THREE DOGMAS OF JUVENILE JUSTICE

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I INTRODUCTION

Juvenile justice policy in Australia is dominated by three assumptions so widely accepted and so rarely challenged they might fairly be described as dogmas. The first assumption is that contact with the court system increases the risk of further offending (ie, is criminogenic). The second assumption is that restorative justice ('RJ') is more effective than traditional justice in reducing the risk of further offending. And the third assumption is that, left to their own devices, most juveniles grow out of crime. In other words, juvenile involvement in crime is for the most part transient and self-limiting.

These three assumptions are the pillars on which juvenile justice policy in Australia currently rests. The notion that contact with the court system is criminogenic underpins efforts to divert young offenders away from court wherever their offences and prior criminal record make that feasible. The assumption that RJ is more effective than traditional justice in reducing reoffending explains why RJ occupies such a central place in Australian diversionary schemes. The assumption that, left to their own devices, most juveniles grow out of crime provides support for minimalist diversionary options such as warnings and cautions – measures which might otherwise be criticised as failing to provide either an effective deterrent or a means by which to address the underlying causes of juvenile involvement in crime. For politicians this is important. If the first assumption leaves the policy maker caught between the Charybdis of failing to respond to juvenile crime and the Scylla of intervening only to make things worse, the third assumption provides an escape route inasmuch as it suggests that 'doing nothing' in some cases may actually be 'doing good'.

The legislation governing juvenile justice policy in Australia was enacted for the most part in the 1990s. At that time, the three assumptions in question were either supported by theory or seemed to be supported by evidence. The first

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assumption had its antecedents in the writings of Tannenbaum, according to whom:

> The process of making the criminal, therefore, is a process of … stimulating, suggesting, emphasizing, and evoking the very traits that are complained of … [T]he entire process of dealing with the young delinquent is mischievous in so far as it identifies him to himself or to the environment as a delinquent person.[1]

Thirty years later Tannenbaum's conjecture re-emerged as labelling theory:[2] the view that social rituals which stigmatise offenders (for example, being charged and brought to court) prompt them to identify as a deviant or, in Becker's terms, to adopt deviance as a 'master status'.[3] The second assumption is derived from Braithwaite's theory of reintegrative shaming.[4] The theory of reintegrative shaming holds that shaming rituals are not criminogenic if they allow offenders some means by which to atone for their wrongdoing and regain social acceptance. The theory suggests that diversion, with or without RJ, ought to be more effective in promoting law-abiding behaviour than stigmatising and degrading offenders (as courts are alleged to do). Studies of juvenile offenders seemed to confirm these claims and the notion that juvenile involvement in crime was overwhelmingly transient. Early studies of juvenile recidivism suggested that young offenders referred to court were more likely to reoffend than those diverted from court.[5] The evidence at the time suggested that juvenile involvement in crime was transient, with most juvenile offenders having only one contact with the court system before desisting.[6] Participants in RJ programs spoke in glowing terms about the experience.[7] However, what policy makers did not know at the time was that the evidence supporting their policies was more fragile and open to question than it appeared. That evidence has weakened even further over the intervening years.

In this article we challenge the three assumptions underpinning juvenile justice in Australia and discuss the policy implications that would flow from their abandonment. The structure of the article is as follows. In the next part (Part II) we show how the three dogmas have influenced the legislative approaches taken by Australian state and territory governments toward juvenile offending. In Part III we review the evidence bearing on the first and second assumptions. In Part IV we review the evidence bearing on the third assumption. In the final part (Part V) we discuss ways in which juvenile justice policy might be reformed if we abandoned the three assumptions and paid closer attention to the evidence on what works in reducing the risk of juvenile reoffending.

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1 Frank Tannenbaum, *Crime and the Community* (Columbia University Press, 1938) 19–20.
2 Edwin M Lemert, *Human Deviance, Social Problems, and Social Control* (Prentice-Hall, 2nd ed, 1972).
3 Howard S Becker, *Outsiders: Studies in the Sociology of Deviance* (Free Press, 1963).
4 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989).
5 Douglas A Smith and Raymond Paternoster, 'Formal Processing and Future Delinquency: Deviance Amplification as Selection Artifact' (1990) 24 *Law and Society Review* 1109, 1109–13.
6 Christine Coumarelos, 'Juvenile Offending: Predicting Persistence and Determining the Cost-Effectiveness of Interventions (NSW Bureau of Crime Statistics and Research, 1994) 33.
7 Lily Trimboli, 'An Evaluation of the NSW Youth Justice Conferencing Scheme' (NSW Bureau of Crime Statistics and Research, 2000) 64–5.

II LEGISLATIVE RESPONSES TO JUVENILE OFFENDING

This part presents an examination of the key juvenile justice legislation around Australia,[8] with particular emphasis on examples of the assumptions discussed in the previous part, especially in relation to the preference for diversion and RJ measures. It should be noted that in Victoria and the Australian Capital Territory ('ACT'), police warnings and cautions are not covered by legislation and are therefore not examined further in this article.

This discussion is supplemented by parliamentary debates, which further illustrate the extent to which these assumptions have underpinned legislative amendments in recent years. It must be acknowledged that there were also important developments in juvenile justice more broadly at the time of these legislative developments. In particular, Australia was involved in developing the *Standard Minimum Rules for the Administration of Juvenile Justice* ('Beijing Rules')[9] and is a signatory to the *Convention on the Rights of the Child* ('CROC').[10] Beijing Rule 11.1 recommends diversion from formal trial processing wherever appropriate, while Beijing Rule 18.1 and CROC Article 40.4 call for a range of dispositions as alternatives to institutional care.[11] We recognise the ongoing importance of these (and other principles) enshrined in international law, but maintain the need to question how they are implemented.

Most Australian jurisdictions set out juvenile justice principles in their legislation, including a statement clearly underpinned by RJ principles to the effect that a young person who commits an offence must (or should) be held accountable and encouraged to accept responsibility for the behaviour.[12] Another commonly articulated principle, which is likewise a hallmark of RJ, is that a victim of an offence committed by a child should be given the opportunity to participate in the process of dealing with the offender.[13] Some jurisdictions also

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8 Generally, the provisions relating to a juvenile (or youth, child or young person) refer to a person who was under 18 at the time of the (alleged) offence or at the time of being dealt with in relation to the (alleged) offence: *Children and Young People Act 2008* (ACT) s 94(4); *Young Offenders Act 1993* (SA) s 4; *Young Offenders Act 1994* (WA) ss 3, 4; *Youth Justice Act 2005* (NT) s 6; *Youth Justice Act 1997* (Tas) s 3. However, under section 3 of the *Children, Youth and Families Act 2005* (Vic), a 'child' 'does not include any person who is of or above the age of 19 years when a proceeding for the offence is commenced in the Court'. In Queensland, a 'child' is generally defined as a person who has not yet turned 17: *Youth Justice Act 1992* (Qld) sch 4; see also s 6. In contrast, in NSW, the legislation applies not only to someone who was a child at the time of the alleged offence but those aged up to 21 at the time of being dealt with by the court: *Young Offenders Act 1997* (NSW) s 7A(1).

9 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Dec 40/33, UN GAOR, 40th sess, 96th plen mtg, Supp No 53, UN Doc A/40/53 (29 November 1985).

10 *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

11 See also CROC art 40.3; *Guidelines for the Prevention of Juvenile Delinquency*, GA Res 45/112, 45th sess, 68th plen mtg, UN Doc A/RES/45/122 (adopted 14 December 1990) art 58.

12 *Children and Young People Act 2008* (ACT) s 94(1)(a); *Young Offenders Act 1994* (WA) s 7(b); *Youth Justice Act 1992* (Qld) sch 1 cl 8(a); *Youth Justice Act 1997* (Tas) s 5(1)(a); *Youth Justice Act 2005* (NT) s 4(a).

13 *Young Offenders Act 1994* (WA) s 7(e); *Youth Justice Act 1992* (Qld) sch 1 cl 9; *Youth Justice Act 1997* (Tas) s 1(d); *Youth Justice Act 2005* (NT) s 4(k).

refer to the desirability of reintegrating the offender into the community,[14] which likewise has a restorative justice flavour.

Several jurisdictions also articulate principles which promote a diversionary approach. For example, in Queensland:

> If a child commits an offence, the child should be treated in a way that diverts the child from the courts' criminal justice system, unless the nature of the offence and the child's criminal history indicate that a proceeding for the offence should be started.[15]

In New South Wales ('NSW'), 'criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter'.[16] The *Youth Justice Act 2005* (NT) stipulates that 'unless the public interest requires otherwise, criminal proceedings should not be instituted or continued against a youth if there are alternative means of dealing with the matter',[17] while the *Young Offenders Act 1994* (WA) suggests that

> [C]onsideration should be given, when dealing with a young person for an offence, to the possibility of taking measures other than judicial proceedings for the offence if the circumstances of the case and the background of the alleged offender make it appropriate to dispose of the matter in that way and it would not jeopardise the protection of the community to do so[.][18]

A New South Wales

The *Young Offenders Act 1997* (NSW) clearly exemplifies the assumptions referred to above. The Explanatory Memorandum to the Bill stated that the object of the Bill was to 'to establish a scheme that provides an alternative process to court proceedings for children alleged to have committed offences, through the use of youth justice conferences, formal cautions and warnings'.[19] When introducing the legislation, the then Attorney-General, Jeff Shaw QC, left no doubt about the motivation for this scheme in the second reading speech, observing in the opening paragraph '[s]tudies have shown that the majority of matters for which young people come to court are relatively minor and that most young people come to the attention of the criminal justice system only once, and do not reoffend'.[20]

He went on to state that '[l]ow level interventions such as warnings or police cautions have been shown to be effective in preventing reoffending',[21] adding that:

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14 See *Children and Young People Act 2008* (ACT) s 94(1)(i); *Young Offenders Act 1997* (NSW) s 7(e); *Youth Justice Act 1992* (Qld) sch 1 cl 16.

