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YOUTH JUSTICE IN QUEENSLAND: WRONG WAY, TURN BACK

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Today I begin by acknowledging the Traditional Custodians of the lands and waters of the Gold Coast, the Yugambah people, and pay my respects to their Elders past, present and emerging.

Late in 2022 the Queensland government boasted about increasing the number of children in expensive, counter-productive and what is always an undergraduate school for adult prisons, youth detention.

On 29 December 2022 the Police Minister Mark Ryan proudly proclaimed; “The total number of cases where a young person has been refused bail at their first appearance has risen from 377 in 2017-18 to 585 in 2021-22.”² Note there is no mention by Mr Ryan of the direct and indirect cost to the community of this depressing fact.

But only 2 months on from that troubling and perverse statement was the passing by the Queensland Parliament of one of the cruelest pieces of legislation we have seen in this country in recent years, and that’s saying something given the state sanctioned child abuse that is enforced through ‘tough on crime’ state and territory governments pandering to the ill-informed political class, tabloid media and lobby groups.

The legislation suspends the State’s *Human Rights Act 2019* (HR Act) so as to allow the detention of children who breach bail. The *Strengthening Community Safety Act 2023* – Orwellian in the title’s deception – used the override power, set out in s 43 of the HR

¹ Republic Chambers Hobart, Higgins Chambers Brisbane, Patron Justice Reform Initiative, National Criminal Justice Spokesman for the ALA; National President of the ALA, 2011-2012

² Hon Mark Ryan, Media Statement 29 December 2022

Act, to in exceptional circumstances, expressly declare that a provision of an Act has effect despite being incompatible with human rights.³ The legislation introduced a number of highly punitive measures to reduce access to bail by youth.

Expanding a trial – which means it is permanent - of electronic monitoring devices as a condition of bail for a further 2 years to include eligible 15-year-olds, and expanding the list of offences with a presumption against bail to include people who are passengers in stolen vehicles and enter premises with intent to commit an indictable offence, are but two of the changes.⁴

As the Queensland Human Rights Commission observed in a submission on the legislation, the human rights overridden, let's say deliberately trampled upon in the manner of an authoritarian state, by the legislation impacted on these rights:

“Article 4 of the ICCPR and accompanying guidance material explicitly prescribes that no derogation from certain rights may be made including to the prohibition of torture or cruel, inhuman or degrading treatment (protected in s 17 of the HR Act), the recognition of everyone as a person before the law (protected in s 15 of the HR Act), and the imposition of retrospective criminal laws or increased penalties (s 35). The rights protected in the United Nations Convention on the Rights of the Child are also intended to apply during emergencies.”⁵

And not satisfied with this unseemly breach of the rule, the Queensland government last year, again responding to what could be viewed as a case of moral panic in this State (more on that later), passed another law, *the Child Protection (Offender Reporting and Offender Prohibition Order) and Other Legislation Amendment Act 2023*, which allows for children to be held in police cells. Again, the Queensland government overrode the HR Act – I mean if you have done it once and got away with it, why not make it a habit.

Only a few days ago, the Premier Steven Miles announced the government would introduce legislation to allow the media and victims of crimes to be present in cases involving children and young people. A dangerous proposal which will lead to

³ See discussion by Queensland Human Rights Commission Submission, February 2023, to the Queensland Parliament on the Bill, at [36]

⁴ See Department of Business, Education and Training website - <https://desbt.qld.gov.au/youth-justice/reform/changes-act>

⁵ Fn 3, [44]

stigmatizing and vigilantism and further destroy the lives of the young. And, of course, like his predecessor, Anastacia Palaszczuk, Mr Miles has taken to undermining the separation of powers by criticizing the judiciary because, apparently, they are not doing what the community expects of them. One assumes the Premier and those in the media and community who blame magistrates and judges for 'being out of touch' don't know about the work of the renowned Tasmanian academic, and that State's former Governor, Kate Warner, who found that the majority of those serving on juries would have given a lesser sentence than was given by the judge.⁶

The depths of depravity to which the Queensland government has sunk on youth justice – and the LNP is as bad, actually nastier – can be viewed when you visit the website of the government department which is meant to care for children and youth.

Here is what it says about a law which allows for children to be held in police cells for lengthy periods: "These amendments ... reflect and validate what has been the understood and established practice for the last 30 years," the Department says.

And it's no big deal because all the legislation does is to "make lawful the longstanding practice of holding children in watchhouses until beds become available in youth detention centres."⁷

If you read this type of explanation on the website of the government of Rwanda or El Salvador, two notorious exemplars of the abuse of human rights, you would not be surprised. But, in a democracy?

