Justice, Welfare Or A New Direction?: An Examination of the *Juvenile Justice Legislation Amendment Act* 1996 (Qld)

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1. Introduction

Young offenders and juvenile crime have a high public profile in Australia today. With the focussing on juvenile crime and anti-social behaviour by the media our politicians have taken up the issue as a matter of political survival. Recent election campaigns in the Australian States have seen much attention paid to car theft, graffiti and vandalism, the system of cautioning young offenders and the state of juvenile institutions. Electoral promises of tougher responses against juvenile offenders are popular. Governments must be seen to be tackling the problem and engaged in reform and change.

The usual picture painted of juvenile crime is aptly described in a submission to the Australian Law Reform Commission in its examination of the sentencing of young offenders:

> Notions of a 'juvenile crime wave' about to engulf the community have wide popular currency. It seems to be commonly believed that juveniles commit a disproportionately large number of serious personal and property offences, or that new legislation and programs lead to an increase in juvenile crime, or that society is getting soft on its delinquents, and that tougher institutions and harsher penalties would help curb juvenile crime.[1]

The *Juvenile Justice Legislation Amendment Act* 1996 (Qld) ("the Act") received

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1 A Frieberg, R Fox & M Hogan *Sentencing Young Offenders* Sentencing Research Paper No. 11 The Law Reform Commission and Commonwealth Youth Bureau 1988 as cited in M Findlay, S Odgers & S Yeo *Australian Criminal Justice* Oxford University Press Melbourne 1994 at 263.

assent on 15 August 1996.[2] The Act, which heralded a return to a more justice oriented model of juvenile crime, attracted much criticism from the Queensland Criminal Justice Commission, the Opposition and civil liberties groups.[3] This article briefly examines the theoretical and political rationale for the Act. Political debates are briefly examined in order to determine the political rationale for the Act. The primary focus of this paper however, is the testing of the Act against international human rights standards. It is an approach encouraged by the increasing deference to international human rights norms within the academic and judicial arenas.[4] Thus it is appropriate that due regard be given to international values in determining the benchmarks for acceptable treatment of young offenders, notwithstanding that the instruments in which some such values are explicated have not been incorporated into municipal law.

Of the various sources of Australia's international obligations, those which bear most strongly upon issues of juvenile justice are the:

- International Covenant on Civil and Political Rights (ICCPR);[5] and
- Convention on the Rights of the Child (CRC).[6]

Due regard should also be given to the principles and standards recognised in the:

- United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"); and
- United Nations Standard Minimum Rules for Non-custodial Measures ("The Tokyo Rules").

2. Principles of Juvenile Justice

Philosophical debate about the purpose of juvenile justice is often couched in the language of conceptual "models".[7] They conceive of society and the individual as

2 Amendments discussed herein under headings "3. Community Conferences" and "4. Cautions" (sections 8 (inserting new Part 1C, Division 2) and 43 (inserting new Part 5, Division 1A) of the Act) are not yet in force (see *Juvenile Justice Legislation Amendment Act* 1996, s.2 and Schedule 3, and *Subordinate Legislation* 1996 No 324 (Qld) 14 November 1996). Amendments discussed under headings "5. Arrest", "7. Life Sentences" and "8. Presence and Liability of Parents" (ss 13(3), 45, 22, 62 and 63 of the Act) came into force on 18 November 1996 (see *Subordinate Legislation* 1996 No 324 (Qld) 14 November 1996). All other amendments discussed herein came into force on the date of assent.

3 See *Courier Mail* 24 July 1996 at 3 and 31 July 1996 at 13.

4 One need only turn to the recent High Court decisions in *Dietrich v. The Queen* (1992) 177 CLR 292 and *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273 as ready examples in this regard.

5 In force for Australia on 13th November 1980 *Australian Treaty Series* 1980, No 23.

6 In force for Australia on 16th January 1991 *Australian Treaty Series* 1991, No 4.

7 See N Naffine 'Philosophies of Juvenile Justice' in F Gale, N Naffine & J Wundersitz (eds) *Juvenile Justice: Debating the Issues* Allen & Unwin Sydney 1993 at 2.

operating in quite different ways. Two particular models feature consistently in the literature on criminal justice for children: one is the "welfare" model, the other is the "justice" model. It is usual to find the welfare and the justice model presented as dichotomies for the purposes of discussion about law reform.[8]

