ABOLISH CHILDREN'S COURTS?
JUVENILES, JUSTICE AND SENTENCING *

*by Arie Freiberg**
Professor of Criminology
University of Melbourne

> [A]re you not aware that [no person has ever been convinced] by an appeal to reason, which only makes people uncomfortable? If you want to move them, you must address your arguments to prejudice and the political motive ...[1]

INTRODUCTION

When twenty thousand Western Australians gathered in front of Parliament House on Perth in August 1991 in a rally for "justice", they were expressing not only their outrage at the recent spate of deaths of a number of innocent people killed as a result of high speed car chases, but also a more profound disquiet about the state of their society. Implicit, or explicit, in their disquiet was a fear of crime and violence, in particular, that committed by young offenders.[2]

Juvenile justice has been high on the political agenda for more than a decade in this country.[3] A recent Queensland survey of policy makers, politicians, criminal justice practitioners and academics ranked issues relating to youth crime third and fourth out of twenty-five.[4] Task forces, inquiries and reviews abound. Most jurisdictions have recently changed, or are about to change, the law relating to juveniles.[5] These legislative and social changes, like most social movements in Australia, are reflective of political currents elsewhere.[6]

Australia, like the United States, has seen a rise in the amount of both adult and juvenile crime.[7] There is evidence of an increasing despair that dispositions and programmes are

* My thanks to Dr Rob White and Professor Pat O'Malley for comments upon an earlier version of this lecture.

1 Comford, F M, Microcosmographica Academica 1908, at 2.

2 Fagan, J, "Social and Legal Policy Dimensions of Violent Juvenile Crime" (1990) 17 *Crim Just Beh'r* 93.

3 It is never completely off the agenda. Fear of "bodgies" and "widgies" was prevalent in the 1950s and perhaps it is true to say that in some way or another, each generation distrusts and fears its young.

4 Queensland, Criminal Justice Commission, *Youth, Crime and Justice in Queensland* (Paper prepared by I O'Connor), Brisbane, 1992 at i.

5 See, eg, *Children's Protection and Young Offenders Act 1979* (SA); *Juvenile Justice Act 1983* (NT); *Children's Court Act 1987* (NSW); *Children's Court of Western Australia Act* (No 2) 1988 (WA); *Children's Court Act 1989; Children and Young Persons Act 1989* (Vic); Children's Court Bill 1992 (Qld); Juvenile Justice Bill 1992 (Qld).

6 Rossum, R A, Koller, B J and Manfredi, C P, *Juvenile Justice Reform: A Model for the States* (1987) Rose Institute of State and Local Government and American Legislative Exchange Council.

7 Although there are strong indications that the levels in Australia have stabilised over the last few years.

ineffective, that "nothing works". Like no other issue, the problem of violent juvenile offending, polarises those who propound the traditional juvenile justice philosophies of welfare, rehabilitation and the best interests of the child and those who advocate a move to juvenile justice systems based upon due process and retributive sanctions.[8] As its incidence is perceived to increase, legislators and the public are less and less willing to subscribe to the view that juveniles are not "responsible" for their behaviour, and that their transgressions are merely "delinquent" rather than criminal.[9] In the United States this has led to the application of the full range of criminal sanctions to juveniles and to the reduction or elimination of the jurisdiction of juvenile courts. Increasingly, the technique of waiver of jurisdiction is employed to transfer juveniles to the adult courts as public and judicial confidence in the ability of juvenile courts to handle violent juvenile offenders ebbs.

BACK TO "JUSTICE"

It was, perhaps, with unconscious irony that the Western Australian movement styled itself the Rally for "Justice". The emergence of the "justice" model in the United States in the mid-1970s was a reaction to a criminal justice system which had adopted the positivist notions of crime as illness and sanctioning as treatment to a far greater degree than either the United Kingdom or Australia.[10] Sentencing in America was predominantly indeterminate with a great deal of discretion being vested in administrative bodies such as parole boards. This was also true of the juvenile justice system. Its standard sentence was an indeterminate one limited only by the coming of age of the offender.

The emergence of the justice model has been related to the collapse of the post-war economic boom. Prosperity, and its attendant optimism has been said to have allowed the "cultivation of rehabilitative philanthropy" and carried with it a belief in the inherent perfectibility of people. Recession, increasing crime rates (including fear of a juvenile "crime wave"), the diminution of funds to pay for rehabilitative programmes and increasing dissatisfaction with their ineffectiveness led to calls for a return to the eighteenth century classicism which the model draws on.

The model is part of a larger reform agenda in the United States. Its content can be summarised as an attempt to "get tough" with young offenders and to match the "privileges" of youth with concomitant responsibilities. The main articles of this reform agenda include greater attention to the needs of victims of juvenile crime, restoring the concept of individual and system accountability, more effective prosecution of serious juvenile offending, divestment of jurisdiction over minor and status offences, greater respect for procedural due process, abolition of, or reduction in, the jurisdiction of the juvenile court, facilitating the prosecution of juvenile offenders in adult courts, determinate sentencing, graded punishment based on crime and past record, mandating minimum terms of incarceration and the

8 Above n2 at 95.

9 Id at 93.

10 The material in this paragraph is drawn from Freiberg, A, Fox, R G and Hogan, M, *Sentencing Young Offenders* (1988) Australian Law Reform Commission, Sydney at 58–9.

introduction of comprehensive systems of sentencing guidelines. This agenda bears more than a little similarity to that advanced by the Rally for Justice, which identified a range of areas which it considered required reform including:

- mandatory minimum terms;
- maximum terms retained for use in extreme cases;
- prior sentences to be taken into account;
- sentences for each crime to be served separately and cumulatively;
- the prosecution to continue its case after plea and sentencing;
- mandatory pre-sentence reports;
- victim impact statements;
- those living away from home on their own resources to be automatically classed as adults;
- mandatory restitution either monetary or through enforceable work orders;
- public education and victim assistance.

A number of themes are clearly identifiable. The judiciary is not to be trusted with the exercise of discretionary power. Sentences, their length and the way they are to be imposed are to be made mandatory. Information must be sought about the impact of the crime upon the victim, whose interests must be accorded a greater weight than is currently thought to be the case. Sanctions must be more severe and the conditions harsher. All of this is, of course, more likely to occur in the adult courts, so increasingly there is a call for more offenders to be tried as and with adults. As juvenile courts begin to resemble the adult courts, the logical question arises — do we in fact need to retain a separate juvenile court system?

The reform agenda is, however, a contradictory one and it would be unwise to read too much back into Australia from the United States. While it is true that at both the adult and youth levels demands are evident for a more punitive and retributive orientation, courts and criminal justice agencies recognise that providing that intervention can be kept within limits, the provision of opportunities for growth and development is a proper and desirable goal of any system, whether juvenile or adult and that neither fiscal stringency nor an undue cultural pessimism should relegate this aim into an unwarranted oblivion.

The purpose of this lecture is to examine some of these recent trends in juvenile justice, but with particular attention to the legislative changes in Western Australia wrought by the *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) and the *Criminal Law Amendment Act 1992* (WA). I will attempt to locate these changes in wider movements in criminal justice, analyse them in the context of traditional sentencing principles and evaluate them in the light of current criminological research. The arguments are presented with full awareness of Comford's admonition that a mere appeal to reason is unlikely to convince anyone. However, being unskilled in the exploitation of prejudice, the excitement of emotion or the manipulation of the political motive, I will be forced to rely on the traditional academic tools of analysis, logic and fact.

