

The capacity and opportunity for judicial officers to address the “special needs” of offenders is not just eroded by perceived restrictions on sentencing discretion, but is also inhibited by what appears to be a diminishing capacity in Corrections agencies to provide services, or guidance, to address particular needs that require special conditions of detention or more intensive supervision.

Sentencing is part of a continuum of events and processes that extend back, in some instances, to the birth of the individual (often further back than that) and then beyond ultimate release from prison, or expiration of any community supervision order. Yet, the vast majority of offenders appearing for sentence come to the process with issues/problems or characteristics that the sentencing process is poorly equipped to address. But address these issues courts must, because the courtroom is for many damaged or needful individuals, the ‘crucible’ in which potential life changing decisions will be made, by the Court and the offender. Many times “underlying issues” to offending are so endemic or chronic that the offender, or the offending behaviour, cannot be corrected by anything the sentencer does. It might be fairly said that if most offending conduct reflected either social or individual characteristics of the offender and his community, the fact that on many occasions there is a sentencing process at work shows that the damage has been done, the repair of which may be beyond the capacity of the process. The “genie” is out of the bottle, so to speak, and very little can be done to put him back. Sometimes the process of sentencing aggravates existing problems for the individual, or even the problems of the community from which he or she comes. As a healing process, sentencing can never be assured to succeed. Keeping the victim happy usually never satisfies the offender and vice versa.

A THUMBNAIL STATISTICAL PICTURE

The statistical picture, principally of adults and children in custody, from surveys and census enquires over the last 5 years gives some flavour of the width of some of the issues that require addressing on a daily basis in sentencing. Although the statistics provided are from New South Wales and it would be fair to say that New South Wales would have the largest population of offenders, both dealt with by custodial orders or community based alternatives, the figures would be fairly representative of the Commonwealth of Australia, perhaps with the exception of the percentage of the Aboriginal offenders dealt with as a proportion of the wider offender population in the Northern Territory, where it is even higher than in New South Wales.

The census of New South Wales prisoners conducted on 30 June 2007, revealed a total of 9,557 full time inmates (out of a total of 10,318) of which 92.4% were male and 7.6% were female. 20.1% were Aboriginal, 74.3% were Australian born and 69.1% had been previously imprisoned. Of the total of inmates in custody, 22.4% were on remand. It is interesting to note in passing that in 1982 the total of full time custodial inmates both male and female was 3,466 and the percentage of persons who identified themselves as Aboriginal was 5.8%. In 1990, the year after the introduction of the **Sentencing Act** 1989, which abolished remissions upon sentences in New South Wales, the full time custodial population was 5,538, of which 9.1% were Aboriginal. In 2001, 7,801 were in full time custody, of which 15.1% were Aboriginal. In 2002, when there was a slight change in the identification of aboriginality, there were 8,154 persons in full time custody of which 17.2% were identified as Aboriginal.

These statistics might be seen in context of some wider particulars. In the 2006 national census 138,000 Aboriginal people were identified as resident in New South Wales (2.1% of the state wide population), of which there were slightly more indigenous women (70,027) than men. 28% of indigenous people in New South Wales are unemployed, compared with the then national employment rate at June 2006 of 4.3%. Only 32% of Aboriginal New South Wales residents lived in dwellings that they owned, or were buying, compared to 73% for the total population.

Indigenous people were more than twice as likely to report their health as fair or poor than non indigenous people (27% compared with 16%), they were almost one and a half times more likely to have a disability or long term health condition than non indigenous people (56.6% compared with 40.1%). 23% of all infant deaths are of Aboriginal children. 53% of Aboriginal male deaths and 41% of Aboriginal female deaths occur with people less than 50 years of age, compared with 13% and 17% respectively of all male and female deaths.

In 1996 a survey conducted by NSW Department of Women reported 22% of indigenous people in New South Wales report being a victim of physical or threatened violence in the previous twelve months. Indigenous people are approximately six times more likely to be the victims of domestic assault than non aboriginal people. 69% of Aboriginal women surveyed say they were abused as a child, of which 75% say that they were sexually assaulted. 73% of Aboriginal women surveyed say they were abused as adults, of whom 42% say that they were sexually assaulted, 79% stating that they were physically assaulted. 14.3% of Aboriginal people appearing in the Local Court appear on at least one offensive language or conduct charge, representing 20% of such charges that are laid.

The 2007-2008 survey of persons in Juvenile Justice custody in New South Wales showed that the average daily custodial population was 390, including 27 females, of which 200 were identified as Aboriginal people.

A survey of prisoners on reception to Corrective Services facilities in New South Wales, conducted in 2003, revealed that 70% of males and 90% of females had at least one diagnosable psychiatric disorder within the previous twelve months. 46% of all prisoners taken into reception had suffered symptoms at least one major mental disorder, that is either of psychosis, anxiety or affective disorder. 63.7% of males and 57% of females had a personality disorder. Of those surveyed 67% of males and 85% of females had suffered symptoms of a psychiatric disorder within the month prior to their admission to custody. On reception 63.7% of males and 74.5% of females reported substance abuse disorders in their past.

A survey conducted of children subject of community based orders in 2006, revealed 15% were within the scope of identifiable intellectual disability, 40% reported severe symptoms consistent with a clinical psychiatric disorder, 26% reported symptoms of substance disorder in the severe range, 19% reported symptoms of ADHD and 72% reported at least one form of prior abuse, be it physical, sexual or emotional.

What emerges is primarily a picture of disadvantage, dysfunction and damage, usually well entrenched before a sentencing court is called into the fray.

GENERAL SENTENCING 'RULES'

> *"It is highly undesirable that the process of sentencing should be become any more technical than it is already"….. ."It should, however, be emphasised that (whether sentences are to be concurrent or not) is not to be attended by "excessive subtleties and refinements". It should be approached as a matter of commonsense, not as a matter of semantics"…. ."Sentencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision." (**Pearce v The Queen** (1998) 194 CLR 610) [39], [42], [46])*

The jurisdictional and legislative context of sentencing, as well as the particular needs of an offender will usually inform the relevance of 'special needs' to this process and the outcome. That a particular offender has an identifiable characteristic, such as an intellectual disability, may bear little relevance to the capacity of a court to address it in sentencing, for example if the offence in question is one dealt with usually in the Local Court by a modest fine at the most. On the other hand such a characteristic may be crucial in sentencing an offender for armed robbery, not just subjectively, but in the assessment of the objective facts of the case.