The welfare model has its roots in communitarianism and socialism. It sees human beings as creatures requiring intimacy and community. To understand the individual, it is necessary to understand his or her social context and the web of relations which form the human being. For proponents of the welfare view, the values and priorities of people are shaped by their social and historical circumstances.[9]

Those who adhere to the justice model take a different view of humanity and the social order. They derive philosophical support from classical liberal theory — the political philosophy which underpins modern justice in the Anglo-American tradition. Here, human beings are cast in the role of self-determining agents who are concerned principally with autonomy and liberty. The human being, according to the liberal view, acts on the social world as a rational, sentient being, rather than being acted upon as social victim or object.[10]

Pitts[11] has noted that both the justice and welfare models are ultimately attempts to ensure the social conformity of young people; they disagree only on how to achieve this objective. One method advocates conformity through punishment of the rational actor, thus deterring future aberrations; the other promotes conformity through various approaches which rest on social engineering and rehabilitation to the existing social conditions and norms.

The State assumes a very different role in the welfare and justice models. In particular, in the welfare model, rehabilitation is the primary goal in sentencing. On the other hand, the justice model promotes just deserts and a focus upon the responsibility of the young person for the offence, as well as on a punishment that "fits the crime". Whereas the welfare model promotes "needs" over "deeds" the justice model emphasises the offence rather than the offender. It should be pointed out that no legislative framework strictly conforms to the spirit of either of these models. They are useful conceptual benchmarks, however, in which to assess changes to juvenile justice legislation.

The last twenty years has seen a rejection of rehabilitation as a punishment philosophy and its replacement with just deserts. Disillusionment with the failures of rehabilitation led to calls for a greater concentration on retribution and deterrence, as well as concerns about the degree of discretionary power given to judges and parole boards in the exercise of the sentencing function. Just deserts has taken

8 W Friedmann *Legal Theory* Stevens and Sons London 1967 Chapter 6; T O'Hagan, *The End of Law?* Basil Blackwell Oxford 1984 at 5; C Cunneen and R White, *Juvenile Justice: An Australian Perspective*, Oxford University Press Melbourne 1995 at 189-197.

9 A MacIntyre *After Virtue* Duckworth London 1981; P Hirst *Law, Socialism and Democracy* Allen and Unwin London 1986.

10 M Sandel *Liberalism and the Limits of Justice* Cambridge University Press Cambridge 1982.

11 J Pitts *The Politics of Juvenile Crime* Sage London 1988.

longer to manifest itself as the dominant philosophy within the realm of juvenile justice. But it has triumphed nonetheless.[12]

In recent years Queensland has moved away from a strong welfare approach towards a justice model for young offenders. Under the previous State Labor government the *Juvenile Justice Act* 1992 and the *Children's Court Act* 1992 replaced the highly welfare-oriented Children's Services Act 1965. Reflecting many aspects of a justice model the *Juvenile Justice Act* set down that sentences should be specific and determinate (with the decision to detain a young offender being made by the Court, not the Director General of the relevant State government department), that there should be proportionality in sentencing (with outcomes being geared to the seriousness of the offence) and that children should have access to legal representation to ensure that their legal rights are protected. In adopting a legislative scheme so concerned with due process, the *Juvenile Justice Act* represented a large shift in emphasis from a welfare model to a justice model.

Even so, welfare concerns were not entirely jettisoned. The *Juvenile Justice Act* indicated, for example, that because of the minor and transitory nature of most youth offending, diversion from the court system was a primary concern. To facilitate this, the *Juvenile Justice Act* established a formal police cautioning system. It also recognised the importance of the family and the need to reintegrate the young offender into his community. Detention was thus viewed as a last resort and, to this end, the *Juvenile Justice Act* aimed to increase the community-based sentencing options available to the Children's Court.

The *Juvenile Justice Legislation Amendment Act* reflects a further step towards a justice oriented model. The rationale for this was spelt out by the Attorney-General and Minister for Justice, the Honourable Denver Beanland MLA in his Second Reading Speech to parliament when he said

> [T]he National/Liberal coalition Government has heard and is acting on the concerns of many, many Queensland people. Since late 1993, they have felt little but dismay about juvenile crime and the system's response to it. ... The National/Liberal coalition government believes every opportunity must be afforded to juvenile offenders to mend their ways to stop their descent into adult crime. However, *juveniles must be confronted with the responsibility of their actions*. It is only then that rehabilitation is possible, and the community safeguarded.[13]

Nowhere in the entire debate in the community and in Parliament is his government's philosophical dispute over the principles of juvenile justice more apparent

12 Cunneen & White, *supra* n.8 at 191-193. For an analysis of similar developments in the United Kingdom in the late 1970s and 1980s see L Gelsthorpe and A Morris 'Juvenile Justice 1945-1992' in M Maguire, R Morgan & R Reiner *The Oxford Handbook of Criminology* Clarendon Press Oxford 1994 949 at 965-980.