15 *Youth Justice Act 1992* (Qld) sch 1 cl 5.

16 *Young Offenders Act 1997* (NSW) s 7(c).

17 *Youth Justice Act 2005* (NT) s 4(q).

18 *Young Offenders Act 1994* (WA) s 7(g).

19 Explanatory Memorandum, Young Offenders Bill 1997 (NSW). For background, see also Janet B L Chan (ed), *Reshaping Juvenile Justice: The NSW Young Offenders Act 1997* (Institute of Criminology, 2005).

20 New South Wales, *Parliamentary Debates*, Legislative Council, 21 May 1997, 8958 (Jeff Shaw).

21 Ibid.

> [I]t has been questioned whether formal court proceedings and incarceration in juvenile justice centres are necessarily the most effective means with which to change the conduct of that small percentage of juvenile offenders who do become persistent offenders or engage in more serious offences. Stigmatisation of young people, and divorcing young people from family and community support structures, can contribute to rather than solve problem behaviour.[22]

The Bill 'provide[d] for a hierarchy of four different levels of interventions into juvenile offending, beginning with police warnings and cautions and graduating through to conferencing and, finally, attendance at court'.[23]

Section 8 sets out the offences covered by the Act. Pursuant to section 8(1), these are summary offences or indictable offences that may be dealt with summarily, under chapter 5 of the *Criminal Procedure Act 1986* (NSW) or another prescribed law. Section 8(2) goes on to specify a number of offences which are not covered by the Act, including offences resulting in death, a number of specified sexual offences and offences under the *Drug Misuse and Trafficking Act 1985* (NSW) and all offences under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Subject to these limitations and further offences prescribed by regulation, warnings are limited to summary offences,[24] while cautions and conferences are available for all offences covered by the Act.[25]

Part 3 relates to the imposition of police warnings. Section 14(2) creates an entitlement to be dealt with by a warning for relevant offences, unless the circumstances involve violence or the investigating official does not regard this as being in the interests of justice.

Cautions and youth justice conferences ('YJCs') are covered in parts 4 and 5 respectively. Both may only be employed if the child admits the offence and consents to a caution being given[26] or conference held.[27] The entitlement to a caution is subject to the police officer's consideration of the seriousness and degree of violence of the offence, the harm caused to any victim, the child's prior offences and matters under the Act and 'any other matter the official thinks appropriate in the circumstances'.[28] However, a child is not entitled to be dealt with by caution if he or she has been dealt with by caution on three or more occasions.[29] Similar conditions apply to YJCs.[30]

Section 31 empowers a court to give a caution. If it does so, it must then dismiss the proceedings,[31] and no further proceedings are to be taken against a child for an offence in respect of which the caution was given.[32] Likewise, no

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22 Ibid.
23 Ibid.
24 *Young Offenders Act 1997* (NSW) s 13.
25 *Young Offenders Act 1997* (NSW) ss 18, 35.
26 *Young Offenders Act 1997* (NSW) ss 19(b)–(c).
27 *Young Offenders Act 1997* (NSW) ss 36(b)–(c).
28 *Young Offenders Act 1997* (NSW) s 20(3).
29 *Young Offenders Act 1997* (NSW) s 20(7).
30 *Young Offenders Act 1997* (NSW) ss 36–7.
31 *Young Offenders Act 1997* (NSW) s 31(1A).
32 *Young Offenders Act 1997* (NSW) s 32.

further proceedings are to be taken in relation to an offence for which a child satisfactorily completes an outcome plan determined by a YJC.[33]

B Victoria

In the Second Reading Speech for the Children, Youth and Families Bill 2005 (Vic) it was suggested that the potential of group conferencing to

> redirect young offenders away from the criminal justice system and prevent recidivism will be boosted by the incorporation of group conferencing into the bill as a pre-sentence diversionary option for suitable young people who are facing a probation or youth supervision order. Group conferencing aims to bring the young offenders, police, victims and the families of young offenders together to raise the young person's understanding of the impact of their actions and reduce the likelihood that they will reoffend. … Group conferencing is founded on restorative justice principles.[34]

In Victoria, unlike all other jurisdictions, restorative conferencing is a diversion program used by the courts; police are unable to refer juveniles to restorative conferences.[35] Group conferences are governed by section 415 and include as their objectives: 'to increase the child's understanding of the effect of their offending on the victim and the community' and 'to reduce the likelihood of the child reoffending'.[36]

C Queensland

When the Juvenile Justice Bill 1992 (Qld) was introduced to Parliament, it was seen as 'imperative that children who commit offences must be held accountable and be encouraged to accept responsibility for offending behaviour' and '[d]iversion of children from the court's criminal justice system is encouraged, wherever possible'. To this end, the Bill 'promote[d] police cautioning as the most appropriate means of dealing with the majority of children who come to the attention of the police'.[37] Following a review of the legislation in 2007, it was renamed the *Youth Justice Act 1992* (Qld). According to the Second Reading Speech for the amending legislation, the 2009 legislation focused on improving 'diversionary options for young offenders' and 'refining youth justice conferencing'.[38]

Under section 11, before starting criminal proceedings against a child for an offence other than a serious offence,[39] a police officer must consider whether, in all the circumstances, it would be more appropriate to take no action, administer a caution, refer the offence to a conference or, in relation to minor drugs matters,

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33 *Young Offenders Act 1997* (NSW) s 58.

34 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1375 (Sherryl Garbutt).

35 See Kelly Richards, 'Police-Referred Restorative Justice for Juveniles in Australia' (Trends and Issues in Crime and Criminal Justice No 398, Australian Institute of Criminology, August 2010).

36 *Children, Youth and Families Act 2005* (Vic) ss 415(4)(a)–(b).

37 Queensland, *Parliamentary Debates*, Legislative Assembly, 18 June 1992, 5923 (Anne Warner).

38 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 May 2009, 306 (Karen Struthers).

39 See *Youth Justice Act 1992* (Qld) s 8 for what constitutes a serious offence.

offer the child a drug diversion assessment program.[40] In making this decision, the police officer is to have regard to the circumstances of the alleged offence, the child's criminal history, and any previous cautions or dealings for an offence.[41]

Division 2 relates to cautioning and has as its purpose 'to set up a way of diverting a child who commits an offence from the courts' criminal justice system by allowing a police officer to administer a caution to the child instead of bringing the child before a court for the offence'.[42] Under section 16, a child may only be cautioned if they admit committing the offence and consent to the caution. Following a caution, the child is not liable for prosecution and the caution is not part of their criminal history.[43] Under section 21(1), the Children's Court may dismiss a charge if an application for the dismissal is made by or on behalf of the child, and it is satisfied a caution should have been administered or no action taken.

Section 22 sets out when a police officer may refer an offence for a conference. YJCs are covered by part 3, with potential benefits for the child including 'meeting any victim and taking responsibility for the results of the offence in an appropriate way'[44] and 'having less involvement with the courts' criminal justice system'.[45] Somewhat unusually, the provision also sets out as potential benefits to the community (in addition to benefits for the victim and the offender's family):

(i) fewer offences being committed because of effective early intervention by the community;

(ii) less public cost from unnecessary involvement of the courts' criminal justice system; and

(iii) increasing resolution of disputes within the community without government intervention or legal proceedings.[46]

D South Australia

In South Australia, the power for police to caution arises only in respect of minor offences. Under section 4 of the *Young Offenders Act 1993* (SA), a minor offence is one which, in the opinion of the police officer in charge, should be dealt with as a minor offence because of the limited extent of the harm caused, the alleged offender's character and antecedents, the improbability of the person reoffending, and, where relevant, the attitude of the person's parents or guardians.[47] Informal cautions are governed by section 6 and are available where

40 *Youth Justice Act 1992* (Qld) s 11(1).
41 *Youth Justice Act 1992* (Qld) s 11(2).
42 *Youth Justice Act 1992* (Qld) s 14. Section 22A of the *Young Offenders Act 1994* (WA) is framed in almost identical terms.
43 *Youth Justice Act 1992* (Qld) ss 15(2)–(3).
44 *Youth Justice Act 1992* (Qld) s 30(4)(a)(i).
45 *Youth Justice Act 1992* (Qld) s 30(4)(a)(iv).
46 *Youth Justice Act 1992* (Qld) s 30(4)(d).
47 *Young Offenders Act 1993* (SA) s 4.

the youth admits to committing the minor offence and the police officer does not consider that the matter requires any formal action;[48] no further proceedings may then be taken.[49]

Under section 7(1), a police officer may take more formal proceedings, including convening a family conference or laying a charge in court. However, a charge may only be laid where the youth requires the matter to be dealt with by the Court, or the officer is of the opinion that the matter cannot be adequately dealt with by the officer or a family conference because of the youth's repeated offending or some other circumstance of aggravation.[50]

Family conferences are governed by division 3 and include immunity from prosecution where the youth is cautioned and no further requirements are imposed or he or she complies with any requirements imposed.[51] Similar to Tasmania and the Northern Territory, the court retains a discretion to refer a matter to a police officer or family conference even after the youth's guilt has been determined.[52]

E Western Australia

Under section 22B of the *Young Offenders Act 1994* (WA), before starting a proceeding against a young person, a police officer must first consider whether it would be more appropriate in all the circumstances to take no action or administer a caution; in addition, section 23 stipulates that cautioning is to be preferred in certain cases. However, cautions are not available for over 80 offences set out in Schedules 1 and 2 of the Act.[53]

Part 5, division 2 relates to referrals to a juvenile justice team ('JJT'); exercise of the discretion to do so is to be particularly guided by the principle that 'the treatment of a young person who commits an offence that is not part of a well-established pattern of offending should seek to avoid exposing the offender to associations or situations likely to influence the person to further offend'.[54]

