CRIME (SERIOUS AND REPEAT OFFENDERS) SENTENCING ACT 1992: A HUMAN RIGHTS PERSPECTIVE

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When Western Australia's Acting Premier announced early in January 1992 that State Parliament would be recalled early to pass "the toughest laws in Australia" aimed at "hard-core juvenile criminals",[1] the Federal Human Rights Commissioner, Brian Burdekin, denounced the proposal as in serious breach of Australia's international human rights obligations.

Other commentators expressed concerns about the injustice of the sentencing principles embodied in the Sentencing Act ("the Act"), namely, incapacitation and retribution; the unacknowledged fact that the majority of juvenile offenders covered by the Act are expected to be Aboriginal; and the notorious unreliability of existing data on which government projections as to the numbers affected were based, and from which individual criminal records (of "repeat offending") will be drawn. These concerns have not been addressed.

In the following weeks, the Premier announced two changes to the proposal which were intended to save the legislation from offending international standards. The first was to replace Executive review of juvenile detention with a provision for review by the Supreme Court. It was said that detention at the Governor's Pleasure amounted to "arbitrary detention".

The second, very late, change was to extend to adults that portion of the legislation which imposes mandatory indeterminate detention on a defined category of offender. This amendment was to meet the criticism that, without

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1. Media Statement, Premier's Office, 6 January 1992.

it, the legislation imposed a harsher regime on children than on adults, contrary to international law.

These changes, however, have by no means saved the legislation from criticism on the grounds of breaching human rights obligations. The objective of this note is to describe the principal ways in which it continues to do so.

1. THE SCHEME OF THE ACT

The Act is an attempt to target and "selectively incapacitate" certain serious multiple offenders and to require the court to consider the protection of the public and the situation of victims in sentencing of these and certain other offenders. Contiguous amendments to the Western Australian Criminal Code 1913 and the Western Australian Road Traffic Act 1974 authorise the imposition of much higher penalties for juvenile motor vehicle thieves.[2]

There are two basic regimes established by the new Act.

Sentencing Guidelines

The less severe regime of the Act applies to two categories of juvenile (only) offenders: 1. "serious repeat offenders" as defined; and 2. those committing a range of violent offences in the course of stealing a motor vehicle.

1. A serious repeat offender is one who is appearing for sentence on his or her seventh "conviction appearance"[3] for a listed serious offence in 18 months.[4] The serious listed offences include burglary, arson and stealing a motor vehicle aggravated by reckless or dangerous driving.[5]

2. These amendments have the effect of increasing the maximum penalties for a number of offences where the aggravating factor is that a stolen car was involved. The maximum penalty for dangerous driving causing grievous bodily harm is raised from 4 to 14 years and that for dangerous driving causing death from 4 to 20 years when aggravated by the fact of driving in a stolen vehicle: (WA) Road Traffic Act 1974 s 59. Causing grievous bodily harm when done in the course of stealing a car now carries a maximum penalty increased from 7 to 14 years: (WA) Criminal Code 1913 s 297. Finally, the maximum penalty for stealing is increased from 7 to 8 years when the aggravating factors are that the thing stolen is a motor vehicle and the manner of driving it is reckless or dangerous: (WA) Criminal Code (1913) s 378 (2).
3. A person may be convicted of more than one offence at an "appearance" in court. The Act is concerned not with total convictions but with appearances which resulted in conviction(s) of (or including) one or more of the listed serious or violent offences.
4. (WA) Crime (Serious and Repeat Offenders) Sentencing Act 1992 Sch 2 Pt 1.
5. Ibid, Sch 1 Pt 1.

2. The motor vehicle theft offenders are caught by this Act on each such offence and not only on their seventh in 18 months. It is not stealing a vehicle alone which brings an offender within the ambit of the Act, but the commission of specified violent offences in the course of that stealing.[6]

The Act requires the court sentencing juvenile offenders in either of these categories to apply prescribed sentencing guidelines in deciding whether to impose a custodial sentence and, if so, for how long.

Schedule 3 to the Act provides:

> The court sentencing an offender shall have regard to the need to balance rehabilitation with the protection of the community and property and shall also have regard to such of the following matters as are relevant and known to the court -
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> (a) the personal circumstances of any victim of the offence;
>
> (b) the circumstances of the offence, including any death or injury to a member of the public or any loss or damage resulting from the offence;
>
> (c) any disregard by the offender for interests of public safety;
>
> (d) the past record of the offender, including attempted rehabilitation and the number of previous offences committed whether prescribed offences or not;
>
> (e) the age of the offender;
>
> (f) any remorse or lack of remorse of the offender,
>
> and to any other matters that the court thinks fit.

