

Balanced Justice

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Crime Inquiry 2014
Submission 061

Mr Brook Hastie
Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: lacsc@parliament.qld.gov.au

Dear Mr Hastie,

Inquiry into Strategies to Prevent and Reduce Criminal Activity in Queensland

The Balanced Justice Project is a campaign which aims to enhance the safety of all Queenslanders by promoting understanding of criminal justice policies that are effective, evidence-based and human rights compliant.

Balanced Justice involves a number of community groups, which work together to develop resources that promote community understanding around evidence-based, effective and human rights compliant criminal justice policies.

We **attach** eleven factsheets which discuss specific opportunities to improve Queensland's criminal justice system, and to make our community safer. These factsheets provide strong evidence of 'what works', and may be helpful for the Legal Affairs and Community Safety Committee's inquiry into strategies to prevent and reduce criminal activity in Queensland.

We would be happy to discuss the content of the factsheets with the Committee, and I can be contacted on 0411 206 835.

Yours sincerely,



James Farrell
Balanced Justice

Crime statistics – the real picture

Although crime statistics can help to provide a picture of the current situation regarding crime, it is important to understand the limitation of crime statistics when interpreting them.

Crime statistic sources

Information about crime trends in Australia comes from two main sources – police statistics and crime victim surveys.

Police statistics count all the incidents recorded as crimes by the police during the year in each state and territory. These statistics are generally reported as *incidence* measures, that is, a count of reported crimes, usually presented as a rate between the number of crimes and the number of people in the general population.¹ National figures on a selection of important crimes are published by the Australian Bureau of Statistics in an annual report.

Major crime victim surveys are conducted by the Australian Bureau of Statistics and these surveys ask people aged 15 years and over whether they have experienced particular crimes over the past 12 months. Crime survey results are usually based on *prevalence* measures, that is, the number of crime victims, usually expressed as a percentage of people or households that experienced the crime, regardless of the number of times victimised.²

Reliability of crime statistics

The greatest weakness of police statistics is that not all crimes are reported to or recorded by the police. There are only a few types of crimes where virtually all the offences are reported to or discovered by police (e.g. motor vehicle theft, homicide).³ This means that the police statistics produced may not reflect the true crime situation.

While the anonymity associated with crime victim surveys helps to avoid some of the problems associated with the underreporting of crimes to police (i.e. fear of retribution or fear of giving evidence), it is important to note that despite the name, crime victim surveys are not surveys of victims of crime. Crime victim surveys are representative sample surveys of a defined population (usually the adult population) which can be used to obtain estimates of the prevalence of certain types of crimes in the population and estimates of the proportions of victims reporting these crimes to the police.⁴ As crime victim surveys measure both reported and unreported crimes, these surveys have the potential to give a more accurate picture of the true prevalence of crime than police statistics.⁵ However, in order for crime victim surveys to accurately reflect the true crime situation, the sample surveys must be truly representative of the population.

Is crime increasing?

Queensland Police statistics show that in Queensland, between 2000 and 2011:

- homicide rate fell by 56%
- assault rate fell by 10%
- robbery rate fell by 39%
- sexual assault rate fell by 31%
- drug offence rate fell by 1%.⁶

National crime statistics show that between 2000 and 2009, the national homicide rate fell by 39 per cent, the national robbery rate fell by 55 per cent, the national motor vehicle theft rate fell by 62 per cent and all forms of other theft fell by 39 per cent.⁷

Crime victim surveys also show a decrease in assault, robbery, break-in and malicious property damage rates between 2008-09 and 2011-12.⁸

Therefore, considering the above, crime rates appear to be on the decline.

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Public perception

Despite the reality that crime rates are falling, it is a commonly held view amongst Australians that crime is on the rise.⁹ The reason for this view can likely be attributed to distorted, misrepresented or exaggerated facts on crime in the media and by politicians and the police.¹⁰

Although there are various ways that the media abuse crime statistics, a common method is the selective reporting of data. This usually involves comparing a period where the recorded crime rate is unusually low with a period where the crime rate is unusually high, resulting in a completely distorted view on the 'trend' in crime rates.¹¹ An obvious motivation for the manipulation of crime statistics is the increased public attention which such sensationalised statistics attract.

Politicians and police also engage in the selective use of data, selective reporting of the facts and misleading commentary, in order to manipulate crime statistics in a way which best suits their objectives.¹² Reasons for doing so may include the downplaying of certain statistics, or the bolstering of support for a proposed legislative reform.

Balanced Justice view

Unlike New South Wales, Western Australia and South Australia, Queensland does not have an agency which independently compiles, analyses and publishes crime statistics.

On 27 June 2013, the Queensland Police Service introduced the 'Online Crime Statistics Portal'. This portal enables community members to access crime statistics for their street, suburb, postcode, local government area, neighbourhood watch area or police region, district or division. While we welcome the public having increased access to crime statistics, we are concerned that by

encouraging community members to focus on crime statistics in a particular area, communities may end up with a skewed perspective about crime activities occurring in Queensland and make incorrect assumptions about what is happening across the state.

Therefore, to ensure that the community is properly informed, we believe that a crime statistics agency, which is independent of police and government, should be established in Queensland. This agency's role would be to monitor crime statistics and crime recording practices, publish regular reports on crime trends, provide statistical information to the community and provide independent advice to the government.

References

- ¹ Henderson, M, 'Australia Crime Trends' (2012) 24(1) Legaldate 2 at 2.
- ² As above.
- ³ Weatherburn, D, 'Uses and Abuses of Crime Statistics' (2011) November (No. 153) Crime and Justice Bulletin: Contemporary Issues in Crime and Justice 1 at 3.
- ⁴ As above at 2.
- ⁵ As above at 3.
- ⁶ Queensland Police Service, *Reported Offence Rates July 1997 to June 2012*, published at < <http://www.police.qld.gov.au/services/reportsPublications/>> (28 March 2013).
- ⁷ Weatherburn, D, 'Uses and Abuses of Crime Statistics' (2011) November (No. 153) Crime and Justice Bulletin: Contemporary Issues in Crime and Justice 1 at 1.
- ⁸ Australian Bureau of Statistics, *Crime Victimization, Australia, 2011-12*, published at < <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4530.0/>> (28 March 2013); Australian Bureau of Statistics, *Crime Victimization, Australia, 2008-09*, published at < <http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/E929631D0E1956F1CA257839000DEF96?opendocument>> (28 March 2013).
- ⁹ Weatherburn, D, 'Uses and Abuses of Crime Statistics' (2011) November (No. 153) Crime and Justice Bulletin: Contemporary Issues in Crime and Justice 1 at 1; Gelb, K, 'More Myths and Misconceptions' (2008) Sentencing Advisory Council at 4 <https://sentencingcouncil.vic.gov.au/content/publications/more-myths-and-misconceptions> (28 March 2013).
- ¹⁰ Weatherburn, D, 'Uses and Abuses of Crime Statistics' (2011) November (No. 153) Crime and Justice Bulletin: Contemporary Issues in Crime and Justice 1 at 1.
- ¹¹ As above at 10.
- ¹² As above.

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This factsheet was updated on 28 June 2013

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Is Justice Reinvestment a good idea for Australia?

What is Justice Reinvestment?

Justice reinvestment is a relatively new concept and is an approach to dealing with over-imprisonment. Justice reinvestment refers to diverting funds that would ordinarily be spent on keeping individuals in prisons to communities with high rates of offending and incarceration, giving those communities the capacity to invest in programs and services that address the underlying causes of crime, thereby reducing criminal behaviour and the rate of re-offending.¹ Justice reinvestment focuses on both existing criminal behaviour and reducing the number of people entering the criminal justice system in the first place.²

How Justice Reinvestment works

The main stages of justice reinvestment are as follows:³

1. 'Justice mapping': analysing data provided by state and local agencies relating to crime, then to using that data to map specific neighbourhoods that are home to large numbers of people under the supervision of the criminal justice system.
2. Collecting information about services in the community and developing 'practical, data-driven policies' that reduce spending on corrections to reinvest in other services likely to improve public safety and reduce crime.
3. Redirecting funds from corrective services and implementing the policies to reduce offending.
4. Evaluating the effectiveness and impact of the policies on rates of incarceration, recidivism and criminal behaviour, to ensure effective implementation.

The emphasis of justice reinvestment is on empowering the community. The idea is that the community dictates how the money should be spent.⁴ It is about taking a local approach to dealing with a local problem.

The types of justice reinvestment programs adopted will vary according to the needs of particular areas. The causes of crime are complex and may also be location specific, so programs need to be tailored accordingly.⁵ However, justice reinvestment programs may include investments in education, job training, health, parole support, housing or rehabilitation.⁶

United States and Justice Reintervention

In the US, one in every 100 adults is incarcerated and two-thirds of released prisoners return to jail.⁷ This costs the US more than US\$60 billion per year.⁸ As a result, the concept of justice reinvestment has proven popular in the US. So far, 16 US states have signed up with the Council of State Governments Justice Centre to investigate or apply justice reinvestment in their jurisdiction, with another five states pursuing justice reinvestment independently or through non-profit organisations.⁹

The justice reinvestment programs have been notably successful throughout the US. The 2004 justice reinvestment pilot in Connecticut resulted in the cancellation of a contract to build a new prison, realising savings of US\$30 million.¹⁰ So far, US\$13 million of these savings have been reinvested into community-based crime prevention initiatives, including funding the Department of Mental Health and Addiction Services to support community-based programming and resourcing community-led planning processes to develop neighbourhood programs to improve outcomes for residents.¹¹ Reinvested funds have also been channelled into revamping probation and parole, focusing on reducing technical violations and increasing transitional support for probation violators who would otherwise have been re-incarcerated.¹² Justice reinvestment efforts in Texas resulted in \$1.5 billion in construction savings and \$340 million in annual averted operations costs.¹³

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Why is Justice Reinvestment needed in Australia?

Financial costs

As at 30 June 2012, there were **29,383** prisoners (sentenced and unsentenced) in Australian prisons—a national imprisonment rate of 168 prisoners per 100,000 adults, an increase of 1% from the previous year.¹⁴

The latest figures available show that in 2011–12, national expenditure on prisons totalled **\$2.4 billion**.¹⁵ This is a cost of **\$305** per prisoner, per day or **\$111,325** per prisoner per year (in Queensland, during this same period, the cost of incarceration was **\$318.50** per prisoner per day or **\$116,252.50** per prisoner, per year).¹⁶

Twenty years ago there were 2259 people in prison in Queensland (QCS Annual report 1993/4), now there are over 6000. If we were to reduce the prison population to the level of 1993, we would save \$446 581 931 per year. That's four hundred and forty six million that could be invested in crime prevention.

Overrepresentation of Indigenous Australians in prisons

Despite comprising only 2.5% of the Australian population, Aboriginal and Torres Strait Islanders constitute just over a quarter (27% or 7,982) of the total prison population.¹⁷

Indigenous youth account for approximately 50% of the total population of children's prisons.¹⁸

There is a very high rate of recidivism in the Indigenous prison population—75% of Indigenous prisoners have a history of prior imprisonment compared to 50% of non-Indigenous prisoners.¹⁹

Social costs

The cost of imprisoning an individual extends beyond financial costs. The effects of imprisonment include:

- disruption and damage to the lives of every member of the family, particularly where a parent is imprisoned;²⁰
- disruption to Indigenous communities where the Indigenous person played an important social, cultural and family role, leaving family and community members to try and fill the void;²¹ and
- loss of employment and income, exacerbation of debt issues, possible loss of housing, potentially affecting

the incarcerated person's ability to reintegrate back into society when released.²²

People in prison are disproportionately affected by drug and alcohol problems, intellectual disability, illiteracy and innumeracy, low educational attainment, and unemployment.²³ In relation to Indigenous Australians, factors linked to increasing the risk of their involvement in crime includes, substance abuse, overcrowded living environments, unemployment and poverty.²⁴ Without addressing these factors, disadvantaged individuals will continue to commit crimes. Justice reinvestment is an opportunity to address the underlying factors which may cause someone to commit a crime and to break the cycle.

Criticisms of Justice Reinvestment

Criticisms of justice reinvestment include:

- Australia's penal system is quite different to the US, the concepts of justice reinvestment may not work in practice in Australia;²⁵
- the concept of justice reinvestment is vague; it does not have a clear definition and means different things to different people;²⁶ and
- justice reinvestment could be used as a cover for cost cutting.²⁷

Balanced Justice view

The traditional punitive approaches to law and order have not worked and the emergence of the justice reinvestment concept is the perfect opportunity for Australia to trial a new approach to preventing crime.

Regardless of the jurisdiction, it is an accepted fact that socioeconomic factors play a critical role in whether a person commits a crime. As justice reinvestment is about working with communities to address the underlying factors which cause crime, the fact that Australia's penal system differs to other jurisdictions should not detract from the potential success of this approach. Furthermore, the lack of definition of justice reinvestment will allow it to be adopted and tailored by a community in a way that best suits their needs.

