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Out of Step and Out of Touch: Queensland’s 2014 Youth Justice Amendments

Jodie O’Leary*

Abstract

Early in 2014, Queensland significantly transformed its Youth Justice Act 1992 (Qld). The amendments included removing the principle that detention should be a last resort, providing for the automatic transfer of 17-year-olds in detention to adult correctional facilities and a mandatory boot camp order for recidivist motor vehicle offenders in Townsville. This article demonstrates that these amendments are out of step with other Australian jurisdictions, conflict with international obligations and are out of touch with the evidence as to best practice in youth justice.

Keywords: youth justice – juvenile justice – boot camp – detention

Introduction

We’re Queensland. We will do what we think is in the best interests of Queenslanders and if that means going against the other states, we will.1

Queensland is well known for its recalcitrant stance on youth justice. In contravention of the Convention of the Rights of the Child (‘CRC’) art 1, and despite recommendations to the contrary by the United Nations Committee on the Rights of the Child (2012:[82]–[84]) and adverse judicial comment (R v GAM:[50]; R v Loveridge:83–4; R v Lovi:[47]; R v Gordon:[26]), Queensland is the only Australian jurisdiction that deals with 17-year-olds as adults in the criminal justice system. It should come as no surprise that Queensland is once again standing alone on youth justice issues.

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1 Queensland Attorney-General and Minister for Justice, Jarrod Bleijie, cited in Remeikis 2012.
On 15 July 2012, Queensland’s Attorney-General was reported as saying that the Queensland Liberal National Party (‘LNP’) Government was not afraid to act contrary to the rest of Australia regarding youth justice (Remeikis 2012). This statement was proven on 18 March 2014, when the Queensland Parliament approved the passage of the Youth Justice and Other Legislation Amendment Bill 2014 (Qld) (‘the Bill’) with amendments. The new version of the *Youth Justice Act 1992* (Qld) took effect on 28 March 2014. The amended Act contains a number of controversial measures that will impact significantly on the Queensland youth justice system (Trotter and Hobbs 2014). Those measures include: removing the principle that detention should be a last resort; expanding the instances when the Childrens Court may be opened; increasing the opportunity to name and shame offending youth; allowing all juvenile criminal history to be admissible in adult courts; creating a separate offence for young people of breaching bail by reoffending; making provision for the automatic transfer of 17-year-olds to adult correctional facilities; and introducing a mandatory boot camp order for certain recidivist motor vehicle offenders.

This article considers the amendments that bear on the detention of young people in Queensland, including in boot camps. Not only is Queensland countering most other Australian jurisdictions, this article argues that these amendments further jeopardise Australia’s obligations under the CRC and associated instruments and ignore the evidence as to what works in youth justice.

The legislative journey

In March 2013, the Queensland Government released a community consultation document, entitled the ‘Safer Streets Crime Action Plan — Youth Justice: Have Your Say’ (Queensland Government 2013b) (‘the Consultation Paper’). That document detailed some facts about youth justice and some of the Government’s initiatives under consideration in the development of its ‘Blueprint for the Future of Youth Justice in Queensland’. The Consultation Paper provided for responses to a survey, which could be returned in writing or completed via an online platform. Otherwise, the Consultation Paper permitted respondents to make submissions, in writing, to the questions it posed. In excess of 60 written submissions were received from individuals and organisations. The Government has not made these public. There were 4184 responses to the survey. The majority of respondents (76.8 per cent) had been victims of crime themselves or had a family member who was a victim of crime (Queensland Government 2013a). The survey cannot be considered representative of the Queensland community. Further, the lack of security features in the internet platform may have caused error. Potentially, respondents could complete the survey multiple times. Nevertheless, the Government used the results from the survey as evidence of public support for its proposed amendments (Explanatory Notes 2014:14).

The Bill was introduced on 11 February 2014 and referred to the Legal Affairs and Community Safety Committee (‘LACSC’) for report. The LACSC called for submissions apropos the Bill. Despite the tight timeframe, 25 submissions were received from individuals and organisations representing a wide variety of interests, such as universities, legal practitioners, community legal centres, other not-for-profit advocacy organisations, and church groups. The submissions overwhelmingly opposed the majority of the Bill. A public hearing was conducted and representatives of the Queensland Law Society, Amnesty International, the Law and Justice Institute of Queensland and church groups appeared. They again voiced their opposition. The chair of the LACSC recognised this opposition when representatives of the Department of Justice and Attorney-General (‘DJAG’) appeared at the end of the public
hearing. In addressing the DJAG representatives he said, 'I think you can safely say that you struck out. Not many people like our bill' (LACSC Public Hearing 2014:39).

