

# **'Purposes of Sentencing'**

Brian Hancock, Public Defender

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1. Courts are entrusted by the community with the responsibility of meting out to an offender the legal consequences of behaviour which infringes the criminal law. A sentencing court is required to exercise its discretion and to act fairly in all the circumstances of the case. A sentencing court is also required to have regard to all relevant legislation and to act in accordance with established common-law principles.
2. A legal practitioner – whether solicitor or barrister – who represents an offender before a sentencing court must master the relevant facts, law, instructions and evidence and have any witnesses at court and submissions ready to provide or enlarge upon.
3. Many practical matters ultimately will engage a sentencing court's attention. These matters may include: finding of relevant facts; assessment of objective seriousness; victim impacts; mitigating factors; aggravating factors; timing of plea; contrition and remorse; rehabilitation; health; age; cultural background; parity; totality; special circumstances; cumulation or concurrence; criminal record; statistics; penalty options and other issues that may or may not frequently arise. Distinct from these practical

matters are the discretely identified ‘purposes of sentencing’ which form the broader philosophical bases of sentencing and which are the subject of this paper.

### **Common Law**

4. The general purposes of sentencing are various and may overlap or indeed conflict.

They must be considered in relation to each other. In *Veen v The Queen (No 2)* (1988)

164 CLR 465, Mason CJ, Brennan, Dawson and Toohey JJ said at 476:

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

5. In *R v Engert* (1995) 84 A Crim R 67 at 68, Gleeson CJ observed,

Sentencing is essentially a discretionary exercise requiring consideration of the extremely variable facts and circumstances of individual cases and the application to those facts and circumstances to the principles laid down by statute or established by the common law. The principles to be applied in sentencing are in turn developed by reference to the purposes of criminal punishment . . .

In a given case, facts which point in one direction in relation to one of the considerations to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance . . .

It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.

### **Legislation**

6. In sentencing federal offenders, the Commonwealth Parliament has legislated for matters in which a court is to have regard – these include a ‘sentence of appropriate

severity’; ‘deterrent effect’ on the offender; ‘deterrent effect’ on other persons; adequate punishment; prospects of rehabilitation and other matters not all of which might be described as ‘purposes’ as considered in this paper – see section 16A *Crimes Act 1914 (Commonwealth)*.

7. In New South Wales, Parliament has chosen to legislate for the general purposes of sentencing by way of amendment to *Crimes (Sentencing Procedure) Act 1999* inserting section 3A which commenced operation on 1 February 2003. The section discretely sets out seven purposes of sentencing.

The purposes for which a court may impose a sentence on an offender are as follows:

- (a) to ensure that the offender is adequately punished for the offence,
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,
- (c) to protect the community from the offender,
- (d) to promote the rehabilitation of the offender,
- (e) to make the offender accountable for his or her actions,
- (f) to denounce the conduct of the offender,
- (g) to recognise the harm done to the victim of the crime and the community.

8. In New South Wales, Parliament has expressly provided for Principles which apply in any court exercising criminal jurisdiction in any proceedings involving a child offender. Section 6 *Children (Criminal Proceedings) Act 1987* sets out eight principles which – in some respects – qualify the general purposes of sentencing as set out in section 3A *Crimes (Sentencing Procedure) Act 1999* when the court is dealing with a child. Thus, for example, section 6(b) *Children (Criminal Proceedings) Act 1987* provides that, ‘children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance

and assistance’ would qualify the general purpose in section 3A (e) ‘to make the offender accountable for his or her actions’.

### **Inter-play of Common Law and Legislation**

9. Common-law principles of sentencing have not been altered by the section 3A *Crimes (Sentencing Procedure) Act 1999*. The High Court said of s 3A in *Muldrock v The Queen* (2011) 244 CLR 120 at [20]:

The purposes there stated [in s 3A] are the familiar, overlapping and, at times, conflicting, purposes of criminal punishment under the common law [*Veen v The Queen (No 2)* at 476–477]. There is no attempt to rank them in order of priority and nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in *Veen v The Queen (No 2)* [at 476] in applying them.