Like cautions, JJT referrals are not available for Schedule 1 or 2 offences,[55] and if the offence is one for which an infringement notice can be given, this is to be preferred to referring the matter to a JJT unless there are circumstances that make the giving of an infringement notice inappropriate.[56] On the other hand, section 29 provides that first-time offenders should usually be referred to a JJT. Furthermore, a person is not taken to have previously offended merely because of a prior caution or infringement notice.[57] In recognition of RJ principles, a matter

48 *Young Offenders Act 1993* (SA) s 6(1).
49 *Young Offenders Act 1993* (SA) s 6(2).
50 *Young Offenders Act 1993* (SA) s 7(4).
51 *Young Offenders Act 1993* (SA) s 12(10).
52 *Young Offenders Act 1993* (SA) s 17(2).
53 *Young Offenders Act 1994* (WA) s 22(3).
54 *Young Offenders Act 1994* (WA) s 24(a)(i).
55 *Young Offenders Act 1994* (WA) s 25(1).
56 *Young Offenders Act 1994* (WA) s 25(2).
57 *Young Offenders Act 1994* (WA) ss 29(2)(a), 29(2)(ba).

may only be referred to a JJT if the alleged offender accepts responsibility for the act or omission.[58] Finally, where a young person has complied with the terms determined by the JJT, any court hearing a charge in relation to the offence must dismiss without determining it.[59]

F Tasmania

All three of assumptions discussed above were invoked in the second reading speech for the *Youth Justice Act 1997* (Tas):

> Self-report studies indicate that most young people commit some form of offence in adolescence. It is an almost universal phenomenon amongst this age group … Given the opportunity most young people grow out of offending behaviour. … There is broad agreement among police and others involved in the youth justice system that bringing most of the charges to court is unproductive and unnecessary because there are more effective ways to influence the behaviour of young offenders. There is some evidence that a court experience for first offenders may have a negative impact on young people by confirming a criminal identity.
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> …
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> The proposed legislation is designed to create a system based on restorative justice in cases where the harm needs to be put right. … The legislation is based on young persons being held responsible for their actions, together with promoting the idea of diverting young people away from court in the first instance.[60]

Part 2 deals with diverting youths from the court system, and sets out diversionary procedures by police[61] and provisions in relation to community conferences.[62] Section 8 grants police the discretion to informally caution a youth who admits committing an offence, resulting in no further proceedings being taken. In matters where the police officer considers more formal action warranted, the officer may require the youth to be formally cautioned, require the Secretary of the Department of Justice to convene a community conference or file a complaint before the Youth Justice Division of the Magistrates' Court.[63] The latter option is only available where:

- The youth 'requires the matter to be dealt with the Court';[64]
- The youth does not 'agree to being formally cautioned', 'sign the caution' or 'enter into any required undertaking';[65]
- The youth does not 'agree to the convening of a community conference' or 'enter into an undertaking to attend the conference';[66] or

58 *Young Offenders Act 1994* (WA) s 25(4).
59 *Young Offenders Act 1994* (WA) s 33(2).
60 Tasmania, *Parliamentary Debates*, House of Assembly, 2 October 1997, Part 2 (John Cleary).
61 *Youth Justice Act 1997* (Tas) ss 8–12.
62 *Youth Justice Act 1997* (Tas) ss 13–20.
63 *Youth Justice Act 1997* (Tas) s 9. See s 10 in relation to the procedure for formal cautions.
64 *Youth Justice Act 1997* (Tas) s 9(6)(a).
65 *Youth Justice Act 1997* (Tas) s 9(6)(b).
66 *Youth Justice Act 1997* (Tas) s 9(6)(c).

- The police officer is of the opinion the matter cannot be dealt with by formal caution or conference due to the seriousness or nature of the offence.[67]

As in other jurisdictions, if the youth complies with any undertakings required by a conference, or is cautioned without entering into an undertaking, he or she is not liable to further prosecution.[68] Finally, under section 37, the Court has the discretion not to sentence an offender but to order him or her to attend a community conference to be convened by the Secretary of the Department of Justice.[69]

G Northern Territory

The *Youth Justice Act* (NT) was introduced in 2005. At the time of its introduction, the then Attorney-General, Peter Toyne, noted that the legislation, together with the Care and Protection of Children and Young People Bill, would deal with youth offending 'in a way that will divert young people from progressing to becoming adult offenders and wasting their potential to develop into valuable members of the community'.[70] He suggested that 'one of the key features of the bill is an expansion of the successful pre-court diversion scheme', with a 'presumption in favour of diversion as the appropriate response to youth offending in all cases except those involving serious offences; or those involving offending by young people with a history of offending or previous diversions'.[71]

Under section 39, if a police officer believes on reasonable grounds[72] that a youth has committed an offence, he or she *must*, instead of charging the youth, give the youth a verbal or written warning, cause a YJC to be convened and/or refer the youth to a diversion program,[73] unless:

- The 'offence alleged is a serious offence';[74] or
- The youth has 'history that makes diversion an unsuitable option (including a history of previous diversions or previous convictions)'.[75]

However, section 39(5) empowers the Commissioner of Police or their delegate to authorise or require a police officer to deal with a youth by conference or referral to diversion program even where these circumstances arise, thereby demonstrating the broad reach of the diversionary rhetoric. In addition, section 39(6) allows for diversion in circumstances where the youth has

67 *Youth Justice Act 1997* (Tas) s 9(6)(d).
68 *Youth Justice Act 1997* (Tas) s 20(1). See also dismissal of charges following a court-ordered conference: s 41.
69 *Youth Justice Act 1997* (Tas) s 37(1).
70 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 5 May 2005, Serial 292 (Peter Toyne).
71 Ibid.
72 *Youth Justice Act 2005* (NT) s 39(1).
73 *Youth Justice Act 2005* (NT) s 39(2).
74 *Youth Justice Act 2005* (NT) s 39(3)(b). A serious offence is defined in s 39(7) as an offence prescribed by regulation or a similar law, including elsewhere in Australia. At the time of writing, there were over 50 offences prescribed in s 3 of the *Youth Justice Regulations 2005* (NT).
75 *Youth Justice Act 2005* (NT) s 39(3)(d). See also *Youth Justice Act 2005* (NT) s 39(3)(c).

been charged with the offence. In the event of satisfactory completion of a diversion program, 'no criminal investigation or criminal legal proceedings can be commenced or continued against the youth in respect of the offence'.[76]

Part 5 of the *Youth Justice Act 2005* (NT) deals with matters in the Youth Justice Court, but provides the Court with the discretion to adjourn the proceedings and refer the youth to be assessed for inclusion in a diversion program or YJC 'at any stage of proceedings (prior to a finding of guilt)',[77] thereby reinforcing the dominance of diversion.

H Australian Capital Territory

In the ACT, RJ conferencing is governed by the *Crimes (Restorative Justice) Act 2004* (ACT).[78] At the time the legislation was introduced, the then Chief Minister, Jon Stanhope, explained that the Bill provided for a dedicated RJ unit to function as a central point for referral, assessment and delivery of conferences. Its objective would include 'widen[ing] … awareness of alternative programs, especially for young offenders'.[79] The model was to be applied exclusively to juveniles for the first year and then expanded to adult offenders, following a review. What is notable about the ACT is not the extent to which the dogmas of juvenile justice appeared to dominate the parliamentary debates, but the broad acceptance of the desirability of RJ more generally, including in relation to adults. Indeed, the Chief Minister asserted:

> For some time, I and my colleagues have been convinced of the potential of restorative justice practices to make a positive difference in a broader range of cases that enter the criminal justice system than what is now the case in the Australian Capital Territory.[80]

Subject to certain limitations, the Act applies to a 'less serious offence'[81] or domestic violence offence[82] committed by a young person. Perhaps in light of the broad scope envisaged, there is little in the Act which relates specifically to young offenders, however, one of the objectives of the Act, 'to enable access to restorative justice at every stage of the criminal justice process without substituting for the criminal justice system or changing the normal process of criminal justice',[83] is clearly relevant in the context of the present discussion.

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76 *Youth Justice Act 2005* (NT) s 41(1).

77 *Youth Justice Act 2005* (NT) s 64.

78 Note also the *Children and Young People Act 2008* (ACT), which is 'the primary law … which provides for the protection, care and wellbeing of children and young people in the Australian Capital Territory': Explanatory Statement, Children and Young People Bill 2008 (ACT) 2. The legislation sets out nine youth justice principles: *Children and Young People Act 2008* (ACT) s 94.

79 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 5 August 2004, 3475 (Jon Stanhope).

80 Ibid.

81 *Crimes (Restorative Justice) Act 2004* (ACT) s 14(1). As set out in s 12, a 'less serious offence' is an offence other than a 'serious offence', which is defined as an offence carrying a maximum term longer than 14 years for offences relating to money or other property, and in any other case, 10 years, although additional restrictions apply to specified 'less serious sexual offences'. See also ss 14(3), 14(6).

82 *Crimes (Restorative Justice) Act 2004* (ACT) s 16(1).

83 *Crimes (Restorative Justice) Act 2004* (ACT) s 6(d).

III IS CONTACT WITH THE JUSTICE SYSTEM CRIMINOGENIC?

As foreshadowed in Part I, in this section we review the evidence bearing on the assumptions that (a) contact with the court system is criminogenic and (b) RJ, in particular, is more effective than traditional justice in reducing the risk of further offending. We consider these two assumptions separately because, although RJ programs are clearly a form of diversion, it is possible to divert young offenders from the justice system by means other than RJ (for example, warnings or cautions). We first review the results of studies looking at the general effectiveness of diversion. We then turn our attention to studies comparing reoffending rates among young people dealt with by way of some RJ procedure with those dealt with by court.

