

**WELFARE:
THE KEY TO JUVENILE JUSTICE IN MALAYSIA?**

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Introduction

The focus on welfare in cases of juvenile¹ delinquency in Malaysia can be traced as far back as 1946 when the Malayan Union government proposed a separate Act for the treatment of juvenile delinquent after the Second World War. The focus of the proposal was on 'the treatment of juvenile delinquency and the steps necessary in the interest of juvenile welfare....'² The system in England which was based on the welfare and treatment system was referred to and in 1947, the *Juvenile Courts Act 1947* (Act 90) was passed.³

The 1947 Act most significantly introduced the Juvenile Court, a special court to try all juvenile offenders. Section 2 of the Act amongst others defines juvenile as a person aged 10 and under 18 years; made provisions for anonymity of offenders in section 5, provided sentencing procedures and abolished the death sentence on juvenile. Special orders such as probation, approved schools⁴ and The Henry Gurney School⁵ were provided for.

In 1995, Malaysia ratified the United Nation's *Convention on the Rights of the Child*⁶ (CRC). The CRC which was adopted by the United Nation's General Assembly in 1989 significantly emphasize that the 'best interest of the child' shall be the primary consideration in all matters when dealing with a child. A great deal of time was spent in dialog on how to implement the treaty in order to protect and advance the position of children. Thus, in January 1996, a Cabinet Committee was set up to discuss steps to be taken to eradicate social ills in the country. An action plan called 'The Social Action Plan' (PINTAS) was set up and PINTAS recommended that laws relating to social aspects and protection of children should be reviewed. Three statutes concerning the protection of children and social ills were reviewed. They were the *Child Protection Act 1991* (Act 468), which concern abuse and protection of children, the *Women and Girls Protection Act 1973* (Act 106), which concern the protection of girls and women under the age of 23 years, and last, the *Juvenile Courts Act 1947* (Act 90), which concern juvenile delinquency. In consequence of the review, in 2001, the *Child Act 2001* (Act 611) was passed and at the same time the three Acts above were repealed. The Child Act 2001 (The Act) encompasses the three Acts above. The main objective of the Act was to unify laws relating to child-care, protection and rehabilitation as well as to provide remedial measures available to all courts with jurisdiction over children.

In line with the spirit of the CRC, the word 'juvenile' was replaced with the word 'child' and under section 2, a child, for purposes of criminal proceedings is a person aged 10 and below the age of 18 years. A child under the age of 10 years is recognized as a *doli incapax*.⁷ At a glance the Act seems to have taken a further step into promoting welfare in the administration of juvenile justice. The preamble amongst others reads;

Acknowledging that a child, by reason of his physical, mental and emotional immaturity, is in need of special safeguards, care and assistance, after birth, to enable him to participate in and contribute positively towards the attainment of the ideals of a Malaysian society.

Welfare according to the Oxford Dictionary includes wellbeing, health, benefit, happiness, and interest. Thus, treatment on a juvenile must benefit the child's wellbeing, health and interest and it should also be fair to the child. Part 10 of the Act provides for criminal procedure and has incorporated or amended most if not all provisions of the *Juvenile Courts Act 1947*.

¹ The word juvenile/child is used interchangeably in this article. It signifies a person aged 10 and under the age of 18.

² Proceeding of the Advisory Council Malayan Union 1947. B172.

³ Repealed by Child Act 2001.

⁴ Schools under the Social Welfare Department Malaysia.

⁵ Detention centre run by the Prison Department Malaysia.

⁶ GA Res 44/25 (1989) 28 ILM 1448.

⁷ Section 82 Penal Code (Act 574).

Court For Children

The Juvenile Court has been renamed Court for Children by the Act. Section 11 of the Act provides for the constitution and jurisdiction of the Court for Children for the purpose of;

- (a) hearing, determining or disposing of any charge against a child; or
- (b) exercising any other jurisdiction conferred or to be conferred on Courts for Children by or under this Act or by any other written law.