10. Although section 3A *Crimes (Sentencing Procedure) Act 1999* sets out the purposes in legislative form, it is not an exclusive list of purposes. His Honour Price J – in citing the oft-quoted passage of Mason CJ, Brennan, Dawson and Toohey JJ in *Veen v The Queen (No 2)* at 476 – stated in *Abdulrahman* [2016] NSWCCA 192 at [58],

Although there is no mention in s3A *Crimes (Sentencing Procedure) Act* of retribution being a purpose for which a court may impose a sentence on an offender, retribution has long been held to be an important aspect of sentencing: *R v Gordon* (1994) 71 A Crim R 459 per Hunt CJ at CL at 468.

11. Prior to the enactment of section 3A *Crimes (Sentencing Procedure) Act 1999*, the purpose of ‘retribution’ arose for consideration in *R v Milat* (unrep, 27 July 1996, NSWSC). In that case, Hunt CJ at CL was sentencing the offender for ‘horrible crimes of murder’ which demanded ‘sentences which operate by way of retribution’ in order to address the injury which was done by the offender. His Honour said,

Not only must the community be satisfied that the criminal is given his just desserts, it is important that those whom the victims have left behind also feel that justice has been done.

12. A formulation of retribution was affirmed by the High Court in *Ryan v The Queen* (2001) 206 CLR 267 per McHugh J at [46].

13. In *Josefski v R* [2010] NSWCCA 41, Howie J at [38] said,

In my opinion neither the existence of s 3A(g) or s 21A(2)(g) leads to a conclusion that the common law of this State has been altered by the introduction of those provisions. Neither was intended to alter the law that existed prior to their introduction. Section 3A generally has been regarded as a codification of the common law principles of sentencing: see *R v MA* [2004] NSWCCA 92; 145 A Crim R 434 at [23]. It has been held that the purposes of punishment stated in the section are constrained by other sentencing principles that exist under the common law such as the principles of proportionality and totality: *R v MMK* [2006] NSWCCA 272; 164 A Crim R 481 at [11]. *Wickham* is itself authority for the proposition that nothing in s 21A was intended to alter the common law principles of sentencing and see *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168 at [56]-[57].

14. Purposes of sentencing apply to both all parts of the sentence imposed: both non-parole period and parole period. In *Zolfonoon* [2016] NSWCCA 250 the court (Beazley P, Garling and Fagan JJ) stated at [76]:

The Crown's submission that the non-parole period failed to reflect the sentencing objectives of general deterrence, punishment and denunciation must be approached by considering not just the mathematical ratio of the non-parole period to the total sentence (37.2%), but also by focussing on the actual length of the non-parole period. It is correct that the purposes of sentencing as laid down in s 3A of the *Crimes (Sentencing Procedure) Act* 1999 apply to all parts of a sentence imposed. But it must be kept in mind that these purposes which are, at times, in conflict, are not ranked by the legislature in order of priority: *Muldrock* at [20].

15. As a number of the purposes point in opposite directions, the sentencing exercise requires a delicate balancing of them, according to the facts of the immediate case – see *Tabalbag* [2016] NSWSC 1570 per Matthews AJ at [28].

16. Frequently, courts make only passing reference or no reference to section 3A *Crimes (Sentencing Procedure) Act* 1999 – a failure to expressly refer to each purpose does not mean they were not considered (*R v Stunden* [2011] NSWCCA 8 at [113]).

However, it is appellable error for a sentencing court not to address personal and

general deterrence or each of the purposes enunciated in section 3A. In *R v Stunden*, Garling J said (at [111] – [112]),

... the concepts of personal and general deterrence are two of the fundamental purposes of sentencing: s 3A *Crimes (Sentencing Procedure) Act*. Each of the purposes enunciated in s 3A must be taken into account by a sentencing judge "... at least to an extent that is fairly related to the facts of the given case": *R v AS* [2006] NSWCCA 309, per Sully J at [25] (Mason P, Latham J agreeing).