13 The Hon. DE Beanland Attorney-General and Minister for Justice *Juvenile Justice Legislation Amendment Bill* Second Reading Speech Queensland *Hansard* 11 July 1995 at 1556-1557. (Emphasis added).

than in section 4 of the Act which amends section 4 of the *Juvenile Justice Act*. The "principles of juvenile justice" declared in section 4 are intended to act as the central reference point for the remaining provisions of the Act.[14] The Coalition criticised the former provisions as lacking balance in that they focused more on the vulnerability of a child offender, and ways of diverting the child from the normal operation of the criminal justice system, than on the concerns of other members of the community upon whom juvenile crime has an impact.[15]

To address this perceived imbalance, the Act amended the *Juvenile Justice Act* by including the principles:

(a) the need for the community to be protected from unlawful behaviour;
(b) the right of victims to participate in the process of dealing with offenders to the extent permitted by law;
(c) the encouragement of parents to fulfil their responsibility for the care and supervision of their children; and
(d) the strengthening of the family unit by means of suitable punishment options.

Interestingly, however, the Coalition government did not repeal any of the existing principles of juvenile justice. Rather, by simply adding the above principles to be considered in the implementation of the provisions of the *Juvenile Justice Act*, the Queensland Government sought to move towards a more justice-oriented model while retaining a commitment to welfare-related principles.

Of itself, the move toward a more justice-oriented model is not contrary to international instruments that seek to protect the rights of children. On the contrary, the greater emphasis on due process and stricter legal procedures may well enhance the protection of the rights of children. Any analysis of legislation in accord with international human rights instruments is more complex than that conveyed by simple ideological assumptions. The following examination is our assessment of only the more important amendments to the *Juvenile Justice Act* and seeks to highlight where such amendments might contravene obligations under the international human rights instruments noted above.

3. Community Conferences

The amendments founding[16] an alternative, diversionary system of community conferencing is consistent with Articles 40(3)(b) and (4) of the Convention on the

14 So, for example, they are to be taken into account when passing sentence under s. 109(1)(b) of the Juvenile Justice Act.

15 See *Proposed Changes to the Juvenile Justice Act* Queensland Department of Justice and Attorney General July 1996 at 2.

16 Section 8 of the Act, inserting ss.18A-18P into the *Juvenile Justice Act 1992*. Note also, s.43 which inserts a new Part 5, Division 1A into the parent Act.

Rights of the Child.[17] These provisions emphasise the desirability of such measures and the availability of a variety of dispositions. Moreover, the scheme will seek to balance the interests of the accused and the victim and in this way gives due recognition to victims' rights in conformity with the United Nations Declaration of Basic Principles for Victims of Crime and Abuse of Power. In particular, the Act complies with Principle 5 which advocates the strengthening of judicial and administrative mechanisms to enable victims to obtain redress through formal and informal procedures. In this respect, it will also be consistent with the fundamental aims of the Tokyo Rules which seek to promote both the use of non-custodial measures, and the recognition of victims' rights.

The new system of community conferencing is in many ways reminiscent of the Crimes Reparation Project which was piloted in the Beenleigh Magistrates Court in 1992.[18] With an essentially bipartite approach, the new ss.18A-18P[19] deal primarily with the framework for police pre- court referrals, while a new Part 5, Division 1A[20] also makes the scheme available as a pre-sentencing option. Like the Crimes Reparation Project, mediation has been made subject to guilt being either acknowledged by the child[21] or found by the court. [22] In either case, the option is made available only with the consent of the victim[23] and only if the officer or the court considers diversion to be appropriate,[24] that court proceedings are undesirable,[25] or if a court believes that the scheme would assist in determining a suitable sentence order.[26] Hence while the Crimes Reparation Project sought to detail certain offenders to which the scheme was not open, *viz.* those pleading guilty to serious offences,

17 The relevant provisions of Article 40 state:
3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular:
(b) Whenever appropriate or desirable, measures for dealing with such children without resorting to judicial proceedings, provided that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

18 L Macrae 'Victim-Offender Mediation: Is it an option for your client?' (1994) 14 *Proctor* 12; Note 'Victim Offender Mediation in Queensland' (1993) (1) *Queensland ADR Review* 16; B Mason 'Reparation and Mediation Programs: The Perspective of the Victim of Crime' (1992) 16 *Criminal Law Journal* 402.