At the time of introducing the Bill the Attorney-General foreshadowed further amendments to be proposed during the Bill’s consideration-in-detail stage. These amendments related to the prospect of mandatory youth boot camp orders for particular offenders in a particular area. Following the public hearing, submitters were asked to provide further comment on this additional proposal. This time the turnaround was two days. Eight additional submissions were received. Again the majority opposed the specific proposal.

The LACSC prepared a report recommending that the further amendments be included in the Bill and that the Bill be passed (LACSC 2014). Of the eight-member LACSC, the two non-LNP members dissented.

On 18 March 2014, the Bill was read a second time. The Bill and its additional amendments were approved by a vote of 67 LNP and one Independent in favour and 13 non-LNP members against (Parliamentary Debates 2014b:665).

The need for change?

The Government described the proposed reforms to the youth justice system as urgent (Crisafulli 2014) and ‘critical to respond to the escalating seriousness and devastation currently being caused by young criminals’ (Parliamentary Debates 2014a:46 (Jarrod Bleijie)). However, such sentiment is not supported by evidence. Over the past 10 years the number of dispositions of juveniles in Queensland courts has declined (Shanahan 2013:13). There has been a nine per cent reduction in the past three years alone (Youth Justice Performance and Reporting 2013). Young offenders represent between 4–4.5 per cent of all offenders who appear before the Queensland courts (Government Statistician 2011–12). This figure has remained consistent since 2006, and is less than the national average, which is between 5.5–6 per cent; although this may be partly explained by Queensland’s unique position of excluding 17-year-olds from the youth justice system. Nationally, recent Australian Bureau of Statistics (2014) research confirms a reduction in youth offenders, and Queensland is no exception. There seems little reason on the evidence to single the previous Queensland youth justice system out as having somehow failed.

In the face of mounting evidence contradicting the so-called youth crime wave, the Government recognised that ‘proportionally fewer young people are offending’ (Explanatory Notes 2014:1). Instead, it relied on the position that ‘those who are offending are doing so more often and are committing more serious offences’ (Explanatory Notes 2014:1). The increased number of charges per young offender (Shanahan 2013:2, 15) could have a number of explanations. As alluded to in the President of the Childrens Court of Queensland’s annual report, other factors, both administrative and legislative, may have contributed to the increase (Shanahan 2013:4). One legislative change on 27 November 2012 removed the option for the court to indefinitely refer a matter to a youth justice conference. Previously, this option would result in a matter not proceeding to finalisation in the courts. Removing this option would have necessarily resulted in an increase in the number of defendants and charges being finalised in courts. Administratively, charging policies and practices can differ over time, between police stations and between officers. ‘[O]ften a number of related offences are brought for the same event’ (Youth Advocacy Centre 2014:2). Changes in policy and practice can also affect the method of disposition. For example, the number of police cautions had decreased over the relevant period by
13.3 per cent (Shanahan 2013:4), which suggests that matters that may have been diverted previously via caution were now proceeding to court. As such, increases in offence dispositions may not reflect actual increases in offending behaviour.

Regardless, it is agreed that a small proportion of repeat offenders commit the majority of offences in Queensland (Shanahan 2013:2). The new legislation targets the provision of more effective responses for those young people (Explanatory Notes 2014:2).

As shown, the evidence as to the need for change is questionable at best, but improvements in youth justice are always welcomed. For it to be an improvement it must be rooted in solid evidence as to what would achieve the articulated goals in the Explanatory Notes (2014) of holding young offenders accountable for their actions; promoting their rehabilitation; and deterring them from future offending; with the end goal of protecting the community from recidivism (2014:1–2).

Evidence from research in youth justice suggests that two of these criteria, accountability and rehabilitation, potentially support the end goal. For example, while not confined to juvenile offenders, the use of quality cognitive-behavioural therapy has been demonstrated to effectively reduce recidivism; even more so for offenders at a high risk of recidivism (Lipsey et al 2007). However, deterrence is not an appropriate criterion. Deterrence is ineffective. It is particularly ineffective for young people due to the ongoing developments in their brains (Steinberg 2005; Galvan et al 2007; Albert and Steinberg 2011; see further discussion in O’Leary 2013). As articulated by the Supreme Court of the United States in Roper v Simmons, ‘the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence’ (at 571).

The following material assesses some of the most controversial components of the new legislation, specifically the removal of the principle that detention should be a last resort, the automatic transfer of 17-year-olds to prisons, and the introduction of mandatory boot camp orders for recidivist motor vehicle offenders.