It is an appellable error for a judge to fail to address these fundamental purposes at all because they are each relevant to the purpose to be achieved by the imposition of a sentence: *House v The King* (1936) 55 CLR 499. The weight to be accorded to these matters in the consideration of any particular sentence is one upon which minds may legitimately differ.

### **Adequate punishment**

17. The concept of being ‘adequately punished’ in section 3A (a) *Crimes (Sentencing Procedure) Act 1999* incorporates the common law principle of proportionality. The principal of proportionality operates to guard against the imposition of unduly harsh or unduly lenient sentences and requires a sentence to be in accordance with the objective seriousness of the offence in the circumstances of the case. In *R v Scott* [2005] NSWCCA 152, Howie J, Grove and Barr JJ agreeing, said at [15]:

There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed and the circumstances of the crime committed. This principle arose under the common law: *R v Geddes* (1936) SR (NSW) 554 and *R v Dodd* (1991) 57 A Crim R 349. It now finds statutory expression in the acknowledgment in s 3A of the *Crimes (Sentencing Procedure) Act* that one of the purposes of punishment is “to ensure that an offender is adequately punished”. The section also recognises that a further purpose of punishment is “to denounce the conduct of the offender”.

### **Deterrence**

18. The concept of ‘deterrence’ in section 3A (b) *Crimes (Sentencing Procedure) Act 1999* includes both ‘deterring the offender’ (teaching the offender a lesson so he doesn’t do it again – also referred to as ‘specific deterrence’ or ‘personal deterrence’)

and ‘deterring other persons’ (sending a message to the community as a warning in what manner the court will deal with a particular offence; in other words, making an example of the offender for the public at large to heed – also referred to as ‘general deterrence’ or ‘public deterrence’).

### **Specific Deterrence**

19. The requirement for specific deterrence may be lessened by a number of factors including: evidence of rehabilitation (*Stanford v R* [2007] NSWCCA 73 at [19]); motive for offending which will have less effect as the seriousness of the offence increases (*R v Mitchell* (2007) 177 A Crim R 94 at [30] – [32]); a very low risk of re-offending (*R v Mauger* [2012] NSWCCA 51 at [39]).
  
20. Where an offender has a prior criminal record which manifests a continuing disobedience of the law, more weight should be given to retribution, specific deterrence or protection of the community (*Veen v The Queen (No. 2)* (1988) 164 CLR 465 at 477). An offender acting under duress may make considerations of rehabilitation, deterrence and community protection appreciably different (*Papadopoulos v R* [2007] NSWCCA 274 at [176] – [177]).

### **General Deterrence**

21. General deterrence was considered in *R v Harrison* (1997) 93 A Crim R 314 at 320, where Hunt CJ at CL said (at 320),

Except in well-defined circumstances such as youth or the mental incapacity of the offender . . . public deterrence is generally regarded as the main purpose of punishment, and the subjective considerations relating to the particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those who may otherwise be tempted by the prospect that only light punishment will be imposed.

22. As Spigelman CJ said in *R v Wong* (1999) 48 NSWLR 340 at [127] – [128],

There are significant differences of opinion as to the deterrent effect of sentences, particularly, the deterrent effect of marginal changes in sentence. Nevertheless, the fact that penalties operate as a deterrent is a structural assumption of our criminal justice system . . . Deterrence only works to the extent to which knowledge is transmitted to potential offenders about actual sentencing practice.

In *R v Miria* [2009] NSWCCA 68 – a case where the respondent had smashed a schooner glass on the victim’s head in a hotel causing injuries to the head and neck and had pleaded guilty to maliciously inflicting grievous bodily harm with intent – the sentencing judge who had stated, ‘the general deterrence effect of any sentence is debatable, given that it will at best be published as a statistic and thus unlikely to cause anyone to act differently’ was held to be in error. Grove J said (at [16] – [17]),

[16] The facts of the offence by the respondent reveal that his actions are in a category which has already attracted comment in this Court and it is apparent that this is a case in which the need to include an element of general deterrence looms large.

