# The 17 year old & crime

**by Jenny Blokland**

When His Honour Justice Mildren spoke of *Neither Fish nor Fowl*, he was not referring to the meal just consumed at the Roma Bar by a raucous bunch of criminal lawyers.

Justice Mildren delivered a thought provoking speech entitled *Neither Fish Nor Fowl -- The Problems of the 17 Year Old in the Criminal Justice System.*

His Honour's speech highlighted the problems associated with sentencing young offenders who are too old for the juvenile jurisdiction, and in many respects are not yet adults.

The problem was acutely highlighted by His Honour referring to *R v Finestone and Others* (NT Supreme Court, 8/5/92) when His Honour said: "In *R v Finestone and Others* I had to deal with four differently aged young offenders.

"One was 18, another 17, another 16 and another 14.

"They had all pleaded guilty to a pretty serious offence, but for various reasons, it was not appropriate to impose a custodial sentence.

"The 17 year old was 16 at the time of the offence.

"I ordered him to perform community service, without proceeding to a conviction.

"I could not have done this if he had been 17 at the time of his offence.

"But what do you do with the 18 year old?

"He was no worse than the 17 year old and was one day short of his 18th birthday when the offence was committed.

"He had no priors of any kind. I wanted to treat him the same way as the others.

"But I could not.

"He was not a juvenile.

"Principles of parity of sentencing suggested strongly he should not be dealt with more harshly than the others. The important thing was - not to record a conviction.

"But under the *Criminal Law (Conditional Release of Offenders) Act*, I had to convict him to impose a CSO under s20 and the Supreme Court has no power to order conditional release under s5 unless a conviction is recorded -- so once again I could not give him a bond and a CSO as a condition of the bond unless I convicted him.

"Section 4 of the Act allows the Court of Summary Jurisdiction to release a person on a bond without proceeding to a conviction, but that power does not extend to the Supreme Court.

"What to do?

"I have power under s392 of the *Criminal Code* to order a person to be discharged absolutely without proceeding to a conviction but I cannot use that power to attach a bond or CSO.

"In the end, I resorted to the common law bond. I adjourned sentencing him for 12 months and indicated if he was of good behaviour in the meantime, I would discharge him without conviction; but I still could not impose a CSO.

"So he got out of that, and there was nothing I could do.

"A particular problem of current interest is whether a 17 year old who committed his offence when 16 can be sent to a detention centre. The question came up first in *The Queen v Lui*. The problem arises because of s53(6) of the *Juvenile Justice Act*. This section says that if a juvenile is sentenced to detention at a detention centre, and will attain the age of 17 during the period of his detention, he can be detained in a detention centre 'but so that he is not detained in as detention centre during any period of the sentence after he attains the age of 18 years.'

"The Juvenile Court has no power to order detention for more than 12 months.

"Kearney J concluded that these sections combined meant that a Juvenile Court could not sentence a 17 year old to detention if he was 16 at the time of the offence; but he held that the Supreme Court could, because it had a special power under s39(1)(b) to order to detention for a period of greater than 12 months, although he declined to exercise that power in that case.

"I considered the same problem in *R v Williams*. That was a case of rape.

"As rape goes, I held it was at the bottom end of the scale, but I still thought that a head sentence of four years' imprisonment was required. At pp 15-16 of my judgment, I said: 'I do not consider a period of detention in a juvenile detention centre is appropriate. The maximum period of detention available to me, consistent with the philosophy behind s53(6) of the *Juvenile Justice Act*, is until the prisoner obtained the age of 18 years.

"As Kearney J observed in *R v Lui* (at 9) the policy of the Act is that it is considered inappropriate that persons should be held in detention centres beyond the age of 18 years; and there is no specific provision in the Act, as there is in other jurisdictions, for the conversion of a period of detention

into a period of imprisonment, after a detainee obtains the age of 18 years. There is no mechanism by which I can impose a head sentence comprising a period of detention until aged 18 with the balance to be served in prison. I therefore do not consider that detention is a realistic option in this case, given that I consider that a head sentence of four years' imprisonment is called for.'