The Court for Children consists of a Magistrate who in the exercise of his functions as a Court for Children is assisted by two advisers. The two advisers are appointed by the Minister⁸ from a panel of persons resident in the state where the Court for Children presides.⁹ Section 11(3) provides that one of the advisers shall be a woman. It is believed that this will bring a balanced view in which will benefit the child. The function of the advisers is provided in section 11(4);

- (a) to inform and advise the Court for Children with respect to any consideration affecting the order made upon a finding of guilt or other related treatment of any child brought before it; and
- (b) if necessary, to advise the parent or guardian of the child.

Unlike the old provision in the Juvenile Courts Act, section 11 does not only provide that one of the advisers shall be a woman, the proviso appears to arm the advisers with a wider role to advise not only the court but also the parent or guardian of the child. Advisers play a significant role in the administration of juvenile justice. This is because the Court for Children is bound by the justice model from the commencement of the case until the guilty verdict. Once the verdict is announced, the court is to make an order on the child. At this stage, the advisers are to advise the court on what they think is best for the child taking into consideration the needs of the child rather than his deeds. This is where the welfare orientation takes over. Then in commencing its judicial role in making an order, the court must consider the advisers advice¹⁰ although they are not bound by the advice. The court must state its reason for not taking the advice of the advisers in making his order.¹¹

Much emphasis has been placed on the role of the advisers but whether the advisers play their respective role remains a question to be answered. Presently, all advisers are selected by the Social Welfare Department of the respective states in Malaysia. The criteria for court advisers are; he or she must;

- (1) have experience and knowledge in the development and the wellbeing of children,
- (2) a resident of the state (part of the community)
- (3) is able to advise the Court for Children on the welfare of the child for the best interest of the child and his future
- (4) graduated from high school with at least a Malaysian Certificate of Examination (MCE/SPM)¹²
- (5) priority is given to civil service pensioner and those involved in social welfare activities
- (6) not a bankrupt
- (7) is willing to work whenever requested.¹³

The criteria above assume that the advisers are able and equipped to advise the court of matters involving the best interest of children. It must be noted that the advisers are not trained nor are they knowledgeable in the procedure of the Court for Children. They are not exposed to the juvenile justice system prior to becoming advisers. Some do not even know why they are there and some do not think that their role is important.¹⁴ Many a time the advisers are retired teachers, head masters and civil servants. In order for the Court for Children to operate effectively, the two advisers must actively participate as advisers. The spirit of the Act will be defeated if the two advisers do not participate and advice actively in a particular case. These advisers have to play their respective roles and not just be there because the law has provided for them to be there. Advisers are important as most of the time Magistrates who preside in the Court for Children are young graduates or those who have very little or no contact or very little or no experience with children. In making its decision, Court for Children is not only concerned with adhering with the law but also in making an order that suits the welfare of the child.

The importance of the role of advisers is stated clearly by the Act in section 11(17), whereby the Courts before deciding on the order to be imposed, ... shall ascertain from each of the advisers his opinion and all such opinion shall

⁸ Minister means Minister in the Prime Ministers Department.

⁹ Section 11(2) of Child Act.

¹⁰ Section 90(17) Child Act 2001.

¹¹ Section 90(18) Child Act 2001.

¹² Equivalent to "O" Level Examination.

¹³ Criteria supplied by the Social Welfare Department Malaysia.

¹⁴ Reported by the Social Welfare Department Malaysia in their request to writer to draft module for the training of Court advisers.

be recorded. But the court has an upper hand in accepting or not accepting the advice. Although the Court is given the discretion not to accept the advice, it is duty bound to state reasons for its rejection. In this case the Act has provided for a form of check and balance in the interest of the child.

In response to the criticism of the lack of experience and knowledge of advisers, the Social Welfare Department Malaysia has taken a step in preparing modules for the training of court advisers which is expected to be ready and implemented by the end of 2007.¹⁵

The Courts Approach

There has been mixed approach by courts in Malaysia over the years in juvenile cases. In 1978, a boy aged 14 years was convicted and sentenced to death by the High Court for the offence of possession of a pistol and ammunition under the Internal Security Act 1960.¹⁶ However, he was granted clemency by the King. His death sentence was commuted to a detention at the Henry Gurney School.

