THE *SENTENCING ACT* AND THE CHILDREN'S COURT*

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This brief paper may present a different perspective from that of other presenters at this seminar. The *Sentencing Act* (through section 43) has equal application to sentencing in the Children's Court as it has to the sentencing of adults in other criminal courts. This fact alone causes the hackles of some commentators to bristle; not content with lower maxima sentences for juveniles convicted of serious crimes compared with those for adults (but rarely approached) they would suggest a further diminution of sentencing powers. It is a mistake in my view to assess the present legislation in isolation, disregarding the history of sentencing in relation to juvenile offenders.

It is, for instance, less than four years since indeterminate (or "general") sentences ceased to be available, which were subject to administrative control as to actual time served. Although specialist Children's Courts had moved away from indeterminate sentencing and strongly adopted specific term sentences, other nonspecialist courts had clung to a "traditional" approach which placed the wisdom of treatment of juvenile offenders in administrators.

It is also less than 20 years since children as young as 14 were locked up for average terms of eight and a half months for both trivial offences and for welfare categories such as being uncontrollable, exposed to moral danger or truanting.

For those who bemoan the end of the remission system, let us think back to the early 1980s when juveniles had no equivalent rights to those possessed by adult prisoners so far as remissions from their sentences were concerned. A system of administrative remissions then began, originally with some comparison with adults (one third off total sentence for first-time committals, one quarter off in other cases). In early 1984 the more criticised administrative system was introduced which enabled committed juveniles to be entitled to seven ninths remission from total sentence. A public outcry brought these remissions back to equate with so-called earned remissions available to adult prisoners, entitling most detainees to receive up to 19 days per month remission for such categories as good behaviour, industry, excellence in those areas, and presence in low-security detention. The problem with the "earned" system (still an administrative measure) was that a detainee had to work very hard *not* to gain maximum remission. When the Community Welfare legislation was introduced the *Probation and Parole Act* (with modifications of terminology) was adopted for juveniles, until repealed by the *Sentencing Act*. Under the

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Probation and Parole model the Children's Court had been able to specify a non-probation period, and remissions were effective in relation to that period.

"Truth" in sentencing for juveniles has meant some integrity in the legal system. It can readily be seen from the foregoing that when the Children's Court had imposed a specific head sentence, with or without a non-probation period, that sentence bore little relationship to actual time served. The same was of course true for adults, but it was particularly pertinent that juveniles were able to perceive a hypocrisy in the system which lied to them about the time they were to serve. I have yet to hear of detention centre unrest based on a perception of unfairness by sentenced juveniles that the incentive for good behaviour in custody is that misbehaviour *may* lead to additional time. Although an amendment to section 21 of the *Children (Detention Centres) Act* brought about by the *Sentencing Act* has enabled the Children's Court to impose extensions of seven days for declared "serious behaviour", the reality is that no such cases have been brought before the court. This does not mean that all detainees are model inmates; it does mean that there is a perception that the work necessary to prosecute under the provision is hardly worth the trouble of the limited extra sentence. Detainees who commit offences while detained which are otherwise known to the law, for example escape, assault, of course are on occasions prosecuted and may serve cumulative terms upon existing sentences.

While in the adult system claims are made of longer sentences and prison crowding, the same has not been the experience in the juvenile system. Indeed an analysis of Children's Court sentencing in the first 12 months of operation of the *Sentencing Act* (carried out by the Judicial Commission) claimed that:

- the majority (90 per cent) of sentences were for fixed terms of six months or less;
- the average length of minimum or fixed term sentences was approximately four months three weeks;
- the median custodial term (that is, the point below which half the specified terms of custody fall) was just under four months;
- the most frequently ordered custodial term, representing 31 per cent of all custodial terms, was for a period of six months;
- only 10 per cent of custodial terms were greater than six months in length and less than 2 per cent were greater than 12 months.