"In *R v Hart*, earlier this year, another rape case where the prisoner was 16 at the time of the offence and 17 at the time of sentence, Angel J imposed a head sentence of four years with a non-parole period of 12 months, but directed that the prisoner be held at a detention centre until 18 and then the balance of the sentence to be served in prison.

"The DPP has lodged an appeal to the Court of Criminal Appeal. I will not comment that situation any further in case I have to sit on the case.

"Obviously, it is an issue of importance which will have to be solved. In the United Kingdom there is a special statutory provision for the conversion of a sentence of detention into a sentence of imprisonment after a detainee turns 18.

"Judges have been saying that our Act needs to be clarified on these issues for some time. The position of the 17 year old is a lot clearer in other jurisdictions. In NSW, SA, WA, the ACT and Victoria, the legislation makes it clear that the relevant age for the purpose of the Juvenile Court's jurisdiction is the age of the offender at the time of the commission of the alleged offence. Additionally, in NSW and Victoria, defendants must be sentenced as juveniles provided proceedings are commenced before a specified age. In NSW the specified age is 21, and in Victoria it is 18. In the ACT the criteria is whether the juvenile has turned 18 before his first court appearance. No system is entirely satisfactory. The defendant has no control over when the proceedings are commenced or when they are first brought before a court, and there are bound to be anomalies. And whatever system is used, it is unlikely that the legislature would wish persons over 18 to be sent to detention centres just because they were juveniles when the offence was committed.

"Some states now in fact define juveniles by reference to being under the age of 18, rather than 17: SA and WA. With respect, this seems a more sensible age limit than under the age of 17, and would cure the problem of the 17 year old without necessarily creating a problem for the 18 year old who, having reached adulthood, would probably not want to be sent to a detention centre with all the kids, anyway, although it appears that, at least in some jurisdictions, this may be technically possible."

In conclusion, His Honour suggested legislative intervention:

"The particular problem of the 17 year old would be eased, if not solved, if, as I suggested, the age of a juvenile was redefined to be less than 18. The 17 year old has been disadvantaged somewhat by the lowering of the age of majority to 18. This suggests that at 18, as an adult, full maturity and responsibility has been achieved -- a proposition which is quite inaccurate zoologically, and contrary to human experience over thousands of years. At 17, the callow youth is still liable to be at high school, playing out merely the second age of man, at least according to Jacques in *As You Like It*:

***"At first the infant,***
***Mewling and puking in the nurse's arms,***
***And then the whining school-boy, with his satchel,***
***And shining morning face,***
***creeping like snail,***
***Unwillingly to a school."***

His Honour's speech was well received by CLANT members.

In a speech of thanks, Richard Coates said he was pleased that the Supreme Court was taking an interest in the issues dealt with in Mildren J's speech.

At the urging of Bruce McCormack SM, CLANT members also passed a resolution supporting the establishment of a crime statistics unit in the Northern Territory.

It was noted that the Supreme Court often requires statistics during argument on appeals but meaningful statistics are not available.

Concern was also expressed at the lack of statistical material available to explain the still high levels of imprisonment of Aborigines in the Northern Territory and that there were no reliable statistics for formulation of sentencing policy.

CLANT members played Criminal Law Trivial Pursuit into the late hours. In celebration of the adversarial nature of criminal law, we also drew pictures of our favourite adversaries. A rogues gallery to exhibit the results is being arranged.

# Alternative sentencing study by legal service

The Darwin Community Legal Service has received a grant from the Alicia Johnson Memorial Trust to conduct a feasibility study into an alternative sentencing programme for juvenile offenders.

The co-ordinator of the study, Tony Kelly, said the detention rate of young offenders in the Northern Territory is four times the national average.

He said alternatives to detention could include: discussion with and apology to the victim; family conferences; compensation to the victim, and; addressing the social, employment or other needs of the offender.

The study is intended to specify a model for an alternative sentencing panel, formulate guidelines for its operation, identify appropriate panel members, identify administrative support needs, and address the legitimate criticism of existing panels in New South Wales and South Australia.

The study is expected to be completed and in draft form later this month and should be circulated in final, printed form early in the new year.