Section 91(1) of the Act provides the court with types of dispositions as soon as an offence is proved against a child. The court can admonish and discharge the child, or discharge the child on bond of good behaviour, or order the child to be placed in the care of a relative or proper person, or order the child to pay a fine, or order him to be whipped with a light cane, or imprison him, but imprisonment should be the last resort.

Although the juvenile justice system in Malaysia seems to focus on the welfare system, this does not deter the court from using the justice approach, paying more attention on the offence rather than the best interest of the child. This is illustrated by the case of *Sarithan Pachimuthu v Public Prosecutor*,¹⁷ the judge in sentencing a 17 year old boy preferred the justice model and 'just desert', to sentence the boy to 10 years imprisonment. The judge said;

*'The probation report was not in his favour. Besides the offence, the offender had committed three armed robberies, two of which were committed during the period of bond in respect of the first offence. Therefore, he had disregarded the bond that his parents had executed for his proper care and he had also ignored the probation order. He failed to make good use of the opportunity during the bond to turn over a new leaf. Instead, he resorted to more crimes. Thus, by committing this offence, the offender did not seem to have repented and learned a lesson to lead an honest living. He was not too young and immature as not to know what he was doing. He even told his mother that he wanted to be rich so that his family and relatives love him.'*¹⁸ Since he was so brave to commit this offence, he must also be brave to suffer the penalties prescribed by law. Persons indulging in this type of offence are a scourge to society and unless the courts treat deterrence and public interest as vital factors in sentencing, the whole purpose of enacting section 39A(2) ... which imposes life sentence or imprisonment not less than five years and whipping of not less than ten strokes would be meaningless. Thus, in this type of offence, the public interest should never be relegated to the background and must of necessity assume the foremost importance. Hence, the offender must be punished accordingly.

However, the judge in *A Juvenile v PP*¹⁹ approached the case differently. The judge in his judgment clearly had the best interest of the child in mind. The appellant in this case was charged with theft of a motor vehicle, an offence under section 379A Penal Code and pleaded guilty. The child was supposed to sit for his final examination (SPM) but was not able to because the Magistrate had ordered him to be detained in the Henry Gurney School. The Henry Gurney School failed to arrange for him to sit for his examination. Ian HC Chin J held,

The first question that comes to mind is this. Why is the detention order preferred instead of allowing the juvenile to prepare and sit for his SPM? As events turned out, even the school did not arrange or prepare him for examination. The learned Magistrate was, it seems to me, of the view that the examination would not matter because the juvenile's 'performance at school is weak'. But that he is going to fail. After he has made it until Form V. With the proper tuition he could very well turn out to be a prospect. In every event, providing him with the proper education is a matter of great importance as with education, the path to a good paying job is open to the juvenile and this will provide him with an alternative to crime as a way of life. So the court must encourage him to sit and

¹⁵ The writer has been appointed as consultant of the project. Research is currently going on.

¹⁶ *Lim Hang Seoh v PP* [1978] 1 MLJ 68.

¹⁷ [2000]5 CLJ 15.

¹⁸ Emphasize by writer.

¹⁹ [2003] 1 CLJ 171.

do well in his SPM examination instead of dismissing him as having no prospect of making it which the learned Magistrate seems to have done.

The learned magistrate should weigh the alternatives, that is of sending the juvenile to the Henry Gurney School or of letting the parents take care of the juvenile, to see which is better. The seriousness of the offence does not weigh much nor the rampancy of such offence. It is the interest of the public that the juvenile realizes his mistake²⁰ which he does and that he be properly educated so that he will not be a bother in the future which letting his parents take care of him will provide. What the learned magistrate failed to appreciate is that this is not a juvenile hell bent on life of crime but who was placed in a dilemma where, not unexpectedly given his age and fear for damaging the car, a wrong decision was made....

In the premises, the order of the learned magistrate handed down on 17 April 2001 is set aside. In its place is the order of discharge after he has been admonished.