[17] In *Sayin v R* [2008] NSWCCA 307 Howie J stated:

"The offence, popularly known as 'glassing', is becoming so prevalent in licensed premises that there are moves on foot to stem the opportunity for the offence to be committed by earlier closing times and the use of plastic containers. The courts clearly must impose very severe penalties for such offenders, but of course within the limits afforded by the prescribed maximum penalty."

In the same judgment, Grove also noted (at [11]) that:

. . . there is no authority permitting a judge to dismiss general deterrence as a factor for sentence assessment. Of course, in circumstances which are found to be appropriate a particular offender may not be a suitable vehicle for manifesting general deterrence, for example if a mental condition disables the offender from appreciating the level of his wrongdoing: cf *R v Scognamiglio* [1991] 56 A Crim R 81.

23. General deterrence is attributed little weight in cases where the offender suffers from a mental condition or abnormality because such an offender is not an appropriate



medium for making an example of: *Muldrock v The Queen* (2011) 244 CLR 120 at [53]–[54]; *R v Anderson* [1981] VR 155; *R v Scognamiglio* (1991) 56 A Crim R 81.

24. In *R v Wright* (1997) 93 A Crim R 48 (at [51]), Hunt CJ at CL said that while this was an accepted principle, if the offender acts with knowledge of what he is doing and with knowledge of the gravity of his actions, the moderation need not be great. Where an offender has diagnoses of antisocial personality disorder and poly-substance abuse as recognised in the *Diagnostic and Statistical Manual of Mental Disorders DSM (IV)*, 4th edition, such mental conditions won't necessarily justify any mitigation in the application of general deterrence. In *R v Lawrence* [2005] NSWCCA 91, Spigelman CJ said (at [23]):

Although DSM(IV) has come to be widely used . . . it should not be assumed that . . . [by] affixing a label to a mental condition . . . [the] condition is such as to attract the sentencing principle that less weight is to be given to general deterrence . . .

25. The matter of *Muldrock* [2012] NSWCCA 108 was a re-sentence after a successful High Court appeal by the offender (*Muldrock v The Queen* [2011] HCA 39). In order to achieve consistency with the High Court, the NSWCCA placed significant importance on the applicant's intellectual disability and thereby placed limited importance on specific deterrence and placed no importance on general deterrence.

### **Protection of the Community**

26. The introduction of 'protection of the community' in section 3A(c) *Crimes (Sentencing Procedure) Act 1999* was not intended to introduce a system of preventative detention (*Aslett v R* [2006] NSWCCA 49 at [137]). The concept of

‘protection of the community’ is not to be considered in isolation from other purposes of sentencing. In *R v Zamagias* [2002] NSWCCA 17 Howie J said at [32]:

It is perhaps trite to observe that, although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender at the expense of deterrence, retribution and denunciation. In such a case a suspended sentence may be particularly effective and appropriate.

27. Although protection of the community may be an appropriate purpose in sentencing, a sentence should not be increased beyond what is proportionate to the objective seriousness of the crime in order for the court to address the offender’s risk of further offending. In *Veen v The Queen (No 2)* (1988) 164 CLR 465, Mason CJ, Brennan, Dawson and Toohey JJ. said (at 473),

It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.

28. In considering the protection of the community, it is sufficient for a court to be satisfied that the Crown has established a risk of re-offending as distinct from having to prove beyond reasonable doubt that the offender will re-offend (*R v Harrison* (1997) 93 A Crim R 314 at 319 and citing *Veen v The Queen (No 2)*).

29. The concepts of: ‘protection of the community’; ‘likelihood of re-offending’; and ‘future dangerousness’ are related ones. In *R v SLD* (2003) 58 NSWLR 589, a 13-year-old boy removed a sleeping three-year-old neighbour from her house during the night and fatally stabbed her, leaving the victim’s body in a location near his own house. He’d had a juvenile record. After considering relevant psychological and other reports and all relevant material, the sentencing judge concluded the offender posed a

significant risk to the community in terms of potentially killing again or committing sexual offences. The court stated (at [40]) that such a finding of future dangerousness need not be established to the criminal standard.