Thus the guidelines clearly focus the court's attention on retribution and incapacitation as opposed to rehabilitation. Sentencing of juvenile offenders who are not captured by the Act will continue to be guided by principles which give primacy to the rehabilitation of juvenile offenders,[7] while sentencing of juvenile offenders under the Act must "balance rehabilitation with the protection of the community and property".

However, the sentencing court bound by the guidelines will be free to continue to take into account, as it sees fit, the individual circumstances of the offender before it, his or her best interests and the desirability of his or her reintegration into the community. In other words, there is still room for the court to design a humane sentence which is proportionate both to the gravity of the offence and to the circumstances of the offender.

6. Ibid, s 10.
7. *Yorkshire v The Queen* (unreported) Court of Criminal Appeal Supreme Court of Western Australia 20 June 1988 no 7169 per Wallace and Smith JJ:

> [I]t has been accepted by the courts that the reformation of the [child] offender is always an important, if not the dominant consideration, and that any sentences should be tailored with a greater emphasis on the future welfare of the offender.

Thus, although offensive to established sentencing principles on some grounds, the guidelines are of less concern, from a human rights perspective, than the remainder of the Act. With respect to "serious repeat offenders" and certain motor vehicle thieves, the Act leaves a fair measure of discretion to the sentencing court.

Mandatory Indeterminate Custody[8]

No such discretion is available with respect to "repeat violent offenders" - whether juveniles or adults. These are offenders convicted on their fourth appearance in 18 months for a listed violent offence or their seventh for a listed serious offence with the seventh appearance being for one of the listed violent offences.[9]

For these offenders, a sentence of detention or imprisonment is mandatory.[10] The sentencing court has no discretion. Ordinary sentencing principles, including the statutory rule that imprisonment should only be used as a last resort,[11] do not apply.

The sentencing court may determine how long (or short) the sentence of detention will be.[12] However, if the sentence imposed by the court is less than 18 months, the effect of the Act is to increase it to 18 months.

Moreover, release is not automatic after 18 months. The legislation imposes continued indeterminate custody on all offenders involved.[13] That period of indeterminate custody may only be terminated, in the case of juveniles, by the Supreme Court. In the case of adults, the effect is of a sentence at the Governor's Pleasure.

8. For further discussion on "Indeterminate Sentences" see N Morgan *Parole and Sentencing in Western Australia* supra.
9. (WA) Crime (Serious and Repeat Offenders) Sentencing Act 1992 Sch 1 Pt 2.
10. S 6 and s 7 apply to juveniles; ss 8 and 9 to adults.
11. (WA) Children's Court of Western Australia Act (No 2) 1988 s 26; (WA) Criminal Code s 19A.
12. In making this determination with respect to juveniles, the court must apply the sentencing guidelines set out above: s 6 (3).
13. In *Chester v The Queen* (1988) 165 CLR 611, the High Court held that indeterminate detention should be reserved for exceptional cases. The sentencing judge must be satisfied by acceptable evidence that the convicted person is so likely to commit further crimes that he or she represents a constant danger to the community.

Juvenile detainees, under the Act, have no standing to petition the Supreme Court for release.[14] Instead, the application for review of their custody must come from the head of Community Services (if they are in a juvenile detention centre) or of Corrective Services (if in a prison). The first application must be made within three months before the expiry of the 18 month determinate period and thereafter at 6-monthly intervals.

2. AUSTRALIA'S INTERNATIONAL OBLIGATIONS

Two principal United Nations ("UN") human rights treaties are relevant here. The International Covenant on Civil and Political Rights ("ICCPR") was ratified by Australia in 1980 and has since been incorporated into Federal law.[15] The Convention on the Rights of the Child ("CROC") was ratified in 1990 but has not yet been incorporated.[16] Both treaties are binding on the Australian Government at an international level. Federal legislation, policy or practice which is inconsistent with either will be in breach.