Meanwhile, proposed solutions to reducing youth crime which are available, and which have been argued by this organisation, and the Justice Reform Initiative (a national group established by Robert Tickner who was Aboriginal Affairs Minister in the Hawke and Keating governments), and many others, would make a major difference to community safety and the lives of vulnerable young people who are the victims of inherent racism, poverty, an inadequate education and community investment system, and a punitive justice system.

⁶ Warner K et al. 2011. Public judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study. Trends & issues in crime and criminal justice no. 407. Canberra: Australian Institute of Criminology.

⁷ See Fn 4

Latest Data on Youth Detention in Queensland

The Productivity Commission⁸ has recently, as it does each year, released its latest data on youth justice.

Here is what it tells us about Queensland:

The average daily number of children in detention in Queensland in 2023 was 285, of whom 201 are Indigenous, (in 2021-22 it was 269). That is almost 180 higher than the next state, New South Wales⁹;

The Indigenous rate per 10,000 children between 10-17 in detention is 46.0. In 2019-20, it was 32.7¹⁰;

There were 166 children between the ages of 10 and 13 in detention in 2022-23, of whom 135 were Indigenous¹¹;

The cost per day of keeping a child in detention in Queensland in 2023 was \$1833.72 but, in community corrections, \$304.30.¹²

What can we say about these numbers? Firstly, that Critical Race Theory is right – there is inherent and structural racism in the Queensland justice system.

Secondly, from a Law and Economics perspective, government is, on a cost benefit analysis, favoring an expensive alternative which does not equal greater community safety. We will return to this perspective later.

Crisis, What Crisis?

The title of a fine album released by the British group Supertramp in 1975¹³ seems apt in the context of the hysteria that is the manufactured Queensland youth crime ‘crisis’.

⁸ Productivity Commission, ‘Report on Government Services 2024’ ch 17

⁹ Fn 6, Table 17.A.1

¹⁰ Fn 6 Table 17.A.7

¹¹ Fn 6 Table 17.A.9

¹² Fn 6 Table A.20 and Table A.21

¹³ Supertramp, ‘Crisis, What Crisis?’, (A&M Records, 1975)

By the way, the title didn't relate to youth justice but to the economic and industrial strife the UK found itself in in the late 1970s. But the title is too good not to use here.

At the outset, let me say that the data is clear. New ABS data, released last week, says that there were "10,878 offenders aged between 10 and 17 years in Queensland in 2022–23, an increase of 6% (574 offenders) from 2021–22. Youth offenders proceeded against by police comprised 13% of total offenders in Queensland in 2022–23."

Further, "[a]fter accounting for population growth, the youth offender rate increased from 1,863 offenders in 2021–22 to 1,925 offenders per 100,000 persons aged between 10 and 17 years in 2022–23."¹⁴

But is that a crisis? It is a matter of perception. As Professor Terry Goldsworthy and colleagues noted last year; "A sense of crisis is created to some degree by not only rising crime rates, but also a sense of helplessness felt by the community and a perceived failing of the government to provide for a safe and secure community."¹⁵

There is certainly a political, media and community debate (the latter driven as much by the media and interest groups like victims' groups, as by genuine community concern) which is, as it always does, instilling fear and, therefore, making the youth crime issues seem worse than the data suggests. Hysteria must always be discounted and sober analysis, after taking a deep breath, encouraged.

This heightened atmosphere about youth crime exists in the context of a reduction in Queensland, overall, of crime rates. The ABS data referred to above states that "[t]here were 82,677 offenders proceeded against by police in Queensland in 2022–23. This was an increase of 2% from the previous year and was the first increase in offenders since 2015–16. Despite the increase in offender numbers, after accounting for population growth, the offender rate decreased from 1,762 offenders in 2021–22 to 1,745 offenders per 100,000 persons aged 10 years and over in 2022–23."¹⁶

¹⁴ Australian Bureau of Statistics, 'Recorded Crime – Number of Offenders 2022-23'

¹⁵ Terry Goldsworthy, Gaëlle Brotto, Tyler Cawthray, 'Is Australia in the grips of a youth crime crisis? This is what the data says', *The Conversation*, 30 October 2023 <https://theconversation.com/is-australia-in-the-grips-of-a-youth-crime-crisis-this-is-what-the-data-says-213655>

¹⁶ See Fn 11

The preoccupation with youth offending can, in some ways, be seen as an example of what is a long history of 'moral panic' over 'juveniles' and 'youth'. William S. Bush and David S. Tanenhaus, in their 2018 book, 'Ages of Anxiety'¹⁷, have observed, in examining why it is that youth crime rates attract a heightened degree of concern in communities, that the responses to youth offending in a range of settings, both in terms of time and location, "demonstrate the utility of the socio-logical concept of a "moral panic""¹⁸,.