The use of a minor type of disposition above illustrates that the main factor that the court must consider is the future of the child. This was also thought to be significant by the judge in *Re KWK (A Child)*.²¹ The Court of Appeal took into consideration the need for ensuring that the welfare of a child is considered when considering the application for a stay of execution of sentence on the child. The child in this case was found guilty of an offence of murder, an offence under section 302 Penal Code on 1 July 2003. The child was ordered to be detained in prison at the pleasure of the Yang di-Pertuan Agong pursuant to section 97(2) of the Child Act 2001. Notices of an appeal were filed against the orders made. An application for a stay in execution made in the High Court was dismissed.

During the Appeal, the Court of Appeal took an unprecedented step making sure that the child's education is not interrupted during his stay in prison. In doing so, the court took into account affidavits of two officials namely the Prison officer and the District Education officer. In essence, the District Education officer gave assurance that the education needs of the child would not be neglected. The Department gave the assurance that they will provide for teachers to come to prison to tutor the child twice a week. The child was also allowed to bring along his own educational material to ensure that he could complete his E-School on line and A Score programme. An internet line was also being installed to enable the child to surf the net for purpose of education. The prison authorities on the other hand, were willing to allow access to the child even outside visiting hours of the prison.

The case above demonstrates the move of courts towards a more welfare oriented approach in cases involving juveniles. However it must be noted that the steps taken by the court in *Re KWK (A Child)* is an unprecedented one as the court had made a bold move in making it its duty to make sure that the child's welfare and his education is not compromised even when he is incarcerated in prison.

Anonymity²²

Anonymity is one of the most significant aspects of welfare. It is vital in the protection of not only the present but also the future wellbeing of the juvenile. Both the Juvenile Courts Act 1947 and the Child Act 2001 seek to protect the offenders by providing for a different place and time of sitting of the court, limiting persons attending the proceedings and by not reporting the identity of the offender.

Under the Juvenile Courts Act, section 5 provides that, if practicable the Juvenile Court sits either in a different building or room, or on other days, from which normal court sitting is held. Persons allowed to be present are members and officers of the court, parties to the case, as well as bona fide representatives of newspaper or news agencies and other persons the court specially authorizes to be present.

The Child Act 2001 by section 12, provides for a tighter provision in limiting exposure to the public by requiring if practicable, the Court for Children to sit in a different building or room from the other courts or on different days. It also provide that if the Court for Children sits in the same building as other courts, it has to be provided with a different entrance and exit from those of the other courts. In the interest of the child, the Act even excludes bona fide representative of the media from the proceeding of the Court for Children.

The restriction of not revealing the identity of the offender recognizes that publicity may lead to the child being 'labelled' a criminal in the child's own mind, or in the minds of others. Knowledge of the kind of offence committed by the child amongst other children of the institution where the child is sent to can be harmful to the child as it may affect the process of rehabilitation. It may make him conscious and uneasy. It could also be harmful to his family particularly when there are other siblings.

²⁰ Emphasize by writer.

²¹ [2001] 5 MLJ 193.

²² The word anonymity is used by Zalina Abdul Halim, 'Right of Access To Court Proceedings: It's Application Under the Child Act 2001', Siri Undang-Undang Mimi Kamariah, Penerbit Universiti Malaya 2002, p. 155.

Restriction on publication was provided by section 5A of the Juvenile Courts Act 1947. Although reporters are allowed to attend the proceedings, they are restricted from fully publicizing the details of the proceedings. Section 5A reads:

No newspaper report of any proceedings in a Juvenile Court shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in those proceedings, either as being the person against or in respect of whom the proceedings are taken or as being a witness therein, nor shall any picture be published in any newspaper as being or including picture of any child or young person so concerned in any proceedings as aforesaid:

Section 5A refers only to newspaper reports and do not cover other forms of media reports. The restriction is also restricted to proceedings in a Juvenile Court and do not include pre-trial and post-trial stages. There is an exception where, the court has discretion to dispense with the restriction, in the interest of justice. The penalty imposed in contravention of the restriction is only RM500.

One must understand that the impact of media reporting will greatly affect a child's present and future. Mary Bell's case below illustrates the impact of media reporting and the non restriction of the identity of a juvenile on her future.