A Diversion in General

Efforts to test the proposition that contact with the court system is criminogenic have taken two different forms. First, researchers have compared the recidivism of offenders dealt with by the traditional justice system with the recidivism of offenders diverted from court. If the predictions of labelling theory are true, those diverted from court should be less likely to reoffend, all other factors being equal. The second category of research examining this question has taken the form of longitudinal studies that follow the offending careers of individuals experiencing legal intervention early in their lives. These individuals are often compared with others who report the same levels of offending without formal apprehension. Labelling theory predicts that those who come into contact with the criminal justice system will have higher levels of subsequent offending. In the next sections, we will review both these categories of research.

As noted in Part I, early efforts to test the question of whether diversion has a beneficial effect found that offenders diverted from the criminal justice system were less likely to reoffend, a finding seemingly consistent with labelling theory. However, as Smith and Paternoster pointed out, most of these studies involved a comparison of the reoffending of a group diverted from the criminal justice system with a group sentenced conventionally.[84] An alternate interpretation is that these groups might have differed on other factors independently related to reoffending. It is likely that the diverted juveniles were less serious offenders, for instance. Because of this, their risk of recidivism would be lower regardless of the kind of treatment they received. Isolating the impact of diversion from these so-called selection effects is the major methodological challenge facing researchers investigating the impact of diversion.

It is commonly accepted that experimental studies are the best way to ensure that subjects in a study are equivalent on all factors thought to influence

84 Smith and Paternoster, above n 5, 1111–12.

recidivism.[85] In practice, experimental studies are difficult to implement successfully. Given the practical impediments to conducting experimental studies of diversion, many studies have used more readily implemented methodologies. One approach is to match participants in the experimental group to subjects in the control group on salient factors thought to affect reoffending. Another is to adjust for selection bias, to test the impact of diversion while controlling statistically for observed covariates. The second technique is the more commonly used but it has the disadvantage that the researcher has no way of testing whether selection bias has been adequately dealt with. In the next sections, we will review the research that has been conducted using these differing methodologies to test the impact of diversion from court.

Two recent meta-analyses[86] of experimental research investigating the impact of diversion have come to differing conclusions in regard to the impact of diversion. The first, by Petrosino, Turpin-Petrosino and Guckenburg, examined the findings of a total of 29 experiments involving 7304 juveniles.[87] The overall net effect was in favour of diversion. They concluded that formal system processing of juveniles does not appear to reduce crime, and in fact can increase subsequent offending when compared with diverted juveniles.[88] The second recent meta-analysis, by Schwalbe and colleagues, reviewed 28 studies involving 19 301 juvenile offenders and came to a different conclusion.[89] Here, the authors found that overall no differences could be detected in the reoffending of diverted and non-diverted juveniles. The exceptions were four family treatment programs, which led to a significant reduction in recidivism

85 For a discussion, see David P Farrington, 'Randomized Experiments on Crime and Justice' in Michael Tonry and Norval Morris (eds), *Crime and Justice: A Review of Research* (University of Chicago Press, 1983) vol 4, 257.

86 Meta-analyses are a review technique where findings from a diverse array of studies are converted into a common metric to allow comparison.

87 Anthony Petrosino, Carolyn Turpin-Petrosino and Sarah Guckenburg, 'Formal System Processing of Juveniles: Effects on Delinquency' (Systematic Review No 1/10, Campbell Collaboration, 29 January 2010).

88 Ibid 6–7.

89 Craig S Schwalbe et al, 'A Meta-Analysis of Experimental Studies of Diversion Programs for Juvenile Offenders' (2012) 32 *Clinical Psychology Review* 26. Although the title indicates that this was a review of experimental studies, the authors' inclusion criteria were in fact wider than this and they included both experimental and quasi-experimental studies.

amongst participants. Further, three RJ programs conducted with the active involvement of the program designers also led to reductions in recidivism.[90]

There are a number of reasons to prefer the conclusions of Schwalbe et al to those of Petrosino, Turpin-Petrosino and Guckenburg. The first relates to the heterogeneity of effects identified in both studies. Within each meta-analysis, there was wide variation (heterogeneity) in individual effect sizes, with some studies finding diversion reduced reoffending and others finding the opposite. When Petrosino, Turpin-Petrosino and Guckenburg adjusted for this heterogeneity, they found that the supposed negative impact of court processing was only evident when the comparison group was diverted to a program.[91] Where the comparison group received no intervention, reoffending rates were equivalent across groups.[92] The authors interpreted this as evidence for the negative impact of court processing, but, equally, it could be interpreted as evidence that the diversion programs were effective in reducing recidivism.

The other reason to prefer the conclusions of Schwalbe et al to those of Petrosino, Turpin-Petrosino and Guckenburg relates to what has been referred to as the Michigan State University Effect.[93] Some 12 out of the 29 studies reviewed were conducted by researchers and graduate students from this university, generally under the supervision of William Davidson, the co-designer of the Adolescent Diversion Program.[94] These 12 studies had a consistently positive impact on the participants when measured by subsequent offending. Again, this could be interpreted as evidence for the efficacy of this program, rather than the detrimental impact of court. Indeed, this program was also identified by Schwalbe et al as one of the more effective programs they reviewed. Further, it is well-recognised that evaluation studies conducted by program designers are more likely to find results that favour the program. There are a number of reasons for this, including the investigators' familiarity with the program and the fact that the programs are likely to be run by motivated and skilled graduate students, with high levels of enthusiasm for the program. As

90 Closer examination of these three studies casts some doubt on this conclusion, particularly in relation to the advantage these restorative justice programs have over the criminal justice system. Two of these studies related to evaluations of family conferencing in Minneapolis. These were shown to lead to lower recidivism levels but only in comparison to other diversionary programs. The final study reported the results of an evaluation of victim/offender mediation. The diverted group did have lower recidivism levels over a follow-up period of one year, however this difference was not statistically significant. See Edmund F McGarrell, 'Restorative Justice Conferences as an Early Response to Young Offenders' (Office of Juvenile Justice and Delinquency Prevention, US Department of Justice, August 2001); Edmund F McGarrell and Natalie Kroovand Hipple, 'Family Group Conferencing and Re-Offending Among First-time Juvenile Offenders: The Indianapolis Experiment' (2007) 24 *Justice Quarterly* 221; Mark S Umbreit, 'Crime Victims Confront their Offenders: The Impact of a Minneapolis Mediation Program' (1994) 4 *Research on Social Work Practice* 436.

91 Petrosino, Turpin-Petrosino and Guckenburg, above n 89, 31–2.

92 Ibid 32.

93 Ibid.

94 See, eg, Michelle Bauer et al, 'A Diversion Program for Juvenile Offenders: The Experience of Ingham County, Michigan' (1980) 31(3) *Juvenile and Family Court Journal* 53; William S Davidson II et al, 'Diversion of Juvenile Offenders: An Experimental Comparison' (1987) 55 *Journal of Consulting and Clinical Psychology* 68.

Farrington pointed out, this makes it difficult to distinguish the effects of the treatment from the effects of the staff.[95]

Paternoster and Iovanni have suggested several reasons why contact with the criminal justice system might be criminogenic.[96] The first involves impaired conventional opportunities.[97] Convicted juveniles might find their employment[98] and academic[99] opportunities restricted, thus reinforcing their criminality. The second is an alteration of personal identity. According to this view, labelling is a psychological phenomenon that changes the offender's self image to the extent that they will think of themselves as being deviant.[100] The third is that public labelling increases contact with other deviant peers.[101] A final impact not suggested by these authors but still relevant is that being publicly identified as an offender makes an individual a more readily available target for law enforcement agencies.

Farrington investigated the impact of public labelling using data from the well-known Cambridge Longitudinal study.[102] The self-reported offending of 400 juveniles was measured at the ages of 14, 16, and 18. He found that apprehension at age 14 led to significantly higher levels of offending at age 18 among youths with similar levels of self-reported offending.[103] Palamara, Cullen and Gersten[104] and Gold and Williams[105] observed similar findings in studies that were compromised by low numbers of participants and inadequate controls for selection bias. One possible explanation for these findings is that early identification as an offender makes an individual a more available target in future for police. Some additional evidence for this can be found in studies by Klein[106] and Davidson et al.[107] These studies were experimental investigations of the impact of diversion on samples of young offenders. They found that the diverted youths were less likely to reoffend when measured by subsequent contact with the criminal justice system. However, no such difference was observed in the juveniles' self-reported offending, suggesting that although the diverted youths

95 Farrington, 'Randomized Experiments on Crime and Justice', above n 85, 279–80.

96 Raymond Paternoster and LeeAnn Iovanni, 'The Labeling Perspective and Delinquency: An Elaboration of the Theory and an Assessment of the Evidence' (1989) 6 *Justice Quarterly* 359.

97 Ibid 363, 376, 380.

98 Ibid 388.

99 Jon Gunnar Bernburg and Marvin D Krohn, 'Labelling, Life Chances, and Adult Crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime in Early Adulthood' (2003) 41 *Criminology* 1287, 1299–1300.

100 Paternoster and Iovanni, above n 96, Ibid 375–6.

101 Ibid 363, 375–6.

102 David P Farrington, 'The Effects of Public Labelling' (1977) 17 *British Journal of Criminology* 112.

103 Ibid 115–16.

104 Frances Palamara, Francis T Cullen and Joanne C Gersten, 'The Effect of Police and Mental Health Intervention on Juvenile Deviance: Specifying Contingencies in the Impact of Formal Reaction' (1986) 27 *Journal of Health and Social Behavior* 90.

105 Martin Gold and Jay R Williams, 'National Study of the Aftermath of Apprehension' (1969) 3 *Prospectus* 3.

106 Malcolm W Klein, 'Labelling Theory and Delinquency Policy: An Experimental Test' (1986) 13 *Criminal Justice and Behavior* 47, 71.