VIOLENT JUVENILE CRIME

The notion that a juvenile crime wave has, or is about to, engulf the community seems to have wide popular currency. The widespread belief is that juveniles commit a disproportionality large number of serious and personal property offences.[11] The reality is

different, although reliable statistics are hard to obtain. While the evidence is clear that there has been an increase in the rate of crime in all jurisdictions, it is the nature of this crime that is important. In a recent comprehensive study carried out for the Criminal Justice Commission in Queensland, it was found that of all offences cleared,[12] juveniles were responsible for 31 per cent of all stealing offences, 24 per cent of all motor vehicle theft, 8.7 per cent of minor assaults, 8.4 per cent of serious assaults 4.1 per cent of rapes, 4.9 per cent of other sexual offences and 3.1 per cent of homicides.[13] Of all juvenile offending 70 per cent were offences against property while offences against the person amount to 6.9 per cent. The study found that although there had been a substantial increase in juveniles apprehended for crimes in Queensland[14] there had been a decrease in the rate of offending in the last year or so.[15]

Another common perception, created or magnified by media hyperbole, is that gang violence is endemic. This perception creates fear, particularly in women and the elderly. It is often likened to the situation in the United States where gangs are said to be highly organised and virulently crimogenic. Once again the reality is different. A recent study carried out for the Victorian Community Council Against Violence found that although groups of young persons did tend to congregate, their visibility tended to be heightened by their ethnicity. Where groups or individuals undertook criminal activity, it was mostly minor and generally property related. For many young people, these groups, rather than providing a framework for organised, structured and continuing illegal activity, served to provide a supportive social network in an often alien environment.

CARS, COPS AND CRIME

In Western Australia the catalyst for legal change was a series of deaths which resulted from high speed pursuits by police of cars stolen by juveniles, culminating on Christmas Eve 1991 in the death of a young pregnant woman. Over an eighteen month period, eleven persons died and a number of the offenders themselves were killed in these chases. Most of the offenders were Aborigines, but it appears that most of the activity was confined to a small and tightly knit group within the juvenile Aboriginal community.

Two major concerns emerged from these events. The first, and properly so, was the loss of life which occurred as a result of these pursuits. The second was the fact that these offences were committed by offenders with lengthy criminal records.[16] The juvenile

11 Id at 32. The Western Australian police have said that 58 per cent of all known offenders are under the age of 18: Western Australia, Legislative Assembly, Select Committee into Youth Affairs, *Discussion Paper No 3: Youth and the Law*, presented by Jackie Watkins, 18 March 1992.

12 That is for adults and juveniles.

13 Above n4 at 12.

14 In fact a greater than increase than in the rate for adults.

15 Above n4 at 15.

16 See, for example, the case of *McKenna*, Unreported, Court of Criminal Appeal of Western Australia, 19 March 1992, which was one of the first of these cases which was heard in the courts. The defendant was eighteen years old at the time of the offence, had swallowed "Ecstasy" tablets and had injected himself with amphetamines. Over the previous five years he had been convicted on 24 occasions of offences related to motor vehicles. He also had ten convictions of breaking and entering.

justice system was seen to be failing the citizens who were falling victim to a wave of reckless violent crime. Some responses spring readily to mind. One could have recognised that high speed pursuits of stolen cars driven by untrained juveniles who were also likely to be intoxicated, were an inherently dangerous strategy more productive of harm than the theft itself. In fact, in 1990 the policy and practice of high speed car chases was reviewed in a report to the Police Department by Macquarie University and the National Centre for Research into the Prevention of Drug Abuse, Curtin University. This review found that high speed pursuits were common in Perth, were higher on a per capita basis than Adelaide or Sydney, were faster, captured only 50 per cent of those fleeing, rarely captured anyone who had committed a serious crime and captured mostly Aboriginal youths.[17] The study concluded that the deterrent effect of these chases was not measurable in any scientific way.

Alternatively, it could have been recognised that the factors underlying continuing criminality, and in particular persistent car theft, were deeply rooted and resistant to traditional methods of intervention. As a Department of Community Services Report noted, there was a "high correlation between poverty, dysfunctional and socially impoverished families, school failure, truancy, recidivist offending" and the client group under discussion.[18]

Why are cars stolen by the young? One explanation is that car theft is a rational response to the problems some young people face. The lack of physical and social space for young people, inadequate public transport, lack of mobility and money, an abundance of spare time together with feelings of frustration, alienation and boredom result in theft for mobility, material gain or simply diversion.[19] In relation to Aboriginal youth it has been postulated that car theft is an expression of hostility to white society or represents a rite of passage from childhood to manhood.[20] Being pursued by white police officers is regarded as the ultimate proof of manhood. Certainly, car theft may be one way to affirm gender identity in an era when access to the traditional means of so doing, namely participation in the paid work force, is diminishing. As White observes, there is a close association in Australia between masculinity and car ownership and in a culture of "aggressive physicality" the theft of a car is one means of establishing a masculine identity.[21]

PUTTING THE "JOY" BACK INTO JOYRIDING

Yet clearly rational choice theory is only one explanation, and not a very good one for many offences. Positivist approaches to criminology have examined the biological, psychological and other factors which influence the commission of crime and, to a great extent, it is this determinist approach which underpins much of the juvenile justice system. However, recent work on the emotional and moral dimensions of the commission

17 Cited in Watkins, above n11 at 45.
18 Western Australia Department of Community Services (1991) cited in Watkins, id at 45.
19 White, R, *No Space of Their Own: Young People and Social Control in Australia* (1990) at 112.
20 Above n11 at 44.
21 Above n19 at 121.

of crime[22] argues that rational choice theory is inadequate because much crime can be understood as "an array of reactions against mundane, secular rationality and against the (especially modern) forms of social setting in which they are inextricably implicated".[23] The argument is that crime, in this context, car stealing and high speed chases, provides relief or escape, a reaction against humiliation and shame. As with drugs, alcohol or petrol sniffing, crime is a means of exploring the edges of the rational and experiencing the extra-ordinary. By verging, even to the edge of self-destruction (eight youths were themselves killed in these car chases), the offender can transcend the limits of control and experience a "pleasure" which is gratifying in itself.[24]. As Ipp J noted in *McKenna*[25]:

> He stole the car, not for financial gain, but for the stimulation of driving it knowing that he was likely to be noticed by the police who would then give chase.[26] The applicant simply did not care that his conduct would inevitably endanger the lives of others.

Katz points out that vandalism joy-riding and shoplifting are often offences whose rewards are independent of material gain or esteem from peers.[27] " 'Joyriding' captures a form of auto theft in which getting away with something in celebratory style is more important than keeping anything or getting anywhere in particular".[28] The common thread is that these are crimes that thrill their practitioners. Katz argues further that the emotion of delight in deviance must be understood as a process which is juxtaposed against humiliation. The humiliation of certain social groups must be seen as the background for an exploitation by them of the "bad" as a claim to existence or notice.[29] O'Malley and Mugford[30] extend the argument by contending that because the ability to obtain transcendent experiences is not equally distributed in our society, the wealthy may avail themselves of lawful thrills such as skydiving or hang-gliding while other social groups have greater access to crack or other drugs. Whereas to a middle-class world of "calculative rationality" the abandonment of reason in a desperate quest for excitement seems unintelligible, "seen from a world of mundaneness, boredom and humiliation, the excitement of crime is seductive".[31]

ABORIGINES AND JUVENILE JUSTICE

One central factor in the criminal equation in Western Australia must also be noted — that of race. In the 1991 Alicia Johnson lecture, Justice Elizabeth Evatt commented that:

22 Katz, J, *Seduction of Crime: Moral and Sensual Attractions in Doing Evil* (1988); O'Malley, P and Mugford, S, "Crime, Excitement and Modernity", paper presented at American Society of Criminology Annual Conference, San Francisco, 1991.