Lastly, as a critical stage of justice reinvestment is evaluating the effectiveness and impact of justice reinvestment policies on rates of incarceration, recidivism and criminal behaviour, this will ensure the accountability of such policies and prevent justice reinvestment from being used as a cost cutting strategy.

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References

- ¹ Scharwartz, Melanie, 'Building Communities not Prisons: Justice Reinvestment and Indigenous over-imprisonment' (2010) 14(1) *Australian Indigenous Law Review* at 2; Clear, T, 'A private-sector, incentives based model for justice reinvestment' (2011) 10(3) *Criminology & Public Policy* at 587
- ² Scharwartz, Melanie, 'Building Communities not Prisons: Justice Reinvestment and Indigenous over-imprisonment' (2010) 14(1) *Australian Indigenous Law Review* at 2
- ³ Fox, C, Albertson, K and Warburton, F, 'Justice Reinvestment: Can it deliver more for less?' (2011) May 50(2) *The Howard Journal* at 121; Hudson, S, 'Panacea to Prison? Justice Reinvestment in Indigenous Communities' (2013) *Centre for Independent Studies, Policy Monograph* at 1
- ⁴ Scharwartz, Melanie, 'Building Communities not Prisons: Justice Reinvestment and Indigenous over-imprisonment' (2010) 14(1) *Australian Indigenous Law Review* at 5
- ⁵ Scharwartz, Melanie, 'Building Communities not Prisons: Justice Reinvestment and Indigenous over-imprisonment' (2010) 14(1) *Australian Indigenous Law Review* at 3
- ⁶ Scharwartz, Melanie, 'Building Communities not Prisons: Justice Reinvestment and Indigenous over-imprisonment' (2010) 14(1) *Australian Indigenous Law Review* at 3
- ⁷ Brown, D, Schwartz, M and Boseley, L, 'The Promise of Justice Reinvestment' (2012) *Social Science Research Network* at p 2 <<http://ssrn.com/abstract=2078715>> (8 May 2013)
- ⁸ Brown, D, Schwartz, M and Boseley, L, 'The Promise of Justice Reinvestment' (2012) *Social Science Research Network* at p 2 <<http://ssrn.com/abstract=2078715>> (8 May 2013)
- ⁹ Hudson, S, 'Panacea to Prison? Justice Reinvestment in Indigenous Communities' (2013) *Centre for Independent Studies, Policy Monograph* at 10
- ¹⁰ Brown, D, Schwartz, M and Boseley, L, 'The Promise of Justice Reinvestment' (2012) *Social Science Research Network* at p 2 <<http://ssrn.com/abstract=2078715>> (8 May 2013)
- ¹¹ Brown, D, Schwartz, M and Boseley, L, 'The Promise of Justice Reinvestment' (2012) *Social Science Research Network* at p 2 <<http://ssrn.com/abstract=2078715>> (8 May 2013)
- ¹² Brown, D, Schwartz, M and Boseley, L, 'The Promise of Justice Reinvestment' (2012) *Social Science Research Network* at p 2 <<http://ssrn.com/abstract=2078715>> (8 May 2013)
- ¹³ Justice Centre, The Council of State Governments, 'Lessons from the States: Reducing Recidivism and Curbing Corrections Costs through Justice Reinvestment' (April 2013) <<http://justicereinvestment.org/resources/lessons-learned>> (8 May 2013)
- ¹⁴ Australian Bureau of Statistics, 'Prisoners in Australia, 2012', Cat. No. 4517.0, Canberra: ABS, December 2012 cited in Hudson, S, 'Panacea to Prison? Justice Reinvestment in Indigenous Communities' (2013) *Centre for Independent Studies, Policy Monograph* at 4
- ¹⁵ Productivity Commission, 'Report on Government Services 2013' Volume 1 at 8.4 <http://www.pc.gov.au/data/assets/pdf_file/0005/121784/government-services-2013-volume1.pdf> (30 May 2013)
- ¹⁶ Productivity Commission, 'Report on Government Services 2013' Volume 1 at 8.24 <http://www.pc.gov.au/data/assets/pdf_file/0005/121784/government-services-2013-volume1.pdf> (30 May 2013)
- ¹⁷ Hudson, S, 'Panacea to Prison? Justice Reinvestment in Indigenous Communities' (2013) *Centre for Independent Studies, Policy Monograph* at 3
- ¹⁸ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time— Time for Doing: Indigenous Youth in the Criminal Justice System* (Canberra: Commonwealth of Australia, June 2011) cited in in Hudson, S, 'Panacea to Prison? Justice Reinvestment in Indigenous Communities' (2013) *Centre for Independent Studies, Policy Monograph* at 5
- ¹⁹ Select Committee on Regional and Remote Indigenous Communities, *Indigenous Australians, Incarceration and the Criminal Justice System* (Canberra: Commonwealth of Australia, March 2010) cited in in Hudson, S, 'Panacea to Prison? Justice Reinvestment in Indigenous Communities' (2013) *Centre for Independent Studies, Policy Monograph* at 7
- ²⁰ Scharwartz, Melanie, 'Building Communities not Prisons: Justice Reinvestment and Indigenous over-imprisonment' (2010) 14(1) *Australian Indigenous Law Review* at 6
- ²¹ Australian Human Rights Commission, Calma, T, '2009 Social Justice Report – Aboriginal and Torres Strait Islander Social Justice Commissioner' (2009) at p 42 cited in Law Council of Australia, 'Value of a justice reinvestment approach to criminal justice in Australia' (March 2013) at p 12 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/justice_reinvestment/submissions.htm> (8 May 2013)
- ²² Scharwartz, Melanie, 'Building Communities not Prisons: Justice Reinvestment and Indigenous over-imprisonment' (2010) 14(1) *Australian Indigenous Law Review* at 6
- ²³ Hudson, S, 'Panacea to Prison? Justice Reinvestment in Indigenous Communities' (2013) *Centre for Independent Studies, Policy Monograph* at 3
- ²⁴ Weatherburn, D, Snowball, L and Hunter, B, 'The economic and social factors underpinning Indigenous contact with the justice system: Results from the 2002 NATSISS survey,' (2006) 104 *Crime and Justice Bulletin* cited in Law Council of Australia, 'Value of a justice reinvestment approach to criminal justice in Australia' (March 2013) at p 15 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/justice_reinvestment/submissions.htm> (8 May 2013)
- ²⁵ Hudson, S, 'Panacea to Prison? Justice Reinvestment in Indigenous Communities' (2013) *Centre for Independent Studies, Policy Monograph* at 14
- ²⁶ Brown, D, Schwartz, M and Boseley, L, 'The Promise of Justice Reinvestment' (2012) *Social Science Research Network* at p 4 <<http://ssrn.com/abstract=2078715>> (8 May 2013)
- ²⁷ Brown, D, Schwartz, M and Boseley, L, 'The Promise of Justice Reinvestment' (2012) *Social Science Research Network* at p 4 <<http://ssrn.com/abstract=2078715>> (8 May 2013)

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Indigenous overrepresentation in prisons

When the Royal Commission into Aboriginal Deaths in Custody delivered its final report in 1991, it concluded that the high rate of Aboriginal deaths in prison stemmed from Aboriginal overrepresentation in prison.¹ The reason for this overrepresentation was a combination of Aboriginal disadvantage, substance abuse and institutional bias in the criminal justice system.²

The Royal Commission looked in detail at the issues facing Aboriginal and Torres Strait Islander communities and made recommendations about reducing and eliminating disadvantage.³ Following the Royal Commission report, Commonwealth, State and Territory Governments made a concerted effort to reduce the rate of Aboriginal and Torres Strait Islander people imprisonment,⁴ yet their collective efforts have not met with much success.⁵

The Queensland Government published a response document outlining their intention to tackle each of the recommendations which were obligatory for them to address.⁶ The growing police arrests, prison population numbers and lack of application of discretionary powers by police and courts is proof of systemic failures by government agencies. This coupled with a failure to fund sufficient secondary and tertiary service providers to deal with offending behaviours and put in place diversions from custody is proof of little or no regard to not only the Royal Commission's recommendations but also the Queensland Governments own response in 1992.

Statistics released in 2012 revealed that despite comprising only 2.5% of the Australian population, Aboriginal and Torres Strait Islanders constitute just over a quarter (27% or 7,982) of the total prison population.⁷ Furthermore, Aboriginal and Torres Strait Islander youth account for approximately 50% of incarcerated children.⁸

Factors that contribute to Indigenous Overrepresentation in Prison

Disadvantage

As identified in the Royal Commission report, one of the biggest factors contributing to overrepresentation by Aboriginal and Torres Strait Islander people in prison is disadvantage. People who are or have been in prison are typically from highly disadvantaged backgrounds and Aboriginal and Torres Strait Islander people are the most disadvantaged group in Australia.

As a consequence of years of systemic racism and colonisation, Aboriginal and Torres Strait Islander communities are now plagued with high unemployment, lack of job prospects, lack of economic or business opportunity, low incomes, dependence on government pensions and allowances, low home ownership, inability to accumulate capital, greater school drop-out rates, lower post school qualifications, and lower life expectancy.⁹

To gauge how this has all come about one must look at the detrimental impact laws have had upon Aboriginal and Torres Strait Islander people and what were the requirements for social and economic inclusion in the Australian social landscape under those laws. For want of a better term this country's legal system has been premised upon White Race Privilege.¹⁰

Substance abuse

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Substance abuse is another key contributing factor, with issues of substance abuse featuring prominently in Aboriginal and Torres Strait Islander communities.¹¹

As a response to the devastating effects of colonialism, including dispossession, and illness and death resulting from disease and confrontation, alcohol has become somewhat of a panacea for Aboriginal and Torres Strait Islander people's pain, with many using it as a means of escape and solace.¹²

An Aboriginal community worker commenting on the connection between drug and alcohol abuse and the high crimes rates in the Wilcannia community stated:¹³

"Drug and alcohol use is one of the biggest factors. I think there are lots of reasons for that. People drink to forget things, whether it's sexual assault or domestic violence in their home. The only way they are ever going to change drug and alcohol abuse is to have counsellors living in the community, on the ground, for the people. Mental health is a huge issue."

The harmful effects of alcohol on the lives of Aboriginal and Torres Strait Islander Australians are readily apparent, with Indigenous Australians experiencing health and social problems resulting from alcohol use at a rate disproportionate to non-Indigenous Australians.¹⁴ The links between substance abuse and Aboriginal and Torres Strait Islander violence, suicide, offending and incarceration are widely recognised.¹⁵ Drug and alcohol abuse has also been shown to increase the risk of child neglect and abuse which in turn increases the risk of juvenile involvement in crime,¹⁶ and a significant increase in the number of Aboriginal and Torres Strait Islander children removed by State authorities from their families.

The *Bridges and Barriers* report published by the National Indigenous Drug and Alcohol Committee acknowledged the critical need for new strategies to address alcohol and other drug misuse to

significantly reduce the overrepresentation of Aboriginal and Torres Strait Islander Australians in the prison system.¹⁷

Mental health

Another much overlooked factor is mental health within Aboriginal and Torres Strait Islander communities and the relationship of mental health problems with the social and economic circumstances of Aboriginal and Torres Strait Islander people.¹⁸

A report published in the Medical Journal of Australia about the mental health of Indigenous Australians in Queensland prisons found that approximately 73% of Aboriginal and Torres Strait Islander men and 86% of Aboriginal and Torres Strait Islander women in prison had a mental disorder (i.e. depressive, anxiety, psychotic or substance misuse disorders).¹⁹ This is compared with 20% of the wider Australian community.²⁰

These results highlight the critical mental health needs of Aboriginal and Torres Strait Islander Australians, particularly those who are incarcerated. Unfortunately, the National Indigenous Drug and Alcohol Committee recently reported on the lack of opportunities that exist for Indigenous people to access appropriate treatment for mental disorders in custody.²¹ This means that mental health problems are likely to remain untreated and continue to affect the individual on their return back into the community; potentially placing these individuals at greater risk of re-incarceration.²²

Racial bias

While the Royal Commission into Aboriginal Deaths in Custody placed most of its emphasis on disadvantage and substance abuse in Aboriginal communities as the principal reasons for Aboriginal overrepresentation in prison, it also highlighted a number of areas where, in its opinion, institutional bias in the criminal justice system also played a

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role.²³ These areas included bias against Aboriginal offenders in the willingness of police to employ alternatives to arrest, lack of community-based alternatives to prison in rural communities, inadequate funding of Aboriginal legal aid and excessively punitive sentencing.²⁴

However, there is disagreement as to whether institution bias in the criminal justice system continues to be a factor contributing to overrepresentation by Aboriginal and Torres Strait Islander people in prisons. It has been stated by some that whilst Aboriginal and Torres Strait Islander people were historically subject to discriminatory treatment by police and courts, there is little evidence that racial bias in policing or the courts currently plays a significant role in shaping Aboriginal and Torres Strait Islander overrepresentation in prison.²⁵

A 2007 study on this topic held that racial bias is not the cause of overrepresentation in prison and that Aboriginal and Torres Strait Islander defendants are more often sent to prison because they commit more serious offences, acquire longer criminal records, and more frequently breach non-custodial sanctions.²⁶ Consequently, it is suggested that the focus should be on problems of Aboriginal and Torres Strait Islander substance abuse and economic disadvantage, rather than the workings of the criminal justice system.²⁷

While it continues to be debated whether explicit forms of racial bias exist in the criminal justice system, the reality is that the following changes have contributed to the increased use of imprisonment, which has particularly impacted on Aboriginal and Torres Strait Islander people:²⁸

- lack of discretionary powers by police officers;
- reinstatement of the Community Development Employment Programs;
- changes in sentencing law and practice;
- restrictions on judicial discretion;
- changes to bail eligibility;

- changes in administrative procedures and practices;
- changes in parole and post-release surveillance;
- the limited availability of non-custodial sentencing options;
- the limited availability of rehabilitative programs; and
- a judicial and political perception of the need for 'tougher' penalties.