It is more complex to ascribe a legal obligation to the State in a federation such as ours to respect international treaties. The more common problem has been whether the Federal Government can be excused for failing to implement an international obligation on the ground that it has no constitutional power to do so, the matter being entirely within the jurisdiction of the States.[17] Nevertheless, the general rule is that a country cannot rely on its internal laws as a reason for breaching its international obligations. This general rule applies equally to unitary and federal states.[18]

14. Although the Supreme Court may allow the child to be heard (as required by article 12 of The Convention on the Rights of the Child), no standing is granted by the Act itself. In this respect, the Act risks breaching the International Covenant on Civil and Political Rights, art 9.4:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

15. (Cth) Human Rights and Equal Opportunity Commission Act 1986 Sch 2.
16. Incorporation is a positive obligation of the Federal Government in order to comply with the Convention: art 4.
17. This matter seems to have been resolved in Australia by the High Court's interpretation of the foreign affairs power as extending to the Commonwealth the power to pass laws for the implementation of its treaty obligations, within limits: *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1.
18. Vienna Convention on the Law of Treaties 1969 art 27. See also I Brownlie *Principles of Public International Law* 4th edn (Oxford: Clarendon Press, 1990) 35-36.

Australian practice is to withhold ratification of international agreements until national and state laws are in compliance or to enter a reservation to the provision(s) which a national or state law contravenes. A treaty is invariably circulated to all State and Territory Governments for comment and approval prior to ratification.[19] Whether this procedure legally binds the States has yet to be tested. Until now the moral and political obligation has been sufficient to ensure that no State Government has wilfully defied international standards to which the Federal Government has acceded with the States' approval.

Other International Standards

It should be noted that the international community has significantly elaborated on the basic principles in these international treaties. Minimum standards have been promulgated under UN auspices and adopted by the General Assembly. Although they do not have the status of international law, they are highly authoritative and persuasive, especially in this country which has been a leading participant in their drafting and a sponsor at the General Assembly stage.

Chief among these standards are the "Beijing Rules": the UN Standard Minimum Rules for the Administration of Juvenile Justice, adopted by the UN General Assembly in 1985. More recently, in 1990, the General Assembly adopted the UN Guidelines for the Prevention of Juvenile Delinquency (the "Riyadh Guidelines") and the UN Rules for the Protection of Juveniles Deprived of their Liberty. These UN standards contrast starkly with the underlying aims and with the substantive provisions of the Act. For this reason, they would repay study. The focus of this note, however, is on those provisions which are binding on Australia at international law.

3. FUNDAMENTAL PRINCIPLES OF JUVENILE JUSTICE

As noted above, it is the provision for mandatory indeterminate detention for juveniles which causes most concern from a human rights perspective. It is to this provision that the remainder of this note is addressed.

19. On this procedure as it was followed with respect to CROC, see B Burdekin "Transforming the Convention into Australian Law and Practice" in P Alston & G Brennan (eds) *The UN Children's Convention and Australia* (Canberra: Human Rights and Equal Opportunity Commission, 1991) 6, 8.

CROC details fundamental principles of juvenile justice with which the Act is in conflict. The guiding principle is the best interests of the child, as set out in Article 3.1:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

There has been no pretence on the part of the Western Australian Government that the requirement of mandatory indeterminate detention is in the interests of the children and young people to whom it will apply. The provision is, on the contrary, harsh and punitive. It will undoubtedly gravely prejudice the well-being of the young people to whom it is applied.

4. BASIC JUVENILE SENTENCING PRINCIPLES

Article 37(b) of CROC provides:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

Article 9 of ICCPR provides:

> No one shall be subjected to arbitrary arrest or detention.

Detention a Sentence of Last Resort

First, then, the use of imprisonment or detention must be a sentence of last resort for all juvenile offenders. The Sentencing Act, by way of contrast, makes detention the penalty of sole resort for those offenders fitting the definition of repeat violent offenders. It thus directly breaches Article 37(b). Moreover, this Article clearly requires that the sentencing court must have responsibility for considering alternatives to detention in the individual case. A statutory formula which denies the court's discretion in this matter, as does the formula set out in the Act, clearly breaches this requirement.

For the Shortest Appropriate Time

Second, if imprisonment or detention must be imposed, it must be "for the shortest appropriate period of time". Again it is clear that what is "appropriate" is something to be decided in the individual case, not in accordance with a blanket statutory rule such as that in the Act.

What is "appropriate" in the individual case is guided in the first instance by the principle of the best interests of the young person. Article 40 of CROC

also imposes limits on what is appropriate. The State and the courts are limited in how they may treat a young offender. All action must be "consistent with the promotion of the child's sense of dignity and worth", must take into account the child's age and also "the desirability of promoting the child's re-integration and the child's assuming a constructive role in society". Here the principle of "rehabilitation" is clearly spelt out as the aim of actions taken in the case of all juvenile offenders.