Sentencing offenders for indictable offences will require, usually, closer consideration of the "purposes of sentencing", such as those set out in s.3A **Crimes (Sentencing Procedure) Act** 1999, than sentencing for many summary offences given wider sentencing discretions at play in such exercises and, usually by reason of higher maximum penalties, greater attention given to

matters such as denunciation, punishment and deterrence. Meeting the 'special needs' of offenders in such a sentencing context, where maximum penalties are greater, is made more difficult, not just because of the greater technicality of the exercise than may be involved in the high turnover environment of the Local Court, but because to address "special needs" of the offender, may involve giving greater weight to the issue of "rehabilitation", or subjective features of the case, than to countervailing considerations of punishment, deterrence and the like.

Before consideration of the rights of the victim, denunciation and accountability became an explicitly identifiable part of the sentencing rubric, the majority of the High Court in **Veen (No 2) v The Queen** ((1988) 164 CLR 465 at 476), identified four purposes of sentencing (protection of society, deterrence, retribution and reform), famously observing that they were guideposts that sometimes pointed in "different directions". These purposes, of course, may also "overlap" and cannot be considered in isolation from one another.

Their Honours conceded though, that sentencing is not a "purely logical" exercise. They described the "troublesome" nature of the sentencing discretion arises "in large measure from unavoidable difficulty in giving weight" to the purposes of sentencing.

Sir Frederick Jordan, a late Chief Justice of New South Wales, famously said of sentencing in **R v Geddes** (1936) 36 SR 554 (at 555) that

> *" the only golden rule is that there is no golden rule"*.

Justice McHugh said of this aphorism that it "has never been bettered and probably has never been equalled" in **Markarian v The Queen** [2005] HCA 25 (at [65]).

Spigelman CJ, has spoken of a broad sentencing discretion existing generally in which "the ineluctable core of the sentencing task is a process of balancing overlapping, contradictory and incommensurable objectives" not always pointing one way.

Of course the “golden rule” of which Jordan CJ spoke was identified in much simpler sentencing times as can be seen from the context in which his Honour made the observation quoted above. He had said immediately before,

> *“The function of the criminal law being the protection of the community from crime, the judge should impose such punishment as, having regard to all the proved circumstances of the particular case, seems at the same time to accord with the general moral sense of the community in relation to such a crime committed in such circumstances, and to be likely to be a sufficient deterrent both to the prisoner and to others. ….. Considerations as broad as (punishment and inclination to leniency) are, however, of little or no value in any given case. It is obviously a class of problem solving which is easy to see when a wrong principle has been applied than to lay down rules for solving particular cases, and in which the only golden rule is that there is no golden rule”.*

Now we have many “rules”. None of them could be described as ‘golden’, particularly when read together. There are complex legislative provisions that must be taken into account (eg s.3A, 21A,44,54A-D etc **Crimes (Sentencing Procedure) Act** 1999 (NSW), s.16A **Crimes Act** 1914), not to mention a raft of relevant considerations arising from the case law such as delay, parity, hardships of custody, totality of criminality, disclosure of offending as well as coping with the implications (where relevant) of the majority dicta in **Pearce v The Queen** (1998) 194 CLR 610 (at [45]) and giving proper regard to the structuring of judicial discretion by guideline judgments.

The current sentencing climate, in intermediate and superior courts at least, seems to be heading in the opposite direction to that proposed by the majority in **Pearce**. In fact the dicta of the majority on sentencing for multiple offences (at [45])of their judgment) has added to the technicality of addressing the important issue of ‘totality’ when sentencing for multiple offences, even those committed in the course of the one “transaction”.

In sentencing State and Commonwealth offenders, depending upon the offence and the jurisdiction, a number of options are available, sometimes differently

described in different jurisdictions. This so even within the one category of punishment, such as imprisonment. Naturally for some categories of offence, murder, drug importation, sexual assault, serious violence or robbery offences and the like, the realistic options for almost all offenders (special needs or not) are limited. This is particularly so in more serious matters when the ultimate issue to be addressed is how long will the sentence of imprisonment be, rather than how can it be fashioned to assist the offender.

Usually the vast majority of sentencing exercises, within legitimate sentencing discretion, provide theoretically at least, for a range of options which can meet those who may be identified as having 'special needs". Bonds with conditions of supervision, supervised adjournments, community service orders, periodic and home detention, "special circumstances" in fixing non parole periods (as applies in New South Wales), provide some opportunities for the sentencer to find a balance between competing considerations. But the options have limitations of resources and flexibility.

WHY ADDRESS SPECIAL NEEDS IN SENTENCING?

> *"Only the most myopic in this community would deny that much of the contact of Aboriginal people with the criminal law can be traced to their dispossession and the breakdown of their culture. The high incidence of imprisonment of aboriginal people, and the often deleterious and sometimes tragic effects it has upon them, are of justifiable concern to the community:…. To recognise that background in an appropriate case for the purpose of sentence is neither discriminatory nor paternalistic."* (**R v Welsh** (unrep, 14/11/97, NSWSC)

Until such time as 'grid' or mandatory sentencing becomes law, sentencing in all jurisdictions will remain an individualised exercise where the interests and needs of the prisoner will have to be addressed at some point, or in some way, and that will not necessarily be in conflict with other considerations not particular to the offender.

Occasionally, such 'special needs' of the offender may militate in favour of sterner punishment. The case of **Robert Veen** comes to mind. The prisoner's

characteristics required consideration of protection of the public although he was a very damaged young man. Usually however, they will be concerned with issues more relevant to rehabilitation rather than punishment.

The reasons that the particular needs of an offender may need to be addressed do not rest on foundations of paternalism, discrimination or favouritism. They are usually concerned with reforming the offender or ensuring that the penalty imposed is not inhumane or disproportionate to the totality of the circumstances of the case. As the cross-section of sentencing principles shortly set out below imply, or expressly state, the special needs of the prisoner may directly point to the proper sentencing option, the period of time that an offender will be subject to a particular order, the conditions or character of supervision or the facility or the program to which the offender will be submitted.

In nearly all sentencing exercises the sentencer will have an obligation, as a general rule, to understand the cause of the offending, the social and cultural context of the offender, the characteristics of the offender that contribute to the offending conduct or make the offender vulnerable to harm or adverse influence and/or qualities, conditions or characteristics that might be addressed by particular sentencing orders or by some other means, such as diversionary programs and the like.

Usually the individual has a self evident need that may be met, within legitimate sentencing discretion, in a particular and self evident way, eg. drug dependency being addressed by a rehabilitation program or mental illness by medical treatment. On other occasions there is a need to consider the underlying picture where the causes, and remedies, are not as self evident or amenable to sentencing orders.