Mary Bell was found guilty of manslaughter of 2 young boys in Newcastle England in 1968. She was then 11, and was sentenced to detention for life. Before the trial, the court did not make an order of restriction of publication of Mary Bell's name from the proceedings as her identity was already known before the trial.²³

She was released on license in 1980. She had changed her name and in 1984 at the age of 27 gave birth to a daughter. This became known to the media, an application had to be made to the court to restrain the publication of Mary Bell's present name, the child's name and father of the child for the child's welfare.²⁴ The child was then only 2 months old.

In 1998, 18 years after she was released, Mary Bell was again brought into the spotlight. Mary Bell then lived in a small village in England. She and her family was driven out of their home when the villagers learnt of her identity through the press. Signs were posted screaming 'Murderer Out' and with blankets covering their faces, Mary Bell and her family 'escaped' from the security of their home and the village. The incident forced her to tell her unknowing daughter of her past, and sought police assistance.²⁵

The Mary Bell's story illustrates the future impact of an offender when his welfare is not guarded. Anonymity is important not only during, but also before trial. Pre trial reporting could ruin a child's life. Protection of identity is significant for a child under investigation as it can create embarrassment, especially if the child is not charged later. The child may have problems in facing his friends, neighbours, or even afraid to go out in case he is identified. Adam Dent's story illustrates this. Adam Dent was 15 years old and was already an undergraduate at the time.. He was accused of rape and due to the publicity given about him, his academic career was ruined. What was more unfortunate was that in the end he was not even charged with the offence.²⁶

Realizing the importance of restriction of publication, and that the restriction in section 5A was inadequate, a better and improved provision was introduced in section 15 of the Child Act 2001. The restriction covers pre-trial, trial and post trial stage and the type of coverage is not confined to newspaper reports but all media reporting. The section not only encompasses the restriction of publication of a picture of any child in any newspaper, magazine or transmitted through any electronic medium; it also restricts the publication of a picture of any person, place or thing which may lead to the identification of the child concerned.²⁷ Subsection 4 provides for a higher penalty for any contravention, that is a fine not exceeding RM10,000 or imprisonment not exceeding 5 years or both. Although a better and lengthy restriction is now provided by the Act, current newspaper reports would show that the restriction is scarcely observed, let alone enforced. Below is an example of media reporting made by one of the leading newspapers in Malaysia.

The Star News paper reported on 7 February 2007 showing two sisters acquitted by the court of Appeal of killing their step father.

²³ Sereny G, *The Case of Mary Bell*, Pimlico 1995, p. 75.

²⁴ *In re X (A Minor)* [1984] 1 WLR 1423.

²⁵ BBC News, 1 May 1998, http://news/thls.bbc.co.uk/hi/english/uk/newsid_85000/85876.stm.

²⁶ Hansard of England, vol. 334, 1998-99, p. 1236.

²⁷ Section 15(2) Child Act 2001.



The above illustrates the attitudes of the media and authorities towards juveniles. Incidentally the picture was published on the front page of the newspaper and it was the headline of the day. In fact this was a file picture taken from a report made on them when they were remanded to help in the police investigation under section 117 of the Criminal Procedure Code in 2003.²⁸ They were both under the age of 17 years. The children were exposed to the glare of the public and pictures were allowed to be taken. No attempt was made by the authorities (the police escorting them) to protect them from the media or public scrutiny. Effort must be made by all concerned in protecting these children. Unfortunately there is no provision or person or body made available in this matter. Unlike cases of child abuse or children in need of protection, there are 'protectors'²⁹ which consist of social welfare officers in taking charge of them and their welfare. Perhaps the duty of protectors could be extended to these juveniles.

Death Sentence

Section 16 of the Juvenile Courts Act 1947 forbids the sentence of death on a juvenile. Instead, the court shall order the person to be detained during the pleasure of the Yang di-Pertuan Agong or the State Authority of the particular state where the offence was committed. The person shall be detained in a place and under conditions

²⁸ PP v N (A Child) [2004] 2 CLJ 176, the Court of Appeal held that section 117 of the Criminal Procedure Code, i.e. the detention of a child for purpose of investigation, apply to a child.

Section 117 states:

117. Procedure where investigation cannot be completed within twenty-four hours.

(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall forthwith transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before such Magistrate.

