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CRIMINAL JUSTICE MATTERS

THE OPENING DOOR

Reflections on the Criminal Justice Act 1991

The Criminal Justice Act 1991 is a welcome step towards a more rational statutory framework for sentencing.

The Act contains the tightest legislative restrictions ever imposed on the use of custodial sentences - tighter than those currently applying to the custodial sentencing of young offenders, which since 1982 have helped to achieve a substantial reduction in the use of custody for those under 21. The new criteria for community sentences, which relate the restrictiveness of the penalty to the seriousness of the offence, should help to keep the most intrusive penalties 'up tariff' and to prevent their use for minor offences.

The means-related 'unit fine' system will be fairer, as financial penalties will have a more equal impact on the poor and the well-off. The Act's requirements for mandatory pre-sentence reports give probation officers and social workers a key opportunity to persuade courts of the desirability of community sentences in many cases where imprisonment would now be used. All these features of the Act should help to achieve a lower use of custody and a more appropriate use of community sentences (1). Also welcome is section 95 of the Act, which contains the first ever recognition in statute law of the duty of those administering criminal justice to avoid discrimination.

However, simply setting out new criteria for sentencing in legislation does not guarantee that they will be followed in practice. Research into the early days of the 1982 Criminal Justice Act's criteria for custodial sentencing of young offenders showed that some courts were treating these criteria cursorily or even ignoring them. A key factor in making the criteria effective was the impact of appeals, which led to the quashing of many custodial sentences as incompatible with the sentencing criteria in the Act. Appeals are likely to be just as important in ensuring that courts take the provisions of the 1991 Act seriously.

Moreover, a clear lead from the Court of Appeal on sentence lengths is crucial to avoiding an increase in the prison population following the Act's changes in parole and early release arrangements.

Community Sentences and Breach

The Act empowers courts to use a range of new and intensive combinations of community penalties not currently available to them. The purpose of the legislation would be defeated if these new intensive combined penalties were to 'slip down the tariff' and replace existing less onerous sentences. An allied danger is that, if unrealistic combinations of requirements are imposed on offenders, this could lead to a high rate of imprisonment for breach. The targeting of proposals in pre-sentence reports will be important in ensuring that intensive community sentences are reserved for serious cases and that 'packages' of requirements are realistically geared to individual offenders' ability to comply with them (2).

It will also be important for probation officers and social workers to make appropriate use of their professional discretion when considering breach proceedings. The National Standards for probation and supervision orders stipulate that an offender should normally be breached after at most three failures to comply with the order. However, they give the supervisor a degree of discretion in judging whether an apparent failure to comply should be recorded as such; allow supervisors to take into account the offender's personal characteristics, which may affect the degree of premeditation behind an apparent failure to comply; provide that after three instances of failure to comply a probation or social services manager may, exceptionally, approve the continuation of supervision without breach if this is strongly in the interests of the order's objectives; and say that instances of failure to comply more than six months previously may be discounted when totting up whether there have been three or more failures requiring a return to court.

If this considerable degree of discretion is understood and used properly, it should reduce the risk of breaches in inappropriate cases, while ensuring that offenders are breached where this is needed to bring about their co-operation with supervision or where refusal to comply means that supervision is no longer viable.

The Youth Court

Many of the Act's provisions on young offenders are welcome, including the abolition of custodial sentencing for 14 year olds, the new twelve month maximum sentence for 17 year olds and the phasing out of juvenile remands in custody.

However, the Act's provisions on parental responsibility have given rise to widespread concern among social workers and many magistrates, who see them as likely to increase the severe pressure which many such families already face. Courts and pre-sentence report writers must pay particular attention to any factors which would make it unreasonable or undesirable to use these powers - for example, if the parents have genuinely tried to control and discipline the child; if punishing the parents would increase resentment and further aggravate tensions between parents and child, thereby putting the young person even more at risk; or if it is desirable to make the young person face up to responsibility for his or her own actions rather than sloughing this off on to the parents.

The introduction of 17 year olds into the new youth court provides both an opportunity and a danger - the opportunity to bring those aged 17 within the constructive sentencing tradition of the juvenile court; and the danger that a youth court numerically dominated by 16 and 17 year olds will result in a more 'adult' atmosphere in which younger people are dealt with in ways more appropriate to dealing with older offenders. A great deal of hard work and joint effort will be needed in a partnership involving social services, the probation service, voluntary agencies and the courts if the opportunity is to be taken and the danger counteracted.

This means clear inter-agency agreements over the criteria for proposing particular community sentences in individual cases. In the case of 16 and 17 year olds (for whom there is a choice between supervision and probation orders) supervision orders should be seen as the norm, probation orders as being justified in specific cases for good reasons, and combination orders as rarely being appropriate in the youth court.

Conclusion

Taken overall, the Criminal Justice Act 1991 has the potential to bring about a more rational and coherent sentencing framework which uses custody more sparingly and community sentences more appropriately. Whether if fulfils this potential in practice will depend on the joint efforts of all agencies working in the criminal justice system to make the best use of the Act's many positive features.

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References

(1) 'Sentencing - The New Framework', NACRO, 1992 £1.50.
(2) 'Pre-sentence Reports: A Handbook for Probation Officers and Social Workers', NACRO, 1992, £2.50.