What needs to be done?

Although it is important that the criminal justice system does not operate in a manner which is inherently discriminatory towards Aboriginal and Torres Strait Islander people, preventing this alone will not solve the problem of Indigenous overrepresentation in prisons. Underlying factors which result in Aboriginal and Torres Strait Islander people coming into contact with the criminal justice system must also be addressed.

Therefore, while this has been said before, if the overrepresentation of Aboriginal and Torres Strait Islander people in prison is to be reduced, the following must occur:

- the disadvantage experienced by Aboriginal and Torres Strait Islander people needs to end;
- drug and alcohol abuse by Aboriginal and Torres Strait Islander people must be reduced (therefore, the reasons behind substance abuse in Aboriginal and Torres Strait Islander communities must be addressed); and
- the mental health needs of Aboriginal and Torres Strait Islander people must also be addressed (with adequate support being made both within the community and prisons).

Justice Reinvestment

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There is a growing recognition of the pressing need to try new initiatives such as justice reinvestment.²⁹ Justice reinvestment refers to diverting funds that would ordinarily be spent on keeping individuals in prisons to communities with high rates of offending and incarceration, giving those communities the capacity to invest in programs and services that address the underlying causes of crime, thereby reducing criminal behaviour and the rate of re-offending.³⁰ The emphasis of justice reinvestment is on empowering the community, with the idea being that the community dictates how the money should be spent.³¹

Addressing the symptoms of endemic criminal behaviour is a far more suitable approach to dealing with the effect of crime. A youth program in Logan City, Queensland, known as the Friday night Live at Yugambah (F.L.Y.) program, commenced 6 years ago targeting at risk youth to divert them from criminal behaviour. The result was an approximate drop in Aboriginal and Torres Strait Islander youth crime by 17%. Unfortunately, the F.L.Y. program has been unsuccessful in attracting government funds as the precursor for being eligible for funding was that the program had to be dealing with known offenders.

[For more information on Justice Reinvestment, see the Balanced Justice factsheet "Is Justice Reinvestment a good idea for Australia?"]

The contributing factors identified above need to be tackled at the local community level, with genuine involvement by Aboriginal and Torres Strait Islander community members in key decision making. Adopting the justice reinvestment approach may be a way of ensuring that this occurs.

References

¹ Commonwealth of Australia 1991 cited in Snowball, L and Weatherburn, D, 'Indigenous overrepresentation in prison: The role of offender characteristics' (September 2006) No. 99 *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice*, NSW Bureau of Crime Statistics and Research at 1

² Snowball, L and Weatherburn, D, 'Does racial bias in sentencing contribute to Indigenous overrepresentation in prison?' (2007) 40(3) *The Australian Journal of Criminology* 272-290 at 273; Weatherburn, D and Holmes, J, 'Re-thinking Indigenous overrepresentation in prison' (2010) 45(4) *Australian Journal of Social Issues* 559-576 at 560

³ Johnston 1991, Volumes 2 & 4 cited in Cronin, D, 'Indigenous disadvantage, Indigenous governance and the notion of a treaty in Australia: An Indigenous perspective' in *Treaty: Let's get it right!* Aboriginal Studies Press, Canberra, 2003 at 152

⁴ Snowball, L and Weatherburn, D, 'Indigenous overrepresentation in prison: The role of offender characteristics' (September 2006) No. 99 *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* NSW Bureau of Crime Statistics and Research at 1

⁵ As above

⁶ Queensland Government, *Royal Commission into Aboriginal Deaths in Custody: Queensland Government response to the Royal Commission, 1992*, Queensland. Department of Family Services and Aboriginal and Islander Affairs, Published Brisbane, Qld : Dept. of Family Services and Aboriginal and Islander Affairs, 1992. ISBN 072425191X

⁷ Hudson, S, 'Panacea to Prison? Justice Reinvestment in Indigenous Communities' (2013) *Centre for Independent Studies, Policy Monograph* at 3

⁸ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time— Time for Doing: Indigenous Youth in the Criminal Justice System* (Canberra: Commonwealth of Australia, June 2011) cited in Hudson, S, 'Panacea to Prison? Justice Reinvestment in Indigenous Communities' (2013) *Centre for Independent Studies, Policy Monograph* at 5

⁹ Cronin, D, 'Indigenous disadvantage, Indigenous governance and the notion of a treaty in Australia: An Indigenous perspective' in *Treaty: Let's get it right!* Aboriginal Studies Press, Canberra, 2003 at 152; Weatherburn, D and Holmes, J, 'Re-thinking Indigenous overrepresentation in prison' (2010) 45(4) *Australian Journal of Social Issues* 559-576 at 568

¹⁰ Hart, Victor G. and Thompson, Lester J. and Stedman, Terry (2008) *The Indigenous Experience of Australian Civil Society: Making Sense of Historic and Contemporary Institutions*. Social Alternatives 27(1):pp. 52-57.

¹¹ Weatherburn, D and Holmes, J, 'Re-thinking Indigenous overrepresentation in prison' (2010) 45(4) *Australian Journal of Social Issues* 559-576 at 565-566

¹² Wilson, M et al, 'The harmful use of alcohol amongst Indigenous Australians' (May 2010) No. 4 *Australian Indigenous Health Reviews* at 7

Balanced Justice

http://www.responsiblechoice.com.au/wp-content/uploads/2013/01/alcohol_review_june_2010.pdf
(3 June 2013)

¹³ McCausland, R and Vivian, A, 'Why do some Aboriginal communities have lower crime rates than others? A pilot study' 43 *Australian & New Zealand Journal of Criminology* 301 at 309

¹⁴ Wilson, M et al, 'The harmful use of alcohol amongst Indigenous Australians' (May 2010) No. 4 *Australian Indigenous Health Reviews* at 1

http://www.responsiblechoice.com.au/wp-content/uploads/2013/01/alcohol_review_june_2010.pdf
(3 June 2013)

¹⁵ As above at 571; Lumley, K and Norris, Judge Stephen, 'Exchanging ideas about Aboriginal contact with the criminal justice system' (November 2011) 23(10) *Judicial Officers Bulletin* 83-90 at 85

¹⁶ Weatherburn, D and Holmes, J, 'Re-thinking Indigenous overrepresentation in prison' (2010) 45(4) *Australian Journal of Social Issues* 559-576 at 566

¹⁷ Lumley, K and Norris, Judge Stephen, 'Exchanging ideas about Aboriginal contact with the criminal justice system' (November 2011) 23(10) *Judicial Officers Bulletin* 83-90 at 85

¹⁸ As above

¹⁹ Treloar, A, 'Mental health illness rife in prison' (August 2012) 20(2) *Australian Nursing Journal* 34 at 35; Heffernan, E, 'Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons' (2012) 197(1) *Medical Journal of Australia* 37

²⁰ Treloar, A, 'Mental health illness rife in prison' (August 2012) 20(2) *Australian Nursing Journal* 34 at 35; Heffernan, E, 'Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons' (2012) 197(1) *Medical Journal of Australia* 37

²¹ Heffernan, E, 'Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons' (2012) 197(1) *Medical Journal of Australia* 37 at 40

²² Heffernan, E, 'Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons' (2012) 197(1) *Medical Journal of Australia* 37 at 40

²³ Snowball, L and Weatherburn, D, 'Does racial bias in sentencing contribute to Indigenous overrepresentation in prison?' (2007) 40(3) *The Australian Journal of Criminology* 272-290 at 273; Weatherburn, D and Holmes, J, 'Re-thinking Indigenous overrepresentation in prison' (2010) 45(4) *Australian Journal of Social Issues* 559-576 at 560

²⁴ Snowball, L and Weatherburn, D, 'Does racial bias in sentencing contribute to Indigenous overrepresentation

in prison?' (2007) 40(3) *The Australian Journal of Criminology* 272-290 at 273

²⁵ Weatherburn, D and Holmes, J, 'Re-thinking Indigenous overrepresentation in prison' (2010) 45(4) *Australian Journal of Social Issues* 559-576 at 563 and 569; Snowball, L and Weatherburn, D, 'Does racial bias in sentencing contribute to Indigenous overrepresentation in prison?' (2007) 40(3) *The Australian Journal of Criminology* 272-290 at 286

²⁶ Snowball, L and Weatherburn, D, 'Does racial bias in sentencing contribute to Indigenous overrepresentation in prison?' (2007) 40(3) *The Australian Journal of Criminology* 272-290 at 287

²⁷ As above at 286-287

²⁸ Cunneen, C, 'Punishment: two decades of penal expansionism and its effect on Indigenous imprisonment' (2011) 15(1) *Australian Indigenous Law Review* 8 at 11

²⁹ Calma, T, 'Investing in Indigenous youth and communities to prevent crime' (2009), Australian Institute of Criminology
http://www.aic.gov.au/media_library/conferences/2009-indigenouyouth/presentations/tom_calma.pdf (24 May 2013)

³⁰ Scharwartz, Melanie, 'Building Communities not Prisons: Justice Reinvestment and Indigenous over-imprisonment' (2010) 14(1) *Australian Indigenous Law Review* at 2; Clear, T, 'A private-sector, incentives based model for justice reinvestment' (2011) 10(3) *Criminology & Public Policy* at 587

³¹ Scharwartz, Melanie, 'Building Communities not Prisons: Justice Reinvestment and Indigenous over-imprisonment' (2010) 14(1) *Australian Indigenous Law Review* at 5

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Tougher sentences – what the community wants?

Public opinion on sentencing

A constant message in the media is that courts are too 'soft on crime', they let offenders 'walk free' and fail to protect the public.¹ As a vast majority of the public form their opinions in relation to the criminal court system based on information presented in the media, it is no surprise that a majority of the public also think that the courts are too lenient on people who have committed crimes.²

International research regarding public opinion on crime and justice has reached a number of consistent conclusions:³

- the public thinks that sentences are too lenient;
- people tend to think about violent and repeat offenders when reporting that sentencing is too lenient;
- people have very little accurate knowledge of crime and the criminal justice system;
- the mass media is the primary source of information on crime and justice issues;
- when people are given more information, their levels of punitiveness drop dramatically; and
- despite apparent punitiveness, the public favours increasing the use of alternatives to imprisonment.

Recent study

In a recent Australian study, for a period of two years (2007-2009), jurors from all criminal trials in Tasmania were involved in the sentencing of cases they had deliberated on. Each jury returning a guilty verdict was invited by the judge to participate in the study by remaining in court to listen to the sentencing submissions.

Before the sentence was imposed, jurors were asked:

- to indicate the sentence that they thought the offender should receive;
- to answer questions about crime and sentencing trends; and
- to give their views on sentencing severity and whether judges were in touch with public opinion.

After the sentence was imposed, jurors were asked questions such as their view on the appropriateness of the sentence imposed, and whether their original opinions on sentencing had changed.

In relation to questioning about current sentencing practices across all offence types (violence, property, drug and sex offences), the majority of jurors responded that sentences were too lenient. This was most pronounced for sex and violence offences.

However, when jurors were asked to indicate which sentence they thought the offender should receive, 52 percent of jurors selected a more lenient sentence than the sentence actually imposed by the judge and only 44 percent were more severe than the judge.

Furthermore, it was found that there was a high overall level of satisfaction in relation to the sentence imposed by the judge, with 90 percent of jurors considering the sentence imposed to be either very appropriate or fairly appropriate.

This study suggests when individuals are presented with accurate and complete information, they are less likely to be as punitive.

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Therefore, it appears that the public's critical view of the courts, and their punitive stance towards sentencing, ultimately stems from a lack of knowledge regarding the crime situation and the workings of the criminal justice system.

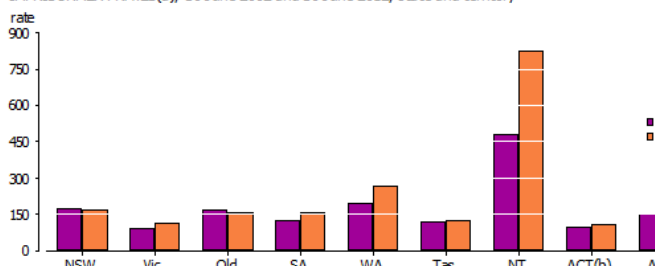
Why is public opinion so important?