19 Inserted by s.8 of the Act collecting the provisions under a new Part 1C, Division 2.

20 Sections 119A-119D, inserted by s.43 of the Act.

21 Section 18H(1)(a).

22 Section 119A(1)(a).

23 Sections 18H(1)(b) and 119A(2)(a) respectively.

24 Sections 18H(1)(c)(i) and 119A(2)(b)(i) respectively.

25 Section 18H(c)(ii).

26 Section 119A(2)(b)(ii) .

domestic violence or who had histories of violent offences,[27] the amendments have left the matter largely to the discretion of the police and the courts. Nonetheless, it is unlikely that the scheme would be viewed as appropriate for dealing with such cases.

Interestingly in the case of referral by a court, the legislation distinguishes between an "indefinite referral" and a referral by the court for the purposes of assisting in the determination of an appropriate sentence. Perhaps a better description of the former is that it has a contingent outcome. If an agreement is reached a notice is issued pursuant to s.119B(2), the proceedings are then terminated and the child is excused from further prosecution for the offence.[28] Conversely, one of three results may ensue from an unsuccessful referral under the second approach. Section 119C(3) allows the court's proper officer to either take no action, refer the matter to a new community conference or to cause the charge to be returned to court for sentencing.[29] Insofar as the outcome is dependent upon an agreement being reached the amendment is cause for some disquiet. It is not unreasonable to anticipate that some victims will seek to impose their own form of retributive justice, by making onerous requests of the child, thus perhaps causing the conference to disintegrate. In view of the various options available to the court's proper officer, however, such an outcome is perhaps more imaginary than real.

These changes are a marked step in addressing a long standing criticism of the criminal law that it has tended to marginalise the role of the victim. Hitherto the victim has been characterised as a "sort of double loser ... first vis-a-vis the offender, [and] secondly and often in a more important manner[,] by being denied rights to full participation in what might have been one of the more important encounters in life".[30] A central feature of mediation schemes is the idea of empowering the parties, a factor which is necessarily lacking in the formalistic approach of the court process. It can only be hoped that community conferences will enable the resolution of conflicts to be achieved at a level more personal to the participants. It is a significant and welcome aspect of these changes that they should compel the juvenile offender to confront the effects of his or her actions upon the victim.

Amendments introducing community conferencing reflect a quasi-justice model approach, whereby adherence to traditional notions of free will justify strong repercussions, but where recognition of socio-economic factors require such responses to be balanced with other considerations. Not suprisingly therefore, in outlining the intended benefits for the child, the legislation[31] emphasises responsibility as against

27 Community Justice Program *Information Sheet - Crime Reparation Project: Victim Offender Mediation (Pre-sentence)* (no date).

28 Section 119B(3). A similar result flows from an agreement being made subsequent to a referral by a police officer: s.18I.

29 Likewise, s.18J(3) provides that where a police referral is unsuccessful because of similar circumstances, the police officer has the option either to (a) take no action; or (b) administer a caution; or (c) refer the matter to another community conference; or (d) charge the child for the offence.

30 N Christie 'Conflicts As Property' (1977) 17 *British Journal of Criminology* 1 at 9.

31 Section 18A(4)(a) of the parent Act, inserted by s.8 of the Act.

the restitutionary and diversionary objectives. Again, the benefits for the victim[32] include the opportunity to encourage the child's sense of responsibility, in addition to developing their own understanding of the child and why the offence was committed. Further emphasis is placed upon the victim's ability to begin the healing process by allowing them to express their concerns and to ask questions. Of course, such considerations are balanced with the perceived overall benefits to the community[33] in the form of early intervention, and hence savings to the public purse in diminished use of the criminal justice system. The approach of the above amendments thus not only embody adherence to diversionary principles and to the recognition of victims' rights, but most importantly they seek to treat the offender "in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others...".[34]

4. Cautions

The amendments also allow the ostensibly limited admission into later proceedings of evidence of cautions and community agreements.[35] In this respect the amendments are cause for some concern in relation to the degree of recognition they afford to the child's best interests.[36] Section 18M(1) provides: "[e]vidence that a caution has been administered to a child or a community conference agreement has been made by a child is not admissible against the child in a proceeding taken against the child for an offence." Subsection 2 states: "subsection (1) does not stop evidence of a caution being admitted against the child — (a) in a proceeding in which the caution is a disclosable caution...". What constitutes disclosable cautions and conference agreements are then outlined in relation to whether the child commits a "later childhood offence"[37] or a "later adulthood offence".[38] In either case, the offender must have received a caution or submitted to a community conference agreement for an offence which was punishable by seven years imprisonment if committed by an adult.