The observations of Justice Hidden in **R v Welsh** reflect a judicial officer with an understanding of “the big picture” which the sentencing process is not well designed, nor inherently has the capacity, to understand let alone address. Similarly, the dissenting judgment of Kirby P (as he then was) in **R v Russell** (1995) 84 A Crim R 386, where his Honour considered the implications of untreated hearing difficulties amongst Aboriginal youth contributing to poor

academic achievement, offending and social disadvantage, reflected an understanding of wider issues to explain the offending conduct and matters that should be addressed to place the offender back in the community better placed not to reoffend. This case is also instructive of the limited role sentencing can play in addressing needs, the more serious the offence(s) before the Court.

Of course, given the supposed "individualisation" required in sentencing, offenders' "special needs", cannot all be accommodated. This may be so, either because of wider policy considerations that impact on some sentencing exercises (eg reflected in the "so called" purposes of sentencing), or because the particular sentencing exercise does not have the scope of purpose, or relevance, to address particular offending (eg a homeless person charged with disorderly conduct/language). Sometimes it is so because the judicial officer does not have the tools, commitment, information or knowledge to address the "special needs" of a particular offender.

The requirement to meet readily identifiable 'special needs' in sentencing is reflected in a number of legislative provisions and case law principles. Both Commonwealth Sentencing Legislation (s.16A **Crimes Act** 1914) and State legislation (eg s.21A **Crimes (Sentencing Procedure) Act** 1999 (NSW)) recognise particular characteristics and/or classes of offenders as relevant in this way.

Commonwealth provisions require a Court to take into account "character, antecedents, age, means, physical and mental condition … prospects of rehabilitation … the probable effect that any sentence … would have on family and dependants". Further, a Court must have regard to the "nature and severity of the conditions that may be imposed, or may apply to, (an) offender under (particular) sentence or order" (s.16A(2) **Crimes Act** (Cth)). A number of these provisions, it must be said, have been "read down" or limited to some extent in superior court decisions. For example, when greater weight is required to be given to general deterrence, then less weight ought be given to good character (**R v Rivkin** (2004) 59 NSWLR 284 at [410]) or when there is a need for "exceptional" circumstances to arise before hardship to third parties be given "substantial weight" (**R v Togias** (2001) 127 A Crim R 23 (at 25-26)).

In Commonwealth sentencing the legislature has acted to remove from consideration matters pertinent to an aspect of sentencing "special needs" offenders, Aboriginal Australians. Customary law or cultural practice must now not be taken into account in excusing or justifying particular conduct or lessening the seriousness of the criminal behaviour to which the offence relates (s.16A(2A)), but it will still be relevant to subjective considerations.

New South Wales provisions speak in general terms of "mitigating factors" including "good character", "good prospects of rehabilitation", "not being fully aware of consequences … by reason of age or any disability" and by reason of "assistance to authorities". All these may be categories of persons who give rise to consideration of "special needs" in sentencing. Other State legislation in New South Wales, specifically addresses special categories of offenders (children, the mentally ill) or provide some specific sentencing processes or options (the drug addicted by the **Drug Court Act(NSW)1998**).

In the context of legislative "sentencing law", bearing in mind that neither Commonwealth or State legislation is regarded (at least in New South Wales) as setting out a "code" of relevant sentencing principles, the legislative landscape is fairly bare in identifying categories of "special needs' offenders, except in the case of children, the mentally ill and to some extent those with drug and alcohol dependencies, to which reference is made later.

This paper is not an appropriate vehicle for exhaustively listing the categories of "special needs" offenders recognised in legislation and/or case law, or the "special needs" recognised in particular cases, but some flavour of the way sentencing principles may fashion the sentencing of such offenders, including those set out below relating to particular categories of offenders where special needs may arise, may be gleaned.

Persons or characteristics frequently discussed in the case law and some legislation (in NSW) in this regard include:

(i) **Children**

Children, that is offenders under the age of 18 years, have specific legislative provisions relevant to their sentencing, (such as in New South Wales the **Children (Criminal Proceedings) Act** 1987) where children will be subject to a different sentencing regime than adults, except where the child commits a "serious indictable offence" (such as homicide, on offence carrying a maximum of 25 years imprisonment and particular categories of sexual assault) as set out in Division 4 of that Act. S.6 of the Act sets out principles that must be applied to children, including recognition of immaturity, need for guidance, desirability of being permitted to live at home and continue education not receive greater punishment than comparable adults and the like. The scheme of sentencing under the Act appears to permit a much wider discretion to address rehabilitation of the offender, than when sentencing adults.

Less weight will usually be given to general deterrence and punishment when sentencing children, in favour of "individual treatment aimed at the rehabilitation of the offender" (**GDP** (1991) 53 A Crim R 112), although this general principle has been read down where particular offences are prevalent (eg dangerous driving - **R v McIntyre** (1988) 38 A Crim R 135) or where offenders "conduct themselves as adults in committing serous crime", **R v Tran** [1999] NSWCCA 109: **R v WKR** (1993) 32 NSWLR 447. This is reflected in the observations in **Pham and Ly** by Lee CJ at CL when he said:

> *"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."*: (1991) 55 A Crim R 128.

Here in New South Wales a Correctional facility for children, who are difficult in custody, has passed to the control of the Department of (Adult)

Corrective Services in recent years. Many people sentenced as children for serious offences are being transferred to adult prisons at 18, rather than remaining in Juvenile Justice care until up to 21, as recommended by Judges under the terms of the relevant statutory provision.

(ii) **Aboriginal people**

In **R v Fernando** (1992) 76 A Crim R 58 asserted that the same sentencing principles apply in all cases, irrespective of the racial identity of an offender, but that a Court cannot ignore those facts which exist only by reason of the offenders membership of such a group. Aboriginality may throw light on the particular offence or the circumstances of the offender. Problems of alcohol abuse and violence within communities, contributing to offending require "more subtle remedies than the criminal law can provide by way of imprisonment" and a lengthy period of imprisonment may be "unduly harsh" when served in a foreign environment.

In **R v Fernando** [2002] NSWCCA 28 (a different appellant) it was recognised that the mitigating quality of a disadvantaged background may feature more frequently. In that matter Spigelman CJ observed, in the context of considerations of personal and general deterrence relating to an Aboriginal offender:

> *"It is, however, often the case that such considerations of deterrence are properly tempered by considerations of compassion which arise when the court is presented with information about the personal circumstances which have led an individual into a life of crime."*

More recently, in **R v Morgan** 2003) 57 NSWLR 533; [2003] NSWCCA 230, at [20],Wood J, revisiting **Fernando**, reiterated that it was not intended as "an exhaustive statement of sentencing practice, or as justifying any special leniency in relation to aboriginal offenders of the class to whom they applied". Reference was made by him to the decision of **R v Ceissman** [2001] NSWCCA 73, involving the sentencing of an Aboriginal offender for serious Customs Act offences as the type of case where Fernando principles had no relevance (see also the majority judgment in **R v Newman** [2004] NSWCCA 102).