The public's concern with rising crime rates and dissatisfaction with sentencing has been used by Western governments over the past two decades as a justification of a hard-line approach and 'tough-on-crime' political rhetoric.⁵ Legislation is often introduced and justified by politicians with reference to public opinion.⁶ Furthermore, while public opinion is not a legally recognised factor for consideration during the determination of sentencing, it appears that judges make assessments of public opinion, with comments such as 'community expectation' and 'community sentiments' routinely appear in sentencing.⁷ For these reasons, it is extremely important that the opinion held by the public in relation to crime and sentencing reflects the actual situation.

The reality of sentencing

At 30 June 2012, all states and territories, with the exception of New South Wales and Queensland recorded increased imprisonment rates compared to 2002.⁸

IMPRISONMENT RATES(a), 30 June 2002 and 30 June 2012, state and territory



(a) Rate per 100,000 adult population.

(b) ACT data for 2002 include ACT prisoners held in NSW prisons. These prisoners are excluded from NSW data.

Northern Territory and Western Australia saw the biggest increases, while Queensland and New South Wales saw slight decreases:⁹

- Northern Territory –72% increase (from 480 prisoners per 100,000 adult population to 826 prisoners per 100,000 adult population);
- Western Australia –37% increase (from 195 to 267 prisoners per 100,000 adults);
- Queensland –6% decrease (from 168 to 159 prisoners per 100,000 adults);
- New South Wales –1% decrease (from 172 to 171 prisoners per 100,000 adults).

Therefore, on average across Australia, over the past 10 years the imprisonment rate increased, demonstrating that the courts are not being as lenient as the public may think.

The increase in imprisonment rates is the likely combination of factors including the:¹⁰

- passing of new laws;
- increasing maximum and minimum sentences;
- reduction in the use of remission, parole and other alternatives to prison; and
- increasing use of the criminal law to prosecute offences.

Given that the increased use of imprisonment has continued whilst crime rates have been falling, it has been suggested that it is politics, rather than crime, which is increasing these imprisonment rates.¹¹

[See **Balanced Justice** factsheet 'Crime Statistics – the real picture' for more information on decreasing crime rates.]

Balanced Justice view

As public opinion can influence political agendas and ultimately legislation, it is crucial that the public is adequately informed.

The disbanding of the Sentencing Advisory Council of Queensland in 2012 was a step backwards for Queensland, as the state no longer has an independent

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body to keep the public informed about sentencing in Queensland. The Council had been responsible for the:

- provision of information to the community to enhance knowledge and understanding of matters relating to sentencing;
- publication of information relating to sentencing;
- research of matters relating to sentencing; and
- publication of the research results.

If the public are to be properly educated about sentencing in Queensland, there needs to be an independent and reliable source responsible for collating and disseminating information about sentencing and sentencing related matters.

¹⁰ Kury, H and Shea, E (eds), *Punitivity International Developments: Vol. 1 Punitiveness a Global Phenomenon*, Universitätsverlag Dr. N. Brockmeyer, Bochum, 2011 at 184

¹¹ Kury, H and Shea, E (eds), *Punitivity International Developments: Vol. 1 Punitiveness a Global Phenomenon*, Universitätsverlag Dr. N. Brockmeyer, Bochum, 2011 at 185

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This factsheet is for information and discussion purposes only. It does not represent the views of organisations involved in the Balanced Justice Project.

References

¹ Warner, K and Davis, J, 'Using jurors to explore public attitudes to sentencing' (2012) 52 *British Journal of Criminology* 93 at 93

² Roberts et al, 'A country not divided: a comparison of public punitiveness and confidence in sentencing across Australia' (2011) 44(3) *Australian and New Zealand Journal of Criminology* 370 at 371

³ Gelb, K, 'Myths and misconceptions: Public opinion versus public judgment about sentencing' (2006), Sentencing Advisory Council at v
<https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/myths_and_misconceptions_public_opinion_v_ersus_public_judgment_about_sentencing.pdf> (8 May 2013)

⁴ Warner, K et al, 'Public Judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study' (February 2011) No. 407 *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology

⁵ Gelb, K, 'Myths and misconceptions: Public opinion versus public judgment about sentencing' (2006), Sentencing Advisory Council at 4
<https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/myths_and_misconceptions_public_opinion_v_ersus_public_judgment_about_sentencing.pdf> (8 May 2013)

⁶ Roberts et al, 'A country not divided: a comparison of public punitiveness and confidence in sentencing across Australia' (2011) 44(3) *Australian and New Zealand Journal of Criminology* 370 at 371

⁷ As above

⁸ Australian Bureau of Statistics, *Prisoners in Australia*, 2012, published at
<<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4530.0>> (9 May 2013)

⁹ As above

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Busting the myths

The facts about addressing youth offending - Part 1

Young people's behaviour has concerned adults from very earliest times:

Our youth now love luxury. They show disrespect for their elders....they contradict their parents, chatter before company, gobble up dainties at the table and tyrannise their teachers¹.

Fear of crime is a strong a motivator in the community. It is often a reaction to media reports which tend to focus on the worst of crimes- and particularly those involving young people - as being most "newsworthy". Sweeping generalisations are made about young people and offending – the regular reference to a "youth crime wave" – but without any supporting evidence.

There is a public perception that children are responsible for a substantial proportion of crime committed in the community. This perception is often reported in the media and is frequently supported by police statement². It was found that **the statistics did not support** these perceptions.

Misinformation means that there is a lack of understanding of the true level, causes and impact of youth offending which in turn means that **public money is not used effectively and efficiently as it is diverted to the wrong activities or responses**. So, the stated object of reducing crime is undermined from the beginning.

The facts - there is no crime wave.

Crime generally is decreasing

Crime rates [in Queensland] over the last ten years or so have largely been on a downward trend. While politicians may make legitimate points about spikes in specific locations or particular types of offence, the chances of Queenslanders becoming victims of crime has been decreasing when population is taken into account³.

The number of youth offenders is decreasing

Queensland's Youth Justice System covers young people aged 10-16 years alleged to have broken the law (for all other States and Territories it covers 10-17 year olds).

In the 2011-12 financial year:

- The Magistrates Court dealt with 5,840 young defendants and the higher courts 358
- There was an **overall decrease** of 6.9% in the number of young people whose cases were dealt with by the courts (following a **decrease** of 8.6% in the number of young people coming in 2010-11 compared with 2009-10)⁴.

Most young people are not offending

There are around 420,000 10-16 year olds in Queensland⁵. The number of 10-16 year olds in contact with the court system is small

and is not increasing proportionate to the population – in 2011-12 only about 1.4% of the total population of 10-16 year old Queenslanders appeared in court.

Young people are already dealt with seriously

It is often said that young people only get a "slap on the wrist" yet children as young as 10 years of age can be (and are) held accountable for breaking the criminal law. In reality, the sentences for young offenders are very similar to those imposed on adults: it is generally the length of the term which is different.

Child ⁶	Adult ⁷
Reprimand	Absolute or Conditional Discharge
Good Behaviour Bond	Recognisances
Fine	Fine
Probation Order	Probation Order
Community Service Order	Community Service Order
Conditional Release Order	Suspended Sentence
Intensive Supervision Order	Intensive Correction
Detention	Imprisonment
Detention up to life – will most likely be transferred to adult jail	Imprisonment - indefinite

Generally, a Magistrate can sentence a child to up to 1 year in detention and a Judge up to 5 years⁸. For offences for which an adult can be imprisoned for 14 years or more, children can also be detained for significant periods of time, for example⁹:

	Child	Adult
Robbery in company with violence	10 years <i>or</i>	Life
Arson	Life* if: there was violence against a person <i>and</i> Court considers particularly heinous	
Grievous bodily harm	7 years	14 years
Receiving stolen goods		

*Life in Queensland means the whole of one's life

Once a person reaches 17 in Queensland, they are dealt with in an adult court and go to an adult prison¹⁰ – even though they cannot vote or buy alcohol or cigarettes. Queensland is only place in Australia where this happens and is contrary to Australia's international commitment.

References

- ¹ Socrates, Greek Philosopher 470-399 BC
- ² Criminal Justice Commission (1992) *Youth, Crime and Justice in Queensland*
- ³ Queensland Police Service data: Brisbane Times: 2 March 2012
- ⁴ Childrens Court of Queensland Annual Report for 2011-12
- ⁵ Queensland Government Statistician
- ⁶ *Youth Justice Act 1992*
- ⁷ *Penalties and Sentences Act 1992*
- ⁸ *Youth Justice Act 1992*
- ⁹ *Youth Justice Act 1992 (child); Criminal Code (adult)*
- ¹⁰ *Youth Justice Act 1992*

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¹ Socrates, Greek Philosopher 470-399 BC

² Criminal Justice Commission (1992) *Youth, Crime and Justice in Queensland*

³ Queensland Police Service data: Brisbane Times: 2 March 2012

⁴ Childrens Court of Queensland Annual Report for 2011-12

⁵ Queensland Government Statistician

⁶ *Youth Justice Act 1992*

⁷ *Penalties and Sentences Act 1992*

⁸ *Youth Justice Act 1992*

⁹ *Youth Justice Act 1992 (child); Criminal Code (adult)*

¹⁰ *Youth Justice Act 1992*

Busting the myths

The facts about addressing youth offending – Part 2

What we know

10-16 year olds are the minority of offenders in contact with the criminal law. In 2011/12, only 4.25% of offenders who appeared before the courts were youth offenders.¹ Offending peaks at around 18 or 19 years of age.

Property offences are the most commonly committed offences by 10–17 year olds in Queensland. The rate of property offences committed by young people has been in decline, falling 21.6% over the past decade. Offences against the person remain considerably lower in prevalence than property offences and have remained relatively stable over the last decade.²

Offending behaviour in relation to young people must be considered in the context of child and youth development. Early adolescence through to early adulthood is a peak period for brain development and consequently a period of increased risk.³

Most young people who come into contact with the police before 18 will not go on to be “career criminals” – their contact will be shortly lived and relatively minor and they will “grow out” of offending from late adolescence.⁴ Many will never come to court, their offending being addressed by a police caution (12,238 cautions were administered in 2011-12). A significant proportion of those brought to court will appear once, maybe twice.⁵

While there is a concern that there is an increase in offences involving some level of violence, this remains a minority of the offences committed by young people. Offences against property was the most common offence type among young people aged 10 to 17 years, accounting for 60.1% of all offences in 2010-11.⁶

Young people themselves are victims of crime. Statistics show that young people under 18 are at least as likely to be the victims of a crime as a perpetrator. In 2011-12 in Queensland, the majority of victims of offences against the person committed by youth offenders were aged under 20 years of age (53.3% of those where age was recorded) and only 6.4% were aged 50 years or over.⁷

Prison/detention does not prevent offending. Research consistently shows that prisons are an ineffective in rehabilitating offenders and preventing re-offending.⁸ Imprisonment is therefore a poor use of public money, particularly as the building, maintaining and staffing of detention centres or prisons is very costly. It costs the taxpayer approximately \$237,980 per year to imprison one young person

(in Australia)⁹ and studies have indicated that youth detention is a pathway to adult offending as 30% of adult offenders were first incarcerated in the youth system.¹⁰

Addressing offending behaviour

For the community to be and feel safe, and to spend our money usefully, we need to address the causes of crime.

For the majority of those who come to the attention of the police or courts and who do not become persistent offenders, the current sentencing regime is clearly sufficient.

The President of the Queensland Children’s Court has noted: *The statistics seem to demonstrate that there are a small number of persistent offenders who are charged with multiple offences.*

The small group of repeat offenders tends to have low socioeconomic status, low educational attainment, significant physical and mental health needs, substance abuse and a history of childhood abuse and neglect.¹¹ Young people in detention in Queensland have reported experiencing multiple social and health problems during the previous year. Most often these problems related to school (69%), peers (62%), family (50%), and drugs or alcohol (43%).¹²

Do what has been shown to work

The Texas (USA) based group *Right on Crime*: puts forward *The Conservative case for reform: Fighting Crime, Prioritizing Victims, and Protecting Taxpayers*¹³:

Cost-effective interventions that leverage the strengths of families and communities to reform troubled youths are critical to a successful juvenile justice system. Youths who “slip through the cracks” may remain in the criminal justice system throughout their lives even though some could have been saved by effective policies during pivotal developmental stages. However, funds should only be spent on programs that are supported by evidence, and risk and needs assessment should be used to ensure that youths who would be most successful in non-residential programs are not placed in costly residential settings.

The “Conservative Solution” includes improved flexibility in funding, so funds currently used to keep young people in large state youth jails can be used for less costly community-based programs which are supported by research.