**Detention is no longer a last resort**

The principle that detention should be a last resort for children is a subset of the broader principle that imprisonment should be a last resort. The principle that imprisonment should be a last resort exists in statutory and common law form. For example, in Parker v Director of Public Prosecutions, President Kirby, as he then was, said:

> Both by statute and by common law a custodial sentence is conserved to cases where the relevant alternatives have been exhausted. Such a sentence is apt as it is often said, where no other course is appropriate and where the most serious penalty now known to the law, loss of liberty, is required by the application of applicable sentencing principles (at 296).

Article 37(b) of the CRC and r 19 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (‘the Beijing Rules’) also enshrine the principle that detention should be a last resort for children. That principle is cognisant of the potential harm detention can cause to the young offender, his or her family, and the community at large. Young offenders are some of the most vulnerable members of our community, often from low socio-economic backgrounds, with low levels of education, poor mental or physical health, and many have been exposed to violence, homelessness, and drug and alcohol misuse (Queensland Government 2013b:9). Although the current state of knowledge is much more nuanced than can be presented here (see detailed discussion in Lambie and
Randell 2013), there is evidence that detention is criminogenic and will further marginalise such young people, entrenching them further in the criminal justice system (Austin et al 2005; Gatti et al 2009; Richards 2011; AIHW 2013). This has been found to be especially so for low-level offenders who are detained (Mulvey 2011).

The detention of young people should therefore be of great concern to the community. By doing no harm and improving the chance for young people to become contributing members of society, there is the potential that they will age out of offending; whereas, a child who becomes entrenched in the youth justice system to the extent of being detained is more likely to become entrenched in the adult criminal justice system (Aizer and Doyle 2013; Gatti et al 2009).

Before the legislative amendment to remove this principle for both adults and children, Queensland, like most other Australian jurisdictions, incorporated the requirement that detention should be a last resort into its youth justice legislation (Youth Justice Act 1992 (Qld) (previous version) ss 150(2)(e) and 208, sch 1 item 17; Youth Justice Act 2005 (NT) s 81(6); Crimes (Sentencing) Act 2005 (ACT) s 133G(2); Children and Young People Act 2008 (ACT) s 94(1)(f); Children (Criminal Proceedings) Act 1987 (NSW) s 33(2); Youth Justice Act 1997 (Tas) s 5(1)(g); Children, Youth and Families Act 2008 (Vic) ss 361, 410(1)(c), 412(1)(c); Young Offenders Act 1994 (WA) s 120). The only state with a point of difference previously was South Australia. In that jurisdiction, while there is still one provision akin to the principle that detention should be a last resort (Young Offenders Act 1993 (SA) s 23(4)(b)), there is a group of offenders to which that principle does not apply. Under Young Offenders Act 1993 (SA) s 23(4)(a), detention does not have to be a last resort for ‘a recidivist young offender or a serious firearm offender’. A young person can be declared a ‘recidivist young offender’ where he or she has been convicted of a serious sexual offence, committed on at least two separate occasions, against person/s under the age of 14, or where he or she has been convicted of another particular type of offence committed on at least three separate occasions (Criminal Law (Sentencing) Act 1988 (SA) s 20C). Those particular offence types include serious drug offences, serious firearm offences, home invasions, robbery, and damage to property by fire (Criminal Law (Sentencing) Act 1988 (SA) s 20A). While still disturbing, arguably the limitation of this principle’s application in South Australia will have little effect, as the offenders who do not have the benefit of its protection are not low-level offenders and would likely be facing detention anyway. Further, the principle is not specifically excluded from the ambit of consideration for these young people.

The Queensland amendments have completely removed the principle from the Youth Justice Act 1992 (Qld) for all young offenders. The legislation goes a step further in explicitly overriding any application of the principle at common law, with the addition of s 150(5):

This section overrides any other Act or law to the extent that, in sentencing a child for an offence, the court must not have regard to any principle that a detention order should be imposed only as a last resort.

Clearly, in Queensland this principle can no longer apply to any young person, regardless of the type of offence he or she is alleged to have committed. Queensland is the exception to the Australian norm.

In the Explanatory Notes (2014) the removal of this principle was explained as necessary ‘to ensure that punishments handed down to both child and adult offenders fit the severity of their crimes, communicate the wrongfulness of offending and protect the community from criminal behaviour’ (2014:2). The LACSC (2014) supported the principle’s exclusion as it
would ‘provide courts with the flexibility to craft sentences’ in accordance with the sentencing principles and purposes of proportionality, deterrence, denunciation and community protection (2014:25). This reasoning is unsound. The principle that detention should be a last resort does not mandate that young people must never be given detention. Rather, it prioritises non-custodial options where appropriate. If those non-custodial options are considered inadequate, detention would be permitted. In *R v Pham & Ly*, Lee CJ at CL stated:

> It is true that courts must refrain from sending young persons to prison, unless that course is necessary, but the gravity of the crime and the fact that it is a crime of violence frequently committed by persons even in their teens must be kept steadfastly in mind otherwise the protective aspect of the criminal court’s function will cease to operate. In short, deterrence and retribution do not cease to be significant merely because persons in their late teens are the persons committing grave crimes (at 135).