23 O'Malley and Mugford, id at 3.

24 Katz, above n22 at 8.

25 Cf n16.

26 In the case of some Aboriginal youths in Western Australia, it appears that the stolen cars were driven to the police station and the police taunted to chase the thieves.

27 Above n22 at 52.

28 Id at 53.

29 Id at 312.

30 Above n22 at 16.

31 Id at 18.

> One of the most serious current problems concerns Aboriginal Youth. The Royal Commission into Aboriginal Deaths in Custody found that they were over-represented in the juvenile justice system, attracting higher penalties and moving through the stages towards detention more rapidly than other groups. In some States a major concern is that the juvenile justice system has failed to reduce crime among Aboriginal juveniles.[32]

In Western Australia, in particular, the data confirm these observations. Wilkie[33] summarises the situation:[34]

> Aboriginal children are overrepresented at arrest (25 per cent of juveniles arrested in 1990; 4 per cent of the juvenile population) ... Aboriginal juveniles were 43 per cent of juveniles arrested for offences against the person in 1990. Overall, the Aboriginal juveniles arrested faced an average 5.5 charges while non-Aboriginal juveniles faced an average 2.7 charges each. Of juveniles appearing in the Children's Courts in WA in 1990, Aborigines were most likely to receive a custodial sentence. In fact Aboriginal juveniles were almost eight times as likely to be incarcerated as non-Aborigines: 12.4 per cent of Aboriginal juvenile offenders were sentenced to custody compared with 1.6 per cent of others. Aboriginal children constitute a majority of juveniles in detention. In 1989-90, Aborigines constituted 67 per cent of sentenced admissions to juvenile detention centres. Aboriginal juveniles are also more likely to be incarcerated in adult prisons or police lock-ups ... In 1990, 82 (66 per cent) Aboriginal boys of a total of 124, and 7 (78 per cent) of a total of 9 girls were received into adult prisons.

This paper is not the place to explore the reasons why the poor, the unemployed, the uneducated and the Aboriginal[35] are so over-represented in the juvenile and adult criminal justice systems. Social change, family breakdown, urbanisation, poverty, unemployment marginalisation, gender, unequal or lack of opportunity, economic crises and deprivation have all been put forward as explanations of juvenile crime.[36] Personal and institutionalised racism cannot be ignored, if the evidence emerging in relation to the sorry state of policy youth relations is to be believed.[37] Specific concerns identified in Western Australia include:

> the high number of offenders who are State wards and who have experienced multiple foster placings; who are homeless, living without positive adult influences; who find the education system alienating and irrelevant; who have been the subject of child abuse; and who have underlying psychiatric or emotional problems.[38]

It is little wonder that with entrenched problems such as these, many of the offenders appear in Court on numerous occasions. Western Australian data show that some 22 per

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32 Evatt, E, "Protecting Children's Rights: Implications for Australia of the International Convention", Alicia Johnson Lecture, 1991 at 13.

33 Wilkie, M, "Western Australia's Draconian New Juvenile Offender Sentencing Laws" (1992) 2/55 *ALB*, citing Broadhurst, R G, *Crime and Justice Statistics for Western Australia: 1990* (1991) Crime Research Centre, University of Western Australia.

34 Footnotes omitted.

35 These are, of course, not mutually exclusive categories.

36 Youth Justice Coalition, *Kids in Justice: A Blueprint for the 90s* (1990), New South Wales at 27.

37 A study by Cunneen found that 86 per cent of juveniles held in detention reported having been hit, punched, kicked or slapped by the police: Cunneen, C, *A Study of Aboriginal Juveniles and Police Violence* (1990), Human Rights Commission, New South Wales.

38 Above n11 at iii.

cent of offenders appeared five or more times before the courts, 8 per cent had more than 11 appearance and 2 per cent (166 youths) had more than 21 appearances. The number of individuals with more than eleven court appearances has increased by 5 per cent since 1988–9.[39] It was this combination of recidivism and the spate of offences relating to the theft of cars which precipitated the State Parliament into action in February of 1992.

"WE DO A LOT OF OVER-REACTING IN THIS STATE"[40]

The *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) ("The Act") and the *Criminal Law Amendment Act 1992* (WA) were rapidly passed into law in February 1992 after a specially convened sitting of Parliament. It came into operation on the 9th March 1992. Its short title was:

> An Act to provide for the sentencing of juveniles who commit certain offences involving the use of stolen motor vehicles and of juveniles or other persons who repeatedly commit those or certain other offences ...

According to the Premier, Dr Carmen Lawrence, the legislation was a means by which hard core repeat offenders can, firstly, be identified and, secondly, be removed from the community so that the public can be protected and offenders themselves made subject to intensive and more effective programs of rehabilitation.[41] It has been condemned by a Committee of the Western Australian Parliament as "irredeemably flawed",[42] by members of the judiciary, who have branded it as "unjust, unsustainable and an administrative minefield",[43] by the Human Rights and Equal Opportunity Commission on the grounds that it breaches international conventions and by a range of commentators.[44] Its purpose, of course, may have had less to do with the suppression of violent juvenile crime than with the assuaging of a media-inflamed public opinion intent on achieving "justice" at any price.

The legislation has three major aspects. It increases maximum penalties for a range of offences related to motor vehicles, it modifies sentencing principles and finally, it provides for indeterminate detention of certain violent offenders. It is premised on the state's ability to identify recidivist and dangerous offenders and on the principle of incapacitation or preventive detention. By s13 of the Act, the Minister is required to monitor, review and report on the operation and effectiveness of the Act and the extent to which its provisions are being applied. The first report was delivered on 28 May 1992.[45]

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39 Id at 7.

40 Judge Hal Jackson, President of the Children's Court of WA, cited in Western Australia, Standing Committee on Legislation, *First Report on the Crime (Serious and Repeat Offenders) Sentencing Act 1992 and the Criminal Law Amendment Act 1992*, presented by The Hon Garry Kelly, May 1992, at 13.

41 Hansard Legislative Assembly, 5 February 1992 at 7903.

42 Western Australia, *First Report of the Review Committee: Crime (Serious and Repeat Offenders) Sentencing Act 1992*, presented by the Hon Ernie Bridge, 28 May 1992.

43 Above n40 at 13.

44 White R, "Tough Laws for Hard-core Politicians" (1992) 17 *Alt LJ* at 58; Wilkie, M, "*Crime (Serious and Repeat Offenders) Act* 1992", unpublished paper, Crime Research Centre, University of Western Australia, 1992.