Begin early

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Antisocial behaviour invariably begins during primary school years and tends to be associated with exclusion (from school itself, but also within the school) which means the young person is not exposed to positive social values and role models.¹⁴ The research indicates that children and young people who are not in school are at high risk of delinquency.¹⁵

Diagnose and support those with disabilities

Research has also identified that 17% of young people in detention in Australia had an IQ of less than 70 and that this is particularly an issue for Indigenous young people. Young people with intellectual disability are at a significantly higher risk of re-offending. A 2005 NSW study also found 88% of young people in custody reported symptoms consistent with mild, moderate or severe psychiatric disorders.¹⁶

Parents are important

Parents are important in the development of language skills, particularly in the early years. The amount the parent talks to the child and how they talk to them is important.¹⁷

Language skills are critical in being able to manage socially but also in being able to develop literacy skills and therefore are important for longer term success at school. Keeping young people at school can prevent and reduce criminal and anti-social behaviour.¹⁸

Early brain development and socio-emotional and cognitive development can be severely affected by inadequate or harmful parenting.¹⁹ Young people who have been abused or neglected often exhibit reduced social skills, poor school performance, impaired language ability, and mental health issues.²⁰

While the majority of abused and neglected children do not offend, a significant number of children who do offend have had abusive, neglectful or inadequate parenting.

Parental monitoring and limit setting have been linked to managing antisocial/offending behaviour, substance abuse and sexual risk taking by adolescents.²¹

The most effective approach ...

...would be to reduce the likelihood of a child or young person ever developing anti-social or offending behaviour patterns by:

- supporting families who are struggling
- providing parents with support and parenting programs from the early years into adolescence
- supporting the development of good oral language and social skills
- responding more appropriately where young people are the victims of abuse and neglect.

For those already in the system, providing therapeutic support, developing life skills and receiving an education will be most effective.

The least effective approach...

... is to put them into a youth detention centre:

Detention acts as a corrupting influence on these children, many of whom go on to re-offend. NSW Attorney General, Greg Smith: 28 Feb 2013

...or a military style boot camp as these have been clearly shown to have no long term effects on repeat offending:
The traditional boot camp for young offenders was arguably the least successful sentence in the Western world – it made them fitter, faster, but they were still burglars, just harder to catch. Judge Andrew Becroft, New Zealand, 2009.

References

- ¹ Criminal Courts Queensland: 2011–12: Government Statistician, Queensland Treasury & Trade
- ² Commission for Children and Young People *Snapshot 2012*
- ³ AIHW *Young Australians: their health and wellbeing 2011* Chapter 25, Young people and crime (AIHW 2011)
- ⁴ Commission for Children and Young People *Snapshot 2011: Children and Young People in Queensland* Chapter 7, Criminal Justice System (CCYPCG 2011) and AIHW 2011
- ⁵ AIC (2011) *What makes juvenile offenders different from adult offenders* Trends and Issues in crime and criminal justice No 409 (AIC (2011))
- ⁶ Child Guardian Report: Child Justice System 2010-11
- ⁷ Children's Court Annual Report 2011-12
- ⁸ Solonec, T., and W., YOUNG. 2011. *Epidemic incarceration and justice reinvestment : it's time for change.* INDIGENOUS LAW BULLETIN; 7 (26): 15-21.
- ⁹ Vumbaca, G. 2012. 'Prevention is the only hope for young offenders because cure is failing.' YAPRAP Youth Issues and Youth Work.
- ¹⁰ Vumbaca, G. 2012. *Young People and Violence.* National Council for Drugs / justice reinvestment for Aboriginal People
- ¹¹ AIHW (2011)
- ¹² Commission for Children and Young People *Views of young people in detention 2011*
- ¹³ <http://www.rightoncrime.com/priority-issues/juvenile-justice/>
- ¹⁴ AIC (2012) *Youth (in)justice: oral language competence in early life and risk for engagement in anti-social behaviour in adolescence* Trends and Issues in crime and criminal justice No 435 (AIC 2012 No 435)
- ¹⁵ Australian Institute of Criminology (AIC) (2003) *What works in reducing young people's involvement in crime? A review of current literature on youth crime prevention* (for the ACT Government)
- ¹⁶ AIC (2011)
- ¹⁷ AIC (2012) No 435
- ¹⁸ <http://www.griffith.edu.au/criminology-law/key-centre-ethics-law-justice-governance/research/prevention-developmental-pathways/the-pathways-to-prevention-project>
- ¹⁹ AIHW (2011)
- ²⁰ AIFS (2011) *The Link between child maltreatment and adolescent offending* Family Matters No.89
- ²¹ Australian Institute of Family Studies (AIFS) (2011) *What works with Adolescents – family connections and involvement in interventions for adolescent problem behaviour* Family Matters No.88

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The removal of court-ordered parole

Court-ordered parole is currently under scrutiny by the Queensland Government, with the Attorney-General flagging the possible removal of court-ordered parole.¹ The Attorney-General has stated that the potential removal of court-ordered parole arises from community concern about crimes committed by people on parole.² Unfortunately, the proposal to scrap court-ordered parole appears to be based on populist misconceptions (i.e. that the scrapping of court-ordered parole will prevent (Jill) 'Meagher-type crimes'³) with the Attorney-General failing to provide any hard evidence to show that court-ordered parole is not working.

What is court-ordered parole?

Parole is the only option for an offender's early release from custody. The *Corrective Services Act 2006* (Qld) provides that persons sentenced to terms in prison will be released to parole at either a date fixed by the sentencing court (court-ordered parole) or when approved by a parole board.

In relation to court-ordered parole, the court has discretion in fixing the date that the person should be released on parole. For example, a court may fix the parole release date to be:

- on the same date of sentencing; or
- during the period of imprisonment; or
- on the last day of the sentence.

When can court-ordered parole be granted?

The type of parole that a person is eligible to be released on is determined by the length of sentence and the type of offence.

The *Penalties and Sentences Act 1992* (Qld) only allows the court to grant court-ordered parole where the sentence is three years or less and the offence committed was not a serious violent offence or sexual offence.⁴

In relation to other offences (i.e. sentences of more than 3 years which are not for a serious violent offence or sexual offence and sentences for serious violent or sexual offences), court-ordered parole is not available. In relation to these offences, the court is only able to fix a date that the person is *eligible* for parole (as opposed to fixing a parole release date), which means that the offender will need to apply to the parole board for parole at the date specified by the court.⁵

What if the parole board considers a person granted court-ordered parole to be a risk to society?

The *Corrective Services Act 2006* (Qld) contains a 'safeguard' provision which allows a parole board to amend, suspend or cancel a parole order, including a court-ordered parole order, if the board reasonably believes that the person subject to the order poses:

- a serious risk of harm to someone else; or
- an unacceptable risk of committing an offence.⁶

Furthermore, if a parole board cancels a person's court-ordered parole order, any application for a subsequent grant of parole during that person's

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same period of imprisonment must be to a parole board.⁷

Queensland Corrective Services (QCS) has implemented a strict regime when supervising people on parole in the community, including those on court-ordered parole.⁸ This includes ongoing assessment, planning, close monitoring and appropriate responses to any change in risk levels.⁹

Why is court-ordered parole important?

Australia currently has a strong judge-centred approach to sentencing. While legislation creates offences and prescribes maximum penalties, the judiciary, for the most part,¹⁰ remains able to exercise its discretion within these boundaries.¹¹

The discretion enjoyed by judicial officers is extremely important as it enables sentences imposed to be tailored to the particular facts of the case and to the individual before them.¹² This discretion is an important part of judicial independence.

As outlined above, the law currently allows the court (for certain offences) to determine a person's suitability for court-ordered parole. The court's discretion is already limited by legislation which prescribes that court-ordered parole can only be granted in relation to relatively minor offences. Judicial discretion, and consequently judicial independence, should not be further curtailed through the complete removal of court-ordered parole.

People in prison who are sentenced to serve less than two years are not eligible for criminogenic programs. If court ordered parolees were sent to prison it would be largely for warehousing rather than rehabilitation.

What will happen if court-ordered parole is abolished?

Loss of a valuable sentencing option

Courts need to have a wide range of sentencing options available to them in order to promote the interests of individualised justice.¹³ Courts must be able to impose sentences that align with both the nature of the offence and the individual circumstances of the case.

In 2011-12, there were 3195 people on court-ordered parole orders in Queensland,¹⁴ demonstrating that these orders are an important sentencing tool. QCS has confirmed that court-ordered parole is its most successful supervision order.¹⁵ In 2012-13, 72% of court-ordered parole orders in Queensland were successfully completed without cancellation or reconviction.¹⁶

QCS has reported that most common reason that an offender has their parole suspended is because Probation and Parole assess that there is an unacceptable risk of further offending.¹⁷ This can be because Probation and Parole are alerted that the person on parole has been charged with an offence or because there has been an increase in risk factors associated with the individual's offending pathway (e.g. the offender losing their job or their accommodation or a separation from their partner or support person).¹⁸

In 2012, only 58% of court-ordered parole cancellations were the result of re-offending with a subsequent new prison offence recorded.¹⁹ Therefore, it appears that many people who fail on parole do so because they have breached the technical conditions of their parole orders and not because they have committed a criminal offence.²⁰ Where a criminal offence has been committed, often these offences may be of a minor nature.

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Increase in prison populations

Court-ordered parole was introduced to address the over-representation of short-sentenced, low-risk prisoners in QCS facilities.²¹ Prior to the introduction of court ordered parole, prisoner numbers were forecast to grow.²² However, the introduction of this type of order helped to stabilise growth in prisoner numbers from 2006 until recently, with the average daily number of prisoners serving sentences of three years or less declining from approximately 2,300 in July 2006 (prior to the introduction of court-ordered parole), to a low of just over 1,800 in January 2011.²³

QCS has reported that approximately 40% of persons who receive court-ordered parole orders are paroled straight from court.²⁴ In 2012, it was found that 80% of people released straight from court to court-ordered parole successfully completed their order.²⁵

Court ordered-parole has notably reversed the growth in short sentence prisoners, delaying the need to invest in prison infrastructure.²⁶

The reality is that removing this order will result in more people being imprisoned, further burdening the prison system.

Prisons in Australia are already at capacity and the cost of running these facilities is incredibly high (in Queensland, the cost of housing a person in prison is approximately **\$318.50** per day or **\$116,252.50** per year).²⁷

Balanced Justice view

Instead of abolishing court-ordered parole, the Queensland Government should be looking at ways to proactively support persons on parole to reduce the possibility of re-offending. Increasing the time which these persons spend in prison is not the answer to preventing recidivism.

It has been stated that:

'Jails, as they're run today, are possibly the worst place to send many criminals. They exacerbate drug abuse and health problems, they do nothing to increase a prisoner's chance of finding employment, they brutalise young men and reinforce violent behaviour'.²⁸

It is known that people who commit offences are disproportionately affected by drug and alcohol problems, intellectual disability, illiteracy and innumeracy, low educational attainment and unemployment.²⁹ Our view is that these underlying factors need to be addressed in order to break the cycle of offending.

For a suggested approach to breaking the cycle of offending, see Balanced Justice Fact Sheet titled 'Is justice reinvestment a good idea for Australia'.

References

- 1 Norton, F, Ryan, B and Howells, M (1 August 2013) 'Attorney-General Jarrod Bleijie orders review into Qld's sentencing laws' <<http://www.abc.net.au/news/2013-07-31/attorney-general-orders-review-into-qlds-sentencing-laws/4855074>> 16 August 2013
- 2 Norton, F, Ryan, B and Howells, M (1 August 2013) 'Attorney-General Jarrod Bleijie orders review into Qld's sentencing laws' <<http://www.abc.net.au/news/2013-07-31/attorney-general-orders-review-into-qlds-sentencing-laws/4855074>> 16 August 2013
- 3 'Queensland aims to head off Meagher type crimes' 31 July 2013, The Brisbane Times <<http://www.brisbanetimes.com.au/queensland/queensland-aims-to-head-off-meaghere-type-crimes-20130731-2qych.html>> (29 August 2013)
- 4 *Penalties and Sentences Act 1992* (Qld), s 160B(3).
- 5 *Penalties and Sentences Act 1992* (Qld), ss 160C and 160D.
- 6 *Corrective Services Act 2006* (Qld), s 205; Note: during the 2011-2012 financial year the two regional parole boards suspended or cancelled a total of 3548 court-ordered parole orders: Queensland Parole Boards Annual Report 2011-12 at p 10 <<http://www.correctiveservices.qld.gov.au/Publications/C>

Balanced Justice

orporate_Publications/Annual_Reports/documents/parole
boardannualreport_2011-12.pdf> (22 August 2013)

7 *Corrective Services Act 2006* (Qld), s 207.

8 Court ordered parole in Queensland, Research Paper
(No. 4) June 2013, Queensland Corrective Services at p
8 <<http://qldcorrections.files.wordpress.com/2013/06/qcs-research-court-ordered-parole-in-qld.pdf>> (29 August
2013)

9 Ibid at 9

10 See Balanced Justice factsheet titled 'Mandatory
Sentencing' for information on other attempts to reduce
court discretion.