30. An offender's prior criminal record is relevant to the issue of 'protection of the community' and may be taken into account when it shows an offender's dangerous propensity. In *R v Baxter* [2005] NSWCCA 234 at [31], Hoeben J observed,

The common law rule . . . is that a prior criminal record does not have the effect of aggravating an offence but it may either deprive the offender of leniency or indicate that more weight is to be given to retribution, personal deterrence and the protection of the community.

31. In *Potts v R* [2012] NSWCCA 229, the applicant had appealed against a jury verdict and sentence imposed for murder after trial – in that trial the appellant had been found guilty of murder after having killed a woman in September, 2008. During the period of ten years prior to September 2008, the appellant had displayed chronic symptoms of paranoid schizophrenia. However, the verdict at trial was not incompatible with the jury concluding his mental state did not reduce the culpability from murder to the lesser crime of manslaughter. He had previously been convicted of manslaughter after killing his father in 2000. During the earlier trial, evidence was lead of 'substantial impairment' which had formed the basis for the verdict of manslaughter. On appeal against the murder conviction and sentence, the applicant argued the sentencing judge had failed to take into account that his mental illness rendered him an inappropriate vehicle for general deterrence. In the appeal judgment, Johnson J (with whom McClellan CJ at CL and Fullerton J agreed) noted (at [135]) that the sentencing judge had taken the appellant's mental health issues into account in reaching a conclusion that a life sentence was not appropriate. He further said (at [137]) 'Where factors have been taken into account in an offender's favour to assist a finding that a life sentence

under s 61 is not appropriate, the Court has said that care should be taken not to double count those factors again in the offender's favour on sentence'. In this matter, the sentencing judge had found the offender represented 'a high risk of further violent crime'. Johnson noted (at [145]), '... a finding of mental illness does not lead to an automatic reduction to the weight to be given to general deterrence in a particular case ...'. He concluded on this aspect of the appeal (at [151]), '... the Appellant was and remains dangerous so that this consideration may overshadow, if not overwhelm, other factors of a generally mitigating type which arise on sentence for an offender with a history of mental illness ...'

32. In another case of a person with mental health issues, the relevance of various purposes of sentencing in the case was thought to be of lesser significance. In *R v AB* [2015] NSWCCA 57, the respondent – who had been charged with the murder of his wife after shooting her five times with a rifle at her home – was found unfit to be tried pursuant to section 14 *Mental Health (Forensic Provisions) Act 1990* (the Act). After a Special Hearing by judge alone pursuant to the Act – (see *DPP v AB* [2013] NSWSC 1739), the trial judge – having found the accused had suffered 'substantial impairment by abnormality of mind' – concluded (at [73]), 'The appropriate finding is that this accused on the limited evidence available is not guilty of murder but is guilty of manslaughter'. The manslaughter verdict was a qualified finding under the Act and did not constitute a basis in law for any conviction (see section 22(1)(c) and trial judgement at [3]). Pursuant to the Act, the trial judge had nominated a limiting term of seven years. The Crown appealed the inadequacy of the nominated limiting term arguing inter alia the trial judge failed to have regard to denunciation. In rejecting the

Crown arguments on section 3A in this case, Simpson J (Price and McCallum JJ agreeing) stated at [41],

Since the nomination of a limiting term involves the court in making the best estimate of the sentence it would have considered appropriate, following a normal trial of a person fit to be tried (s 23 of the Forensic Provisions Act), the provisions of s 3A of the Sentencing Procedure Act are applicable.