(2) The Magistrate before whom an accused person is produced under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be produced before a Magistrate having such jurisdiction or, if the case is triable only by the High Court, before himself or another Magistrate having jurisdiction with a view to committal for trial by the High Court.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

²⁹ Section 2 and 8 Child Act 2001.

according to the condition directed by the di-Pertuan Agong or the State Authority. If the person is detained at the Henry Gurney School, the detention at the school will only be until he reaches the age of 21 years. If he is detained in a prison, the detention will be for an indefinite period.

The term detention during the pleasure of the Yang di-Pertuan Agong/State Authority is borrowed from the English Children and Young Persons Act 1933. A similar provision is found in section 53(1) of the 1933 Act, which states that in lieu of life imprisonment, a juvenile is detained during Her Majesty's pleasure. Detention is for an indefinite period where release is in the discretion of the Home Secretary. The term detention during her Majesty's pleasure had never been specifically defined since its introduction in the Children Act 1908 England.³⁰ The term was originally used in the case of lunatics who were required to be kept in custody for the safety of the public. It was regarded as a purely preventive measure, as arrangement for their discharge was made. In the case of lunatics, a continuous review of their condition is needed. They can only be released when they no longer pose a threat to the public, or are cured. Specification of the period of detention is not possible.

The term 'during Her Majesty's pleasure' was first introduced in the Criminal Lunatics Act 1800 England as a direct result of an attempt to assassinate King George III. The accused in the assassination attack was found by the Magistrate who examined him to be exhibiting symptoms of insanity.³¹ Section 2 of the 1800 Act stated that the court could order that such insane person be kept in strict custody until His Majesty's pleasure shall be known. Like the lunatics, it is believed a child can also go through a rehabilitative process and in time will be fit to return to society. Continuous or periodical assessment or review must be made for the purpose of their release. A good illustration of assessment of an offender was given in the Venables and Thompson case, two 10 year olds who murdered 2 ½ year old Jamie Bulger in England in 1993.³² They were sentenced to detention 'during her Majesty's pleasure'. The Lord Chief Justice of England and Wales, before recommending a tariff period for Venables and Thompson to serve, took into consideration the progress made by both boys. The assessment received from psychiatrists and staff of the units at which the boys were detained was very similar when they described the way the 2 boys had responded to their punishment. Significantly, the assessment generally agreed that both boys were genuinely extremely remorseful about the crime which they had committed, and the effect which it must have had on the victim's family. They had worked hard in pursuing their education. All those who had reported on them regarded the risk of re-offending as being very low.³³ The Lord Chief Justice assessing the report also took into consideration the welfare of both boys and was of the view that: "It was clear that they had done all that was open to them to redeem themselves. Although their crime remains horrendous, their behaviour and response to treatment was very positive and they deserve credit for that."³⁴ On this, the Lord Chief Justice recommended that they serve a shorter tariff for their detention which amounts to an early release.

There was no provision made in the Juvenil Court Act 1947 Act for a review. But the Child Act 2001 by section 97 has introduced a lengthy provision for children sentenced during the pleasure of the Yang di-Pertuan Agong. The provision provides for a yearly review. Section 97 reads:

97. (1) *A sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child.*
- (2) *In lieu of a sentence of death, the Court shall order a person convicted of an offence to be detained in a prison during the pleasure of -*
- (a) *the Yang di-Pertuan Agong if the offence was committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan; or*
 - (b) *the Ruler or the Yang di-Pertua Negeri, if the offence was committed in the State.*
- (3) *If the Court makes an order under subsection (2), that person shall, notwithstanding anything in this Act -*
- (a) *be liable to be detained in such prison and under such conditions as the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may direct; and*
 - (b) *while so detained, be deemed to be in lawful custody.*

³⁰ The Children Act 1908 was replaced by The Children and Young Persons Act 1933.

³¹ Clair Mc Diarmid, Children Who Murder: What is Her Majesty's Pleasure? [2000] Crim. L.R. 549.

³² *R v Secretary of State for Home Department ex parte Venables and Thompson* [1997] 3 All ER 97.

