DETENTION¾ LAST RESORT OR JUST ANOTHER STEP IN THE REHABILITATION PROCESS?

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THE SENTENCING OF JUVENILE OFFENDERS TO CUSTODY IS AN OPTION which is accompanied by considerable community condemnation and stigma. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) has as one of its central values the least possible use of institutionalisation for young offenders. Rule 19.1 prescribes: "The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period".

Freiberg et al. (1988), in Sentencing Research Paper No. 11, quoted the above passage and, at paragraph 420, stated:

> Custodial options in general, but imprisonment in particular, have been criticised as being both economically and socially costly. Disillusionment with prison as an effective correctional measure is widespread. The dangers of institutionalising younger offenders have been well documented. They include the contaminating effects of exposure to other more experienced offenders, thus creating a criminogenic, rather than a prophylactic environment, and the physical and psychological consequences of brutality and overcrowding (Freiberg et al. 1988).

Section 33(2) of the *Children (Criminal Proceedings) Act 1987* (NSW) provides "The Children's Court shall not deal with a person under subsection (1) (g) [that is, sentence of detention not exceeding two years] unless it is satisfied that it would be wholly inappropriate to deal with the person under subsection (1) (a)-(f) [that is, non-custodial options]". Section 35 requires the court to give reasons both as to why detention has been imposed, and why the lesser options were "wholly inappropriate". If the foregoing were not sufficient to deter courts from imposing custodial sentences, we have the community attitude represented, for example, by the rather emotive title of a

paper delivered by Associate Professor Kenneth Polk at the National Conference on Juvenile Justice in Adelaide in 1992 in the following terms "Jobs, not Gaols: a New Agenda For Youth". It is suggested here that virtually no juvenile offenders go to gaol —with few exceptions, those sentenced to custody are held in juvenile detention centres, which are mostly far removed from the style of adult gaols.

Juveniles sentenced to custody are likely to experience a degree of social stigma resulting from their incarceration. If this flows from community perceptions of their criminal behaviour, the result is probably inevitable, but if the stigma flows from the detention per se, there is a need for community attitudes to change. For detention to be seen as an integral part of an overall provision of rehabilitative services, the community should not see detention as an expression of failure or as a "throwaway" option. Rehabilitation can be as effective in an institution as in the community, and may even have some advantages. Arguably, the only difference should be between part-time community work and full-time detention work. Removed from the community pressures which promoted the offending behaviour, and faced with little to do other than participate in rehabilitation oriented programs, an offender ought to have his or her chances of successful intervention maximised. If there is an obvious shortfall in present systems, it is more likely to be in the area of inadequate post-release programs than in the area of custodial rehabilitation.

The principle objective of sentencing in the juvenile justice system should be to ensure that the offender is free of criminal behaviour as soon as possible, and in any case before reaching adulthood and the threat of adult gaols. As the then NSW Minister for Justice, Mr Terry Griffiths (1991) said "The time to deter a person away from a life of crime is when they are young, not once they have become entrenched in the system." In the same article, he also said, "Another of the failures of the juvenile justice system is the lack of post-release programs. All too often, juvenile offenders are being released back to the same environment from which they came. Therefore, the likelihood of them committing further crimes, of a far more serious nature, is increased." The Minister correctly identified that it is the pressure of the offender's environment, rather than a history of incarceration, which leads to increased risk of re-offending.

This view is supported by a study (Brown et al. 1991) which found:

> Of 243 juveniles adjudicated delinquent in juvenile court on their first referral to juvenile justice, 20% went on to adult prison after the age of 18. Of 233 juveniles not taken to juvenile court on their first referral to juvenile justice, 43% were imprisoned in adult life after the age of 18.

The study concluded, in part:

> Thus, the human cost of "giving the kid another chance" by not taking him/her to juvenile court on the first referral for a delinquent act and not having him/her adjudicated delinquent and put on probation or in placement, appears to be doubling the likelihood of his/her going to prison in adult life.

This study appears to lend support to my view that it is better to adopt seemingly harsh sentencing options for young offenders, if that is more likely to produce the result that they learn to accept responsibility for their criminal behaviour as juveniles, than not "getting the message" until they face Long Bay Gaol or its local equivalent. At the Australian Institute of Criminology's juvenile justice conference in Adelaide in 1992 there was much debate between proponents of the welfare model on the one hand and the justice model on the other. However, the two schools of thought are not mutually exclusive: the welfare model is most appropriate to first or minor offenders, the justice model should apply to the entrenched or serious offenders, with overlap where necessary.

In seeking guidance from the judgments of the higher courts as to appropriate sentencing principles, a somewhat confused picture appears. To assist comparison, only decisions of the NSW Court of Criminal Appeal will be quoted although a more draconian attitude may prevail in some other States. For example, in an unreported decision of *R v. Collins*, 17 July 1987, the court said that persons convicted of attacks of robbery on defenceless people may inevitably, notwithstanding their ages, expect custodial sentences. The Court, in *R v. GDP* (1992) 53 A Crim R 112, said:

> Quite different principles apply in the sentencing of young offenders . . . If general deterrence were a substantial consideration . . . then a custodial order would almost certainly be called for . . . rehabilitation must be the primary aim in relation to an offender as young as this applicant.