By moral panic, they mean, in part, "heightened concern about a how a certain group is acting, hostility to that group, and widespread agreement or consensus that the threat from the group is real."¹⁹

This is certainly evident when one surveys the Queensland media, the extreme and inhumane responses of politicians and the constant calls by many for jail time being the only solution to youth crime. None of these responses are helpful in fixing a broken system which has, of course, led us to where we are today. If youth detention was so effective, why hasn't youth crime plummeted?

That this is not self-evident and there are not widespread calls for a turning back from the punitive approach to youth offending, is an example of moral panic, because it is an irrational response. It is not, in any way, embedded in logical or rational thought.

The Need for a New Approach

'Jailing is Failing' is the simple, but accurate, description the Justice Reform Initiative uses. As noted above, I am a patron of the JRI and the Queensland patrons include judges, the Honourable Margaret McMurdo AC, former President of the Court of Appeal, Supreme Court of Queensland and Commissioner of the Victorian Royal Commission into the Management of Police Informants and the Honourable Margaret White AO and Mick Gooda, former Aboriginal and Torres Strait Islander Social Justice Commissioner and former Royal Commissioner into the Detention of Children in the Northern Territory.

¹⁷ William S. Bush and David S. Tanenhaus, 'Ages of Anxiety', (New York University Press, 2018)

¹⁸ Fn 16, p 159

¹⁹ Fn 16, p160

Recently, the JRI made a submission²⁰ to the Queensland Parliament's Youth Justice Reform Select Committee.²¹ It is comprehensive and provides a well thought out, evidence-based reform map which would demonstrably benefit at risk children and young people, victims of crime and community safety. Because it is evidence based, it has inherent merit.

The submission makes a very important point – that 'law and order' politics and 'policies' undermine evidence based, therapeutic reforms. As the JRI submission notes, "[a]ny sensible and evidence-based policy commitments have been limited by the consequences of entrenched and longstanding 'law and order' politics."²²

This is not a controversial view. John Pratt and Michelle Miao have rightly argued that 'law and order' politics are primitive – they are the stuff of the Dark Ages:

"With each society it touches, it is as if penal populism undermines the very kernel on which modern punishment had been built: the way in which, from the time of the Enlightenment, science, rationality and expert knowledge were expected to outweigh emotive, uninformed common-sense, thereby ensuring that reason outweighed anti-reason in the development of penal policy."²³

To return to the JRI submission, let me set out the key features of its rational, evidence based, roadmap for root and branch reform of the Queensland youth justice system.

At the outset, I would urge you all to read the JRI submission because it sets out a comprehensive survey of specific programs, in Queensland and beyond.

Rightly, the submission focuses on early intervention. All the evidence, and I mean all, tells us that you reduce youth crime if you intervene early. Dr Rhiannon Parker, a Research Fellow and the Centre for Social Impact, a collaboration between Swinburne University of Technology, Flinders University, University of New South Wales and The University of Western Australia, has argued that by "investing in early intervention programs and diverting funds from prison budgets into community programs, we can

²⁰ Justice Reform Initiative, 'Submission to Queensland Parliament Inquiry into Youth Justice Reform', January 2024

²¹ On 12 October 2023 the Queensland Parliament Youth Justice Reform Select Committee was established to conduct an inquiry to examine ongoing reforms to the youth justice system and support for victims of crime. <https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=232&id=4295>

²² Fn 19, p6

²³ John Pratt and Michelle Miao, 'Penal Populism: The End of Reason', Chinese University of Hong Kong, Faculty of Law, Research Paper No. 2017-02 p2

tackle the underlying issues that contribute to youth offending and reduce the need for more costly and potentially harmful punitive measures later on.”²⁴

The JRI submission, (and I have extracted and in part summarized portions of the submission here), in the context of early intervention and prevention, refers to:

Pre-natal and infancy home visitation programs- these show positive outcomes in terms of improving the health and wellbeing of children and families and reducing contact with the criminal justice system;

Parenting programs – many are found to be the most effective at reducing antisocial behaviour and youth crime. These programs typically involve training and education that supports parents to develop positive parenting skills and strong relationships with their children;

Preschool programs that provide early intervention and support for children at a crucial transition point in their development. There is evidence that certain behaviours in childhood are indicative of future offending;

Mentoring programs which are effective at reducing offending and supporting children and young people to engage in prosocial behaviour. One study that reviewed 25 experimental and quasi-experimental evaluations of mentoring programs and their impact on delinquency found a 19–26% reduction in behaviours of concern;

After-school programs, anti-bullying programs, sport and recreation programs- these are all effective as tools of early intervention and prevention.