107 Davidson et al, above n 94, 73.

continued to offend at the same rate as the youths sentenced in court, they were less likely to be apprehended. McAra and McVie, in a longitudinal study involving some 4300 youths in Edinburgh examined the impact of being referred to a youth court on subsequent self-reported offending.[108] A total of 59 young people referred to such a hearing were matched using propensity score techniques[109] to a comparison group of 117. Self-reported offending prevalence rates were 67.8 per cent for each group prior to referral.[110] A year later, the court group's self-reported serious offending had increased to 71.7 per cent, while the comparison group's offending had dropped to 52.5 per cent.[111] By contrast, there was no difference in subsequent offending observed between a group of young people who came into contact with police without further action being taken (N = 99) and a matched comparison group (N = 237).[112] This study appears to suggest that arrest can lead to increased contact with the criminal justice system but it may be little more than a policing effect: that is, once known to police, offenders may be more likely to be apprehended if they commit a further offence.[113]

Using data from the Rochester Youth Development study, Bernburg and colleagues found that early contact with police and juvenile justice agencies led to poorer academic results, higher unemployment, more involvement with delinquent peers, and increased offending.[114] A more recent study found that early police intervention was related to drug use, unemployment and receipt of welfare at the ages of 29 to 31.[115] Sampson and Laub also found incarceration as

108 Lesley McAra and Susan McVie, 'Youth Justice?: The Impact of System Contact on Patterns of Desistance From Offending' (2007) 4(3) *European Journal of Criminology* 315.

109 The experimental and control group in propensity matching studies are matched using propensity scores. These are defined as an individual's probability of receiving the treatment (that is, diversion) given a range of observed covariates. Researchers first estimate a statistical model predicting whether an individual was diverted or not. Using this, all participants in the study are assigned a propensity score, which is their probability of being diverted, regardless of the treatment they received. Then, using this propensity score, individuals in the treatment group are matched to individuals in the control group. Use of this methodology results in very close matching between the two groups, and short of a randomised trial, is the best way of accounting for selection bias. See Robert J Apel and Gary Sweeten, 'Propensity Score Matching in Criminology and Criminal Justice' in Alex R Piquero and David Weisburd (eds), *Handbook of Quantitative Criminology* (Springer, 2010) 543 for a more detailed description of this technique.

110 McAra and McVie, above n 108, 333.

111 Ibid.

112 Ibid.

113 See Barry Goldson, 'The Sleep of (Criminological) Reason: Knowledge-Policy Rupture and New Labour's Youth Justice Legacy' (2010) 10 *Criminology and Criminal Justice* 155 for an alternate interpretation of the question of the impact of diversion.

114 Jon Gunnar Bernburg and Marvin D Krohn, 'Labelling, Life Chances, and Adult Crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime in Early Adulthood' (2003) 41 *Criminology* 1287; Jon Gunnar Bernburg, Marvin D Krohn and Craig J Rivera, 'Official Labelling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test of Labeling Theory' (2006) 43 *Journal of Research in Crime and Delinquency* 67.

115 Giza Lopes et al, 'Labeling and Cumulative Disadvantage: The Impact of Formal Police Intervention on Life Chances and Crime During Emerging Adulthood' (2012) 58 *Crime and Delinquency* 456.

a juvenile to be a predictor of later unstable employment.[116] Although these findings are consistent with the prediction that contact with the criminal justice system will lead to public labelling as an offender and increased criminality, they could also be a selection effect, as the same factor or set of factors might be responsible for early arrest, poor academic performance and employment difficulties, as well as deviant peer involvement.

Less research has been conducted to test labelling theory's psychological claim: that a court appearance causes the offender to feel stigmatised, thus increasing subsequent offending.[117] A recent Australian study investigating the reactions of juveniles to being sentenced in the NSW Children's Court found those individuals who reported feeling stigmatised by the hearing were indeed more likely to reoffend.[118] A later follow-up found that this problem seemed particularly marked for the young girls in the sample.[119] While these findings were consistent with the theoretical tenets of diversion, it should be noted that stigmatisation was a relatively uncommon reaction to the court hearing. The mean score observed was 1.67, where 1 = *not at all*, and 2 = *a bit*. These stigmatisation scores were comparable to the levels of stigmatisation reported by conference participants in the Canberra Reintegrative Shaming Experiment. So while evidence exists to suggest that feelings of stigmatisation can lead to higher recidivism, it is also the case that stigmatisation is not an inevitable reaction to a court hearing, and could well be experienced after other juvenile justice interventions, such as youth justice conferences, and perhaps even police cautions and warnings.

B Diversion to Restorative Justice

There have been several reviews of research on the effectiveness of RJ programs in reducing reoffending.[120] The review of studies published between

116 Robert J Sampson and John H Laub, 'A Life-Course Theory of Cumulative Disadvantage and the Stability of Delinquency' in Terence P Thornberry (ed), *Developmental Theories of Crime and Delinquency* (Transaction Publishers, 1997) 133.

117 Braithwaite, *Crime, Shame and Reintegration*, above n 4.

118 Andrew McGrath, 'Offenders' Perceptions of the Sentencing Process: A Study of Deterrence and Stigmatisation in the New South Wales Children's Court' (2009) 42 *Australian and New Zealand Journal of Criminology* 24.

119 Andrew James McGrath, 'The Subjective Impact of Contact with the Criminal Justice System: The Role of Gender and Stigmatization' (2010) forthcoming *Crime & Delinquency*.

120 James Bonta et al, 'Restorative Justice and Recidivism: Promises Made, Promises Kept?' in Dennis Sullivan and Larry Tifft (eds), *Handbook of Restorative Justice: A Global Perspective* (Routledge, 2006) 108–20; John Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' in Michael Tonry (ed), *Crime and Justice: A Review of Research* (University of Chicago Press, 1999) vol 25, 1; Hennessey Hayes and Kathleen Daly, 'Youth Justice Conferencing and Re-Offending' (2003) 20 *Justice Quarterly* 725; Jeff Latimer, Craig Dowden and Danielle Muise, 'The Effectiveness of Restorative Justice Practices: A Meta-Analysis' (2005) 85 *The Prison Journal* 127; Garth Luke and Bronwyn Lind, 'Reducing Juvenile Crime: Conferencing Versus Court' (Crime and Justice Bulletin No 69, NSW Bureau of Crime Statistics and Research, 2002); Lawrence W Sherman, Heather Strang and Daniel J Woods, *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE)* (Centre for Restorative Justice, Australian National University, 2000).

1986 and 2005 by Sherman and Strang identified 23 valid comparisons between a group of offenders referred to a restorative justice program and a group of offenders dealt with via some other form of disposition or 'treatment'.[121] Nineteen of these comparisons (arising from seven studies) involved juvenile or young adult offenders. In what follows, we discuss these studies, as well as several published since the Sherman and Strang review. A number of studies have compared RJ programs to other forms of diversion.[122] As our focus is on the relative effectiveness of RJ versus the court, we limit ourselves to studies that compare these two types of disposition.

McCold and Wachtel conducted an experiment in which 75 eligible violent juvenile offenders and 140 eligible juvenile property offenders were randomly allocated to either a conference or to court.[123] Recidivism was measured in terms of re-arrest rates over a one-year follow-up period following referral to court or conference. A substantial proportion (58 per cent) of those allocated to a conference did not end up receiving a conference.[124] As a result, the reoffending of three groups was compared: those who declined a conference, those who attended a conference and those dealt with by a court. Separate analyses were carried out for property and violent offenders. No effects were found for property offenders, but the reoffending rate of violent offenders who attended a conference was significantly lower than the reoffending rate of violent offenders dealt with by a court.[125] This finding could well have been a selection effect as offenders who chose to attend a conference were likely to have differed from those who refused to attend on other factors independently related to recidivism. Additional evidence for this can be found in the fact that the group that had been referred to a conference but declined to participate had the highest reoffending rate of all the groups.[126]

Sherman, Strang and Woods conducted a randomised controlled trial of the relative effectiveness of conferencing and court in reducing juvenile offending for three offences: property offending with personal victims, juvenile shoplifting and violent offending.[127] Differences in rates of offending for each group before and after treatment were compared. There was a significant reduction in offending rates for the violent offenders in the conference group, however there was no difference observed for the shoplifting offenders and juvenile property offenders.[128] Sherman, Strang and Woods concluded that conferences can reduce

121 Sherman, Strang and Woods, above n 120.

122 Nadine Smith and Don Weatherburn, 'Youth Justice Conferences Versus Children's Court: A Comparison of Re-Offending' (Crime and Justice Bulletin No 160, NSW Bureau of Crime Statistics and Research, 2012).

123 Paul McCold and Benjamin Wachtel, *Restorative Policing Experiment: The Bethlehem Pennsylvania Police Family Group Conferencing Project* (Community Service Foundation, 1998).

124 Ibid 19.

125 Ibid 76–7.

126 Ibid 76.

127 Sherman, Strang and Woods, above n 120. This was for offenders under the age of 30, so this part of the experiment does not relate exclusively to juvenile offenders.