The Court substituted 12 months probation for the previous custodial order, in an offence relating to malicious damage to property, with a loss amounting to over $550 000. In a later decision (*R v. XYJ*, unrep. 15 June 1992), the Court said:

> . . . considerations of punishment and of general deterrence of others should, and may, properly be largely discarded in favour of individualised treatment of the offender, directed to his rehabilitation . . . This is not to say that considerations of general deterrence should be ignored completely when sentencing young offenders.

The Court went on to impose two cumulative terms, each of 18 months, for robbery offences, the defendant having an extensive prior record, with a recommendation for community youth centre release. In the case of *R v. Sherbon*, (unrep., 5 December 1991), the Court had substituted a sentence of one year's imprisonment for a non-custodial sentence on a charge of culpable driving causing death. The Court said:

> . . . there comes a point in the seriousness of the matter where objective features do not stand in the way of a resort to strong coercive punishment as the proper sentence to be imposed.

The difficulty with these decisions lies in the suggestion that it may at least be inferred that their Honours equated a custodial sentence with the

idea that rehabilitation stops as you enter the detention centre gate. If there is any foundation for this inference, then perhaps the courts have failed to draw an adequate distinction between the conditions of custody in adult gaols and in juvenile justice centres. As a current Children's Court Magistrate, and former Local Court Magistrate, I have visited both adult gaols and juvenile justice centres on a number of occasions. I am certain that conditions in the former are far more harsh and less conducive to rehabilitation than in the latter. This possible lack of distinction may be a carryover from community stigmatisation—after all, the courts are supposed to reflect community attitudes!

Community misconceptions are not aided by a comment which appeared in the *Guardian Weekly* of 14 March 1993. The British Government, in response to community outrage over the killing of two-year-old James Bulger, proposed the building of a network of secure detention centres. The journalist suggested that the Home Secretary, Mr Kenneth Clarke, "gave up the attempt to understand, and opted for locking up." Whilst I am happy that the Home Secretary's proposal should be the subject of vigorous public debate, such comments do little to aid the progress of informed commentary.

Sentencing Trends (Judicial Commission of NSW 1991) provided some valuable statistics. We in the Children's Court are heard to say "A small number of juveniles are responsible for the commission of a large number of the crimes we see in court." The report says:

> The vast majority of juvenile offenders in custody have a history of prior offending, with 95% having at least one criminal matter previously recorded against them. Approximately 12% had one prior proven offence, over 40% had two to five priors, over one quarter (28.2%) had six to ten priors, and the remainder (17.7%) had between eleven and thirty four offences on record (1991, p. 6).

These statistics would suggest that the dangers contemplated by Freiberg et al. (1988) are less serious than originally contemplated.

A common myth is that detention centres are colleges for crime. The statistics show, as do the sentencing practices of the Children's Court, that it is rare for any young offender to be sentenced to detention unless he is already experienced in crime. It is reasonable to suppose that, for many of those sentenced, the detected crimes do not fairly represent the whole range of their criminal activity. In simple terms, most detainees are already well skilled in crime. I am unsure as to what Frieberg et al. were referring to in using the term "brutality" (*see* quotation on p. 97 of this chapter). Did it refer to violence between inmates, or to a perception that the environment in detention has a brutalising effect? If the former applies, I would suggest that too little credit is given to the staff of the centres who maintain effective levels of internal security and discipline. In any case, the level of violence in the centre is likely to be considerably less than that experienced by inmates in the "outside world". If the latter applies, then I question the basis for such a conclusion. It seems to me that many detainees come from broken homes, are "street kids", have little recent experience of a secure, stable environment or are otherwise more at risk of environmental brutalisation than in the secure environment of

a detention centre. As to overcrowding, my most recent information is that centres in NSW at least are operating at only about two-thirds of capacity. It is unfortunate, to say the least, that the sentencing research paper referrred to contained language that tends to promote, rather than diminish, the process of social stigmatisation inherent in community misunderstanding.

An edition of the ABC current affairs program "Attitude" dealt with juvenile crime. The common perception of young offenders interviewed on the program was that they expected far less lenient punishment than was actually meted out to them, and that lack of an effective deterrent may contribute to re-offending. Perhaps it is far better to get the message across of the need to accept responsibility for the consequences of offending behaviour while still part of the juvenile arena.

The "last resort" concept of custodial sentencing is not being questioned. However, any directions intended to give effect to that principle should not be expressed in terms that imply that custody is something apart from the rehabilitation process. It is an integral part, and must be recognised as such. If the persistent offender's perception is that community based options are a "slap on the wrist", then his or her most effective rehabilitation will come from a period of incarceration. The programs offered will ensure that the offender loses nothing more than freedom to commit further crimes for a period of time, and should provide more than one useful alternative, including an opportunity to improve often deficient literacy skills.

The rehabilitative programs pursued in the juvenile justice centres use a range of options and innovative ideas. With all of the help being offered to young offenders in detention, the time is ripe for removal of the stigma and for this sentencing option to be seen as "just another step in the rehabilitation process".

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