11 Freiberg, A, 'Australia: Exercising discretion in
sentencing policy and practice' (April 2010) 22(4) Federal
Sentencing Reporter pp 204-212 at p 204

12 Ibid.

13 Bartels, L and Rice, S, 'Reviewing reforms to the law
of suspended sentences in the Australian Capital
Territory' (2012) 14 Flinders Law Journal 253 at 256

14 Department of Community Safety Annual Report
2011-12 at p 20

<[http://www.communitysafety.qld.gov.au/Annual_reports/
Annual_Report_2011-](http://www.communitysafety.qld.gov.au/Annual_reports/Annual_Report_2011-2012/files/DCS_Annual%20REPORT%202011-2012%20complete.pdf)

2012/files/DCS_Annual%20REPORT%202011-
2012%20complete.pdf> (22 August 2013)

15 Court ordered parole in Queensland, Research Paper
(No. 4) June 2013, Queensland Corrective Services at p
1 <<http://qldcorrections.files.wordpress.com/2013/06/qcs-research-court-ordered-parole-in-qld.pdf>> (29 August
2013)

16 Ibid at 9

17 Ibid

18 Ibid

19 Ibid at 14

20 Jones, C et al, 'Risk of re-offending among parolees'
(2006) No. 91 Crime and Justice Bulletin: NSW Bureau
of Crime and Research at p 2

<[http://lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/v
wFiles/cjb91.pdf/\\$file/cjb91.pdf](http://lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb91.pdf/$file/cjb91.pdf)> (23 August 2013)

21 Court ordered parole in Queensland, Research Paper
(No. 4) June 2013, Queensland Corrective Services at p
1 <

<http://qldcorrections.files.wordpress.com/2013/06/qcs-research-court-ordered-parole-in-qld.pdf>> (29 August
2013)

22 Ibid

23 Ibid at 1 and 16

24 Ibid at 1

25 Ibid at 12

26 Ibid at 16

27 Productivity Commission, 'Report on Government
Services 2013' Volume 1 at 8.24

<[http://www.pc.gov.au/__data/assets/pdf_file/0005/1217
84/government-services-2013-volume1.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0005/121784/government-services-2013-volume1.pdf)> (30 May
2013)

28 Anderson, John, 'The label of life imprisonment in
Australia: a principled or populist approach to an ultimate
sentence' (2012) 35(3) University of New South Wales
Law Journal at p 21

<http://works.bepress.com/john_anderson/1/> (23
August 2013)

29 Hudson, S, 'Panacea to Prison? Justice Reinvestment
in Indigenous Communities' (2013) Centre for
Independent Studies, Policy Monograph at p 3

This factsheet was produced on 29 August 2013

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Balanced Justice

Mandatory sentencing

Mandatory sentencing is harsh and unfair and does not reduce crime

Mandatory sentencing is being introduced for more offences in Queensland, despite overwhelming evidence from Australia and overseas demonstrating that it fails to reduce the crime rate, leads to harsh and unfair sentences and disproportionately affects Aboriginal and Torres Strait Islander and other marginalized groups.

Most jurisdictions in Australia already have some form of mandatory sentencing. In the Northern Territory, assaults causing harm carry mandatory prison sentences,¹ and in Western Australia, "third strike" burglars face a minimum of 12 months' imprisonment. In NSW, there are presumptive minimum sentences for certain offences,² while the Commonwealth has mandatory sentences in some circumstances. Increasingly, the Queensland government is introducing mandatory sentencing to more and varied offences, including:

- murder;³
- certain child sex offences;⁴
- evading police;⁵
- graffiti;⁶
- possession, supply or trafficking of unregistered firearms;⁷
- driving under the influence of drugs or alcohol (three times in five years).⁸

While mandatory sentencing may appear a superficially attractive option to reduce crime and provide consistency and certainty in sentencing, evidence-based research shows that it simply doesn't work.

Mandatory sentencing fails to consider an offender's circumstances

Mandatory sentencing means a one size fits all approach which doesn't properly consider the circumstances of the

offender. Giving judges and magistrates discretion maximises the chances of finding a sentence which will address the causes of the offending and reduce the chance of reoffending. Evidence shows that therapeutic approaches to sentencing, such as community and treatment-based orders, can substantially reduce reoffending rates compared with prison.⁹

Kevin Cook, a homeless man, was sentenced to 12 months in prison under the Northern Territory's three strike laws in 1999. His crime? Stealing a towel from a clothes line.¹⁰

Mandatory sentencing leads to harsh and unfair sentences

Mandatory sentencing means a one size fits all approach to the culpability of the person who has committed the crime, instead of matching the sentence to how serious the crime was. This leads inevitably to harsh and unfair sentences.

Mandatory sentencing shifts discretion from the courts to police and prosecutors

Instead of judges having discretion to impose the appropriate sentence, mandatory sentencing encourages judges, prosecutors and juries to circumvent mandatory sentencing when they consider the result unjust. In some circumstances when someone is faced with a mandatory penalty, juries have refused to convict. Furthermore, prosecutors have deliberately charged people with lesser offences than the conduct would warrant to avoid the imposition of a mandatory sentence. Victims groups have opposed mandatory sentencing because it discourages pleas of guilty. In effect, this shifts sentencing discretion from an appropriately trained and paid judicial officer to police and prosecutors who decide – behind closed doors – whether or not a charge that carries a mandatory sentence should be brought against someone.¹¹

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Based on this evidence, the Victorian Government abolished the mandatory prison sentence for this offence in 2010.¹⁷

Mandatory sentencing disproportionately affects marginalised communities

In Western Australia and the Northern Territory, mandatory sentencing laws disproportionately affected Aboriginal offenders, particularly young people from remote areas.¹²

In the United States, far from leading to more consistent sentencing, mandatory minimum sentences for drug cases widened the gap between sentences imposed for black and Hispanic people and white people charged with similar crimes.¹³

Mandatory sentencing does not reduce crime

In the Northern Territory, property crime increased during the mandatory sentencing regime, and decreased once it was repealed. Advisory Commissions and Committees in the United States, UK and Canada have all rejected the notion that mandatory sentencing acts as a deterrent to crime.¹⁴

This is hardly surprising, since research demonstrates that the perceived risk of being caught is a much greater deterrent than the fear of punishment when caught.¹⁵

In 2008, Victoria's Sentencing Advisory Council, an independent statutory body, conducted a review of that state's mandatory minimum sentence for driving while disqualified, and found that the mandatory sentencing scheme:

- was NOT effective in protecting the community;
- did NOT lead to sentences that rehabilitated people or prevented them from reoffending;
- resulted in penalties which are disproportionately high; and
- caused strain on the criminal justice system.¹⁶

Mandatory sentencing violates human rights

Mandatory sentencing laws in the Northern Territory and Western Australia have been examined by three of the United Nations committees – on civil and political rights, the rights of the child and against racial discrimination. Each concluded that the laws violated Australia's international human rights obligations.¹⁸

Balanced Justice view

The Balanced Justice view is that mandatory sentencing should be taken off the agenda. Sentencing reform should focus on promoting the court discretion so that judges can tailor the punishment to fit the crime and make orders (such as drug and alcohol treatment) that maximise the chances of preventing reoffending.

References

¹ s 78BA, Sentencing Act 2008 (NT). A similar scheme was proposed by the Liberal Party in the recent Tasmanian State Election: <http://tasliberal.com.au/news/mandatory-sentencing-for-assaults-against-police-and-emergency-service-workers>

² The presumptive minimum sentences relate only to the non-parole period for certain offences

³ S 305 *Criminal Code Act 1899* (Qld)

⁴ S 161E *Penalties and Sentences Act 1992* (Qld)

⁵ S 754 *Police Powers and Responsibilities Act 2000* (Qld)

⁶ S 9 *Criminal Code Act 1899* (Qld)

⁷ Ss 50, 50B and 65 *Weapons Act 1990* (Qld)

⁸ S 79 *Transport Operations (Road Use Management) Act 1995* (Qld)

⁹ In Victoria, people released from prison are twice as likely to return to corrective services within two years of ending their sentence as those with a sentence involving community correction: Productivity Commission Report on Government Services 2010, C.11-C.12. See also Lulham, Weatherburn and Bartels, 'The Recidivism of offenders given suspended sentences: a comparison with full-time imprisonment' *Contemporary Issues in Crime and Justice* no 136, NSW Bureau of Crime Statistics and Research, 4

¹⁰ Barlow, 'Back to the Future in the Northern Territory: the Return of Mandatory Imprisonment for First Offenders' (2009) 33 *Criminal Law Journal* 231, 234

Balanced Justice



¹¹ See eg Morgan, 'Why we should not have mandatory penalties', (2001) 23 *Adelaide Law Review* 141, 144

¹² Sallmann, 'Mandatory sentencing: a bird's-eye view' (2005) 14(4) *Journal of Judicial Administration* 177, 189-90; Sheldon & Gowans, *Dollars Without Sense: A Review of the NT's Mandatory Sentencing Laws*, (1999) North Australian Aboriginal Legal Aid Service

¹³ United States Sentencing Commission, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (2004), xv

¹⁴ Sallman, above n 6, 187

¹⁵ Morgan, above n 5, 149; D Ritchie, "Does Imprisonment Deter? A Review of the Evidence", Sentencing Advisory Council (Vic), April 2011, 2

¹⁶ Sentencing Advisory Council, *Driving While Disqualified or Suspended: Report* (April 2009), viii

¹⁷ s 28, *Sentencing Amendment Act 2010* (Qld)

¹⁸ Pritchard, 'International Perspectives on Mandatory Sentencing' (2001) 7(2) *Australian Journal of Human Rights* 51

Detention and bail for children

Detention as a last resort

The United Nations' Standard Minimum Rules for the Administration of Juvenile Justice (the *Beijing Rules*) which outline the importance of nations establishing a set of laws, rules and provisions specifically applicable to child offenders and with the administration of juvenile (youth) justice being designed to meet the varying needs of child offenders, while protecting their basic rights.¹ The Beijing Rules and Article 37(b) of the United Nations Convention on the Rights of the Child (*CROC*) also require that in juvenile justice, detention pending trial must only be used as a *measure of last resort* and *for the shortest possible period of time*. Whenever possible, detention pending trial should be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.²

Research supports this approach in relation to that children, namely that the criminal justice system should recognise their inexperience and immaturity.³ Early adolescence through to early adulthood is a peak period for brain development and consequently a period of increased risk.⁴ *Children, due to the continuing development of the frontal lobes that does not culminate until the early to mid-twenties, exhibit behavioural and emotional deficits compared to adults. They have less capacity for forward planning, delaying gratification and for regulating impulse. Impulsivity is a commonly observed element in juvenile offending and raises questions as to the culpability of juveniles in relation to criminal behaviour.*⁵

Minor offending by many young people may therefore be the result of testing the boundaries of acceptable behaviour through this developmental period. Alternatively, early brain development and socio-emotional and cognitive development can be severely affected by inadequate or harmful parenting. While the majority of abused and neglected children do not offend, a significant number of children who do offend have had abusive, neglectful or inadequate parenting.

Whatever the reason, what is important is that any interventions will help to foster a young person's desistance from crime.⁶ It has been found that the more restrictive and intensive an intervention, the greater its negative impact, with juvenile detention being found to have the strongest criminogenic effect – that is, increasing their involvement with crime rather than their ability to desist⁷ and the younger a child is when first detained, the more likely that they will come back into custody.⁸

Removal of principle of detention as a last resort

The Queensland Government is currently reviewing the youth justice system and has suggested that detention as a last resort could be removed as a principle for both adult and child offenders.

Firstly, this would place Queensland clearly in breach of international commitments.

Further, it would also risk criminalising young people by involving them in the detention system earlier than is necessary. By using the most significant punishment early, the court has effectively played its "trump card" and there is nowhere else to go after this other than to keep locking the young person up for longer and longer.

Since detention has not been shown to be effective in preventing re-offending and is expensive to run (it costs the Australian taxpayer approximately \$237,980 per year to imprison one young person), removal of the principle of detention as a last resort would not seem to be of any benefit to the community, either in terms of safety or cost effectiveness. Young people, particularly young women, completing a detention sentence have also been identified at greater risk of homelessness on release – which puts them at further risk of offending.

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Increasing remand of children in custody in Australia

Since 2004, the number of juveniles in detention in Australia has been increasing.⁹ This is concerning for several reasons including:

- the widespread use of remand in custody is inconsistent with the principle of detention as a last resort for juveniles
- only a small proportion of young people remanded in custody are convicted and sentenced to a custodial order
- periods of detention represent missed opportunities to intervene in juveniles' lives with constructive and appropriate treatment.¹⁰

Queensland has a particularly poor record with over 70% of young people in detention on remand – about the highest in the country.

Bail in Queensland

One way in which a person who is charged with an offence is brought before the court is by *arrest and charge*. A decision is then made about whether the person will be released into the community or kept in custody until their matter is dealt with by the court. If they are released then this may be with or without *bail*.

The purpose of bail is to ensure the attendance at court of a person charged with a criminal offence while recognising international human right principles of the right to liberty and presumption of innocence that underpin the justice system. Further, given that bail is not to be used as a punitive measure, the objects should reflect the fact that a person who has not been convicted of an offence should not be imprisoned unless there is a good reason to do so¹¹.

Where bail is granted, the police or court may impose conditions to ensure that while on release the person will not:

- commit an offence; or
- endanger anyone's safety or welfare; or

- interfere with a witness or otherwise obstruct the court matter.