Her Honour said further (at [42]),

However, it has been held that the purpose of nominating a limiting term is not to punish: *R v Mailes* [2004] NSWCCA 394; 62 NSWLR 181 at [32]. Accordingly, the first of the stated purposes can be put to one side. It may also be seen that the purposes lettered (b), (c), (d) and (e), also have, *in the circumstances of this case*, little bearing. Adams J held (and the finding was not challenged) that, by reason of his mental disability, the respondent was an unsuitable vehicle for general deterrence. It follows from the respondent's progressive dementia, together with the express finding that he would not commit another act of violence, that protection of the community, and rehabilitation, have little (if any) relevance; and there is little to be gained by making an offender suffering from progressive dementia accountable for his actions. (*Emphasis* added)

Her Honour said further (at [45]),

It seems to me that the denunciation falls into the same category as general deterrence: an offender who is unsuitable, by reason of mental disability, to be a vehicle for general deterrence, is equally unsuitable to be the subject of denunciation. The irrelevance results from the diminished moral culpability, which itself results from the impaired mental capacity of the offender.

## **Rehabilitation**

33. Rehabilitation has long been described as one of the cornerstones of the sentencing discretion (*R v Cimone* (2001) 121 A Crim R 433 per Beazley JA at [19]). The community and the individual offender both benefit if an offender successfully returns to a productive, crime-free life.

34. In *R v Groombridge* (unrep, 30 September 1990, NSWCCA), Wood J with whom Hunt and McInerney JJ agreed, said at [8] – [9],

Judges need to be astute to detect cases where, after a poor record, a turning point or watershed in the life of a young offender has been reached, see *R v Caridi* CCA, unreported, 3 December 1987.

There is a strong public interest in rehabilitation, both for the benefit of the community and the individual. That interest of rehabilitation may properly be taken into account in determining whether or not to impose a fixed term. Additionally, if a minimum and additional term are imposed, it may also be taken into account in relation to each leg of the sentencing process. The force of rehabilitation is not confined to the minimum term to the exclusion of the additional term or vice versa, for the reasons explained by this court in *R v Moffitt*, unreported, 21 June 1990 and *R v Chee Beng Lian*, unreported, 28 June 1990.

35. In *R v Ponfield* (1999) 48 NSWLR 327 at [38], Grove J noted that ‘the prominence to be given to rehabilitation of the young in determining sentence is recognised to the point of being almost axiomatic’. Voluntary cessation of criminal activity provides evidence of rehabilitation (*R v Burns* [2007] NSWCCA 228 at [30]).

36. Where there has been a substantial delay in prosecution and the offender rehabilitates and has not re-offended, those are matters relevant to appropriate penalty (*AJB v R* (2007) 169 A Crim R 32 at [29] – [30]; *Kutchera v R* [2007] NSWCCA 121 at [27] – [28]; *Wright v R* [2008] NSWCCA 91 at [14]). Rehabilitation of an absconder at large cannot be ignored but cannot be given the same weight as rehabilitation by an offender during a delay not brought about by the offender (*R v Warner* unrep, 7 April 1997, NSWCCA per Simpson J; *R v Nahle* [2007] NSWCCA 40 at [25]).

37. Tension may exist in a matter between purposes of ‘protection of the community’ on the one hand and ‘rehabilitation’ on the other. In *Dimian* [2016] NSWCCA 223 Davies J (with whom Hoeben CJ at CL and Hall J agreed) stated at [62],

A further consideration is that of institutionalisation for someone who has been serving a sentence now for 13 and a half years. That is a consideration of some significance for a repeat sex offender who at some stage, even allowing for the making of a continuing detention order under the *Crimes (High Risk Offenders) Act* 2006 (NSW), will have to be returned to the community at some stage. Two of the purposes of sentencing in s 3A of the Sentencing Act are the promotion of the rehabilitation of the offender and the protection of the community from the offender. Although keeping an offender in custody obviously protects the community in the short term it may not do so in the long term if adequate rehabilitation is not achieved particularly for a repeat sex offender. Avoiding an offender becoming institutionalised can only assist rehabilitation and, in the case of a

repeat sex offender, the community is also protected by an adequate period on parole to further the rehabilitation that has taken place in custody.