128 Ibid 18.

crime by violent offenders,[129] but this conclusion would seem open to question on a number of grounds. First, a subsequent referral to a youth conference was not counted as a re-offence. Because juvenile offenders attending a conference may be more likely to be referred to another conference if they reoffend than juvenile offenders whose offending has brought them to court, this means the study might have underestimated the reoffending of the conference group. Second, the violent offenders dealt with by a conference had higher previous offending rates than those dealt with at court. This raises the possibility that (a) the fall in reoffending rates in the conference group might have been a result of regression to the mean[130] and (b) the conference and court groups differed on factors independently related to reoffending, thus making it uncertain whether the difference in reoffending was a treatment or selection effect. Finally, the researchers utilised inappropriate statistical tests.[131]

Luke and Lind examined the relative effectiveness of conferencing versus the NSW Children's Court in reducing juvenile reoffending.[132] They compared the time to first re-appearance in court or at a conference and the number of re-appearances in court or at a conference (per year) for 590 juveniles who were given a conference in the first year of the operation of the NSW *Young Offenders Act* and 3830 who were referred to court. After adjusting for offence type, age and number of prior convictions, they found that juveniles referred to a conference took longer to re-appear and had fewer re-appearances than those who were dealt with at a conference.[133] They acknowledged the possibility that the lower recidivism rate among conference participants might have been the result of a selection process in which low risk offenders appearing in court prior to the introduction of the Act were referred to conferences after the introduction of the Act.[134] However, they rejected this explanation on the grounds that the court re-appearance rate of juvenile offenders dealt with in the Children's Court was the same before and after the Act.[135] What they did not consider was the possibility that these low risk offenders might previously have been cautioned. The referral to conferences of low risk juveniles would thus lower the reoffending rate of juveniles in the conference group relative to those in court, even if conferencing itself had no effect on reoffending. They also had only limited controls for other factors that might have influenced rates of reoffending. There were, for example, no controls for the number of concurrent offences or

129 Ibid 18–19.

130 As Farrington commented 'apprehension and court processing may be caused by and follow an unusually high rate of offending. If offending rates fluctuate about some average level, they would be lower after apprehension than before it, even if they were unaffected by the official processing': Farrington, 'Randomized Experiments on Crime and Justice', above n 85, 285.

131 Specifically, they used T-tests, which are inappropriate for data not normally distributed.

132 Luke and Lind, above n 120.

133 Ibid 5–6, 13.

134 Ibid 13.

135 Ibid 13–14.

Indigenous status. Both of these factors are known to influence rates of reoffending.[136]

Triggs compared 193 young offenders referred to a conference by the District Court in New Zealand with 10 groups of 193 offenders who had been dealt with by the Court.[137] Reoffending was defined as a new (proven) offence within two years of the date of the index conference or finalisation of the court matter.[138] The conference and court groups were matched on gender, age, first offender status (whether a first offender or not), offence group and ethnic group, as well as their *predicted* reconviction rates.[139]

The actual reconviction rates for the 10 court groups ranged from 42 per cent to 49 per cent, with an overall average of 45 per cent.[140] None of the differences in reoffending between the conference and the court groups were statistically significant.[141] The conference group took slightly longer to reoffend than the court group but this difference was also not statistically significant.[142] The actual reconviction rate was found to be lower than the predicted rate for the conference group (41 per cent versus 45 per cent) but the difference was not statistically significant.[143] Triggs argued that the consistently lower reconviction rates for the conference group suggested that the lower reconviction rate for the conference group was 'real'.[144] Given the non-significant nature of the differences in question, this conclusion seems unwarranted.

Bergseth and Bouffard compared 164 juvenile offenders referred to a conference with 166 dealt with by a traditional court.[145] The court sample was comprised of youths referred to court during the same time period (2000 to 2003) as the conference cases, and for largely similar offences as the conference group.[146] The key dependent variables in the study were the likelihood of any new officially recorded contact with police, the number of such contacts and time to re-arrest.[147] Significant effects favouring the conference group were found on all three measures, even after adjusting for age, race, area (urban versus rural), number of prior contacts with the justice system, and offence type (property

136 Nadine E Smith and Craig Jones, 'Monitoring Trends in Re-Offending Among Adult and Juvenile Offenders Given Non-Custodial Sanctions' (Crime and Justice Bulletin No 110, NSW Bureau of Crime Statistics and Research, 2008).

137 Sue Triggs, 'New Zealand Court-Referred Restorative Justice Pilot: Two Year Follow-Up of Reoffending' (New Zealand Ministry of Justice, 2005).

138 Ibid 14.

139 Ibid 3. The predicted reconviction rate was derived from a logistic regression model linking risk of reconviction in the District Court to a variety of offence and offender characteristics, including number of proven charges per year since the age of 13, time since last court appearance, age, offence type, gender and number of concurrent charges.

140 Ibid 15.

141 Ibid.

142 Ibid 18.

143 Ibid 15.

144 Triggs, above n 137, 7.

145 Kathleen J Bergseth and Jeffrey A Bouffard, 'The Long-Term Impact of Restorative Justice Programming for Juvenile Offenders' (2007) 35 *Journal of Criminal Justice* 433.

146 Ibid 437.

147 Ibid 444–7.

offence versus violent offence).[148] A potential source of bias was the exclusion of 49 offenders selected for inclusion in the conference group dealt with by both conference and court. It is possible these individuals were more serious offenders and thus their exclusion could have biased the comparison between conference and court.

A recent study conducted in NSW used propensity score matching to compare the reoffending of a group of juveniles diverted to youth justice conferences (N = 1041) with a matched group of offenders dealt with by the Children's Court (N = 2160).[149] No difference was observed in reoffending, using a number of different measures: a re-offence within 24 months; frequency of reoffending in 24 months; mean number of days to next re-offence; and seriousness of the subsequent offence.[150] These findings contrasted with Luke and Lind's earlier evaluation of youth justice conferences in NSW described above,[151] however, the use of propensity matching in Smith and Weatherburn's study deals with the problems of selection bias identified earlier in a more comprehensive manner, making the conclusions of their study preferable.

In conclusion, our survey of the research investigating the hypothesised detrimental impact of court reveals a common pattern of small sample size, limited controls for selection bias, selective attrition, ambiguous comparison groups, and conclusions unwarranted by the evidence presented.[152] There is evidence that public identification as an offender could impair subsequent conventional employment and education and marginalise offenders into similarly deviant peer groups, but equally this could be a selection effect. There is also evidence that a negative emotional reaction to court can lead to further offending, but it is not at all clear that these feelings are unique to court.

Further, the studies reviewed comparing outcomes for young people dealt with via RJ programs and those dealt with via court provide little basis for confidence that conferencing reduces reoffending at all, let alone by the 7–8 per cent claimed by Bonta et al[153] and Latimer, Dowden and Muise[154] in their meta-analyses of research findings on RJ. The question we now turn to is whether and to what extent this matters. Is involvement in crime among young offenders a predominantly transient process?

148 Ibid 448.
149 Smith and Weatherburn, above n 122.
150 Ibid 16–17.
151 Luke and Lind, above n 120.
152 For a more detailed discussion of these problems see Andrew McGrath, 'The Effect of Diversion from Court: A Review of the Evidence' (2008) 15 *Psychiatry, Psychology and Law* 317.
153 Bonta et al, above n 120.
154 Latimer, Dowden and Muise, above n 120.

IV DO JUVENILE OFFENDERS DESIST?

In answering the question of whether most juvenile offenders desist, it is important to distinguish between the population of juvenile offenders as a whole (including both detected and non-detected offenders) and the subset of this population who come into contact with the criminal justice system. The latter are not representative of young offenders as a whole because those who repeatedly offend are more likely to be caught than those who offend only once or twice.[155] Thus, even if we have reason to believe that most juvenile offending is transient, we cannot necessarily make this assumption about those who come into contact with the criminal justice system.

The evidence, such as it is, suggests that transient offenders have little, if any, contact with the criminal justice system. Using data on self-reported offending among secondary school students, for example, Weatherburn estimated that no more than six per cent of the estimated 270 000 young offenders involved in six types of crime in 1996 were arrested and prosecuted in that year for one or more of these offences.[156] In a later study of self-reported offending among the same population of secondary school students, Weatherburn and Baker found that the proportion of juveniles who offend at some point in time but have not offended in the past year tends to increase with each year of school for all the offences except motor vehicle theft.[157] This finding suggests that most juvenile criminal 'careers' are coming to an end by the time a young person leaves school and that most juvenile offending is transient. But what about the young people who come into contact with the criminal justice system? Are they generally transient or persistent offenders?

To answer this question, Coumarelos examined rates of re-conviction amongst a sample of 33 900 juveniles convicted of one or more charges between the beginning of 1982 and the end of 1986.[158] She found that 69.7 per cent had only one court appearance.[159] This suggested that most juvenile offenders coming into contact with the court system were transient offenders. However, Coumarelos was unable to track her juvenile offenders into adulthood.[160] She also imposed a perfectly understandable restriction on her data which had the inadvertent effect of biasing her results. To ensure she had the entire juvenile criminal history of everyone in her sample, she restricted her analysis to juveniles who had reached the age of 18 by the end of the study period.[161] This had the effect of excluding a significant number of juvenile offenders who had their first court appearance when they were quite young. Later research revealed that

155 Jose A Canela-Cacho, Alfred Blumstein and Jacqueline Cohen, 'Relationship Between the Offending Frequency (λ) of Imprisoned and Free Offenders' (1997) 35 *Criminology* 133, 134.

156 Don Weatherburn, *Law and Order in Australia: Rhetoric and Reality* (Federation Press, 2004) 147.

157 Don Weatherburn and Joanne Baker, 'Transient Offenders in the 1996 Secondary School Survey: A Cautionary Note on Juvenile Justice Diversion' (2001) 13 *Current Issues in Criminal Justice* 60, 68.

158 Coumarelos, above n 6.

159 Ibid 33.

160 Ibid 12.

161 Ibid 5.

juveniles who appear in court when they are young (10–14) have significantly higher reoffending rates than older juveniles.[162] The exclusion of these young offenders gave the false impression that most do not reoffend.

