***"The first HMP detainee, Sidney Clements (convicted of murdering his young step-brother in 1915), served only two years before being released on licence."***

# Detention during HM's pleasure

**Kate Akester** examines sentencing practice in serious juvenile crime.

The much publicised killing of James Bulger and its aftermath, including the controversial trial of two eleven year olds (Jon Venables and Robert Thompson) in an adult crown court, have awakened interest in the treatment of serious juvenile crime generally. One consequence has been that a great deal of legal attention has been paid to the mandatory sentence for young people convicted of murder, *Detention During Her Majesty's Pleasure.*

The nature of this sentence is under scrutiny. The Home Secretary will be making an announcement in Parliament at about the end of October, in which he will indicate his response to the House of Lords judgement - largely on this very subject - in *Ex parte V and T (12 June 1997).*

## Children Act

To begin at the beginning. The sentence first appeared in the 1908 Children Act, at the same time as the sentence of death for 8-16 year olds was abolished. This form of indeterminate detention became mandatory for this age group (it now applies to 10-18 year olds) convicted of murder. The original idea was that it should be an essentially rehabilitative measure; and the first HMP detainee, Sidney Clements (convicted of murdering his young step-brother in 1915), served only two years before being released on licence. The 1933 Children and Young Persons Act recast the sentence in its present form, and we know from Home Office records (Instructions to Governors 1949) that reviews were to be conducted annually at least, and that the detainee was to be released at the earliest possible moment, allowing for a degree of punishment and successful rehabilitation.

The 1983 changes to the parole system swept HMP detainees into the same bracket as adult mandatory lifers, with the consequence that tariffs (minimum periods of detention) were set by the Home Secretary in accordance with his view of the period required for punishment. The judiciary were consulted, and gave their opinion in the form of recommendations.

## The European court

The changes in the administration of discretionary life sentences (for crimes other than murder) enshrined in the Criminal Justice Act 1991 formed the background for the European Court of Human Rights challenge (Hussain and Singh 1996), which established that HMP detainees were more equivalent to them than to mandatory lifers. The Court accepted that youth, with its enhanced ability to mature and change, had the effect of diminishing responsibility. The rationale of the sentence was declared to be therapeutic and preventative, although a punitive element was also incorporated. As a result, the Crime (Sentences) Act 1997 includes a provision to give the Parole Board, rather than the Home Secretary, the power to direct release in these cases. They have been exercising it in discretionary lifer cases since 1992.

The decision in Hussain and Singh was one of the main planks in the *Ex parte V and T* arguments, which were concerned with attacking the Home Secretary's power to set tariffs for young people, a point which had not been raised in the ECHR. The majority view in the House of Lords was that although the setting of tariffs remained legal, they could not be set in stone at an early stage. Rather they had to be provisional and reviewable, and the welfare of the young person had to be taken into account as well as his/her punishment. In the words of Lord Hope, "The sentence must be approached from the outset with a view to their rehabilitation and reintegration into society, once they have served the requirements of punishment and it is safe for them to be released".

## The need for flexibility

JUSTICE submitted an *amicus* brief to the House of Lords in *Ex parte V and T.* We referred to

Julie Grogan

**Tuesday 4 November 1997**

***The incorporation of the European Convention on Human Rights and criminal proceedings.***

Lord Williams of Mostyn, Parliamentary Under-secretary of State at the Home Office, will speak at 7 pm after the ISTD AGM in the Great Hall of King's College London.

*RSVP to ISTD if you wish to attend. 0171 873 2822.*

**ISTD**

**AGM**

international law principles on the aims of imprisonment for children, and their bearing on English law. These principles were illustrated by reference to the Canadian system, which features recent legislative change in this precise area. The keynote of the system that has emerged is flexibility. The current arrangements recognise the particular needs of children, the differing circumstances of the offence and ages of the offenders, and the need to protect the public. They do so by acknowledging the need for gradations at the time of sentencing; but, equally importantly, by allowing review of sentencing disposals by reference to the development and progress of the young person.

## Postscript

As a postscript it is worth recording that Abed Hussain, whose application to the ECHR is mentioned above, himself came before the Parole Board in June this year. They made it clear that his release should not be delayed further. He had served 19 years in detention. It is likely that if he had had the benefit of a provisional reviewable tariff (as per the House of Lords) and an oral hearing at an earlier stage he would have been released some years ago. His case was an example of Parole Board recommendations not being accepted by the Home Secretary. It is time politicians lost their role in these types of decisions altogether. ■

***"It is time politicians lost their role in these types of decisions altogether."***

Bearing this example in mind, we await Jack Straw's forthcoming announcement with interest. It should include an immediate review of all HMP detainees' tariffs, together with proposals for regular review thereafter, in line with the majority in the House of Lords, the UN Convention on the Rights of the Child, and the International Covenant on Civil and Political Rights.

The *Ex parte V and T* case will now proceed to the ECHR, which may well decide that the Home Secretary should not have the power to set tariffs for young people at all. It is also likely to be considering the appropriateness of adult courts for children as young as 10.

*Kate Akester is legal officer at JUSTICE.*

# Sentenced by the media?

**Andrew Ashworth** advocates a reappraisal of public opinion about crime and sentencing.

The prison population has risen from some 40,000 in January 1993 to around 63,000 in summer 1997. In this year's Eve Saville Memorial Lecture, "Sentencing in the 80s and 90s: the Struggle for Power" (available from ISTD, price £1.50) I argued that the greater use of custodial sentences by the courts was not required by any legislation that has been passed. In his Police Foundation lecture, delivered on July 10th, the Lord Chief Justice, Lord Bingham, seemed to agree with that. The rising prison population is the result of increased severity in the sentences handed down by magistrates and judges; and Lord Bingham had "no doubt that it is related to the pressure of public opinion."