Reasons for not remanding children in particular in custody include:

- it is at odds with the presumption of innocence (children held in remand report feeling isolated and frustrated by the experience of being denied bail and held on remand; they feel as if they have already been found guilty¹²);
- for those young people engaged in school or work, it disrupts that and risks disengagement, again increasing the risk of re-offending;
- it may expose young people to negative influences¹³ - detention centres have been described as 'Universities of Crime' where young people may know more about offending when they come out than when they went in.

Breach of bail

The law relating to bail is slightly amended for children (10-16 year olds: in Queensland, a child is a person who has not yet turned 17 years for the criminal law.¹⁴). If any person fails to attend court or breaches a condition of their bail, then they can be arrested and brought back to court. This breach of bail or bail condition is a further offence for adults which means that the court can impose a fine or imprisonment for that breach but it is not an offence for children and so they cannot be sentenced for this. In either case, however, the court can then decide not to grant bail again but order the adult or child to remain in custody until their case is dealt with.

The Queensland Government is reviewing the youth justice system and has suggested changes in relation to bail which would treat a child offender the same as an adult offender in that breach of bail would become an offence. As noted above, this is contrary to accepted international norms and does not take account of the inexperience and immaturity of young people.

It is important to note that there is no evidence that monitoring, arresting and detaining young people for breaches of their bail condition reduces re-offending among juvenile offenders.¹⁵ The more likely outcome of

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a 'breach offence' is the further criminalisation of the child and an increased likelihood of the child being placed in custody, thereby further entrenching the child in the criminal justice system.

Young repeat offenders often face a number of challenges in their lives which put them at greater risk of (re-) offending. By virtue of their youth and that the law generally (aside from the criminal law) does not recognise that children are independent before the age of 18, there are many influences which affect their lives and life situations over which they have no control and can make no choices.

An example of this is the issue of where a young person lives. Young people under 18 have difficulties in being able to rent in their own right. Sometimes the family home is not a safe or viable place for the young person to be or the family relationships are in disarray and this may lead them to leave. Their access to a legitimate income is also significantly reduced compared to an 18 year old and therefore being able to pay rent and other life necessities, including food and travel, becomes problematic.

If a young person is out of home for whatever reason and has no money, then involvement in offending behaviour becomes a potential consequence. This could be as simple as evading a fare on public transport. They do not have the life skills or experience to know where they should go to seek help and often assume that no-one would be interested in helping them anyway.

Similarly, even if a young person is on bail and at home, if the family is not able to support them adequately in terms, for example, of ensuring that they meet any bail conditions or making sure they have the resources to get to court, then they have limited ability or capacity to manage that situation and may well find themselves in breach of bail. This is a particular concern for children on care and protection orders who are overrepresented in the youth justice system.

Some bail conditions are particularly onerous for young people and can "set them up to fail". To tell a young person they cannot associate with any of their friends, for example, or not to go to a certain place where young people meet is unrealistic. Young people are social

beings and to isolate them for maybe weeks at a time is going to invite a breach of the condition – certainly without any other support being provided to the young person. Even if the young person does not contact their friends, it is likely their friends will try to contact them and a breach is likely to occur.

Care needs to be taken to ensure that any bail conditions imposed are reasonable and are directly relevant to the purposes of ensuring that the young person attends court on the specified day and protecting the community.¹⁶ Charging young people with what might be termed "technical breaches" can create problems in the longer term to no-one's benefit – as this example from New South Wales shows:

In NSW a young girl was arrested for breaching a bail condition which required her to be home by 9.00 p.m. She was arrested as she was making her way home when the train pulled in at five minutes past nine. She spent at least a month in custody, even though when convicted she did not receive a custodial sentence for the shoplifting charge. The young girl gave up her schooling after these events.¹⁷

Balanced Justice view

Available statistics and research suggest that detention of a juvenile is generally ineffective as a deterrent to their re-offending.¹⁸ Therefore if the goal is to support young people and to reduce repeat offending, options which are likely to result in the increased detention of children are inappropriate.

The focus should instead be on:

- addressing the issues that put children at risk of becoming offenders to start with, particularly repeat offenders; and
- diverting young people coming into contact with the criminal justice system as soon as possible.

References

- ¹ Richards, K 'What makes juvenile offenders different from adult offenders?' (2011) *Australian Institute of Criminology: Trends & Issues in Crime and Criminal Justice* (No. 409) at 1 <<http://www.aic.gov.au/documents/D/6/D/%7bD6D891BB-1D5B-45E2-A5BA-A80322537752%7dtandi416.pdf>> (15 April 2013)
- ² *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985), r 13.1 and 13.2 cited in Stubbs, J, 'Re-examining Bail and Remand for Young People in NSW' 2010 (43) *Australian & New Zealand Journal of Criminology* 485 at 488
- ³ Richards, K, Trends in Juvenile Detention in Australia' (May 2011) *Australian Institute of Criminology: Trends and Issues in Crime and Criminal Justice* (No. 416) at 1 <<http://www.aic.gov.au/documents/D/6/D/%7bD6D891BB-1D5B-45E2-A5BA-A80322537752%7dtandi416.pdf>> (15 April 2013); Richards, K 'What makes juvenile offenders different from adult offenders?' (2011) *Australian Institute of Criminology: Trends & Issues in Crime and Criminal Justice* (No. 409) at 1 <<http://www.aic.gov.au/documents/D/6/D/%7bD6D891BB-1D5B-45E2-A5BA-A80322537752%7dtandi416.pdf>> (15 April 2013) Australian Institute of Criminology.
- ⁴ *Australian Law Reform Commission*, 'Seen and heard: priority for children in the legal process (1997) Report 84 at 251 <<http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC84.pdf>> (15 April 2013)
- ⁵ *The prohibition of the publication of names of children involved in criminal proceedings* / Standing Committee on Law and Justice. [Sydney, N.S.W.] : the Committee, 2006 (Report ; no. 35)
- ⁶ Richards, K 'What makes juvenile offenders different from adult offenders?' (2011) *Australian Institute of Criminology: Trends & Issues in Crime and Criminal Justice* (No. 409) at 5 <<http://www.aic.gov.au/documents/D/6/D/%7bD6D891BB-1D5B-45E2-A5BA-A80322537752%7dtandi416.pdf>> (15 April 2013)
- ⁷ As above at 7
- ⁸ Snowball, L, 'Diversion of Indigenous Offenders, Trends and Issues in Crime and Criminal Justice', (2008) *Australian Institute of Criminology* (No. 35) cited in Wong, K, Bailey, B & Kenny, D, 'Bail Me Out: NSW Young People and Bail' (February 2010), *Sydney: Youth Justice Coalition* at 3-4 <<http://www.yjconline.net/BailMeOut.pdf> > (15 April 2013)
- ⁹ Richards, K, Trends in Juvenile Detention in Australia' (May 2011) *Australian Institute of Criminology: Trends and Issues in Crime and Criminal Justice* (No. 416) at 7 <<http://www.aic.gov.au/documents/D/6/D/%7bD6D891BB-1D5B-45E2-A5BA-A80322537752%7dtandi416.pdf>> (15 April 2013)
- ¹⁰ As above at 4-5
- ¹¹ PIAC
- ¹² *Australian Law Reform Commission*, 'Seen and heard: priority for children in the legal process (1997) Report 84 at 277 <<http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC84.pdf>> (15 April 2013)
- ¹³ Bamford, D, King, S, & Sarre, R, 'Factors affecting remand in custody: A study of bail practices in Victoria, South Australia and Western Australia. (2009) *Australian Institute of Criminology: Research and Public Policy Series* (No. 23) at p 2; Brignell, G. (2002) 'Bail: An examination of contemporary issues', *NSW Judicial Commission: Sentencing Trends & Issues* (No.24), retrieved January 13, 2010 from <http://www.judcom.nsw.gov.au/st/st24/index.html>; Justice Policy Institute (US) (2009), 'The costs of confinement: Why good juvenile justice policies make good fiscal sense', retrieved January 13, 2010, from http://www.justicepolicy.org/images/upload/09_05_REP_CostsOfConfinement_JJ_PS.pdf; Kellough, G & Wortley, S (2002), 'Remand for plea: Bail decisions and plea bargaining as commensurate decisions' 42 *British Journal of Criminology* 186 at 187; Oxley, P, 'Remand and bail decisions in a magistrates court' (1979), *Department of Justice (NZ): Research Series* (No. 7); Stubbs, J, 'Bail reform in NSW' (1984), *Sydney: NSW Bureau of Crime Statistics and Research* at p. 92; cited in Stubbs, J, 'Re-examining Bail and Remand for Young People in NSW' 2010 (43) *Australian & New Zealand Journal of Criminology* 485 at 486.
- ¹⁴ Youth Justice Act 1992 (Qld), Schedule 2
- ¹⁵ Vignaendra, S, Moffatt, S, Weatherburn, D & Heller, E, 'Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime' (May 2009), *BOCSAR Bulletin* 128 cited in Wong, K, Bailey, B & Kenny, D, 'Bail Me Out: NSW Young People and Bail' (February 2010), *Sydney: Youth Justice Coalition* at 3 <<http://www.yjconline.net/BailMeOut.pdf> > (15 April 2013)
- ¹⁶ As above at 497
- ¹⁷ Stubbs, J, 'Re-examining Bail and Remand for Young People in NSW' 2010 (43) *Australian & New Zealand Journal of Criminology* 485 at 497-498
- ¹⁸ *Australian Law Reform Commission*, 'Seen and heard: priority for children in the legal process (1997) Report 84 at 285 <<http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC84.pdf>> (15 April 2013)

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Balanced Justice

‘Naming and shaming’ young offenders

Laws preventing the identification of young people

In most parts of Australia there are laws that prevent people publishing information which might identify a child involved in court proceedings.¹ It is generally understood that because of the very fact that children and young people are young, they make poor decisions or choices because of their lack of experience and, with appropriate guidance and support, they can make better choices and change their behaviour – rehabilitation. This is more likely to happen with children and young people than adults.²

We know that offending behaviour in relation to young people must be considered in the context of child and youth development. Early adolescence through to early adulthood is a peak period for brain development and consequently a period of increased risk in decision making and behaviour.

In Queensland information identifying young people aged 10-16 years³ charged with offences cannot be published unless the Court allows this⁴ and it may only do so in very specific circumstances:

- the child is sentenced for an offence for which, if the child was an adult, the maximum sentence would be life imprisonment;
- the offence involved the violence against another person; and
- the court considers the offence to be particularly dreadful (heinous).⁵

When deciding whether to allow identifying information about a child to be published, the Court must consider:

- the need to protect the community;
- the safety or wellbeing of a person other than the child;
- the impact on the child's rehabilitation; and
- any other relevant matter.⁶

Why are these protections so important?

Most young people who come into contact with the police before 18 will not go on to be “career criminals” – their contact will be shortly lived and relatively minor and they will “grow out” of offending from late adolescence. Many will never come to court, their offending being addressed by a police caution. A significant proportion of those brought to court will appear once, maybe twice. There can be no sensible reason to name these offenders.

The group of repeat offenders is very small. These young people tend to have low socioeconomic status, low educational attainment, significant physical and mental health needs, substance abuse and a history of childhood abuse and neglect. Young people in detention in Queensland have reported experiencing multiple social and health problems during the previous year. Most often these problems related to school (69%), peers (62%), family (50%), and drugs or alcohol (43%). It is unclear how naming such young people could be useful.

Publicly identifying a child offender has the potential to jeopardise the rehabilitation of that child.⁷ It may give them a bad name which they cannot rid themselves of – irrespective of whether they are trying to “turn over a new leaf” - so that people exclude them and make assumptions about how they will behave in the future. This can affect, for example, their job prospects and ability to positively engage with their community generally.⁸ Inability to get a job or otherwise be involved in positive activities is a risk factor for further offending, which does not make the community safer or reduce crime. Consequently, it is widely recognised that young people who offend should not be stigmatised and labelled by publicly naming them.⁹

Research has shown significant detrimental effects resulting from young people being labelled as ‘delinquent’ or ‘criminal’.¹⁰ These detrimental effects can continue far beyond the time when the information about the young person is first published, particularly in a world where it can be published online.¹¹

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There is also very little evidence to demonstrate that the naming of young people prevents re-offending which could be the only real justification for taking such action.¹² Recent research conducted in the Northern Territory (the only jurisdiction in Australia where the naming of child offenders is permitted) presents evidence that 'naming and shaming' can have the opposite effect with child offenders, with children acting as though they need to live up to their tarnished reputations.¹³ Children and young people are unlikely to understand the consequences that may result from being publicly named for criminal offending.¹⁴ Some children may even welcome the publicity as a 'badge of honour' and value the immediate gratification of belonging to an 'outside group', cementing the anti-social behaviour rather than helping the child move away from such behaviour.¹⁵

In Britain, since 2003, local authorities and police have been permitted to 'name and shame' children who have been placed on an 'anti-social behaviour order' (**ASB Order**).¹⁶ As a result, personal details of young offenders, such as their portraits, names and the requirements of their ASB Order have been published.¹⁷ The rationales behind this approach appear to be:

- deterring the young person from further antisocial behaviour through public humiliation;
- increased community control by involving citizens in the surveillance of the offender; and
- reassuring citizens that something is "being done" about young people,

none of which focus on preventing crime.¹⁸

The United Kingdom Government has now announced it will abandon ASB Orders as they have been found to be ineffective in addressing the behaviour complained of and actually contribute to the criminalising of young people¹⁹ - not least because the high breach rate of ASB Orders has led to a sharp increase in prison sentences for antisocial behaviour offences. Imprisonment is very costly and generally does not prevent re-offending.