38. The concept of 'rehabilitation' in 3A (d) *Crimes (Sentencing Procedure) Act 1999* is not confined to the young or to persons who may have committed crime in the causative context of some addiction or with a long history of offending.

39. In *R v Pogson; R v Lapham; R v Martin* [2012] NSWCCA 225 – in which a five-judge bench was constituted – the three respondents were 'white-collar' offenders who'd pleaded guilty to making false statements to ASIC in connection with a company prospectus. The Crown appealed the alleged inadequacy of Intensive Correction Orders – one argument concerned the issue of rehabilitation and its inapplicability to the respondents. On the nature of the concept of rehabilitation, McClellan CJ at CL and Johnson J said (at [117]),

Although not defined by statute, the term "*rehabilitation*" has a well-recognised content in the context of sentencing. Rehabilitation as an object of sentencing has not been confined to those who are regarded as being ill or predisposed to crime by environmental factors, including alcohol or drug abuse. A statement frequently cited with respect to the concept of rehabilitation is that of King CJ in *Vartzokas v Zanker* (1989) 51 SASR 277 at 279 where he said:

"The passage which I have quoted from the remarks of the learned sentencing magistrate discloses, in my opinion, an error of principle. It implies that rehabilitation or reform, as an object of sentencing, is confined to those who are 'in need of rehabilitation by reason of factors such as illness or being 'predisposed to such behaviour by his environment or his experiences of life', that is to say, to persons subject to some personal or social disadvantage. That involves a misconception of the meaning of rehabilitation and its place in the sentencing process.

Rehabilitation as an object of sentencing is aimed at the renunciation by the offender of his wrongdoing and his establishment or re-establishment as an honourable law-abiding citizen. It is not confined to those who fall into wrongdoing by reason of physical or mental infirmity or a disadvantaged background. It applies equally to those who, while not suffering such disadvantages, nevertheless lapse into wrongdoing. The object of the courts is to fashion sentencing measures designed to reclaim such individuals wherever such measures are consistent with the primary object of the criminal law which is the protection of the community. Very often a person who is not disadvantaged and whose character has been formed by a good

upbringing, but who has lapsed into criminal behaviour, will be a good subject for rehabilitative measures precisely because he possesses the physical and mental qualities and, by reason of his upbringing, the potential moral fibre to provide a sound basis for rehabilitation. It would be a great mistake to put considerations of rehabilitation aside in fashioning a sentence for such a person."

In their same judgment, McClellan CJ at CL and Johnson J also said (at [124]),

By contrast to deterrence, rehabilitation has as its purpose the remodelling of a person's thinking and behaviour so that they will, notwithstanding their past offending, re-establish themselves in the community with a conscious determination to renounce their wrongdoing and establish or re-establish themselves as an honourable law abiding citizen: *Vartzokas v Zanker* at 279 (King CJ).

### **Accountability**

40. Making the offender accountable for his actions as per section 3A (e) *Crimes (Sentencing Procedure) Act 1999* is a purpose of sentencing that must be fulfilled (*R v Pogson* (2012) 82 NSWLR 60 at [98]); and it is an important purpose of sentencing (*R v Dawes* [2004] NSWCCA 363 at [40]).

### **Denunciation**

41. In *R v Nguyen* [2004] NSWCCA 332, the court considered the importance of denunciation in section 3A(f) *Crimes (Sentencing Procedure) Act 1999* and deterrence in a Crown Appeal against a suspended sentence for a serving police officer who'd persuaded an innocent person to plead guilty to a criminal offence. Spigelman CJ said (at [59]),

Notwithstanding the strong subjective case which the Respondent has made, I have nevertheless come to the conclusion that the objective gravity of the offence, particularly one committed by a serving police officer, requires a period of actual custody in order to serve the purposes of general deterrence and denunciation of the conduct.