The Act, by mandating a minimum 18 month sentence for all violent repeat offenders, breaches the requirement that detention be for the shortest appropriate time. For some, at least, who fit the definition, a shorter sentence will be "appropriate". Yet the Act, by denying a true discretion to the court, overrides this principle, denying the right to the shortest appropriate sentence to some young people. Moreover, the use, for all, of continuing indeterminate custody aggravates the breach of this principle.

Must not be Arbitrary

Third, detention must be neither unlawful nor arbitrary. The term "arbitrary" is wide and perhaps somewhat vague. Nevertheless, it is used in the jurisprudence of many countries and we may properly rely upon its common usage in interpreting its meaning in international human rights provisions.[20]

Generally, the term refers to actions which are "unjust". Thus, "arbitrary" detention is detention "incompatible with the principles of justice or with the dignity of the human person".[21] In the Australian context, we might first consider the accepted sentencing principles relating to individually tailored sentencing, proportionality between the sentence and the offence[22] and the abhorrence of imposing a fresh penalty for an offence which has already been punished.[23] It is clear that section 6 of the Act stands well outside these

20. The ICCPR drafting committee explicitly acknowledged this in the final stages of its consideration of art 9, when it was argued that the term "arbitrary" should not be excluded because it is "legally valid" and commonly used in many countries and their courts: M J Bossuyt *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights* (Boston: Martinus Nijhoff Publishers, 1987) 201.
21. Ibid, 198, 201.
22. *Veen v The Queen (No 2)* (1988) 164 CLR 465, Mason CJ, Brennan, Dawson and Toohey JJ, 472.
23. In *Veen* supra n 22, the majority held that to give such weight to the offender's previous criminal history as to lead to a penalty which is disproportionate to the gravity of the offence would be to impose a fresh penalty for past offences: Mason CJ, Brennan, Dawson and Toohey JJ, 477.

accepted principles of just sentencing. A category of juvenile offenders is singled out, without reference to sound criminological understanding, and subjected to treatment of the harshest kind.

The term "arbitrary" also refers to actions which are "capricious" or without reference to fixed standards. The continued indeterminate detention of people pursuant to the Act is arbitrary in this sense because of the absence of standards against which the Supreme Court is required to review that detention.

Must be Proportionate

Fourth, the sentence imposed must be proportionate. Article 40.4 of CROC provides in part:

> A variety of dispositions ... shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Here is a further clear statement that sentencing, in the case of juveniles at least, must be individually tailored. Thus, a sentence is disproportionate if, like the mandatory detention imposed by the Act, it ignores the individual circumstances of the offender.

Proportionality must also refer to general principles of sentencing and community standards. A sentence is disproportionate if it is guided by aims which are unjust, merely punitive or inhumane. It is strongly arguable that the Act is punitive in intent and will operate unjustly. Proportionality must also refer to the specified and internationally agreed aims of juvenile justice: the rehabilitation or reintegration of the young offender and the protection and promotion of his or her best interests. There is no evidence that prolonged detention can achieve rehabilitation; in fact, quite the contrary. In any event, incapacitation and not rehabilitation is the clear aim of this Act.

Must be Capable of Review

Finally, both conviction and sentence must be capable of judicial review. Article 14.5 of ICCPR provides:

> Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

The right of appeal, which is an essential element of a fair and just criminal justice system, is also required by Article 42.2(v) of CROC.

The Act permits no right of appeal which could overturn the mandatory indeterminate custodial sentence applicable to violent repeat offenders as defined.[24]

5. CONCLUSION

Western Australia's new Sentencing Act is in grave breach of Australia's human rights obligations as they apply to children and young offenders.[25] Instead of establishing programs for young offenders which are humane, just and principled, the State Government has opted out of its responsibilities for just those young people most in need of its attention and care.

24. The Human Rights Committee (established by the ICCPR) has interpreted the phrase "according to law" in Article 14.5 as "not intended to leave the very existence of the right to review to the discretion of the States parties": D McGoldrick *The Human Rights Committee* (Oxford: Clarendon Press, 1991) 431.

25. In May 1992 the WA Standing Committee on Legislation (Chair: G Kelly) presented its first report on the Act. The Committee concluded "that there are serious concerns that the legislation not only breaches the letter but also the spirit of those treaties [ie to which Australia is a signatory]": First Report on The Crime (Serious & Repeat Offenders) Sentencing Act 1992 and The Criminal Law Amendment Act 1992 (Perth: Parliament of WA, 1992) 5.