Chen et al corrected both of these problems in a longitudinal cohort study which involved following 5476 juveniles who made their first appearance in court in 1995 to see what proportion were reconvicted (in a juvenile or adult court) of a further offence within eight years.[163] They found that nearly 70 per cent of the juvenile offenders in their sample were convicted of a further offence within eight years.[164] Members of their cohort accumulated an average of 3.5 further court conviction episodes over this period.[165] This suggested that most juvenile offenders coming into contact with the criminal justice system were repeat offenders.[166]

The principal limitation of the study by Chen et al is that the cohort of young offenders they examined all had their first court appearance before the commencement of the *Young Offenders Act 1997* (NSW). In what follows, we examine the fate of 8813 young offenders who had their first known[167] police caution, conference or proven court appearance[168] in 1999, after commencement of the Act. The data for the analysis are drawn from the NSW Bureau of Crime Statistics and Research Re-Offending Database ('ROD'). ROD consists of a set of continuously updated records of each individual cautioned, referred a youth justice conference or who has appeared in a NSW court charged with one or more offences in a NSW court at any point since 1994.[169] The questions we seek to answer are:

(a) What proportion of the cohort is convicted of a further offence?[170]

(b) What is the average frequency of reconviction[171] amongst those who have at least one further conviction? and

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162 Shuling Chen et al, 'The Transition from Juvenile to Adult Criminal Careers' (Crime and Justice Bulletin No 86, NSW Bureau of Crime Statistics and Research, 2005).

163 Ibid 9.

164 Ibid 10.

165 Ibid.

166 Ibid.

167 The term 'known' is used because the NSW Bureau of Crime Statistics and Research records only go back to 1994. It is conceivable, though highly unlikely, that some juveniles in the sample had no contact with the criminal justice system between 1994 and 1999 but had some contact prior to 1994. Note that, prior to 1997, when the NSW *Young Offenders Act* was introduced, the only formal contact a juvenile could have with the criminal justice system was a court appearance.

168 A 'proven' court appearance in the present context is one in which the juvenile either pleads guilty or is found guilty of one or more offences.

169 Further details of ROD (eg, the accuracy of the matching process) can be found in Jiuzhao Hua and Jacqueline Fitzgerald, 'Matching Court Records to Measure Reoffending' (Crime and Justice Bulletin No 95, NSW Bureau of Crime Statistics and Research, 2006).

170 Note that a 'further offence' consists of an offence proved at court. We ignore further offences dealt with by way of a police caution or youth justice conference.

(c) What proportion end up in custody (that is, receive a control order or a sentence of imprisonment)?

To answer these questions, we followed the cohort for a 10 year period. For reasons that will become apparent, we break the answers to (a), (b) and (c) down by age, gender, race and disposition (namely, caution, conference, or court appearance). Table 1 provides descriptive statistics for the cohort of young offenders included in the analysis. Note that, due to missing values, some of the frequencies do not add up to 8813.

Table 1: Sample descriptive statistics

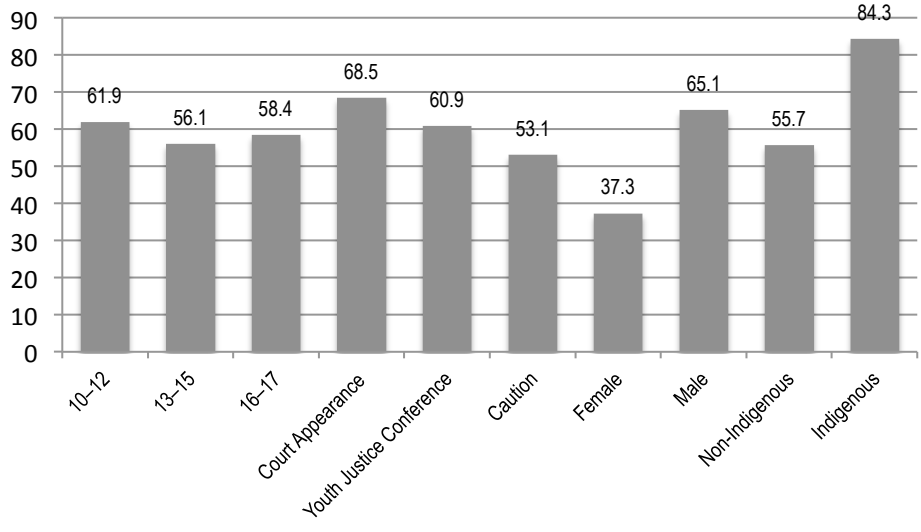
Variable	Frequency	Percent
Age		
10–12	690	7.8
13–15	4148	47.1
16–17	3975	45.1
Gender		
female	2365	26.9
male	6436	73.1
Indigenous status		
non-Indigenous	6752	82.2
Indigenous	1460	17.8
Index offence		
violence	1130	13.3
robbery	193	2.3
theft	4234	49.8
fraud	264	3.1
drugs	746	8.8
weapons	152	1.8
property damage	790	9.3
public order	622	7.3
driving	212	2.5
justice proc.	134	1.6
miscellaneous	30	.4
Disposition		
court appearance	2254	25.6
youth justice conference	593	6.7
caution	5966	67.7

171 A reconviction for present purposes is a further court appearance at which the offender is convicted of at least one further offence. An average frequency of reconviction of 3.91 would mean that those who appeared in court at least once, on average made 3.91 further court appearances at which at least one conviction was recorded.

Figure 1 provides the answer to (a).

Figure 1: Juveniles Making Their First Known CJS Contact in 1999:
Percent reconvicted in 10 years

Overall % reconvicted = 57.6%

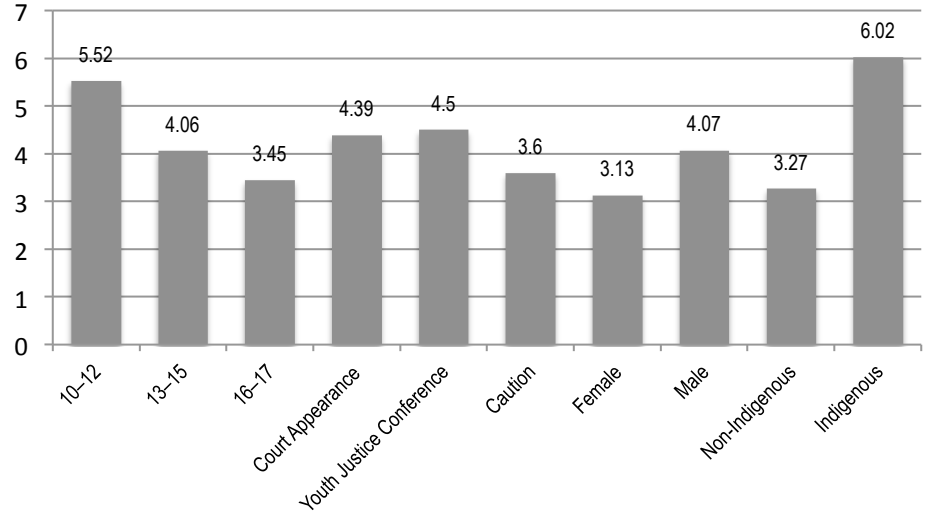


Inspection of Figure 1 shows that approximately 58 per cent of those who received their first caution, conference or proven court appearance in 1999 were reconvicted of a further offence within 10 years. The majority of offenders in every subcategory are convicted of a further offence except those who are female (37.3 per cent of whom are reconvicted). Even those who are cautioned are more likely than not to be convicted of a further offence. The reconviction rate of Indigenous offenders (84.3 per cent) is extremely high.

Figure 2 shows the average frequency of reconviction among those who had at least one further conviction in the 10 year follow-up period.

Figure 2: Juveniles Making Their First Known CJS Contact in 1999:
Average frequency of reconvictions in 10 years amongst those with at least one further conviction

Mean = 3.91

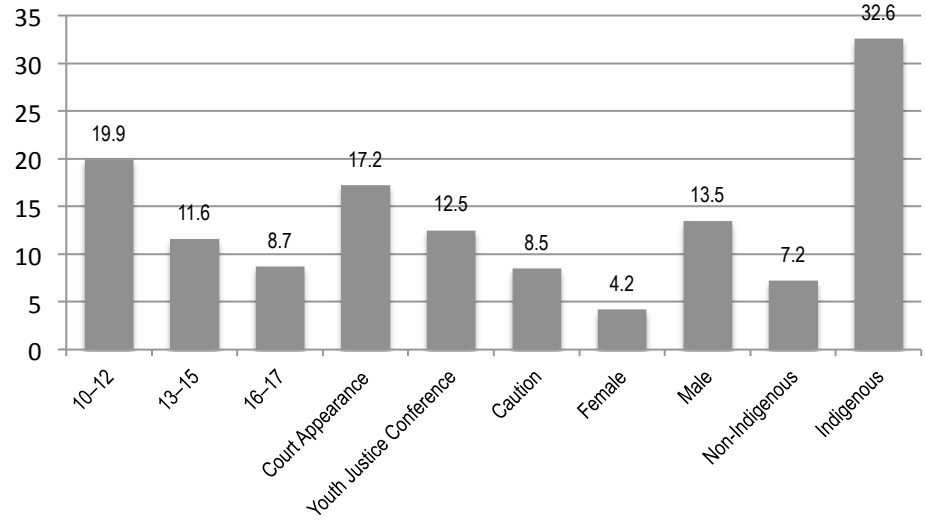


On average, those who had at least one further conviction made nearly four (3.91) more court appearances at which one or more convictions were recorded. The frequency of reconviction over the 10 year follow-up period varies considerably depending on the characteristics of the offender, with the lowest average conviction frequencies being recorded by females (3.13) and the highest being recorded by Indigenous offenders (6.02). Note, however, that even those whose first known contact with the justice system was a police caution managed to accumulate an average of 3.6 further court appearances at which they were convicted of one or more offences.

Figure 3 shows the percentage given a custodial penalty (control order or sentence of imprisonment) within the 10 year follow-up period.