In **Morgan**, Wood J at [21], said of his earlier judgment:

> *"…(The principles) were intended to reflect an understanding of some of the factors which can lead a person of this racial background into offending behaviour, and which, in appropriate cases, may have a particular relevance for the way in which a sentencing order may suitably be framed. They can have also a particular relevance for persons appearing before the courts who come from remote parts of the country, and who have particularly disadvantaged backgrounds, or when the offence is alcohol-related."*

The Western Australian Aboriginal Benchbook notes that principles of "substantive" 'equality' may support a "special approach" to the sentencing of Aboriginal offenders that is not discriminatory. Features of Aboriginal life in Australia held to be mitigating factors or otherwise relevant include emotional stress from interracial relations (**Neal v The Queen** (1982) 42 ALR 609), difficulties arising from adjustment to urban life (**Harradine v R** (1992) 61 A Crim R 201): forced or arbitrary removal from family at a young age (**R v Fuller-Cust** (2002) 6 VR 496, social-economic disadvantage (**R v E:** (1993) 66 A Crim R 14), the impact of imprisonment upon an aboriginal person in the context of cultural and social background (**WA v Rogers** [2008] WASCA 34) amongst other matters peculiar to Aboriginal social life.

Some attempts have been made as well to develop special sentencing programs across Australia for Aboriginal people and there are emerging a number of different models of "Aboriginal" Courts, such as 'Circle Sentencing' and 'Koori Courts' at the moment primarily in summary jurisdictions. 'Koori Courts' in intermediate courts are planned in Victoria. There is one specialised open rural correctional facility for Aboriginal people, near Brewarrina, but with limited places (up to about 40-50) with a prison population of about 2,000. That is only available for men.

(iii) **Mental illness / disability**

The fact that an offender suffers from a mental illness or disability at the time of the offence or at the time of sentencing may be taken into account in sentencing

(**R v Anderson** [1981] VR 155). It may be relevant, if it contributes to an offence in a material way, to the reduction of moral culpability. Therefore the weight given to denunciation and punishment may be reduced. It may render the offender an inappropriate vehicle for general deterrence. It may make a custodial sentence weigh more heavily upon the person. However, the illness or disability may give need for greater weight to be given to personal/special deterrence (R v **Hemsley** [2004] NSWCCA 228 at [33]-[36]).

Whilst the sentencing of such an offender may call for a "sensitive discretionary decision", it is a task to be undertaken "in light of the circumstances of the individual case and in the light of the purposes to be served by the sentencing exercise" (**R v Engert** (1995) 84 A Crim R 67 (at 71)).

Not all mental disorders/disabilities will require less weight be given to general deterrence, particularly if protection of the public arises as relevant consideration eg, where the offender has a classifiable Antisocial Personality disorder (**R v Lawrence** [2005] NSWCCA 91). In that case, the limitations of DSMIV Classification were discussed (at [23]-[24]). As Gleeson CJ (NSW Supreme Court) said in **Engert**, there are no "automatic consequences" that arise in sentencing from the presence (or absence) of a particular condition.

Again, as noted elsewhere, there are special statutory provisions for dealing with various categories of mentally ill offenders, whether by reason of unfitness to be tried, acquittal on the basis of mental illness, or summary dismissal because of illness subject to supervision, that usually sympathetically attempt to address the fundamental issues, the main one being medical treatment. But the capacity of gaols to properly treat mentally ill and disabled prisoners is limited. Particularly given the limitations of 'hospital' space and medical resources.

(iv) **Physical Illness / disability**

Whilst ill health is not a "licence to commit crime" and correctional authorities have the ultimate responsibility to provide appropriate care and treatment for sick prisoners, factors that may reflect upon the otherwise appropriate sentence will include, the need for particular treatment, hardships in custody arising from the prisoner's condition and the capacity of custodial authorities to meet the

reasonable needs of the offender whilst in custody (**R v Vachelec** (1981) 1 NSWLR 351).

As a mitigating factor upon otherwise appropriate punishment, particularly imprisonment, ill health usually arises when it creates a greater burden than usual, or where there is a serious risk that incarceration will have a gravely adverse effect on the health of the offender (**R v Smith** (1987) 27 A Crim R 315 (per King CJ at 317)). The prisoner's condition need not be as serious as discussed in **Smith** (an HIV case) nor life threatening to be taken into account. (**R v Miranda** (2002) 128 A Crim R 362). However, whilst both in **Smith** and **Miranda** it was held that the state of an offender's health will always be relevant to the consideration of appropriate sentencing, its weight will be determined by consideration of other ,sometimes countervailing, issues.

(v) **Drug (alcohol/gambling) dependency/addiction**

Generally speaking drug/gambling/alcohol addiction (dependency) is not a mitigating factor in sentencing, but may be relevant both to the assessment of the objective and subjective issues for consideration.

In the case of intoxication at the time of the offence, it may be relevant to an assessment of the extent of planning/deliberation involved, although previous offending whilst intoxicated will diminish the weight to be given to this aspect, an existing self realisation of the effect alcohol/drug ingestion may have a person may make intoxication an "aggravating" factor in the instant case.

As to the underlying cause of offending by reason of addiction, particularly to drugs, Wood CJ at CL, in the guideline judgment **R v Henry (& Ors)** (1999) 46 NSWLR 346, observed at [273]

> *" In my view the relevant principles are as follows:*
> *(a) the need to acquire funds to support a drug habit, even a severe habit, is not an excuse to commit an armed robbery or any similar offence, and of itself is not a matter of mitigation;*
> *(b) however the fact that an offence is motivated by such a need may be taken into account as a factor relevant to the objective criminality of the offence in so far as it may throw light on matters such as:*
> *(i) the impulsivity of the offence and the extent of any planning for it: …..*

(ii) the existence or non-existence of any alternative reason that may have operated in aggravation of the offence, for example, that it was motivated to fund some other serious criminal venture or to support a campaign of terrorism;

(iii) the state of mind or capacity of the offender to exercise judgment, for example, if he or she was in the grips of an extreme state of withdrawal of the kind that may have led to a frank disorder of thought processes or to the act being other than a willed act;

(c) it may also be relevant as a subjective circumstance, in so far as the origin or extent of the addiction, and any attempts to overcome it, might:

(i) impact upon the prospects of recidivism/rehabilitation, in which respect it may on occasions prove to be a two-edged sword: ….