This quote indicates that, as it stood previously, the courts were not limited in crafting appropriate sentences to achieve those articulated sentencing purposes. The more serious offenders could still face detention. The principle provided an important moment to contemplate whether detention was justified.

Further, a suggestion that the removal of the principle is necessary to assuage public discontent is not arguable on the evidence. Even assuming its validity, less than 50 per cent of the group of largely victim respondents to the survey agreed that removing this principle would be an effective solution in preventing youth crime and making Queensland safer (Queensland Government 2013a).

According to the report of the President of the Childrens Court of Queensland, the number of children in detention on remand in Queensland increased from 56 in 2003–04 (56 per cent) to 125 in 2012–13 (78 per cent) (Shanahan 2013:31). Another justification offered by DJAG was that removal of the principle that detention should be a last resort would somehow impact on this ‘unacceptable’ number of Queensland children in detention on remand (DJAG 2014:7). This is despite research finding that the majority of Magistrates in Queensland did not agree that legislative change would effectively reduce the number of young people held on remand (Mazerolle and Sanderson 2008:46, 98) and Richards and Renshaw’s report that stated that legislative change is only one component of necessary reform (2013:98). By removing the last resort principle, DJAG (2014:7) states that ‘the current constraints which limit courts’ capacity to dispose of matters quickly’ will be relieved. This position is untenable. There is no way that more children will be given bail by removing the principle that detention should be a last resort. If a court is going to make an order of detention, the requirement for it to first order the preparation of and receive a pre-sentence report has been retained (*Youth Justice Act 1992* (Qld) s 207). There will necessarily still be a lag time between the young person’s first appearance and any detention order.

Exacerbating the issue of young people being held on remand is the amendment that criminalises offending while on bail. Previously in Queensland it was not an offence for a young person to breach a bail condition, including the condition not to reoffend (*Bail Act 1980* (Qld) s 29(2)(a)). Rather, where a young person was found to be in breach of a bail condition, it provided an opportunity for reconsideration of bail. Where he or she reoffended while on bail, this was taken into account in sentencing for the new offence. The insertion of s 59A into the *Youth Justice Act 1992* (Qld) makes a finding of guilt for a new offence while on bail an offence in itself, subject to penalty. This results in a notation on the young person’s criminal history. Such a notation will impact significantly the likelihood of any subsequent grants of bail for that young person, similarly to the impact of fail to appear entries (Mazerolle and Sanderson 2008:12).
Given that detention will not be a last resort, and in conjunction with the amendments to make breach of bail by reoffending an offence, young people will more likely be remanded in custody while a pre-sentence report is being generated. Therefore, the likely result is that this amendment will be, as stated in the Explanatory Notes (2014:8), one of the ‘several amendments made by the bill [that] may increase the likelihood that some children who come in contact with the youth justice system will spend time in detention’.

DJAG has conceded that there is no evidence that detention has a deterrent effect (LACSC Public Hearing 2014:41). Instead, to reiterate, expanding the group of young people in detention will inevitably counteract the end goal of protecting the community. As stated by one of the opposition members in the Bill’s debate, Jackie Trad, detention centres will become ‘a college for crims’, ‘production lines, turning rebellious teens into intractable criminals with no respect for the law and the skills to put their criminal attitude into practice’ (Parliamentary Debates 2014b:612 (Jackie Trad)).

Transferring 17-year-olds to prison

Offenders in Queensland who commit an offence after they turn 17 are dealt with in the adult criminal justice system. This potentially means that 17-year-olds can be incarcerated in adult prisons. The problems with this system have been detailed elsewhere (Hutchinson 2006; Hutchinson 2007; Commission for Children and Young People and Child Guardian 2012). Imprisoning 17-year-olds arguably contravenes art 37(c) of the CRC, which requires that ‘every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so’. Imprisoning a child with adults would rarely be in the child’s best interests. However, such an argument could be made where detaining (as opposed to imprisoning) the child would require moving the child to a location that would affect family accessibility. In ratifying the CRC, Australia made a reservation to art 37(c). That reservation accepts the obligation to separate children from adults ‘only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia’ (Convention on the Rights of the Child: fn 4).