Two issues arise from the nature of these provisions. First, consideration should be given to the fact that many offences perpetrated by juveniles will fulfil

32 Section 18A(4)(b).
33 Section 18A(4)(c).
34 Article 40(1) of the CRC.
35 The amendments in question are incorporated into the same Division dealing with the community conferences discussed above. In particular, see ss.18K-18O of the parent Act, inserted by s.8 of the Act.
36 Article 3(1) of the CRC states:
1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the *best interests* of the child shall be a primary consideration". (emphasis added).
37 Section 18N.
38 Section 18O.

the "seven years or more" criterium. The legislation casts a very wide net. Submissions to the Attorney-General from the Youth Advocacy Centre (YAC)[39] and the Queensland Branch of the Australian Section of the International Commission of Jurists (ICJ)[40] in relation to this amendment highlighted break and enter, armed robbery and unlawful use of a motor vehicle as some examples. In relation to all three offences, juveniles comprise a significant proportion of the total number of offenders.[41] Targeting these offences may have significant outcomes for juvenile offenders. Certainly, the admission of cautions and agreements for such offences into evidence will compromise diversion as a continuing rationale for the juvenile justice system.

Secondly, the amendments fail to reflect recent criticisms made of the Western Australian *Crime (Serious and Repeat Offenders) Sentencing Act 1992*. This legislation was criticised for two principal reasons. In the first instance, by giving undue emphasis to the criminal history of the child at the sentencing stage it was argued that the legislation effectively imposed fresh penalties for past offences.[42] A further criticism was that the legislation created the potential for juveniles to be treated more harshly than adults in identical circumstances.[43] Both apply with equal force to the present amendments.

Particular attention should be drawn to the different requirements for admissibility of the cautions or agreements in later proceedings depending upon whether the offence is a later childhood or adulthood transgression. If a child commits a further offence in later childhood, after having been administered a caution or having submitted to a community conference agreement for a seven year offence, the caution or agreement becomes disclosable.[44] On the other hand, if an offender later commits a further offence in *adulthood* evidence of such caution or communtiy agreement will not be admissible *unless the child was dealt with for a second or later seven*

39 Youth Advocacy Centre (1996) *Response to Proposed Amendments to the Juvenile Justice Act* 1992 at 8.

40 Queensland Branch of the Australian Section of the ICJ *Re Proposed Amendments to the Juvenile Justice Act 1992 (Qld): Submission Paper* (1996) at 4.

41 Cunneen & White *supra* n.8 at 98 Table 5.1.

42 R Broadhurst & N Loh 'The Phantom of Deterrence: The Crime (Serious and Repeat Offenders) Sentencing) Act' (1993) 26 *Australian and New Zealand Journal of Criminology* 251 at 253. The authors argued that the undue weight given to the offender's previous history was contrary to the principle against double jeopardy: citing *Veen v. R (No 2)* (1988) 164 CLR 465.

43 M Harrison 'Children's Welfare, Rights and the Legal System' (1992) (33) *Family Matters* 27 at 31.

44 Section 18N states:
18N.(1) This section applies to a person who –
(a) as a child is administered a caution, or makes a community conference agreement, for a seven year offence committed by the child; and
(b) after the caution is administered or the agreement is made, commits an offence as a child (the "later childhood offence").

year offence.[45] Section 180(4) defines "dealt with" as including (a) the administering of a caution; (b) making a community conference agreement for the offence; (c) dealt with on a finding of guilt. Section 180(4) also defines a second seven year offence in s. 180(1)(b) and (c) to mean a seven year offence committed by the child after being dealt with for a seven year offence.