(ii) suggest that the addiction was not a matter of personal choice but was attributable to some other event for which the offender was not primarily responsible, for example, where it arose as the result of the medical prescription of potentially addictive drugs following injury, illness, or surgery); or where it occurred at a very young age, or in a person whose mental or intellectual capacity was impaired, so that their ability to exercise appropriate judgment or choice was incomplete;

(iii) justify special consideration in the case of offenders judged to be at the "cross roads": R v Osenkowski (1982) 30 SASR 212; 5 A Crim R 394."

In the same judgment however Spigelman CJ said (at [206]):

"I attach particular significance to the impact that acknowledgment of drug addiction as a mitigating factor would have on drug use in the community. The sentencing practices of the courts are part of the anti-drug message, which the community as a whole has indicated that it wishes to give to actual and potential users of illegal drugs. Accepting drug addiction as a mitigating factor for the commission of crimes of violence would significantly attenuate that message. The concept that committing crimes in order to obtain moneys to buy an illegal substance is in some way less deserving of punishment than the commission of the same crime for the obtaining of moneys for some other, but legal, purpose is perverse."

Even in the context of purely subjective considerations, existing addictions will inevitably require consideration when contemplating an appropriate sentencing option, the fixing of non parole periods or the terms of future supervision and/or release to the community.

(vi) **Persons with dependants / hardship to third parties**

The general principle is that hardship to dependants is not a 'mitigating' matter, which would substantially change an appropriate order, unless the hardship is 'exceptional', whether 'highly', 'wholly' or 'truly'. Pregnancy, at the time of

sentence, would not ordinarily be 'exceptional' but there may be circumstances where it might be "inhumane" to refuse to take it into account. In **Togias** (2001) 127 A Crim R 23, it was observed that circumstances may be relevantly exceptional if a child was left without parental care, or a dependant would suffer overwhelming hardship because of the imprisonment of the offender. In that matter it was said that at common law and pursuant to s.16(2) **Crimes Act** (Cth), the 'extraordinary' features of the matter may be taken into account by suspending a term of imprisonment, shortening the sentence, decreasing the minimum term of imprisonment (see also **R v Nguyen** (2001) 118 A Crim R 519). Grove J, in **Togias** at [69]-[79], reviewed a number of decisions from across the Commonwealth involving the sentencing of pregnant offenders, or those with infant children. Even if pregnancy or custody of young dependants does not justify mitigation of penalty, it may fashion the manner in which the sentence may be service, or the appropriate form of penalty.

(vii) **Protective custody/hardships in custody**

Persons at greatest risk of physical harm if detained in custody, traditionally have included paedophiles, (and some other sexual offenders), informers (both within and outside the prison system), ex policemen and correctional officers, the young, the handicapped.

The hardships of protective custody are relevant in mitigation of penalty when assessing the discount for cooperation with law enforcement agencies (**R v Joseph Sukkar** [2006] NSWCCA 92, at [56]) and also because of recognition by courts that time in protective custody is equivalent to a significantly longer loss of liberty than under ordinary conditions of imprisonment (**AB v The Queen** (1999) 198 CLR 111 (at [105]) per Kirby J); **R v Cartwright** (1989) 17 NSWLR 243 (at 255); **R v Howard** [2001] NSWCCA 309 (at [18])). This will arise from extended periods of isolation, limited access to programs and entertainments, stricter visiting rights and the like. Courts are required to be satisfied that conditions in custody will **in fact** be more onerous. (**R v Way** (2004) 60 NSWLR 168 (at [176]-[177]) and regard will need to be had to the availability of special categories of accommodation for particular offenders and particular management programs. Paedophiles and other sexual offenders may not

necessarily be subject to hardships and disadvantage once commonplace (**R v Scott** [2003] NSWCCA 28 – at [34]).

> *"It is appropriate for a sentencing court to take into account the circumstance that a sexual offender may spend his custody in conditions subject to some form of 'protection' status. Evidence as to the likely conditions of custody is important if the court is to make an informed assessment of the extent to which the offender's custody will be more onerous than that of prisoners housed in the general prison population. The concerns of which Hunt J spoke in **Burchell** would seem to be significantly lessened for sexual offenders who are placed in special facilities such as the MSPC (a special unit for sex offenders at Long Bay Gaol)."*

Circumstances of custody may be relevant to the total sentence imposed, and the fixing of a minimum term, or "non parole period" (**R v Totten** [2003] NSWCCA 207). In **R v Patison** (2003) 143 A Crim R 118 (at 136-131) it was observed that a year in 'strict protection' could be equated to 18 months to two years in ordinary custody. The safety of prisoners is a relevant matter in determining the length, or form of, a sentencing order (**York v The Queen** (2005) HCA 60 (at [31]-[32] per McHugh J).

Foreign nationals have said to have "no complaint" if dealt with harshly for serious crimes and thus are isolated from family or disadvantaged culturally (**R v Chu** – NSWCCA – 16/10/98) but disadvantages of isolation from family and friends, difficulty with language and the like, for foreign nationals were relevant matters, not to treat the relevant offender leniently, but equally with other offenders who do not serve their sentences with such disadvantages. (**R v Huang** (2000) 113 A Crim R 386 (at [18]-[19]).

(viii) **Prior good character**

The absence of convictions, or the good character, of the offender is a matter usually taken into account in mitigation of penalty and in fact must be taken into account under some legislative provisions (example s.21A(3)(f) **Crimes (Sentencing Procedure) Act** (NSW)). This category of offender may fit into

the category of "special needs" offender because of the requirement, notwithstanding good character, that the offender may be gaoled, sometimes at a mature age, for the first time and special considerations may therefore arise. However, the weight given to good character traditionally has over recent years eroded to some extent. A number of decisions have held that less weight may be afforded or given to good character in cases such as child sexual assault (**Ryan v The Queen** (2001) 206 CLR 267), social security fraud, drug supply or importation, culpable driving, drink driving amongst other offences. The Court of Criminal Appeal in New South Wales has held that the category of offences in relation to which less weight should be given on sentence to evidence of good character is not closed (**R v Gent** [2005] NSWCCA 370 at [61]). The weight to be given to good character is now generally seen to vary depending upon the character of the offence committed (**Ryan v The Queen** at 269). There may also be particular categories of offending that regularly involve people of good character and thus, it is said that, good character will be accorded less weight, for example in relation to serious drink driving offences (**Guideline Judgment concerning the Offence Of High Range Prescribed Concentration Of Alcohol** (2004) 61 NSWLR 305). Child pornography is another example of offending where persons of otherwise good character frequently will appear before the Courts and find less weight is given to that. This type of offender, as with many offenders of prior good character guilty of child sexual assault, will give rise to consideration of hardships in custody, protection of the offender, and other collateral issues.