45 The Bridge Report (above n42).

INCREASE IN MAXIMUM PENALTIES

There is a touching faith, particularly held by legislators, that significant changes in criminal behaviour can be brought about by alterations in statutory maximum penalties. In the face of an overwhelming lack of evidence pointing to a relationship between statutory maximum penalties, judicial sentencing behaviour and the rate or severity of offending, one of the most common political responses to perceived increases in crime rates is to increase maximum penalties. Western Australia is no exception. At the same time as the *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) was enacted, the *Criminal Law Amendment Act 1992* (WA) was passed, which increased the maximum penalties for offences of aggravated motor vehicle theft. The maximum penalty for dangerous driving causing grievous bodily harm was raised from four to fourteen years, and that for dangerous driving causing death from four to twenty years, if the motor vehicle was stolen.[46] Similarly, if grievous bodily harm is caused in the course of stealing a car, the maximum penalty is fourteen years instead of seven.[47]

If the penalty structure of the Criminal Code of Western Australia is anything like that of most other states, it is anachronistic, internally inconsistent, unnecessarily complex and misleading. Many of the penalties will reflect the values and attitudes of past policy makers. The scale itself will be inconsistent because:

> the criminal law grows continuously, reactively and often haphazardly [which] results in a lack of congruence between the level of punishment set for offences at one time and that for similar offences at some other, later, period. This makes it difficult for sentencers to determine the relative seriousness they are to accord to offences by reference to the penalty that is attached to them.[48]

Contrast this with the position in Victoria which has recently made an attempt to rationalise its maximum penalty structure. In 1988 a Sentencing Task Force, chaired by Frank Costigan QC, was established to develop a new general scale of maximum penalties and to apply these to the *Crimes Act 1958* (Vic). The Task Force reviewed both the overall magnitude of the scale of sanctions and the relative ranking of offences and penalties within that scale.[49] The result can be seen in the *Sentencing Act 1991* (Vic) which came into operation in April 1992. The Act establishes fourteen penalty levels from life imprisonment down to a fine of $100. Despite some small changes made by Parliament in its late stages to increase the number of levels, this rationalisation of maxima represents a small step forward in the development of a coherent sentencing system.

The *Criminal Law Amendment Act 1992* (WA) does not. Rather than focussing upon the degrees of harm and the culpability of the offender, the Western Australian

46 See *Road Traffic Act 1974* (WA), s59.

47 Criminal Code 1913 (WA), s297.

48 Fox, R G and Freiberg, A, *Review of Statutory Maximum Penalties in Victoria: Report to the Attorney General* (1988), Melbourne, at 6.

49 See above; Fox, R G and Freiberg, A, "Ranking Offence Seriousness in Reviewing Statutory Maximum Penalties" (1990) 23 *ANZ J Crim* 165; Fox, R G, "Order Out of Chaos: Victoria's New Maximum Penalty Structure" (1991) 17 *Monash U LR* 106.

amendments identify the extraneous factor of fact that a motor vehicle was stolen to create a circumstance of aggravation. This not only lacks logic, but will, more than likely, confuse sentencers who seek guidance from Parliament as to the relative seriousness of offences.

Interestingly, Victoria has recently increased the maximum penalty for the offence of culpable driving to the same level as that of manslaughter, doubling the previous penalty. This is entirely logical, as it identifies offences relating to motor vehicles as essentially dealing with injury or potential injury to others, rather than as a separate category of "driving offences". Offences of manslaughter, culpable driving, reckless and careless driving are better categorised as "offences against the person" or "endangerment" offences and therefore deserving of maximum penalties in the higher range. This change represents a welcome move to amalgamate "general" and "specific" offences which in fact deal with the same conduct and stands in stark contrast with the illogical response of the recent Western Australian legislation. Such ill-thought through legislation only serves to bring the sentencing structure into disrepute and in the long term often precipitates a complete reconstruction.

MODIFICATION OF SENTENCING PRINCIPLES

Australian judges have been relatively unfettered in their the exercise of their sentencing discretion. Subject only to the statutory maximum penalty and the general principles laid down by courts of appeal, they have been relatively free of the strict controls through the use of mandatory or presumptive sentencing guidelines which have been the feature of sentencing reform in other jurisdictions.[50] Sentencing guidelines, or statements of purposes or principles are comparatively new in Australia. In the juvenile justice system, the Australian Capital Territory, New South Wales, the Northern Territory, South Australia and Victoria have all recently included such statements in their revised juvenile legislation.

The general principles of adult and juvenile sentencing have been modified by the Act which provides that if a person is convicted of a prescribed offence[51] (other than a violent offence[52] committed after the commencement of the Act and the person is a juvenile[53] when the offence was committed or the person was convicted and is a repeat offender,[54] the court sentencing the offender is required to apply certain sentencing guidelines in

50 Fox, R G, "Controlling Sentencers" (1987) 20 *ANZ J Crim* 218.

51 A prescribed offence is defined in Schedule 1, Part 1 to include offences of endangerment, theft of motor vehicles aggravated by reckless or dangerous driving, burglary, criminal damage, arson, and dangerous or reckless driving.

52 A violent offence is defined in Schedule 1, Part 2, to include offences major offences against the person, major sexual offences, kidnapping and robbery, as well as dangerous driving causing death or injury.

53 That is, under the age of 18.

54 A serious repeat offender is one who is appearing for sentence on his or her seventh "conviction appearance" for a prescribed serious offence within an 18 months' period. A "conviction appearance" is defined in Clause 3 of Schedule 2 as either an occasion on which the offender appeared in court and was convicted of a prescribed offence or offences or, in relation to violent offences, an occasion on which the offender appeared in court and was convicted of a violent offence or offences. However, if the offence is a violent offence, only three convictions are required to qualify for classification as a "repeat offender": Schedule 3, Clause 1.

deciding whether or not to incarcerate the offender and the length of that incarceration.[55] The "Sentencing Guidelines" are set out in Schedule 3 and state:

> The court in sentencing an offender shall have regard to the need to balance rehabilitation with the protection of the community and property and shall also have regard to such of the following matters as are relevant and known to the court —
>
> (a) the personal circumstances of any victim of the offence;
>
> (b) the circumstances of the offence, including any death or injury to a member of the public or any loss or damage resulting from the offence;
>
> (c) any disregard by the offender for interests of public safety;
>
> (d) the past record of the offender, including attempted rehabilitation and the number of previous offences committed whether prescribed offences or not;
>
> (e) the age of the offender;
>
> (f) any remorse or lack of remorse of the offender,
>
> and to any other matters that the court thinks fit.

These guidelines also apply to juveniles, whether or not they are repeat offenders, who are convicted of a range of offences[56] which involve the theft of a motor vehicle.

Like all guidelines, these leave a great deal of room for judges to manoeuvre. Many of the factors are, or should already be taken into account by judges in imposing sentence. The effect of the crime on the victim, the age of the offender, remorse or lack of it and the like are all standard factors considered by the courts. However, the way in which some of these guidelines are framed, and their content, is more problematic. Guideline (a), for example, refers to the "personal circumstances of any victim of the offence" rather than to the effects of the crime on the victim.[57] If the two are co-terminous, then there is no problem, but if the former is broader, what does it mean? The term "personal circumstances" is not a term of art and may have nothing to do with the crime itself. It may refer to the financial circumstances of the victim, to his or her psychological or emotional state, to age, sex, status or antecedents, all of which may be completely out of the control of the offender. It is not clear whether it applies to the victim's conduct which may have contributed to the offence.[58]

Guideline (b) also raises serious questions. By requiring a court to have regard to "any death or injury to a member of the public or any loss or damage resulting from the offence" a court may be tempted to breach the well-established sentencing principle that no-one should be punished for an offence of which he has not been convicted.[59] Although

55 *Crime (Serious and Repeat Offenders) Sentencing Act 1992*, s5(2).

56 Such as murder or manslaughter committed in the course of stealing a motor vehicle, resisting arrest, infliction of grievous bodily harm and similar offences: s10.

57 The wording is identical to s16A(2)(d) of the *Crimes Act 1914* (Cth).

58 See the criticisms of the Commonwealth provision in: Australia Director of Public Prosecutions, *Annual Report 1990–91* at 97.