In relation to those who enter the youth justice system, the JRI proposals include:

Evidence based tertiary prevention programs and community-based supports. Tertiary prevention programs occur after a child has had contact with the law or after a person has become a victim of crime, with the aim of preventing recidivism. These community-led services and strategies for children in contact with the justice system encompass diversion and sentencing alternatives, in-prison programs, and post-release support;

²⁴ Rhiannon Parker, 'Rethinking Australia's Youth Justice System by Embracing Child Rights', 27 April 2023 <https://www.csi.edu.au/news/rethinking-australias-youth-justice-system-by-embracing-child-rights/>

Restorative youth justice conferencing is part of the suite of solutions because it has been shown to reduce reoffending in circumstances where young people are remorseful, and their conference outcomes are reached via consensus.

And on alternatives to youth detention the JRI observes:

“Alternative youth justice placements. If residential options are required where there is not a suitable home environment, it is critical to consider what does work. Incarceration does not work to make the community safer, deter offending, or reduce crime. Youth detention centres, prisons, and watch houses – in any form - are not suitable places for children. Any model that seeks to support children to stop offending should take a child-centred approach to ‘do no harm’.”²⁵

Law and Economics - Youth Detention is Economically Irrational

The Law and Economics movement emerged from the University of Chicago. Richard Posner, one its finest exponents, and a former judge, explains the application of economics to law this way:

“The economic analysis of law ... tries to explain and predict the behavior of participants in and persons regulated by the law. It also tries to improve law by pointing out respects in which existing or proposed laws have unintended or undesirable consequences, whether on economic efficiency, or the distribution of income and wealth, or other values.”²⁶

From a Law and Economics perspective, the current approach to youth justice in Queensland is a case of irrationality and prejudice on the part of the key actors – government, the legislature and elements of the community – who, because of this, are ensuring unintended and undesirable consequences of a wrong-headed policy in a range of areas. These include increased crime, lost income producing opportunities, disparity of wealth, lost tax revenues from employment, and increasing the cost to the health care system.

²⁵ Fn 19, p42-43

²⁶ Richard A. Posner, "Values and Consequences: An Introduction to Economic Analysis of Law" (Coase Sandor Institute for Law & Economics Working Paper No. 53, 1998), p2

Without repeating the data mentioned above, just consider how irrational and indeed fiscally irresponsible it is of government and the legislature in Queensland to approve and actually spend \$1833.72 per day keeping a child in detention in 2023 as opposed to \$304.30 in community corrections.

It is hard to think of a more gross waste, both directly and indirectly, of government spending. And that is saying something!

The Law and Economics approach to penal populism would be to argue that there are far too many people in detention and that the cost of keeping them in detention is far outweighed by the cost to the community, which is in the billions of dollars across Australia.

An analysis from the Justice Policy Institute in the United States has estimated the cost, direct and indirect, of detaining youth to be “an estimated \$8-\$21 billion in long-term costs for the confinement of young people” in that nation. This includes the cost of recidivism, lost future earnings of those detained, lost future government revenue (income tax etc), additional public health care spending, and costs of sexual and other assault claims.²⁷

In summary, if you are fiscal conservative, you could not support the current emphasis on ‘law and order’ polices. It is disastrously expensive and is a case where economics is jettisoned in favour a short-term political sugar hit and forelock tugging to the tabloid media.

Conclusion

There are never one size fits all solutions to curtailing anti-social and criminal activity in communities. And there are periods when crime rates go up, and periods when they come down. But we are our own worst enemy when it comes to justice, including youth justice.

Too many in the community are lied to by government, the political class, generally, and the media. They will tell you that treating vulnerable young people more harshly will

²⁷ National Justice Policy Institute, ‘Sticker Shock: Calculating The Full Price Tag For Youth Incarceration’, p36-37 https://justicepolicy.org/wp-content/uploads/2022/02/sticker_shock_final_v2.pdf

solve the problem. That the community will be safer – that there will be a return to a mythical era when you didn't have to lock your doors.

Of course, these are dangerous fictions. Unless we embrace serious reform, unless we fund the excellent examples of strategies that work for children and youth in Queensland – listed extensively in the JRI submission – instead of building more state sanctioned child abuse centres, nothing will change.

In that regard, some of the comments of the Premier, Mr. Miles, seem a step in the right direction, albeit, it has been a case of one step forward, two steps backwards given his attack on the courts, and the idea of opening up the children's court to media and victims. I refer to the Premier's refusal this week to walk away from the commitment that detention is a last resort. It seems the LNP thinks that Dickensian style punishment regimes for children is 21st century thinking.

Let me conclude with this powerful lesson, taken from the masterful and powerful short story by Alan Sillitoe, 'The Loneliness of the Long-Distance Runner'²⁸, which is about a boy sent to a youth detention facility, one of the notorious Borstals in the UK.

“You see, by sending me to Borstal, they've shown me the knife and, from now on, I know something I didn't know before: that it's war between me and them.”

Tells you everything that is wrong with youth detention and other harsh punishment as a solution.

²⁸ Alan Sillitoe. 'The Loneliness of the Long Distance Runner', (W H Allen, UK, 1959)