Figure 3: Juveniles Making Their First Known CJS Contact:
Percent receiving a custodial sentence within 10 years

Overall % receiving a custodial sentence = 11%



One in nine (11 per cent) of those whose first contact with the criminal justice with the criminal justice system occurred in 1999 was serving a custodial sentence within 10 years. In the case of those whose first contact occurred when they were between the ages of 10 and 12, nearly one in five (19.9 per cent) ended up in custody. Nearly a third (32.6 per cent) of the Indigenous offenders in the cohort received a custodial penalty within 10 years. Of course, these results emanate from only one jurisdiction (NSW). There is no reason to believe the pattern would be markedly different in other states and territories, but we cannot be sure of this without replicating the study elsewhere. The results, nevertheless, are hardly consistent with the notion that offending by juveniles coming into contact with the criminal justice system is largely transient. In the absence of any evidence that juvenile contact with the criminal justice system is transient, it would be imprudent to assume that it is.

V LIFE WITHOUT THE DOGMAS

This brings us to the question of whether juvenile justice policy should be reformed in light of these facts and, if so, in what way. The question is difficult to answer, because it involves a balancing of rights and obligations. Individuals have a right, if convicted of an offence, not to be sanctioned in a way that is disproportionate to the harm they have caused and their culpability in causing it. The state, on the other hand, has an obligation to ensure that citizens and their property are kept safe from the depredations of offenders. In our submission, the current policy of diverting offenders away from court was sustainable when it was believed that most offenders who come into contact with the justice system cease offending of their own accord and that reoffending amongst the remainder is best reduced through a youth justice conference. Now that we know both of these assumptions are incorrect, it is time to reassess the balance. None of this is to suggest that reducing reoffending is the sole aim of juvenile justice policy. It is, however, a very important goal and one that cannot be ignored without undermining public confidence in the juvenile justice system.

The case for reform is strengthened by another important consideration. At the time the current Australian policies on juvenile justice were framed, very few programs had been shown to be effective in reducing juvenile reoffending. This situation has changed dramatically over the last 20 years. Programs such as Functional Family Therapy, Aggression Replacement Training, Multidimensional Treatment Foster Care, and Multisystemic Therapy have all been shown to be cost-effective responses to juvenile reoffending.[172] Some Australian jurisdictions have trialled some of these programs,[173] but few of them have found their way into mainstream juvenile justice practice. In NSW, juvenile justice agencies do not get any formal opportunity to place a young offender on a rehabilitation program until a court places the young offender on a supervised order. By this time a young offender may have had multiple contacts with the criminal justice system. Failure to intervene early is likely to make intervention more difficult and less likely to be successful. Indeed, failure to ensure that all young offenders at significant risk of reoffending are offered a place on an effective rehabilitation program not only puts the community at unnecessary risk, but also means that the number of young offenders ending up in custody remains higher than it need be, with all the attendant psychological damage, stress and hardship this entails. This needs to change.

What sorts of reforms to juvenile justice policy are required to resolve these issues? In answering this question it is important to remember that reducing juvenile reoffending is not a policy objective to be pursued at any cost. Juvenile offenders ought not to be subjected to constraints that are out of all proportion to the harm they have caused, even if those constraints are imposed with a view to

172 Stephanie Lee et al, 'Returns on Investment: Evidence-Based Options to Improve Statewide Outcomes' (Washington, State Institute for Public Policy, 2011).

173 Eg NSW is currently trialling a version of Multisystemic Therapy called the 'Intensive Supervision Program'.

helping them live more law-abiding lives. It is also important to remember that restorative justice programs are very popular with victims of crime and may in many instances be more effective in giving victims a sense that justice has been done than conventional court proceedings.[174] There is, furthermore, little economic justification for placing young offenders on expensive intervention programs in circumstances where the available evidence suggests that the risk of further offending is minimal or very low.

What is needed, then, is a mechanism which allows for minimal or limited intervention (for example, warning, caution or conference) in cases where the offending is minor and where the offender poses no significant risk, while at the same time allowing for more substantial intervention (that is, placement on an appropriate rehabilitation program) where the seriousness of the offence or the risk of reoffending is high. One approach to this problem would be to leave it to the police or the courts to decide when more substantial intervention is warranted. The problem with this approach is that, left to their own devices, human beings are generally poor judges of risk.[175] A better approach would be to improve the quality of the information available to judges and magistrates when making determinations of risk. One way to do this is to make more effective use of the screening, risk assessment and needs assessment tools that have been developed over the last decade.

At the moment, most jurisdictions make no attempt to formally screen juvenile offenders for risk of further offending or to assess the factors contributing to their offending, or, indeed, to refer them to appropriate rehabilitation programs (where this happens at all) until they have accumulated several contacts with the criminal justice system. As noted above, a juvenile offender may have acquired a significant offending history before a court imposes a supervised order and refers the young person to an appropriate rehabilitation program. Rather than waiting until involvement in crime has become entrenched before taking steps to prevent further offending, it would make more sense to screen juvenile offenders for risk of reoffending fairly early on in the piece (for example, after two separate police warnings, cautions or conferences within some specified period) and intervene wherever it seems appropriate to do so.

It is true that risk/need assessment has had its critics. Some of the factors thought to impact on the accuracy of these instruments include ethnicity, gender, and administration in custody versus community settings.[176] However, it is also true that no assessment tool has perfect predictive ability, and that contemporary

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174 Jo-Anne Wemmers and Marisa Canuto, *Victims' Experiences With, Expectations and Perceptions of Restorative Justice: A Critical Review of the Literature* (International Centre for Comparative Criminology, 2002).

175 See Daniel Kahnenman and Amos Tversky, 'Prospect Theory: An Analysis of Decisions Under Risk' (1979) 47 *Econometrica* 263.

176 See Anthony P Thompson and Andrew McGrath, 'Subgroup Differences and Implications for Contemporary Risk-Need Assessment with Juvenile Offenders' (2012) 36 *Law and Human Behavior* 345 for a more detailed discussion of these factors.

risk/need assessment is supported by a substantial and growing body of research evidence.[177] While the possibility of errors of prediction exists, of all the options open to policy makers, we feel contemporary risk/need inventories offer the most psychometrically credible and transparent method of assessing risk of reoffending.

Offenders who have committed minor offences and who are judged to be at low risk of reoffending could continue to be dealt with by way of one of the current diversionary options. Those found to be above a specified level of risk could be referred to the Children's Court for a full assessment and whatever response (including placement on an accredited rehabilitation program) the court deems appropriate in light of advice received from professionals assisting the court. This would undoubtedly increase the number of young offenders coming before the Children's Court, but the research reviewed in this article suggests there is no criminological reason to be concerned about such an outcome. Indeed, it would have the distinct advantage of expanding the range of cases where the court decides the appropriate balance between the interests of the young offender and those of the broader community.

This approach, of course, presupposes the existence of an effective screening or 'triage' tool. It also presupposes the existence of an effective means of matching offenders to appropriate programs, as well as a suite of effective programs adequately resourced to ensure that all those in need of treatment and support receive it. Weatherburn, Cush and Saunders[178] and Lind[179] have shown that it is possible to reliably screen juvenile offenders for risk of reoffending using just a few basic readily available indicators (for example, number of prior contacts with the justice system, gender, age at first contact). Validated juvenile offender risk/needs assessment instruments, such as the Youth Level of Service Inventory,[180] can be used to gauge a young person's 'criminogenic needs' (factors influencing offending) and the kinds of programs that would be useful in reducing the risk of further offending. Of course none of these instruments are perfect. There is always a trade-off between setting the threshold of intervention too high and failing to refer young people who would benefit from assistance and support (technically known as a 'miss'), and setting it so low that young people

177 Mark E Olver, Keira C Stockdale and J Stephen Wormith, 'Risk Assessment with Young Offenders: A Meta-Analysis of Three Assessment Measures' (2009) 36 *Criminal Justice and Behavior* 329, 342; Craig S Schwalbe, 'Risk Assessment for Juvenile Justice: A Meta-Analysis' (2007) 31 *Law and Human Behavior* 449; D A Andrews et al, 'Sources of Variability in Estimates of Predictive Validity: A Specification With Level of Service General Risk and Need' (2011) 38 *Criminal Justice and Behavior* 413.

178 Don Weatherburn, Rachel Cush and Paula Saunders, 'Screening Juvenile Offenders For Further Assessment and Intervention' (Crime and Justice Bulletin No 109, NSW Bureau of Crime Statistics and Research, 2007).

179 Bronwyn Lind, 'Screening Cautioned Young People For Further Assessment and Intervention' (Crime and Justice Bulletin No 149, NSW Bureau of Crime Statistics and Research, 2011).

180 Robert D Hoge and D A Andrews, *Youth Level of Service/Case Management Inventory: User's Manual* (Multi-Health Systems, 2006); Robert D Hoge and D A Andrews, *Youth Level of Service/Case Management Inventory 2.0: User's Manual* (Multi-Health Systems, 2011).

who are not at risk of intervention are referred for assessment and support (technically known as a 'false alarm').

The real challenge lies in creating a suite of effective programs well enough resourced to ensure that all those in need of treatment and support actually receive it. At the moment most of the money spent by juvenile justice agencies goes on keeping young people in custody.[181] In an ideal world, a much more substantial proportion should be devoted to keeping young offenders out of custody. This is a major challenge for state and territory governments but one to which they will have to rise if they want to see a substantial and sustained reduction in juvenile reoffending.

181 Eg, in NSW 62% of the budget of the NSW Department of Juvenile Justice goes to 'Custodial Services': Juvenile Justice NSW, *Annual Report Summary 2010–11* (2011) <www.djj.nsw.gov.au/pdf_htm/publications/annualreport/111117%20%20Annual%20report%20Summary%20Brochure%2010%20-11%20print%20A4%20v2.pdf>.