59 *Di Simoni* (1981) 147 CLR 383, 389, 393; *Boney; Ex parte Attorney-General* [1986] 1 Qd R 190; *Kane* (1987) 29 A Crim R 326.

a court is required to take account of all the circumstances of the offence, it must not sentence the offender for an offence of which that person has not been convicted. If a person has been killed or injured as a result of the offence, the proper course would be to charge the offender with that offence and sentence him or her accordingly. Similarly, the requirement that the court take into account any disregard by the offender for interests of public safety comes dangerously close to sentencing an offender for offences of endangerment in relation to which no charges have been laid.

At a broader level, the guidelines once again highlight the perennial and often artificial tension between "rehabilitation" and "protection of the community". In 1984, the Victorian Child Welfare Practice and Legislation Review Committee noted:[60]

> ... the greatest challenge confronting the decision-makers in the Children's Court is fashioning a disposition which satisfies two quite differing community expectations — on the one hand, that the perpetrator of a crime be punished, and on the other, that the young must be shown greater tolerance and leniency while they are still learning society's rules. A sentencing framework which is weighted too heavily in favour of the punishment objective runs the risk of destroying any opportunity to rehabilitate an individual young offender. Conversely, too much emphasis on rehabilitative objectives can, in practice, mean that young people are discriminated against and subjected to a much longer period of indirect punishment than adults.

Are the interests of the community necessarily antithetical to those of the offender? Does the "protection of the community" necessarily require a punitive disposition?

The phrase "the protection of the community" is one of those emotionally charged expressions whose meaning very much depends upon its context. The "protection of the community" from crime is often said to be the ultimate object of the criminal law, all the purposes of punishment being subsumed under this head.[61] Protection can be taken to refer to the prevalence of crime in the community or the deterrent effect of sanctions against the commission of similar offences by this person or others.[62] In both the adult and juvenile spheres, the tension between the best interests of the offender and the deterrence of others is manifest. On the one hand it is argued that the greater the success that can be obtained in the reformation or rehabilitation of the offender, the greater the benefit for the community.[63] On the other hand it is argued that if offenders, including juvenile offenders are seen to go unpunished, or are considered to be inadequately punished, public respect for the law will be diminished and crime will concomitantly increase.

60 Victoria, Child Welfare Practice and Legislation Review Committee, *Report: Equity and Social Justice for Children, Families and Communities* (1984) at 441.

61 *Channon* (1978) 20 ALR 1, 5; *Cuthbert* (1967) 86 WN (Pt 1) (NSW) 272, 274; *Yardley v Betts* (1979) 22 SASR 108.

62 Bowker, M M, "Waiver of Juveniles to Adult Court Under the *Juvenile Delinquents Act:* Applicability of Principles to *Young Offenders Act*" (1986–87) 29 *Crim LQ* 368, at 397.

63 *Williscroft* [1975] VR 292, 303.

Appeal courts around Australia have recently articulated the competing paradigms. In *GDP*[64] a 15 year old youth convicted of malicious damage in New South Wales amounting to over a million dollars in relation to a "frenzy" of destruction had a sentence of 12 months' detention reduced to probation. Despite submissions stressing the importance of deterrence and retribution, Mathews J adopted the view stated in *Smith*[65] that: "In the case of a young offender there can rarely be a conflict between his interest and the public's. The public have no greater interest than that he should become a good citizen." In a recent Australian Capital Territory case of *Boudelah*[66] of rape, two members of the appellate court increased sentences for rape on an 18 year old because they thought that deterrence and retribution were proper factors to be taken into account in relation to juveniles.[67] However, Jenkinson J, in dissent observed:[68]

> The reconciliation of conflicting aims — condemnation and deterrence on the one hand preservation of youth from corruption on the other — not uncommonly results in the imposition of a sentence verging on the inadequate. The principal consideration against shortening the period of actual imprisonment in such a case is that members of the community who learn what the court has ordered tend to regard those orders as resulting from a failure to appreciate the enormity of the crime and from an excessive concern for the interest of the offender. In truth the reduction of the period of actual imprisonment below what the crime merits in all the circumstances is, or in my opinion should be, intended to serve the interest of the community rather than that of the offender by minimising exposure of the youthful offender to influences and circumstances known to incline such offenders to further criminal or otherwise socially harmful behaviour.

The Western Australian guidelines identify this dilemma but do nothing to resolve it. To that extent, they are the least dangerous part of this legislation. However, allied with the provisions requiring mandatory detention or imprisonment, the Act may prove to be counter-productive and make the community less, rather than more safe.

INDETERMINATE DETENTION OF VIOLENT OFFENDERS

Perhaps the most disturbing aspect of this legislation is that which mandates a sentence for certain offenders. Under the Act, if a juvenile is convicted of a violent offence and is deemed to be a repeat offender, the court *must* sentence that offender to a term of imprisonment or detention and, at the expiration of that sentence, the offender may not be released except upon the order of the Supreme Court.[69] The Supreme Court can only make an order if an application is made to it by the Chief Executive Officer of the Department responsible for the prison or juvenile institution in which the offender is incarcerated.[70] The offender has no right to apply for release. A person under such

64 (1991) 53 A Crim R 112.
65 [1964] Crim LR 70.
66 (1991) 100 ALR 93.
67 See also *Hallam v O'Dea* (1979) 22 SASR 133; *R v SV & Nates* (1982) 31 SASR 263; *Homer* (1976) 13 SASR 377; *Davis and Dinah* (1989) 44 A Crim R 113.
68 (1991) 100 ALR 93, 108.
69 *Crime (Serious and Repeat Offenders) Sentencing Act 1992*, s6.

custody may be returned to prison or detention for breach of conditions of release on the order of a Judge.[71] Although a sentencing court has a discretion as to the length of incarceration, an effective minimum term of 18 months is mandated by the legislation.[72]

The Bill originally applied to juveniles only, but it was extended to adults when it was indicated that children would be more heavily punished than adults for the same offences.[73] These provisions have been criticised on the grounds that they offend basic principles of sentencing, that they breach human rights and that they will prove ineffective or even possibly be counterproductive. Some of these objections are examined in more detail.

DISPROPORTIONALITY

In the absence of clear and precise legislative provisions to the contrary, it is generally accepted at common law that the basic principle underlying sentencing is that of proportionality, that is, that the punishment should fit the crime. This means that increases in sentences of imprisonment beyond what is proportional merely for the purpose of extending the protection of society from those suspected of being dangerous is not permitted. The High Court has recently reaffirmed the principle of proportionality in *Veen v The Queen (No. 2)*[74] where the majority of the court stated:

> the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences ... The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender, has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders form committing further offences of a like kind.

Similarly, in *Chester*[75] the High Court stated that:

> The stark and extraordinary nature of punishment by way of indeterminate detention, the term of which is terminable by executive, not by judicial, decision, requires that the sentencing judge be clearly satisfied by cogent evidence that the convicted person is a constant danger to the community ...

The principle is not immutable and as recently as 1990, the Court of Criminal Appeal of Queensland has upheld a sentence of indeterminate detention under s63 of the

70 Section 7(4).
71 Section 7(12). The first application must be within 3 months before the mandatory 18 months period expires, with subsequent mandatory applications at intervals of no more than 6 months thereafter: s7(5).
72 Section 7(1).
73 See Sections 8 & 9.
74 (1988) 62 ALJR 224, 229.
75 (1988) 165 CLR 611, 619.

Children's Services Act 1965 (Qld) on the ground that such provisions are designed to promote, safeguard and protect well-being of children and youth and can be distinguished from similar sentencing provisions aimed at habitual criminals.[76] Although the severe limitations on sentencing options available to a judge in Queensland were cited as the major reason for such a decision, such a justification is hollow when what is really required is a a legislative amendment to provide sanctions which would properly reflect the gravity of the offence and the needs of the offender, but, at the same time, would not permit the sentence imposed upon a juvenile to be more severe than that imposed upon an adult.