The Committee on the Rights of the Child (2012:9) has consistently recommended the withdrawal of this reservation. The Queensland Commission for Children and Young People and Child Guardian (2012:7) and the National Children’s Commissioner (2013:9, recommendation 3) have also called for the reservation’s withdrawal. Nevertheless the reservation remains. Queensland may argue that it is not feasible to move 17-year-olds into the youth justice system given the financial burden of doing so. However, this argument is weakened where the reservation is considered in its entirety. In that instance, feasibility should only be considered in the context of family contact and, as such, the reservation is unnecessary due to the best interests qualification, which would already provide an exemption. Another argument that may be mounted is that most 17-year-olds, even when held in the adult prison system, are usually housed separately in the Youth Offenders Unit at the Arthur Gorrie Correctional Centre in Brisbane (Hutchinson 2007:82), colloquially known as the ‘boy’s yard’. This argument ignores the different position of 17-year-olds outside of South East Queensland and the position of 17-year-old females (Anti-Discrimination Commission Queensland 2006:116). Those young people who are not separated will be exposed to more experienced offenders and their safety may be threatened.
Even for those young people who are separated, the access to youth-focused programs is more limited in prison, as is contact with family.

The amendments exacerbate these problems as they will result in an increased number of 17-year-olds spending time in adult prison. Previously, where a young person was sentenced in the youth justice system, he or she would only be transferred to an adult prison upon a court order. This order could be made at the time of sentence (Youth Justice Act 1992 (Qld) previous version s 276B) or upon application by the young person or the chief executive (Youth Justice Act 1992 (Qld) previous version s 276C). Transfer usually only applied to 18-year-olds. In deciding whether to make such an order the court would have regard to various factors, including any particular vulnerability or maturity issues of the young person and the availability of relevant services and programs in prison (Youth Justice Act 1992 (Qld) previous version s 276D).

Under the amendments, 17-year-olds will be automatically transferred from detention to an adult corrective services facility where they have six months or more actual detention to serve (Youth Justice Act 1992 (Qld) pt 8 div 2A). The transfer will occur ‘on, or as soon as practicable after, turning 17’ (DJAG 2014:6). There is no potential to review the transfer unless it was affected by jurisdictional error (Youth Justice Act 1992 (Qld) s 276E).

Community views for these specific amendments were not canvassed in the Consultation Paper. The Consultation Paper only sought views as to the automatic transfer of 18-year-olds to prisons. Of the submissions to the LACSC, following confirmation of the proposal specifics, many problems were raised in line with the opposition to 17-year-olds being housed in prison generally and more specifically because of the removal of discretion in the transfer decision.

Justifications provided in support of these amendments were:

- that 17-year-olds were ‘of sufficient maturity to be held fully accountable for their actions’;
- equality of treatment between 17-year-olds serving custodial sentences, ‘regardless of whether they were originally found guilty and sentenced as children or as adults’; and
- removing the influence of 17-year-olds on the younger, more vulnerable offenders (DJAG 2014:6).

Justifying a change on the basis of equity with an already fundamentally flawed position is bad policy. Removing children from detention, where they may influence other children, to an environment where they can potentially be influenced by adults is not appropriate, especially when research conducted by Queensland Corrective Services confirmed that those who enter prison at 17 or 18 have the greatest likelihood of high recidivism and lengthy custodial careers in the future (de Andrade 2013). Any rehabilitation potentially offered by the programs in detention will be undermined by the subsequent imprisonment. Removing any discretion to consider transfer case by case and any right of appeal will result in absurd situations. To avoid such absurdity, courts may, in sentencing young people, (analogously to the successful arguments mounted in B (a child) v Hepple) mitigate the sentence to take into account the fact that their incarceration in prison is a harsher punishment than detention, potentially undermining accountability.
Mandatory youth boot camp orders

The LNP Government introduced boot camp orders as a sentencing option in youth justice in Queensland in late 2012, despite significant apprehension from those it consulted. Much of the trepidation related to the ineffectiveness of boot camps as a youth justice measure (Hutchinson and Richards 2013; Drake et al 2009; Wilson et al 2005; Wilson and Lipsey 2000). As the Australian Institute of Criminology (2002) stated, ‘intensive strict regimes (for example boot camps) are not effective at reducing reoffending unless they comprise a more therapeutic component and provide skills that generalise to the young person’s usual environment’ (2002:38). The boot camps developed in Queensland were asserted to be informed by evidence. The evidence considered largely supports the position of the Australian Institute of Criminology. That is, it recognised that boot camps are not effective unless they involve some form of treatment and ongoing support in the community (DJAG 2013).

There are two forms of boot camp in Queensland, an Early Intervention Youth Boot Camp and a Sentenced Youth Boot Camp (‘SYBC’). The first is aimed at preventing young people from entering the youth justice system. The second is an alternative to detention. Both of these forms generally require the consent of the young person before participation. Only the SYBC order is incorporated into the legislation and it is this form that is impacted by the amendments.