42. It is an error for a court to impose a sentence that doesn't denounce the conduct (*R v King* [2009] NSWCCA 117). In *Ryan v The Queen* (2001) 206 CLR 267, Kirby J said at [118]:



A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of an offender. This objective requires that a sentence should also communicate society's condemnation of the particular offender's conduct. The sentence represents "a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law". In the case of offences against children, which involve derogations from the fundamental human rights of immature, dependent and vulnerable persons, punishment also has an obvious purpose of reinforcing the standards which society expects of its members.

43. In another case it was stated that 'denunciation looms large' despite the offender's intellectual disability. In *R v JP* [2015] NSWCCA 267, the crown appealed against the inadequacy of a suspended sentence for a section 66A (2) *Crimes Act 1900* offence. The case involved the offender – who had an intellectual disability – sharing images of her performing cunnilingus on her six-week old daughter. Price J (at [81] to [83]) and Button J (at [87]) disagreed with Hoeben CJ at CL; they thought full-time custody was the only appropriate penalty nonetheless they concurred in exercising the court's residual discretion in the appeal not to intervene. Price J stated (at [80] – [81]),

The gross breach of trust and utter vulnerability of the respondent's baby constitute serious aggravating factors on sentence. Section 3A (f) of the *Crimes (Sentencing Procedure) Act 1999* provides that a purpose of sentencing is "to denounce the conduct of the offender." The principle of denunciation looms large in the present case, notwithstanding the strong subjective circumstances of the respondent.

### **Recognising Harm done to victim of the crime and the community**

44. In reference to s3A(g), Johnson J stated in *AK* [2016] NSWCCA 238 at [126] that:
- 'This is an important feature in the present case. Young child victims are especially vulnerable. It is important that sentences passed for serious child sexual assault crimes such as this recognise the harm done to the victim of the crime'.

## Conclusion

45. The various purposes of sentencing will take on varying degrees of importance depending on the circumstances of each individual case. In the guideline judgment of *R v Henry, Barber, Tran, Silver, Tsoukatos, Kyroglou, Jenkins* [1999] NSWCCA 111; 46 NSWLR 346, Spigelman CJ at [8] referred to,

... observations of Mahoney ACJ in *Lattouf* (NSWCCA 12 December 1996) where his Honour repeated his own remarks in *Kable v DPP* (1995) 36 NSWLR 374 at 394:  
“If justice is not individual, it is nothing.”

His Honour continued at [9] – 10]:

This ringing phrase must not be taken out of context. In *Lattouf* his Honour emphasised the multiple objectives served by the sentencing process. One could equally well say “If justice is not consistent, it is nothing”.

As His Honour put it in *Lattouf*:

“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.”

46. Ultimately, in pursuing the purposes of sentencing, sentences imposed by courts must be just and reasonable. In delivering a paper on sentencing at the Bar Association C.L.E. in Orange on 13 February 2010, Public Defender Eric Wilson commenced with two citations with which I will conclude this paper on the purposes of sentencing.

47. In *SZ v Regina* [2007] NSWCCA 19, (2007) 168 A Crim R 249, Howie J at [5] said,

... the sentence must bear a reasonable relationship with the objective seriousness of the offence and fulfil the manifold purposes of punishment: see for example *R v Geddes* (1936) 36

SR (NSW) 554; and *R v Dodd* (1991) 57 A Crim R 349. Sometimes it is said that the sentence must 'accord with the general morale sense of the community': *R v Rushby* [1977] 1 NSWLR 594. After taking into account the various statutory and common-law principles and applying such discounts that arise on the particular facts, the sentencing judge is required to stand back and ask whether the resulting sentence is just and reasonable, not only to the offender but also to the community at large.

48. In *Muir* (unrep, NSWSC 3 April 1991), Hunt J when imposing a sentence for an offence of 'wound with intent to inflict GBH' said in part,

The prisoner has no relevant previous convictions. He is, in effect, at the turning point of his life, and in my view the community, if fairly apprised of all the facts, would accept that the prisoner should be given the chance to work his way through to a better future, rather than that he should be flung onto the human scrapheap of society by an uncaring criminal justice system, simply as a warning and an example to others.