(ix) **The institutionalised offender**

The 'institutionalised offender' is one of the great challenges for the courts because the more institutionalised the offender, the greater risk of more serious offending on release at greater cost to the community. Special categories of sex offenders, undeterred by imprisonment, can now be dealt with under special "preventative detention" legislation in most States, but this is no answer to meeting the needs of the prisoner, even if to do so will ultimately be for the benefit of the community. Sometimes the problem can be addressed in a finding of "special circumstances" in fixing the 'non parole' period (**R v Moffitt** (1990) 20 NSWLR 114 - at 120-121 per Wood J.; s.44 **Crimes (Sentencing**

Procedure) Act 1999) or occasionally by choosing an option ‘out of left field', at the risk of a Crown appeal. The challenge here is largely for the offender and those who provide any post release supervision or guidance. Of course, again, resources play a role. Pre-release programs, or ‘half way house’ models require many special resources which are not always available.

THE ROLE OF THE SENTENCER

Depending upon the particular ‘special needs’ of an offender that arise, the role of the judicial officer in addressing or meeting those needs may not be decisive, or even influential. The majority of the High Court in **Weininger v The Queen** [2003] HCA 14, observed of sentencing proceedings:

> *“A sentencing hearing is not an inquisition into all that may bear upon the circumstances of the offence or matters personal to the offender. Some matters may be fixed by the plea or verdict of guilty although, even there, there may be ambiguities (example manslaughter verdicts). Many of the matters relevant to fixing a sentence are matters which either the prosecution or the offender will draw to the attention of the sentencing Judge. Some matters will remain unknown to the sentencing Judge. The question then becomes, what use is the sentencing Judge to make of what is known, and of the matters urged by the parties? This is not a series of choices for the Judge between alternatives. Not only may some things be unknown, some will concern matters in which a range of answers may be open”*. [23]

The capacity of the judicial officer to address the ‘special needs’ of the offender may be limited by a number of factors that reflect upon not only the role of the sentencer, but the dependence of judicial officers and court orders upon the position of courts and judicial officers in the criminal justice system.

Charge Selection

The character of the sentencing proceedings and the options available to a court will depend in part on charge selection. This is a matter beyond the control of the Courts except in the most exceptional circumstances. Charge

selection/negotiation falls to the prosecution primarily, sometimes with adept assistance or submissions from the defence. The role of the prosecutor, and the sentencing judge, in the context of "plea bargaining", between the parties was discussed in **GAS (& Anor) v The Queen** [2004] HCA 22 (at [28]-[32]). The particular characteristics of a person reflecting "special needs" may determine whether a particular charge may be preferred as an alternative to that initially laid which may attract summary jurisdiction, as opposed to prosecution only on indictment, or by committal for sentence. In the sentencing of children, the selection of an available charge as a "serious indictable offence" will take the matter out of the jurisdiction of the Children's Court.

Often where an indictable offence is preferred in New South Wales, the charge may be one that attracts a "standard non parole period" (cf ss.54A-D **Crimes (Sentencing Procedure) Act** 1999) required to be taken into account after trial but which will still have relevance if there is a plea of guilty (**R v Way** (2004) 60 NSWLR 168). The charge may, or may not, allege an element of aggravation, that if present in the charge, may increase the maximum penalty from as little as 7 years up to 25 years (eg s.35 **Crimes Act** "reckless wounding" – s.33, "wounding with intent to cause grievous bodily harm"). Of the categories of "special needs" offender referred to above, some that may have relevance to this area may include those with mental disabilities, drug dependence etc. There may be other more subtle influences as well arising from the circumstances of the offender or the victim that will inform charge selection.

Process Selection

A "special needs" offender such as one suffering a mental illness or disability may not be fit to be tried or may be mentally ill. Under New South Wales legislation, a person "not fit to be tried", who is found to have committed an offence after a 'special hearing', must be sentenced in accordance with s.23 **Mental Health (Criminal Procedure) Act** 1990, which provides for limited options when fixing a term of imprisonment, particularly denying the sentencer the power to fix a "non parole" period, but rather having to fix a 'limiting term'. An accused found "not guilty" on the grounds of "mental illness" will be subject to the management and supervision of the Mental Health Tribunal, over which

the referring court will have no supervision. Such a situation generally involves direct concern and treatment for the relevant "special need" of mental health care. Matters dealt with summarily, may be dismissed, on "terms", if an offender suffers a mental illness as characterised by the legislation. (s.32 **Mental Health (Criminal Procedure) Act**)

Further, the 'special needs;' of offenders may be met in the form of "the restorative justice" model of adjudication, such as "Circle Sentencing": or "Koori Court" models, now proliferating across the nation or by specialised courts, 'Drug Courts', or Court referred treatment programs such as the 'Cedar House' program in Sydney for child sexual offenders. Where the needs of an offender are such that to intensively treat or deal with them may truly break the cycle of offending, these alternative models for dealing with offenders appear to provide the greatest chance of success.

These matters usually arise from the choice of the parties, not by any unilateral direction of the court.

Penalty Selection

Although the imposition of the appropriate sentence is very much a matter for the sentencer, because the core function of the sentencing process is the selection of the appropriate option, within legitimate sentencing discretion, the options may be limited by reason of geography, some characteristic of the offender that itself speaks of special need or for some other reason. In this exercise of discretion, taking into account the relevant maximum penalty, the existence of any relevant guideline judgment and./or standard non parole period, sentencing statistics and guidance from "similar cases" resolved by the Court of Criminal Appeal, particularly correcting one's mistakes, comparable sentences and the like, the judicial officer is very captive to the skill of the advocates, the quality of the evidence adduced, the options available at law, the advice of Government/Non Government service providers (Community Corrections/Private Rehabilitation Services) and the like.

Sometimes particular offenders are ineligible for particular options because of particular characteristics or subjective features that themselves may speak of

special needs. For example, particular categories of current or past offences may disqualify a person from Community Service orders, periodic detention and home detention, amongst some of the options relevant. Some offenders are ineligible for particular options because of drug dependency or physical or mental disability. Of course, a consequence of these legislative and/or administrative limitations is that offenders may be denied non-custodial options or more creative custodial options when sentenced and thus denied opportunities for reform.