It is interesting to contrast the apparent nonchalance with which a minimum term of eighteen months incarceration was adopted by the Western Australian legislature with the comments of Kearney J of the Supreme Court of the Northern Territory who, in commenting on a sentence imposed on a juvenile aged 16 years for a range of property offences and escape observed that: "Sentences of detention aggregating 18 months, imposed on a 16-year-old youth, undoubtedly constitute a heavy punishment" possibly even "crushing".[77] It was only when it was pointed out, in Western Australia, that these mandatory sentences would be heavier than those imposed upon adults that the Bill was ostensibly extended to cover both adult and juvenile offenders.

INDETERMINACY

The justice model generally calls for sentences imposed upon juveniles to have definite limits. Precision in sanction aids the achievement of proportionality. The Victorian Child Welfare Practice Committee regarded determinacy as a basic principle of sentencing:[78]

> Every sentence should have a fixed maximum period. The setting of a clear limit is a statement by society of the measure of punishment appropriate to a particular offence. It tells the offender when their debt to society has been paid.

One of the major criticisms of welfare models of juvenile justice is that they leave too much discretion in the hand of administrators. Originally, the Western Australian Bill left the release decision in the hands of administrators, but it was changed to the Supreme Court at a later time. However, altering the decision-making forum has not made the criteria for release any clearer. As Human Rights Commissioner Burdekin correctly noted, the Act does not contain:

> any ascertainable standard or factor by which a reference to the Supreme Court can determine whether an application should result in the release of the detainee or prisoner concerned — and on the basis of which the detainee may expect to be released (whether by demonstrating rehabilitation, making restitution to victims, serving a period of detention sufficient to satisfy the requirements of retribution and deterrence, undertaking further programs of punishment and rehabilitation, or a combination of these and any other relevant factors)[79]

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76 *W* (1990) 48 A Crim R 72.

77 *Gollan v Bourne* (1989) 42 A Crim R 22, 29.

78 Above n60 at 441. A recent Western Australian review also recommended that determinate sentences replace indeterminate orders: Western Australia, Department for Community Services, *Report on the Review of Departmental Juvenile Justice Systems* (1986).

LACK OF FRUGALITY

The principle of frugality or parsimony holds that one should use the least restrictive sanction necessary to achieve the defined social purpose. This operates both in relation to the type of sanction involved as well as its quantum. Increasing the use of imprisonment by incapacitation runs counter to this philosophy.

The philosophical foundations for this principle are various. The first is that state interference in the life of the individual at any time on any level is undesirable. The second is more pragmatic. It is founded on the belief that state intervention is actually counter-productive because it might lead to recidivism, or further recidivism by exposing young persons to harmful influences. The Assistant Director-General of the Western Australian Department of Community Services, Mr Terry Simpson, submitted that "there is substantial documented evidence that the lengthy sentences of detention for juveniles actually exacerbate social adjustment problems and increase the likelihood of a long term criminal career." The Bridge Committee commented that "Given the ultimate rehabilitation of juvenile offenders brought within the Act is unlikely to be advanced by indeterminate sentencing, and indeed is likely to be retarded, the effects of the legislation may be anticipated to be adverse to the community's long term interests".[80] The Committee also argued that increasing the number of Aborigines in detention and increasing the length of time spent there creates the risk of further deaths in custody.[81]

The use of mandatory incarceration as a sanction for juveniles also runs counter to a widely accepted principle of juvenile justice that where possible, it is desirable to allow the child to continue to live at home or to continue his or her education, training or employment.[82] As Simpson argued, sentences of detention for juveniles exacerbate social adjustment problems and increase the likelihood of a long term criminal career:

> The isolation from family, the community and social networks for long periods of time seriously impedes normal social and psychological maturation including the development of those skills necessary to function in the community.[83]

INCAPACITATION AND PREDICTION

Incapacitation is the isolation of certain offenders from the larger society with the intention of preventing them from committing further crimes. The fundamental hypothesis underlying selective incapacitation theory is that there is a small proportion of offenders which is responsible for a disproportionate amount of serious crime. The theory is based on the premise that active and serious offenders can be identified and their future criminal conduct predicted. There is an assumption in all prediction studies that past behaviour will

79 Cited in Kelly, above n40 at 11.

80 Above n42 at 16.

81 Id at 11.

82 See, for example, *Children's Services Act 1986* (ACT), s5(3)(b)(c); *Children (Criminal Proceedings) Act 1987* (NSW), s6(c)(d); *Children's Protection and Young Offenders Act 1979* (SA), s7(b)(c); *Children and Young Persons Act 1989* (Vic), s139(b)(c).

83 Above n42.

continue into the future. In Western Australia, the criteria for selection for incapacitation are the commission of six or more offences over an eighteen month period or of three violent offences in that period.

Prediction studies have a long history but have encountered major problems.[84] First, the association between predictor items and subsequent behaviour is not strong. Secondly, there is a significant rate of false negatives, that is, a failure to predict those who recidivate. Thirdly, there is a significant rate of false positives, that, persons mistakenly predicted as recidivists. Experience elsewhere has also shown that the targeting of criminal justice resources upon the most serious and active offenders tends to result in an over-emphasis upon the young, the poor and certain racial minorities. In the United States, Decker and Salert[85] found that disadvantaged groups, in society, such as blacks, women and the poor are more likely to receive higher prediction scores, and thus designated high rate offenders, even when controls for prior offences are included. As more and more of these groups are targeted, it becomes clear that factors other than individual rational choice are operating to create offending. At their extreme levels, selective incapacitation models result in the punishment of people for factors over which they have no control: they are being punished for their status.

Incapacitative theories suffer from a number of other deficiencies. Even assuming that it is possible to target recidivist offenders accurately,[86] incapacitation theory violates the principles of proportionality and frugality[87] and is inconsistent with statutory and common law directions that imprisonment be a sanction of last resort. Constraining discretion as to the use of imprisonment, as well as increasing the number at risk of incarceration also has the effect of placing severe pressure on prison or detention resources. The Department for Community Services estimated that the legislation will result in more frequent and lengthier sentences and that additional detention capacity of forty will be required.[88]

Where incapacitation is based upon the imposition of mandatory or minimum terms of detention or imprisonment, it brings into play what has been termed the "hydraulic" theory of discretion, which holds that if discretion is eliminated or reduced at one part of the criminal justice syste, it will emerge or increase at another point. Thus if discretion is removed from the judiciary at the sentencing stage, it will appear at the prosecution or release stages.

More ominously, however, the manner in which selective incapacitation has been structured in Western Australia has invested the law enforcement authorities with undue

84 See also Broadhurst, R G, *Selective Incapacitation and the Western Australia and South Australia Juvenile Justice Research Data Bases* (1992), unpublished paper.

85 Decker, S H and Salert, B, "Selective Incapacitation" (1987) 15 *J Crim Just* 287.

86 Broadhurst (above n8) argues that the criterion of six conviction appearances (the meaning of this term is open to some doubt: Bridge, above n42 at 14–15), within eighteen months or three for violent offenders has been done in absence of access to reliable and valid data as to the likely effects, benefits or otherwise of targeting high risk offenders. He argues that the data base is inadequate for the accurate selection of individuals. This was noted by Bridge (id at 14) and others who recommended that the government improve its data and crime statistics.