The SYBC purports to adopt best practice in boot camps; it is said to include intensive family support, cognitive therapy, education, training, employment and health services (DJAG 2013). The order involves a residential component of one month at a boot camp centre, followed by a community supervision phase of a maximum of five months (Youth Justice Act 1992 (Qld) s 226E(3)). The pilot SYBC, in Cairns, was forced to close following a publicised escape of young people from the camp. Subsequently, a super boot camp was established to operate as the SYBC for children from the Cairns and Townsville area. That boot camp is located at Lincoln Springs Station, which is a two-hour drive west of Ingham. Ingham is more than 100 km north of Townsville and 200 km south of Cairns.

Singing the praises of boot camps, the Attorney-General noted that ‘early indications from these boot camps are that they are proving effective in changing young people’s behaviour’ (Parliamentary Debates 2014a:46 (Jarrod Bleijie)). He is recorded as saying that 85 young people have started a youth boot camp order and most of them have either completed it or are currently in the community integration phase (Parliamentary Debates 2014b:594). The Attorney-General, even anecdotally, can only be talking about the Early Intervention Youth Boot Camps, as the new SYBC only started in December 2013. It is the SYBC that, with the amendments, has become part of a mandatory order for particular types of offenders.

Queensland courts must now make a SYBC order against a young offender who is found guilty of a relevant vehicle offence when he or she has, on or before the day he or she is found guilty of that offence, been found guilty of two or more other vehicle offences (committed within one year before or on the day of the relevant vehicle offence) (Youth Justice Act 1992 (Qld) s 206A). These orders can only apply where the young person is 13 years of age or older at the time of sentence, usually resides in the area prescribed by regulation (Townsville), and is not ineligible. A young person will be ineligible if he or she is facing or has a history of a disqualifying offence (being largely sex offences, murder and manslaughter) (Youth Justice Act 1992 (Qld) s 226C(3) and sch 5). A young person can also be determined ineligible where the court considers he or she poses an unacceptable risk of physical harm to others in the boot camp. The court is required to order a pre-sentence
report, which will contain details as to eligibility as well as details as to the proposed boot camp program (Youth Justice Act 1992 (Qld) s 151(3B)). The requirement of the program details in the pre-sentence report is odd given the court has no choice, if the young person is eligible, but to make the order, and the young person has no choice as to its imposition.

The mandatory nature of these orders is troubling, especially when the value of these SYBC orders has not been assessed summatively. Rule 17.1 of the Beijing Rules requires that principles of proportionality, individualisation and parsimony apply with respect to young offenders. The mandatory nature of these orders infringes these principles. It limits the court’s ability to pay careful consideration to the circumstances surrounding the offending and craft an appropriate sentence.

The Northern Territory has flirted with mandatory sentencing for young property offenders and Western Australia continues to have a mandatory minimum sentencing regime for particular offenders. The Northern Territory experience had some disastrous results, demonstrating the potential for disproportionality for young offenders subject to mandatory sentencing (Johnson and Zdenkowski 2000:104–5). Further, a Northern Territory Office of Crime Prevention report noted that the levels of recorded property crime in the Territory were not significantly affected (2003:13). The laws in the Northern Territory have since been repealed.

The Western Australian legislation continues to apply to burglary offenders who are facing their third or more burglary conviction (Criminal Code (WA) s 400(3)). Section 401(4)(b) of the Criminal Code (WA) results in a mandated minimum sentence of at least 12 months detention or imprisonment, notwithstanding a provision in the Young Offenders Act 1994 (WA) s 46(5)(b), which otherwise precludes the operation of mandatory minimums to young people. Its application has also led to disproportionate results (Aboriginal and Torres Strait Islander Social Justice Commissioner 2002:105). However, the courts have interpreted this provision flexibly to permit conditional release to an intensive youth supervision order, instead of detention (B (a child) v Hepple). On the other hand, using the court’s power in special circumstances to make a declaration under the Young Offenders Act 1994 (WA) s 187(3), which would remove the young person from the category of recidivist offender, to defeat the operation of a mandatory sentence has been specifically prohibited. It was said to undermine Parliament’s intention (B (a child) v Hepple:43)). More recently, mandatory minimums of three months detention or imprisonment have been extended to apply to young people aged 16 or older, who are convicted of various forms of assault offences, such as assaults against police, detention centre or court staff (Criminal Code (WA) ss 297(5); 318(2)).