Another independent study seeking to analyse comparative terms during the various remission systems and post *Sentencing Act* is understood to suggest average sentences pre/post *Sentencing Act* as 3.6 months and 5 months respectively. However viewed, the differences in actual terms served have not varied vastly. A departmental estimate — probably seeking enhancement of capital works moneys for detention centres — that the *Sentencing Act* would require an additional 250 "beds" was grossly astray.

According to the Judicial Commission's report, 6.8 per cent of convicted offenders in the Children's Court received detention, 4.7 per cent received community service orders, and 13.8 per cent received supervision orders (recognizance or probation). It is a sad commentary on services available to the court that for 75 per cent of guilty offenders their only experience of the system was arrest and court appearance.

As I have written elsewhere there remains much more that can be done, even in the present climate of "last resort" sentencing to reduce the percentage of detained offenders:

- community service might be more widely used if the maximum hours (at present 100) bore some relationship to custodial terms available for serious crimes;
- home detention (without electronic gimmickry) could be available for selected low-risk detainees;
- the sanction of periodic detention for juveniles inserted in the *Children (Detention Centres) Act* by the *Sentencing Act* could be implemented;
- more Community Youth Centres and other forms of intensively supervised release (provided for in the legislation) could be provided.

Speaking for myself, and I suspect for a number of other magistrates, in view of the average detention terms imposed by the Children's Court, a shorter minimum term for juveniles might be seen to be appropriate with provision for a longer period on parole. In anticipation of the effects of the *Sentencing Act* an additional 22 guidance officers had been appointed in 1989 specifically to supervise parolees.

The concept of "truth in sentencing" is narrowly considered by many to refer only to custodial terms. It should relate to all the court's orders, that is, if the court orders supervision it should be assured that the requirements of supervision will be understood by both supervisor and supervised and will in fact be carried out; that if a fine is imposed it will be enforced in the ways now provided by legislation. (Towards the end of the first year's operation of the Fine Default legislation, at one metropolitan court alone an attempt was made to have $12,000 in unenforced fines written off.) Despite the relatively small percentage of paroled detainees from Children's Court sentences (referred to above) I am unaware of any detainee having been the subject of reported parole breach since the *Sentencing Act* commenced, suggesting that guidance officers adopt the same approach they adopt for community supervised offenders, or alternatively that there is an unlikely remarkable success rate achieved with parolees which has not been encountered elsewhere in services associated with offenders who have reached the level of detention for their offending.

PAROLE JURISDICTION

A little-known feature of the *Sentencing Act* is the creation of a parole jurisdiction in the Children's Court with powers equivalent to the Offenders Review Board but exercised in relation to persons serving sentences in detention centres imposed by the higher courts. As at 31 December 1990 there were 27 persons in detention centres serving sentences of three years or more, of whom eight could be expected to be transferred to prison to complete their minimum terms.

In the period September 1989 to December 1990 the Children's Court granted 14 parole orders, and refused three; reconsidered and confirmed one refusal; revoked seven parole orders; took no action for breach of parole reported in three cases; granted one parole after eligibility reviewed.

Adjusted minimum terms involved in parole determinations during the period included five detainees serving 12-18 months; six serving 18 months to two years; and four serving

terms of two to three years. Offences involved ranged from manslaughter, robbery whilst armed or with wounding, serious sexual offences, arson, break enter and steal, and larceny; the majority of offenders had been convicted of more than one offence. Ages of detainees involved ranged from 15 to 20 years, and included two females each aged 17 years.

The mechanism provided by the *Sentencing Act* assures detainees of legal representation at parole review hearings (if sought), and an ultimate right of application to the Court of Criminal Appeal for aggrieved detainees. Adopting the same approach as the Children's Court has to assessment and supervision of offenders under recognizances or probation orders, the Community Corrections Service (as the Probation and Parole Service is now known) is involved with assessment and supervision of parolees aged seventeen and a half years and above.

While some commentators would attempt to justify the expense of a "Young Offenders Review Board" the Children's Court Parole Jurisdiction is coping well with those it is required to consider, exercising the government view referred to in the Sentencing Bill debate "that the special needs of children could be best understood and represented by maintaining continuity of approach by utilizing the existing expertise of (the Children's Court)."