International obligations to protect the interests of children

The *United Nations Convention on the Rights of the Child* (the **UNCRC**) and the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985* (the **Beijing Rules**) refer specifically to a young person's right to privacy at all stages of juvenile justice proceedings.²⁰ Rule 8.1 of the Beijing Rules notes that this is 'in order to avoid harm being caused to her or him by undue publicity or by the process of labelling'.²¹

The **UNCRC** was ratified by Australia in December 1990: consequently, any federal, state or territory legislation, policy or practice that is inconsistent with the **UNCRC** places Australia in breach of its international obligations and could have consequences at the international level.²² In addition, the Beijing Rules represent internationally accepted minimum standards, and although these are not necessarily binding on Australia at international law, failure by Australia to adhere to these rules may result in international scrutiny.²³

Balanced Justice view

Naming and shaming young people involved in the justice system is likely to undermine their chances of rehabilitation. It ignores fundamental, widely accepted principles contained in international law, and the evidence which shows that it can actually lead to increased levels of offending.

The existing protections in the *Youth Justice Act 1992* provide an appropriate balance of holding offenders to account for their actions, while protecting vulnerable young people and encouraging rehabilitation. These laws should not be changed.

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References

- ¹ Australian Law Reform Commission, 'Particular Privacy Issues Affecting Children and Young People – Identification in criminal matters and in court records', *Australian Privacy Law and Practice (ALRC Report 108)* (2008) (Vol.3) at 2321 published at <http://www.alrc.gov.au/publications/report-108> (2 April 2013)
- ² Kyriacou, K 'Name and shame all child offenders, says Attorney-General Jarrod Bleijie', *The Courier Mail*, 14 July 2012 <<http://www.couriermail.com.au/news/queensland/getting-kids-back-on-track/story-e6freoof-1226425740039>> (2 April 2013)
- ³ Importantly in Queensland, unlike all other Australian States and Territories, for the purposes of the criminal law, a child is a person who has not yet turned 17 years. Everywhere else, it is a person who is not yet 18.
- ⁴ *Youth Justice Act 1992* (Qld), sections 301(1) and 234
- ⁵ *Youth Justice Act 1992* (Qld), sections 234 and 176(3)(b)
- ⁶ *Youth Justice Act 1992* (Qld), section 234
- ⁷ 'Qld wants to name and shame young offenders', ABC News, 14 July 2012 <<http://www.abc.net.au/news/2012-07-14/qld-name-and-shame-proposal/4130614>>; Kyriacou, K 'Name and shame all child offenders, says Attorney-General Jarrod Bleijie', *The Courier Mail*, 14 July 2012 <<http://www.couriermail.com.au/news/queensland/getting-kids-back-on-track/story-e6freoof-1226425740039>> (2 April 2013)
- ⁸ Naylor B, 'Do not pass go: The impact of criminal record checks on employment in Australia' (2005) 30 *Alternative Law Journal* 174 at 174-175, cited in Crofts, T and Witzleb, N, "Naming and shaming" in Western Australia: Prohibited behaviour orders, publicity and decline of youth anonymity' (2011) 35 *Criminal Law Journal* 34 at 35
- ⁹ Crofts, T and Witzleb, N, "Naming and shaming" in Western Australia: Prohibited behaviour orders, publicity and decline of youth anonymity' (2011) 35 *Criminal Law Journal* 34 at 34
- ¹⁰ 'Particular Privacy Issues Affecting Children and Young People – Identification in criminal matters and in court records', *Australian Privacy Law and Practice (ALRC Report 108)* (2008) (Vol.3) at 2320 <<http://www.alrc.gov.au/publications/report-108>> (2 April 2013)
- ¹¹ Krause, M, 'Involving the Community in Youth Justice – "Naming and Shaming" and the Role of Local Citizen Courts in Britain and the Former GDR' (2011) 38(4) *Social Justice* 91 at 97
- ¹² Lincoln, Robyn, 'Naming and shaming young offenders: reactionary politicians are missing the point', *The Conversation*, 22 August 2012 <<http://theconversation.com/naming-and-shaming-young-offenders-reactionary-politicians-are-missing-the-point-8690>> (2 April 2013)
- ¹³ As above
- ¹⁴ Crofts, T and Witzleb, N, "Naming and shaming" in Western Australia: Prohibited behaviour orders, publicity and decline of youth anonymity' (2011) 35 *Criminal Law Journal* 34 at 44
- ¹⁵ As above at 44-45
- ¹⁶ Krause, M, 'Involving the Community in Youth Justice – "Naming and Shaming" and the Role of Local Citizen Courts in Britain and the Former GDR' (2011) 38(4) *Social Justice* 91 at 91
- ¹⁷ As above at 91
- ¹⁸ As above at 93 and 97
- ¹⁹ 'Asbos to be abolished under new government plans', Channel 4 News, 7 February 2011 <<http://www.channel4.com/news/asbos-to-be-abolished-under-new-government-plans>> (3 April 2013); Theresa May (Home Secretary), 'Moving beyond the ASBO' speech delivered at the Coin Street Community Centre (28 July 2010), cited in Crofts, T and Witzleb, N, "Naming and shaming" in Western Australia: Prohibited behaviour orders, publicity and decline of youth anonymity' (2011) 35 *Criminal Law Journal* 34 at 37
- ²⁰ *Convention on the Rights of the Child*, 20 November 1989 (1991) ATS 4, art 40(2)(b)(vii) and *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985), r 8.1, cited in Australian Law Reform Commission, 'Particular Privacy Issues Affecting Children and Young People – Identification in criminal matters and in court records', *Australian Privacy Law and Practice (ALRC Report 108)* (2008) (Vol.3) at 2320 published at <http://www.alrc.gov.au/publications/report-108> (2 April 2013)
- ²¹ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985), r 8 commentary, cited in Australian Law Reform Commission, 'Particular Privacy Issues Affecting Children and Young People – Identification in criminal matters and in court records', *Australian Privacy Law and Practice (ALRC Report 108)* (2008) (Vol.3) at 2320 published at <http://www.alrc.gov.au/publications/report-108> (2 April 2013)
- ²² Australian Law Reform Commission, 'Decision Making by and for Individuals under the Age of 18 – Privacy rights of children and young people at international law', *Australian Privacy Law and Practice (ALRC Report 108)* (2008) (Vol.3) at 2256 published at <http://www.alrc.gov.au/publications/report-108> (2 April 2013)
- ²³ As above

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Admissibility of findings of guilt

Young people test the boundaries

Young people's offending behaviour must be considered in the context of child and youth development; early adolescence through to early adulthood is a peak period for brain development and consequently a period of increased risk.¹

Minor offending by young people may result from testing the boundaries of acceptable behaviour as they adjust to their emerging responsibilities and changing position in society, or perhaps the culmination of a history of deprivation and disadvantage.² Whatever the reason, it is important to recognise that young people make mistakes while they are growing up, and they should be subject to a system of criminal justice that recognises their inexperience and immaturity.³

Young people's offending is episodic

Most juvenile crime is episodic and transitory, with young people predominantly 'growing out' of offending behaviour over time through a maturation process.⁴ Most young people who come into contact with the police before 18 will not go on to be "career criminals" – their contact will be shortly lived and relatively minor and they will "grow out" of offending from late adolescence.⁵ The majority of these young people have one or two contacts with the criminal justice system and do not reoffend.⁶

Many will never come to court, their offending being addressed by a police caution.⁷ A significant proportion of those brought to court will appear once, maybe twice.⁸

Children's Courts focus on rehabilitation

In Queensland, less than 6 per cent of young people appearing before the Childrens Court are convicted. Childrens Court judges understand that recording a conviction will have a serious impact on the young person's future, affecting their employment prospects, chances of reoffending, and any future sentencing considerations if they do come back into the justice system.

It is the sentencing Childrens Court judge that is best placed to make this judgement, with all of the relevant, contemporary information in front of them. To allow judges to use a small part of this information (the sentencing outcome) in the future is unfair and dangerous.

The 'juvenile penalty'

A 2004 study showed that sentencing of juveniles transferred to adult courts in Pennsylvania have been found to be more severe, a result of a considerable 'juvenile penalty'.⁹ The same report suggests that a person's juvenile record overshadows other traditional sentencing considerations, like the severity of the offence and history in adult courts. This study also suggests that juveniles transferred to adult courts are intended to be punished the same way as adults, but actually receive more severe treatment than comparable adult offenders. This evidence shows that juveniles in adult courts are disproportionately punished, despite the historical acceptance that young people 'are still developing and warrant different treatment'.¹⁰

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Past behaviour doesn't prove anything today

There are a number of laws across Australia that limit the use of a person's past history in court cases, to ensure that a person is judged on the facts of the specific incident that led to their charges. Evidence shows that both magistrates and juries are more likely to convict in cases where the previous convictions are similar in nature to the current offence,¹¹ suggesting that past actions may have a negative impact on the way that people are treated in courts.

Limiting use of Children's Court findings in adult courts

All Australian jurisdictions limit the use of orders made in Children's courts.¹² Our justice system recognises that adults should not be punished for minor offences that occurred while they were young, especially when they received a relatively minor sentence such as a fine, without a conviction. Children's court judges are best placed to identify the issues relevant to the young person before them, including the punishment that the young person receives and the support that is available to help them rehabilitate themselves and prevent future offending.

Balanced Justice view

The point of a youth justice system is to acknowledge that young people are developing and make mistakes; to focus on rehabilitation and reducing future contact with the justice system; and to make sure that young people aren't caught up in a cycle of offending and punishment.

Allowing adult courts access to young people's records with the Children's Court, without all of the information that was available to the Court at that time, will likely lead to harsh and unfair

punishments and undermine the rehabilitative strategies put in place by the Children's Court.

Adult courts should not consider the findings of guilt of young people in the youth justice system, but should consider the facts before the court and the actions of adults in determining guilt and sentencing offenders.

References

- ¹ AIHW *Young Australians: their health and wellbeing* 2011 Chapter 25, Young people and crime (AIHW 2011)
- ² Australian Law Reform Commission, 'Seen and heard: priority for children in the legal process (1997) Report 84 at 251 <<http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC84.pdf>> (15 April 2013)
- ³ Richards, K, Trends in Juvenile Detention in Australia' (May 2011) *Australian Institute of Criminology: Trends and Issues in Crime and Criminal Justice* (No. 416) at 1 <<http://www.aic.gov.au/documents/D/6/D/%7bD6D891BB-1D5B-45E2-A5BA-A80322537752%7dtandi416.pdf>> (15 April 2013); Richards, K 'What makes juvenile offenders different from adult offenders?' (2011) *Australian Institute of Criminology: Trends & Issues in Crime and Criminal Justice* (No. 409) at 1 <<http://www.aic.gov.au/documents/D/6/D/%7bD6D891BB-1D5B-45E2-A5BAA80322537752%7dtandi416.pdf>> (15 April 2013) Australian Institute of Criminology.
- ⁴ Cunneen and White 2002; Mukherjee 1983; Richards 2011.
- ⁵ Commission for Children and Young People *Snapshot 2011: Children and Young People in Queensland* Chapter 7, Criminal Justice System (CCYPCG 2011) and AIHW 2011
- ⁶ Rose 2006; Weatherburn 2004
- ⁷ 12,238 cautions were administered in 2011-12
- ⁸ AIC (2011) *What makes juvenile offenders different from adult offenders* Trends and Issues in crime and criminal justice No 409 (AIC (2011))
- ⁹ MC Kurlychek and BD Johnson, 'The juvenile penalty: A comparison of juvenile and young adult sentencing outcomes in criminal court' (2004) 42(2) *Criminology* 485.
- ¹⁰ MC Kurlychek and BD Johnson, 'The juvenile penalty: A comparison of juvenile and young adult sentencing outcomes in criminal court' (2004) 42(2) *Criminology* 485, 507.
- ¹¹ S. Lloyd-Bostock, 'The Effects on Jurors of Hearing about the Defendant's Previous Convictions: a Simulation Study' [2000] *Criminal Law Review* 734.
- ¹² Youth Justice Act 1992 (Qld) s 148; Children (Criminal Proceedings) Act 1987 (NSW) s 15; Youth Offenders Act 1997 (NSW) s 68; Youth Justice Act 2005 (NT) s 136; Young Offenders Act 1993 (SA) s 58; Annulled Convictions Act 2003 (Tas) ss 6 and 9; Young Offenders Act 1994 (WA) ss 189-90.

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