Wilkie and Sidoti (1999) of the Australian Human Rights Commission have commented that the laws that previously existed in the Northern Territory and those that continue to apply in Western Australia represent a key deficiency in the full implementation of CRC in Australia. The Committee on the Rights of the Child (2012:82(e)) has noted the continuing practice in Western Australia requires substantial reform to conform to international standards. The Human Rights Committee (2000) of the United Nations stated that:

Legislation regarding mandatory imprisonment in Western Australia and the Northern Territory, which leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed and would seem to be inconsistent with the strategies adopted by the State party to reduce the over-representation of indigenous persons in the criminal justice system, raises serious issues of compliance with various articles of the [ICCPR] (2000:section 3).
The unequal impact that mandatory sentencing can have upon Indigenous, mentally ill and intellectually disabled young offenders is alarming. The Aboriginal and Torres Strait Islander Social Justice Commissioner (2002) provided a stark example of a statement by a Northern Territory magistrate while sentencing:

This Court’s hands are tied, of course, by mandatory sentencing. It’s clear that this defendant suffers from an intellectual disability, and I can quite confidently say that, but for mandatory sentencing, I think I would not have imposed a sentence which would have resulted in this man being imprisoned for so long. It may well be that I may have even suspended it fully (2002:116).

This potential for unequal impact is compounded in the Queensland situation, as only young people who reside in Townsville will be subject to the different and potentially unfair regime of mandatory SYBC orders, purely because of where they live.

Of course, these mandatory sentencing regimes in the Northern Territory and Western Australia refer, largely, to mandatory sentences of detention or imprisonment and the orders mandated in Queensland are SYBC orders. However, the young person's liberty is still deprived during the residential component of a SYBC order and a young person may still be disproportionately affected.

Unfair situations are not difficult to envisage. For example, a 14-year-old in Townsville, without any criminal history, who falls in with the wrong crowd and in one day is the passenger in a number of stolen vehicles resulting in three separate unlawful use of motor vehicle charges, would be required to attend a SYBC. As articulated in the Law and Justice Institute’s (2014b:2) supplementary submission:

Surely this young person, who has never had the opportunity to hear the warnings of the judiciary that ‘should you reoffend you will be facing a mandatory penalty’, is not among the target group. No other intervention would yet have been tried for such a young person and yet they will be removed from their family and ensconced in a program residing with more established offenders.

Such anomalies provide validation as to why mandatory sentences are generally avoided in youth justice systems in other jurisdictions. The NSW Law Reform Commission did not support the application of mandatory sentencing to young offenders (2005:200). To do so, it considered, would conflict with Australia’s international obligations under CRC arts 3(1), 37(b) and 40 (2005:199). It also considered the evidence that mandatory sentences have little deterrent effect (2005:200). Hoel and Gelb (2008) of the Victorian Sentencing Advisory Council agree that there is a low likelihood that mandatory sentencing would deliver its aims (2008:21).

Apart from the mandatory nature of the order, there are other problems associated with the SYBC order for recidivist motor vehicle offenders. The only other Australia jurisdiction to use boot camps in youth justice is the Northern Territory. A Review of the Northern Territory Youth Justice System (Northern Territory Government 2011) recommended that the number of youth rehabilitation camps (also known as ‘boot camps’) be increased and be regulated by legislation (2011:viii). Early Intervention Boot Camps were to commence in July 2013, with discussions underway regarding the delivery of youth boot camps for sentenced youths (Department of Correctional Services 2013). In the review, one option provided for delivery of these SYBCs was to include them as part of existing orders available under the Youth Justice Act 2005 (NT) div 8, such as the alternative detention order (Northern Territory Government 2011:53). Such an order, however, requires a young person’s consent (Youth Justice Act 2005 (NT) s 100(3)). The Queensland amendments
remove the requirement of consent to the SYBC order for recidivist motor vehicle offenders. This is inconsistent with earlier statements by DJAG that consent is required to maximise the therapeutic nature of the SYBC order (LACSC 2012:9). The benefits of consent for the prospects of offender rehabilitation are long held. Treatment is thought to be more effective where the offender is internally motivated. An objective test of this motivation is the requirement for consent. Where there is consent, there is more likely to be engagement in the program and lasting reform. Pahrar et al’s (2008) meta-analysis of the effectiveness of treatment measured against the level of coercion used for the offender to be involved in the treatment found that mandated treatment in a custodial setting did not have a significant effect upon general recidivism. The residential phase of the boot camp would be considered a custodial setting as the young person is not free to leave. As such, the asserted therapeutic nature of the SYBC order is undermined by its mandatory nature.

In addition, contrary to best practice articulated above and to the principles outlined in the *Youth Justice Act 1992* (Qld) sch 1, the residential camp’s remote and rough location undermines reintegration. It provides a barrier to family involvement in this phase and it is doubtful whether any employment skills that are gained will be useful or transferrable to an urban environment to which many offenders will return.