87 See above.

88 Bridge, above n42: Appendix 2.

discretionary power which can determine whether or not an offender will fall under the provisions of the Act. The police have a discretion to determine which charges to prefer, and they can either prefer charges which come within the Schedule to the Act or those which do not.[89] As the Bridge Committee noted "The exercise of police discretion in these matters will be difficult to detect and yet have wide ramifications in relation to the numbers dealt with under the Act".[90] Similarly, discretion could be used to maximise the number of juveniles by spreading out the laying of charges to create additional conviction appearances.[91]

THERE ARE NO TIGERS IN PERTH

There is an apocryphal story that a man was seen running through the streets of New York snapping his fingers and moaning loudly. When stopped by the police and asked what he was doing, he said that he was keeping tigers away. "But", said the police, "there are no tigers within 5000 miles of here", to which the man replied: "Well then, I must have a pretty effective technique".[92]

Many politicians have the same unshakeable and unprovable belief in the efficacy of their methods as does the tiger man of Manhattan. Following the passage of the Act, there were reports in the Western Australian media which suggested a drop in juvenile crime, linking that decrease to the deterrent effect of the new legislation. This was supported by the Minister for Justice who, although conceding that any conclusions were dangerously premature, stated that the statistics he had obtained showed decreases in comparison with the previous year in motor vehicle theft, in high speed pursuits, breaking and entering offences around the time the legislation was being debated.[93] The Bridge Committee, in contrast, found no such evidence and was satisfied that rate of decline had been steady since 1990 and no causative significance could be attached to introduction of legislation.[94]

The deterrence model is based on the concept of a rational creature guided by reason, making free choices with knowledge of all the facts. It is the embodiment of the market model of crime: criminal behaviour is freely chosen; an individual who decides to commit a crime has decided that the benefits of the crime outweigh its costs. In order to create an informed market, the Western Australian government warned people who were at risk by visiting them personally where possible or writing to them, where not. A pamphlet setting out the key elements of the Act was distributed.[95]

89 This is particularly true in respect of such charges as resisting arrest: White, R, "Police Powers and Children's Rights" (1992) 5 *Childright Bull.* Broadhurst estimates that half of the estimated target population would cease to be at risk if the offence of assaulting police were removed from the schedule of offences: (above n84).

90 Above n42 at 8.

91 Id: Appendix 2.

92 Zimring F and Hawkins, G, *Deterrence: The Legal Threat in Crime Control* (1973) at 27–8.

93 Western Australia, *Crime (Serious and Repeat Offenders) Sentencing Act 1992: First Report*, presented by The Hon David Smith, 4 June 1992, at 4.

94 Above n42 at 10. It would also appear that changes in police pursuit guidelines around this time had some impact.

95 Above n93 at 2.

Unfortunately, pure deterrence theories, like pure market models, are significantly flawed. Research on the research on the application of deterrence theory to juveniles has found that the real predictor of future offending was not a juvenile's perceptions of the certainty and severity of punishment for future offending, but the individual's self-perception of the self as law abiding and positive self image.[96] The best kind of sentencing option, it was found, was the range of options designed to assist the child to make good the harm caused by the offence. This is consistent with Braithwaite's theory of reintegrative shaming which posits that crime is not deterred by the threat or actuality of harsh punishment, but by informal modes of social control. However, rather than being integrative and inclusionary, The Western Australian punishments are exclusionary and stigmatising.[97]

It is not unlikely that the publicity surrounding the passage of the Act had some long term effect, but all the indications are that the fundamental and deep-seated social pathologies of which car theft and recidivist offending are merely symptomatic will prove unresponsive to the superficial legal interventions which this Act represents. As Seaman J conceded, in the course of judgment which upheld a sentence of seven years' imprisonment imposed on one 18 year old offender convicted of manslaughter in these circumstances:[98]

> I appreciate that there may be difficulties in deterring the applicant because of his lack of insight into his own behaviour as revealed by the psychological evidence and that there are difficulties in deterring young people who live in subcultures which are alienated from society.

ABOLISH JUVENILE COURTS?

The results of the "get tough with juvenile crime" policies in Australia and elsewhere manifest themselves in many different ways. The *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) is one illustration of communal disquiet. In the United States, the phenomenon of transferring juveniles to adult criminal courts is another one. Four classes of youths are likely to be transferred: the bad, the mad, the uncooperative and those who have nothing to lose.[99] For certain chronic or persistent offenders aged fourteen to seventeen, especially dangerous and violent juveniles who pose serious public risk, the get tough movement has led to an increasing invocation of the power to waive or transfer trial to adult courts which are able to impose more serious penalties on juveniles which are outside juvenile court jurisdiction.[100] Transferees also tend to be male and members of a minority group, members of gangs and those who have committed offences with an adult co-offender.

The growth in the use of adult courts has encouraged a number of commentators seriously to question the basic separation between the adult and juvenile jurisdictions. Arguing that the introduction of criteria of fault and culpability, the requirement of proportionality of sentence

96 Schneider, A L, *Deterrence and Juvenile Crime: Results from a National Police Experiment* (1990).
97 Above n13 at 50.
98 Unreported, Court of Criminal Appeal of Western Australia, 19 March 1992.
99 Champion, D J and Mays, L M, *Transferring Juveniles to Criminal Courts: Trends and Implications for Juvenile Justice* (1991) at 74.
100 Id at xiii.

and various procedural reforms have resulted in a juvenile justice system indistinguishable from the adult system, some commentators have concluded that the juvenile court in its criminal jurisdiction ought to be abolished altogether.[101]

TRANSFERS AND SENTENCES

Transfer provisions have existed in Australian and United States statutes for years. Until recently, relatively few offenders were transferred. There is no serious or sustained move in this country to abolish the juvenile court, but if, as is so often the case in other spheres of social life, we find ourselves attracted to some watered down version of American social reform, this question may be placed on the reform agenda. The Western Australian Act is perhaps emblematic of the tensions which have led to these moves in the United States and a precursor to major changes in the way that we process juveniles through our justice system.

Transfer mechanisms are often invoked because juveniles are thought not to be able to be punished severely enough in the juvenile justice system or because treatment services are inadequate. The purposes of sentencing in the adult courts, namely retribution, incapacitation, rehabilitation and deterrence are thought to be more appropriate than the rehabilitative orientation of the juvenile court.[102]

According to research now being carried out by Ms C J Hunt, a Masters student at the University of Melbourne, Western Australia, together with Queensland and New South Wales, has one of the highest rates of transfers to the Supreme Court or the District in Australia. Her analysis of cases transferred between 1987 and 1990 in Western Australia show that about 50 per cent were Aboriginal. Aboriginal youths were tried on a greater number of charges and were more likely to be charged with sexual offences, particularly aggravated sexual assault. Of all the charges in the Supreme Court, 62 were in respect of sexual assaults, 11 per cent were in respect of robbery or stealing with violence and 11 per cent for other serious indictable offences against persons. In the District Court 43 per cent of cases were sexual assaults, 31 per cent robbery and 18 per cent were other serious indictable offences against the person.

Only 11 of the 59 offenders had no prior convictions at all. One youth had 229 offences in the Children's Court. Most of the youths committing more than 100 offences (5/7) were Aboriginal. For these most serious of offences, only 42 per cent received a sentence of imprisonment, and 8 per cent received detention at the Governor's Pleasure. The rest received probation, or other dispositions or the outcome was not known. Of the 29 sentences of imprisonment, 55 per cent were for under 3 years in the Supreme Court, while 87 per cent were under 3 years in the District Court. In relation to District Court offences, Aboriginal

101 Winzer, S and Keller, M F, "The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?" (1977) 52 *NYU LR* 1120; Gardner, M R, "Punitive Juvenile Justice: Some Observations on a Recent Trend" (1987) 10 *Int'l J Law & Psychiat* 129; Giller, H, "Is There a Role for a Juvenile Court?" (1986) 25 *Howard J Crim Just* 161

102 Above n2 at 120.

youths committed 59 per cent of the offences for which imprisonment was imposed, a sentence of three years being the most common term.