Flexibility within a particular sentencing option

Even if one has chosen a particular option, particularly one which involves some service in units of time (eg Community Service Orders, imprisonment), there is the need to consider the period required to be served under the order or which alternative is appropriate within a particular penalty framework (eg suspended sentence of imprisonment, periodic detention, home detention, full time custody). If some form of full or part time custodial penalty is appropriate, one must decide whether a non parole period is to fixed, of what length and what conditions ought be fixed for the period of parole supervision. Most importantly, one needs to identify and fashion appropriate conditions for supervision, in whichever form it takes. Some of these conditions are not enforced or resourced.

There are sentencing options which may involve diversion within main stream sentencing options, such as the Drug Treatment Correctional Centre now operating in New South Wales (**Compulsory Drug Treatment Correctional Centre Act** (NSW) 2004)

Execution of the sentence

Here the meeting of special needs falls outside the control of the judicial officer to a large extent and would appear to be the great “imponderable” in the process. Community Correction orders may be referred back to the judicial officer (such as supervisions orders) but others, such as Community Service Orders (in New South Wales at least) may go back to a different judicial officer for enforcement without consultation. For terms of imprisonment (other than

suspended terms), the execution of programs, the enforcement of parole orders, or the consideration of breaches, will fall to administrative decision makers (either within Corrective Services itself or by the Parole Board) or some similar administrative (quasi judicial) body.

Of particular concern to judicial officers is the availability and structure of programs both within and outside custody for the particular offender that may meet, treat or otherwise accommodate a special need, such as: drug and/or alcohol rehabilitation, anger management, mental health treatment, education/special skills courses, accommodation etc.

For sentencing of imprisonment greater than 3 years the decision to release to parole when a non- parole period is fixed may be overtaken by events never contemplated by the judicial officer at the time of sentencing, particular discipline issues while in custody and successful completion of mandatory courses – such as the CUBIT programme for sex offenders. Shortages of resources in a custodial setting may prevent an offender having access to a particular program, completion of which is essential to release on parole. For some categories of offenders there are now, in most States, legislative power for Supreme Courts to order some form of continuing preventative detention or supervision, not contemplated, or even available, at time of sentence.

PRACTICAL ISSUES FOR JUDICIAL OFFICERS

Allowing for the confines of jurisdiction, relevant legislation and case law (and any other matters) which inform legitimate sentencing discretion, there are a number of practical issues that arise in relation to the sentencing of persons with “special needs”, for judicial officers to consider. Some of these are dependant upon the individual knowledge and skill of the sentencing officer. Some require for skills of perspicacity, best exercised by those in possession of a crystal ball.

There is the need to identify what are “special needs” relevant to sentencing of offenders, correctly establish the relevance of those “special needs” to the sentencing process, thereby, tailoring sentencing orders to recognise or accommodate the “special needs” arising in the instant case and ensuring (or

hoping) that the orders of the Court are complied with or fully enforced. This identification process will usually not be difficult, with the help of competent representation, but sometimes it falls to instinct, experience, hard work or just "plain luck" to stumble upon this aspect of the matter.

For Corrections and other enforcement agents there are issues of availability and allocation of resources to meet the relevant "special needs" identified by courts, or enforcement of specific statutory requirements, but these are usually beyond the control or knowledge of the judicial officer.

There are a number of mechanisms for assisting in the practical identification treatment of special needs in sentencing.

Judicial education

Whether through courses conducted by judicial education bodies or attention to detail of the available literature, this may assist the judicial officer in:

(i) identifying persons with special needs, what those needs are and how they can be met,

(ii) empathising with such persons, or at least understanding the relationship of need to offending or reform,

(iii) identifying and/or understanding resources to meet particular needs both within and outside correctional institutions.

The needs of children, women, aboriginal people and the mentally ill can be met with knowledge of the resources within the community to deal with issues such as homelessness, education, protection from domestic violence and medical treatment. The AIJA and the NJCA conduct and/or fund specific educational programs in Aboriginal cultural awareness as well as conferences and research programs. The Judicial Commission in NSW conducts similar activities through its Ngara Yura program.

Professional Education

Courses or literature to advance or develop the skill of legal professionals will greatly assist in the sentencing of offenders.

If the judge is “the student” and advocate “the teacher” then the role of the advocate to identify relevant ‘special needs’ may be vital for the Court to assess

(i) the objective facts,

(ii) the subjective matters in mitigation,

(iii) relevant options in sentencing and/or suitable programs available for the offender,

(iv) other information that may inform the process.

The profession can help in identifying matters referred to under the previous subheading.

Resources

Even with the best will in the world, if resources for supervision, counselling, treatment and the like are not available, the capacity of the judicial officer to address “special needs” or to be informed of them will not be met.

It is not uncommon, for example, to learn of people in custody unable to get access to counselling services whilst on remand, or be delayed access to programs essential to grant of parole. Another issue that sometimes defeats the sentencing exercise, from the perspective of the judicial officer, is the “second guessing” of the judicial officer’s evaluation of the situation, either intentionally or by neglect. Premature termination of supervision or failure to enforce conditions of supervision are common instances of this situation. Parole Boards may, in their discretion, change conditions of parole, deny parole or insist on programs to be completed before parole is granted.

Changing character of "special needs"

The particular needs of an offender may change at particular points of the sentencing process. The sentencer may need, when fashioning orders, to anticipate changes in circumstances in the future particularly in fixing minimum terms of imprisonment and conditions of supervision. What can be done, or should be done, to meet particular need(s) prior to sentence may be different in character, scope or application, depending upon the manner of disposition of the matter. Custodial and/or community based supervision, may place different emphasis upon different aspects and appropriate strategies for addressing them will differ depending upon the setting.

The release from custody to the community will of itself create new or fresh issues that will demand address. Although, of course, many of these matters will be beyond the control of the judicial officer. To some extent the possession of the 'crystal ball' to which reference is made elsewhere is the only way the judicial officer can, within his or her functions, meet or address any such perceived future need.

What happens after orders expire

In nearly all sentencing exercises at some time the imprisonment/supervision/community work will come to an end. If the offender goes back to the environment from which the offender springs then, so far as the sentencer is concerned, one can only hope that lessons learnt along the way will better equip the individual to cope with the challenges of old influences and temptations. The significance of the social circumstances of the offender, usually over which he or she usually has little or no control, in influencing conduct, are well known and Courts have no power (or jurisdiction) to change them. Their sometimes overpowering effect, or the effect of matters such as drug addiction, can be seen in recidivism in the face of certain return to custody for longer and longer periods.