## "Pressure of public opinion"

What is this "pressure of public opinion", and how does it make itself felt? Of course there are many shades of opinion among members of the public, from soft through to harsh. Findings from the British Crime Survey in recent years do not give the impression of a generally punitive public, baying for tougher sentences. There has always been considerable support among victims for greater emphasis on compensation and on community sentences. So the Lord Chief Justice's reference to "public opinion" seems not to be a ref-

***"No criminal justice system can afford to operate in ways that are at odds with widespread public views. But public opinion should not be confused with political rhetoric or with the opinions put about by the mass media."***

erence to the results of careful studies of large sections of the public.

## The political dimension

It seems more likely that Lord Bingham was referring to two other forces, politicians and the mass media. In recent years several politicians, most notably the former Home Secretary Michael Howard, have "talked up" sentencing levels and have claimed that "prison works". There is a deep suspicion that many of these statements are more concerned with the advancement of the maker's political career than with presenting a balanced view of the available evidence.

As for the media, large sections of the popular press select a small minority of the available crime stories and present them in a way designed to enhance the sale of their newspapers. Lord Bingham, in his Police Foundation lecture, complained that judges have been continually attacked for their leniency during the very period when they have been increasing substantially the level of sentences. This is further testimony to the selectiveness of the media. The drive to produce "news" which can be presented as "sensational" leads inevitably to the projection of an unbalanced impression of the criminal justice system. Moreover several newspapers, like many politicians, are more concerned to pander to a "macho" view of law and order, in the hope of boosting sales, than to deal more thoughtfully with the issues.

We return, then, to the Lord Chief Justice's suggestion that the courts, in increasing their use of imprisonment, have been responding to "pressure of public opinion." What is wrong with this is not so much Lord Bingham's view that public opinion counts, as his view of what counts as public opinion. No criminal justice system can afford to operate in ways that are at odds with widespread public views. But public opinion should not be confused with political rhetoric or with the opinions put about by the mass media.

## Media reporting

Of course it would be naive to expect newspapers and television programmes to present balanced, textbook accounts of every topic they deal with. It would hardly be realistic to propose that, just as cigarette packets must carry a health warning about smoking, every story about crime or sentencing should be followed by a warning that newspaper stories are not designed to give a balanced view of the criminal justice system as a whole — even accepting that criminal justice is a serious issue of social policy, which should not be treated lightly. But there are some sections of the media which have not behaved irresponsibly on this serious issue.

There have been television programmes and articles in the broadsheets which have sought to give a more rounded view of the problems. Moreover, at the time when Michael Howard was whipping up support for the minimum sentences now contained in the Crime (Sentencing) Act 1997, the Evening Standard published a thoughtful editorial in which it argued that "by placing the foremost emphasis in his policies upon sentencing and harsher prison regimes, [Mr. Howard] gains a certain crude popularity at the expense of deceiving the British people — and perhaps himself — about crime and punishment" (February 14th, 1997). But this is notable chiefly for being so unusual among popular newspapers.

## A need for a 'replacement discourse'

There is a need to develop what some criminologists have called a "replacement discourse". In other words, the repressive approach to discussing law and order must be replaced by a more constructive language which emphasises that there are many more promising ways of preventing crime than imposing more imprisonment; that we should be looking at a more integrated social policy which encompasses crime rather than assuming that the criminal justice system can bring about improvements; and so on. The "macho" approach to crime and punishment must be attacked as a deception — to adopt the *Evening Standard's* words. And the judges and magistrates must re-assess their own approach. Lord Bingham's idea of public opinion is, unfortunately, leading them in the wrong direction. ■

***Andrew Ashworth** is Vinerian Professor of English Law at the University of Oxford.*

## The Work of the Prisons Ombudsman

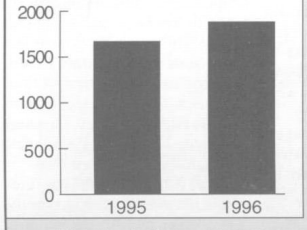
*The Annual Report of the Prisons Ombudsman was presented to Parliament in July 1997*

*The following extracts from it are reproduced by kind permission. Copies may be obtained from the Ombudsman's Office at St Vincent House, 30 Orange Street, London WC2H 7HH. Tel: 0171 389 1527*

**Number of Complaints**

- During 1995, I received 1,699 letters of complaint. In 1996, my office dealt with 1,897 complaint letters, an increase of 12%. In addition, I received a large number of telephone enquiries about complaints which involved a significant proportion of staff time.

**Figure 1: Number of complaints**

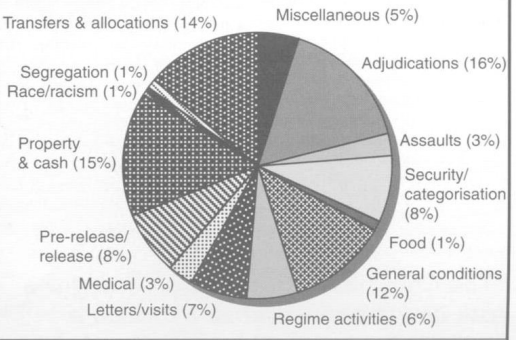



- 137 of the complaint letters received in 1996 had previously been aired with me. The true number of grievances raised with this office in 1996 was therefore 1,760.
- The rise in the number of complaints being made to me was not surprising. Over the same period, there was a general increase of 11% in the prison population and a large number of policy and procedure changes directly affecting prisoners were implemented in 1996.

**Breakdown of Complaints**

The breakdown of the complaints received during 1996 was as follows:

**Figure 2: Complaints by category**




The pattern of complaints received was similar to last year, with property, transfers and allocations, adjudications and general conditions giving rise to the greatest number of complaints.