Lipsey (2009) has identified three factors that correlate to increased program effectiveness in youth justice:

1. a therapeutic intervention philosophy (rather than one involving control or coercion — surveillance, deterrence, and discipline);
2. involving high-risk offenders; and
3. high quality of implementation.

Unfortunately, the SYBC orders have not been summatively assessed so there is little information as to the quality of implementation. However, the new mandatory form of order challenges these other factors as the removal of consent necessitates compulsory treatment, a form of control and, given the potential for disproportionate application, in some instances the offenders subjected to this order may not be considered high risk.

**Conclusion**

During the LACSC public hearing (2014:42), a non-LNP member, Bill Byrne, posed the following question:

I am concerned though about any additional evidence that the department may have — any peer-reviewed evidence perhaps from an academic environment — that gives any sort of substantiation to the essence of the measures in this bill. Am I asking too much to ask whether there is any material, peer reviewed, that can point to these measures having any prospect of changing the present dynamic?

DJAG could not point to any evidence to substantiate the Bill’s measures.

Notwithstanding this concession, these measures are now law. Detention is no longer a last resort, 17-year-olds with six months left to serve in detention will be transferred to adult prison and a particular group of offenders from a specific part of Queensland will be plucked from their normal place of residence and required to attend boot camp.
After keeping up the appearances of consultation and being presented with overwhelming opposition to the proposed laws suggesting the amendments were out of touch with the evidence, the Queensland Government has enacted these laws. The Government is not bothered that international instruments and the normative position in other Australian jurisdictions is largely and consistently adverse to the Queensland amendments. The Queensland Government has implied that it is willing to be out of step with other Australian jurisdictions and to defy international standards to do what it thinks is in the best interests of Queenslanders. Certainly the amendments are not in the best interests of Queensland’s young offenders; the amendments do little to add to accountability and will impinge on rehabilitation prospects. Removal from the community, detention, and imprisonment usually only serve as temporary protection, compounding the young person’s problems and aggravating the offending cycle. As such, the amendments are not in the best interests of Queenslanders on the whole.

However, Queensland is not alone when it comes to favouring such a stance and affording lip service only to best practice in youth justice. There are states in the United States, for example, who ‘have not taken any but the most rudimentary steps in embracing’ evidence-based youth justice programs (Greenwood and Welsh 2012:494). This is despite the circulation in the United States of various lists about what works, such as by the Washington State Institute for Public Policy and the Campbell Collaboration. Greenwood and Welsh recognise the substantial obstacles inhibiting the adoption of best practice programs, including lack of access to research (2012:495). While there is no single body pulling together the evidence of what works in Queensland, the Queensland Government is gathering such evidence through consultations such as that undertaken for the Youth Justice Bill and more recently calling for submissions in an inquiry on strategies to prevent and reduce criminal activity in Queensland. Many of those submissions do and will reference the evidence readily available in other jurisdictions. Such a process, however, failed to impact in relation to the Youth Justice Bill; it may be that there is conflicting evidence or that it is not presented in a way that it is easily digestable or that submitters can be too easily tarred with a partisan brush and any evidence they present disregarded. If so, a possible solution may rest in the establishment of an independent body to streamline this exercise, such as the What Works Centre for Crime Reduction in the United Kingdom (HM Government 2013). Such a body would only be a start; commitment would be needed to championing proven best practice options and working with such a body in developing methods to evaluate chosen options to further contribute to the evidence base. Without such changes, there is a danger that best practice approaches will remain tokenistic.

Cases

*B (a child) v Hepple* [2013] WASC 303 (15 August 2013)

*Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282

*R v GAM* [2011] QCA 288 (18 October 2011)


*R v Loveridge* (2011) 220 A Crim R 82

*R v Lovi* [2012] QCA 24 (24 February 2012)

*R v Pham and Ly* (1991) 55 A Crim R 128

*Roper v Simmons* 543 US 551 (2005)
Legislation/Treaties

*Bail Act 1980* (Qld)

*Children (Criminal Proceedings) Act 1987* (NSW)

*Children and Young People Act 2008* (ACT)

*Children, Youth and Families Act 2005* (Vic)


*Crimes (Sentencing) Act 2005* (ACT)

*Criminal Code Act Compilation Act 1913* (WA) (‘Criminal Code (WA)’)

*Criminal Law (Sentencing) Act 1988* (SA)


*Young Offenders Act 1993* (SA)

*Young Offenders Act 1994* (WA)

*Youth Justice Act 1992* (Qld)

*Youth Justice Act 1992* (Qld) (previous version) current as at 10 February 2014

*Youth Justice Act 1997* (Tas)

*Youth Justice Act 2005* (NT)

Youth Justice and Other Legislation Amendment Bill 2014 (Qld)

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