Appellate review by prosecution appeal

The ever present judgment of appellate review is an inhibition upon preferring rehabilitation to punishment and deterrence. Most sentencers, operating in a jurisdiction where the appellate review is not in reality a glorified resentencing exercise, as in review of Local Court decisions, will be inclined to sentence "within the range", rather than go out on limb to properly address 'special needs'. Rather than risk a prosecution appeal which, if successful, usually leaves the prisoner worse off (notwithstanding 'double jeopardy' principles), the sentencer will choose a more onerous penalty, but within the general range. More emphasis on punishment leaves less room to address rehabilitation, unless personal deterrence can be seen as an instrument for reform. Appellate courts are more concerned with the public policy implications, because their judgments have wide readership. The more punitive the sentencing option, usually the greater delay in access to programs that might more readily address the causes of offending. Again, it is recognised that as a matter of public policy although some offending is so serious that punishment and deterrence must outweigh other considerations, most offending by its character does not disqualify courts pursuing reformation, primarily for the public good!

My experience is that a number of very serious offenders, recidivist armed robbers, sex offenders and perpetrators of violence, even multiple murderers, have histories of offending based on characteristics or environmental factors, which, if addressed properly at an earlier stage, may have stopped them from committing these far more serious crimes at a later time. Some, of course, have been irretrievably damaged by past, failed social or penal policies, usually based solely on concepts of punishment.

CONCLUSION

Although there still remains no "golden rule" in sentencing, it might be fairly concluded that effectively addressing “special needs” in sentencing, is limited by a range of factors many of which the sentencer cannot control. The judicial officer is usually constrained by what is presented in court, in all respects, from identifying those characteristics of the offender relevant to sentencing, through to the specific charge brought and the viable options available for that charge.

Judges are not social engineers but are cast in that situation because the “sentencing” of an offender is a “fault line” upon which both the community’s and the offender’s interest in the punishment, welfare, reform and/or rehabilitation of him or her is concentrated. Apart from specific legislation dealing with mentally ill or disabled persons, no other mechanism exists to compulsorily require damaged or disadvantaged people to address or deal with issues relevant to offending.

The following points may be made in conclusion to summarize some of the issues that I have addressed:

(i) The more serious the offending where greater weight must be given to deterrence and denunciation/retribution usually, the less likely that the ‘needs’ of the offender will be addressed or met in the sentencing process.

(ii) The public interest policy in punishment over rehabilitation in a particular sentencing exercise will rarely address the causes of offending. In some more serious matters, this may be academic. Many ‘special needs’ will never be met by conventional sentencing procedures, either because of limitations of options and sentencing law or simply because sentencing is not the appropriate mechanism for reform.

(iii) The capacity of judicial officers to meet the needs of offenders is constrained considerably by circumstances beyond their control. The

role of the judicial officer is not necessarily central or pivotal to sentencing outcomes that meet the specific needs of offenders.

(iv) Sentencing law with its increasing complexity and with some shift in emphasis, largely dictated by legislative change, inhibits the ability of courts to either address the causes of offending behaviour or to provide a template or foundation for reform and rehabilitation. The sentencer may be inhibited by the prospect of a prosecution appeal. If the sentence is "outside the square", a successful prosecution appeal may leave the offender worse off, than if one "toes the line".

(v) Some offenders can only have their "special needs" met outside sentencing processes, even when those "needs" are relevant to sentencing. Some "needs" can never be met by the sentencing process, even where those needs ordinarily not take a back seat to considerations of punishment, general deterrence and the like.

(vi) The better informed the sentencer, the more able he or she will be to satisfy those purposes of sentencing that address the "special needs" of prisoners.

(vii) Greater resources for custodial and supervision agencies and flexibility of sentencing options will enhance the capacity for Courts to meet the need for rehabilitation of offenders. Punishment is well resourced, programs for reform are usually not.

(viii) Alternative sentencing models, intensive treatment regimes and the like provide opportunities that conventional sentencing regimes cannot match or provide.

(ix) Some 'special needs' require attention to solutions that put as a priority protection of the victim or the community in the short to long term.

Some suggestions:

(1) Legislative change to provide greater 'mix and match options' on sentencing:

(a) 'community service work' or in house rehabilitation programs as conditions of bonds, home detention, in addition to periodic detention.

(b) Power for courts to choose the type of community service work that might be performed, or programs that are available as part of community service work or of imprisonment.

(c) Greater power for courts to choose the place of detention, in the appropriate case, rather than make recommendations for such matters.

(2) Greater attention in legislation to the rights of children to protect them from incarceration in adult prisons and to the cultural and social disadvantages of Aboriginal people to promote rehabilitation over punishment.

(3) Legislative recognition of wider options in sentencing and greater flexibility in the execution of penalties, particular imprisonment, such as pre-release to halfway houses (or rehabilitation centres) before non parole periods expire, or short sentences expire where there is no non parole period. There are many creative models available from overseas (eg. in Canada dealing with 'First Nation' offenders) to provide fresh inspiration.

(4) Sentences of 6 months or less should be served by community service work, or in rehabilitation programs, with the risk of full time detention on failure to perform the work or complete the program.

(5) Where imprisonment or detention is the last and only option more "special prisons", or places within them, for the drug addicted, the

mentally ill and disabled, aboriginal men and women, domestic violence and repeat serious driving offenders.

(6) Judicial education bodies must provide specialist sentencing checklists to alert the Court to available options and programs or matters to look out for, as well as focussed programs and publications advising judicial officers of services and programs available to meet specific needs.

(7) There should be wider and more creative use of restorative justice models, or alternative court models, particularly for Aboriginal Australians and the drug and alcohol addicted for summary and indictable matters.

The approach in sentencing which encapsulates the challenge of balancing the competing policy considerations reflected in the 'purposes of sentencing' is reflected in the following wise words.

> *"General sentencing principles must be established, so that the community may know the sentences which will be imposed and so that sentencing judges will know the kind and the order of sentence which it is appropriate that they impose. But, of course, principles are necessarily framed in general terms. General principles must, of their nature, be adjusted to the individual case if justice is to be achieved. For this reason, it is in my opinion important in the public interest that the sentencing process recognise and maintain a residual discretion in the sentencing judge … There is a public interest in the adoption and articulation of sentencing principles which will deter the commission of serious crime and punish those who commit it … But there are other interests to which the sentencing process must have regard; these are other objectives which the sentencing process must seek to achieve. Paramount amongst these is the achievement of justice in the individual case." (7)*. (**R v Lattouf**, per Mahoney ACJ CCA(NSW)-12 Dec. 1996, cited in **R v Henry** [1999] 46 NSWLR 346(at [10]).