It still remains true that the vast majority of all offenders are dealt with by the juvenile courts. In view of the draconian, unjust and unworkable laws such as the *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA), which apply equally unfairly to both adults and juveniles but are clearly aimed at the latter, it is necessary to consider a wide range of jurisdictional options.

One option would be to invoke the transfer mechanism more often to juveniles so that they can be dealt with by the adult courts.[103] In this way, the more severe maximum penalties would be made applicable and certain fundamental sentencing principles would not be subject to distortion. As Fagan observes:

> The harsh consequences of transfer suggest that its use should be limited to a class of offenders who are clearly separate behaviourally from those who remain in the criminal justice system. When transfer is invoked, it should reflect a decision that the youth has crossed a behavioural threshold calling for a correctional approach that the juvenile system may be unable to provide. Transfer should be a last resort disposition that should be a proportionate response to adolescent crimes that are more serious than those committed by youths who remain in the juvenile justice system.[104]

Another option is to increase the jurisdiction of the juvenile court either generally or by appointing a Supreme Court or District Court judge to preside over the court with the sentencing powers of both the Children's Court and the higher court in serious cases. This has also occurred in Western Australia, where the Chief Judge even has power to impose a sentence of life imprisonment.[105] According to Hunt, transfers after the change of legislation in Western Australia in 1989 have been reduced dramatically, with only two cases being reported. These powers are subject to the right of the accused to choose trial by jury.[106] This option has the advantage of keeping the offender within the jurisdiction and philosophy of the juvenile court while extending the court's sanctioning powers, although it denies police and prosecutors the power to request transfers on the basis of a perceived desire to have more severe sanctions imposed.

In theory this should obviate the need for irrational sanctions such as those introduced in Western Australia. Of course, it does not. "Get tough" policies are not utilitarian in purpose or result. Their appeal is to emotion and not reason. As has been found in the United States, transfer mechanisms serve more to placate the public than to deal with juvenile crime. As a recent study concluded:

> The increased use of waivers by prosecutors and judges in recent years is indicative of their response to the public outcry over perceived increases in juvenile violence in various

103 Above n10: Ch7; above n84.

104 Above n2 at 121.

105 See *The Age*, Melbourne, 29 August 1992, reporting the case of a 16 year old boy sentenced to life imprisonment in the Children's Court after pleading guilty to wilful murder. The same kind of system has been proposed for Queensland.

106 In the first 18 months after the legislation, between five and ten youths opted for trial by jury.

> communities. Whether or not the amount of violence among juveniles is actually increasing is academic and irrelevant. The fact is that the public perceives it to be increasing. Something must be done about it, and the waiver is a tangible manifestation of action taken by the juvenile courts to deal with crime committed by juveniles.[107]

CONCLUSION

Although the notion of a separate juvenile court jurisdiction is still under a century old, its demise, in this country at least, is not imminent. However, the warning signs are there. For the moment the title of this lecture is rhetorical, but it may not remain so. In my view, whether in the adult or juvenile jurisdictions, the "answer" to crime, if there be an "answer", lies not in more severe sanctions or longer terms of imprisonment. There are no panaceas or short term solutions to serious juvenile crime. Boot camps, day-in-gaol programs and short sharp shocks are attractive, but ineffective. Prisons and detention centres are, in the long term, counterproductive both in terms of public safety and the personal human development of the offender.[108] In the United States, despite its "get tough" policies, greater detention and incarceration of youths has not resulted in greater rehabilitation or a reduction of recidivism.[109]

While they may win elections, or remove an outraged or inflamed populace from the streets, "get tough" laws ultimately fail because they fail to address the fundamental social injustices which produce these forms of crime. In 1990, the Youth Justice Coalition in New South Wales, in a powerful report, observed:

> juvenile crime can be accounted for as a consequence of social change, urbanisation, poverty, difficulties in integration, exclusion from the mainstream, lack of opportunities, gender, increased temptation of but lack of access to disposable good, economic crises and growing up. It is clear that there are strong links between social disadvantage, deprivation and particular sorts of crime and its control ... More specifically, it has clear connection with unemployment, homelessness, school alienation, family breakdown, drug abuse, boredom and inactivity, low moral and poor self image, inadequate community, family and support services.[110]

Even the courts, which are required to implement the Western Australian legislation, have been acutely conscious of the limitations of legal intervention. In *McKenna*[111] Rowland J, observed:[112]

> this case and subsequent cases of young people involved in illegal car activities have received a great deal of publicity and there is a great deal of public concern and outrage at the carnage caused by those young persons on our roads, such persons often being under

107 Above n99 at 120.
108 Above n2 at 108–9.
109 Above n99 at 2.
110 Above n36 at 27.
111 *McKenna*, above n16.
112 The comments were made in the course of a dissenting judgment. The case was not one in which the new legislation was invoked.

> the influence of drugs or alcohol and involved in car chases. The concern of the public is well-founded. It is, however, with great respect, far too hopeful to suggest that the Courts can provide an answer to this problem. Modern research and statistical information would suggest that long terms of imprisonment will not solve the problem. The problem is far more basic and it is one for the whole of the community to solve. Sentencing tribunals and the Court of Criminal Appeal are faced regularly with serious offences of all types by young and relatively people with appalling backgrounds which often stem from a breakdown of the traditional family ties and from backgrounds where it is often thought that it is not necessary to work at family relationships and from backgrounds where there is a lack of work ethic and a breakdown in moral values. I make these comments because there seems to be a widespread belief in the community that if the courts lock up many of these young people for a long time, the problem will go away. With the greatest of respect, that is, at best, naive. The courts can and will undertake to impose punishments provided by the law. The courts can and will do all that they properly can to ensure that those who have been, and are likely to be, a danger to the public are restrained to an extent which is commensurate with the crime for which they are being sentenced ... The courts cannot, however, deal with the root cause of these problems.

To their credit Australia courts have resisted the urge to punish to the exclusion of the other aims of sentencing. If anything, sentencers cling to a belief in the prospects of change in offenders' behaviour, in habilitation or rehabilitation. In this they reflect the outlook and philosophy of the juvenile court. Perhaps what we should be looking at is a merger of the adult court with the juvenile court, but a juvenile court built on concepts of proportional punishment and procedural justice.[113] Perhaps we could just have one court with a number of divisions in which age would be just one criterion for jurisdiction. There are a range of creative solutions to the problems of juveniles, justice and sentencing.

However, the solution represented by the *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) represents a poverty of political imagination, an admission of social failure and a travesty of sentencing policy. All the indications are that it will probably be used rarely, if at all. It will have served its purpose if it quells the moral panic which expressed itself the streets of Perth and if it cools the recurrent fever which juvenile crime seems periodically to provoke in the body politic. The Act should act as a deterrent — not to the juveniles who are its ostensible targets, but to policy makers and legislators around Australia. We ignore its lessons at the peril of our young people, our juvenile justice system and, ultimately, of the justice system as a whole.

113 Freiberg, A, Fox, R G, and Hogan, M, "Procedural Justice in Sentencing Australian Juveniles" (1989) 15 *Monash U LR* 379.