³³ Court Guide and Notices, Lord Chief Justice of England and Wales, Thompson and Venables. Recommendation as to tariff to the Secretary of State for Home Affairs para 3 www.courtservices.gov.uk/notices/t_hm.htm.

³⁴ *Ibid.*, para 13.

(4) If a person is ordered to be detained at a prison under subsection (2), the Board of Visiting Justices for that prison -

(a) shall review that person's case at least once a year; and

(b) may recommend to the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri on the early release or further detention of that person, and the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may thereupon order him to be released or further detained, as the case may be.

The Board of Visiting Justices according to section 97(4) shall review the child's case at least once a year and may then recommend for an early release. Board of Visiting Justices consist of a persons appointed by the Menteri Besar or Chief Minister of a state on a yearly basis. All magistrates of a state or Federal Territory are ex-officio members of the Board. Unfortunately, there is no guideline in regards to the review, as to what is to be taken into consideration and as to who is responsible for the reporting. To be effective, there must be clear guidelines for this yearly review.

The setback in section 97 of the 2001 Act is also that the provision has taken away the discretion the court as to the place of detention provided by the Juvenile Courts Act 1947. Section 97 provides that the child shall be detained in a prison. The provision seems to be inconsistent to the spirit of the 2001 Act which underline the interest and welfare of the child. A child sentenced to prison feels demoralized³⁵ as the word prison signifies 'criminal'. The outcome of the provision is that the prison authorities are then forced into making arrangement for young children in their prison and provide for the child's education.³⁶ Prisons will have to provide activities to cater the needs of children of all ages (between 10 to below 18 year old). It must be noted that different children have different needs and their interest must not be neglected.

Although the Child Act 2001 forbids the death sentence on a child, it should be noted that the 2001 Act by section 133³⁷ does not apply to offences tried under the Essential (Security Cases) Regulation 1975 (ESCAR).³⁸ This brings us to the all too "famous" case of *Lim Hang Seoh v Public Prosecutor*³⁹ which sparked controversy regarding the death sentence over children. In this case, the accused, a boy of 14 years was convicted by the High Court for the offence of possession of a pistol and ammunition and was sentenced to death under section 57 of the Internal Security Act 1960 (ISA). He appealed to the Federal Court. The Federal Court agreed with the trial judge and upheld the decision of the High Court holding that the court had no choice in this case by Regulation 3(3) ESCAR there was only one sentence authorized by law for the offence, and that is the death sentence, despite the fact that the accused was only a child of 14 years.

ESCAR was introduced as a security measure for the whole nation in 1975 when it was threatened by the communist operating in the jungles of Malaysia. It was meant to combat communists and communism. ESCAR was meant to be temporary, and once the threat of communist and communism ends, ESCAR will be withdrawn.⁴⁰

Lim Hang Seoh's case brought great reaction from inside as well as outside Malaysia. Reaction of the public towards the death penalty continued unabated until on 14 October 1977, the Pardons Board in Kuala Lumpur announced that the sentence of *Lim Hang Seoh* would be commuted to detention at the pleasure of the Yang di-Pertuan Agong at the Henry Gurney School until the age of 21 years. To date, ESCAR has not been used on any child. But the regulation 3(3) still remains unchanged. The regulation should have been repealed with the coming into operation of the Child Act 2001. While the regulation is still in forced, it is not possible to make and create specific policy on children. The creation of policy on children is important as it is used as a guide in planning and deciding a child's rights or interest.

³⁵ *Ibid.*

³⁶ *KWK (A Child) v PP* [2003] 4 CLJ 51.

³⁷ Section 133 states;

All rules, regulation orders, notices, forms, directions and authorisation letters made, issued or given under the repealed Acts shall in so far as they are consistent with this Act, continue, in force until revoked or replaced by the Act.

³⁸ Regulation 3(3) ESCAR provides:

'where a person is accused of or charged with a security offence he shall regardless of his age, be dealt and tried in accordance with the provision of these Regulation and the Juvenile Courts Act 1947, shall not apply to such person'. The Juvenile Courts Act is substituted with the Child Act 2001.

³⁹ [1978] 1 MLJ 68.

⁴⁰ Hansard Malaysia, 1st Parliament, 19 December 1975, p. 9840.