The legislation seems to suggest that a child's previous caution or agreement becomes disclosable after committing only two offences, whilst such evidence is not admissible against an adult unless he or she has committed at least two seven year offences as a child, and a further offence as an adult. This has the effect of making a child's caution or agreement disclosable sooner than an adult's. Additionally, the legislation has the potential to produce a somewhat iniquitous result. Assume, for instance, that two offenders commit the offence of shoplifting. Both have previously been administered a caution for a seven year offence (e.g. break and enter). Assume also that one offender is one day from his seventeenth birthday, but the other turned seventeen on the day of the shoplifting and hence is no longer an adult under *the Juvenile Justice Act*.[46] It would appear that the sixteen year old's prior caution would be disclosable since s. 18N(1)(b) does not seem to require the later childhood offence to be a seven year offence. Conversely (or perversely), it is submitted that the seventeen year old's prior caution would ***not*** be disclosable because (a) the shoplifting was not committed whilst the offender was a child and hence s. 18N(1) does not apply; and (b) the seventeen year old was not dealt with for a second seven year offence as a child which is required if the previous caution is to be disclosable in adult proceedings.[47] Thus, whilst the shoplifting offence complies with s.180(1)(c) as an offence committed by an adult, the previous caution would not be disclosable because of the absence of a seven year offence from the seventeen year old's juvenile criminal history.[48] Not only would such a consequence be absurd, but it would appear to be in direct contravention of Articles 14(1) and 26

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45 Section 180 which states:
180.(1) This section applies to a person who –
(a) as a child is administered a caution, or makes a community conference agreement, for a seven year offence committed by the child; and
(b) is dealt with as a child for a second or later seven year offence; and
(c) after being dealt with as a child for a second or later seven year offence commits an offence as an adult (the "later adulthood offence").

46 See s.5 "child"; except where s.6 applies.

47 Section 180(1)(b) and (c).

48 It is possible that the drafter did not foresee these complications. Indeed, on one interpretation, if, in order for s. 180 to apply to an adult offender, he or she must previously have committed at least two seven year offences, logic stipulates that the caution would have been disclosed in the proceedings for the second seven year offence (as a child) by virtue of s. 18N. However, this process of deductive reasoning postulates that an adult offender had in fact committed a second offence as a child which would have led to the disclosure of the offender's previous caution or agreement; hence rendering its later disclosure in the adult proceedings somewhat innocuous. The problem arises, as in the above example, when a child turns seventeen and commits his or her second offence as an adult, and thus avoids the disclosure of his or her previous caution in circumstances where it would certainly have been disclosable were he or she still legally a child.

of the ICCPR which guarantee to all persons equality before the law.[49] Clearly, therefore, an appropriate method of dealing with this inconsistency would be to preclude the disclosure of a child's previous caution or community conference agreement except under the same circumstances applicable to an adult. That is, unless the child has committed at least two previous seven year offences.

5. Arrest

The amendment to section 20(1)(b) has extended the arrest and ex officio powers of police to allow the arrest of a child for a *serious* offence,[50] without first exhausting all other alternatives. Prior to this amendment the police were obliged to consider whether a situation required that no action should be taken, or that a caution should be issued, *before* proceeding to effect an arrest.[51] The adoption of arrest as a mechanism of first instance would appear to be contrary to the spirit of Article 40(1) of the Convention on the Rights of the Child.[52] It would also appear to disregard Rule 10.3 of the Beijing Rules, which requires that all contacts between law enforcement agencies and juvenile offenders be managed in such a way that respects the juvenile's legal status as a young person and promotes his or her well-being.

Given that arrest is both a humiliating and stigmatising experience — particularly for young people — the new provisions give rise to some concern. It is tempting for governments to employ stronger, more expeditious means of securing the attendance or presence of a child suspect where a serious indictable offence has been perpetrated. However, such temptation must be balanced against the cost (to the public as well as the child) of compromising the child's "sense of dignity and worth". It is to be hoped that in the administration of the Act balance is retained.

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49 Article 14(1) (so far as is relevant) states that "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law...". Likewise, Article 26 provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

50 Amended by s.13(3) of the Act. It is to be noted that a serious offence under s.8 of the *Juvenile Justice Act* is an offence punishable by life or which, if committed by an adult, would be punishable by 14 years or more (unless the offence is punishable summarily). Of the various offences that come under these provisions, break and enter, and armed robbery are examples. In view of the preponderance of such offences amongst young offenders the amendment will clearly have wide ranging effect.

51 Section 10 (Police officer to consider alternatives to proceeding against child). This section has now been renumbered as s.19 by s.10(2) of the amending Act.

52 Article 40(1) states:

1. State Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law *to be treated in a manner consistent with the promotion of the child's sense of dignity and worth*, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society." (Emphasis added).

6. Fingerprints and Palmprints

Under s.10(2) of the *Juvenile Justice Act*[53] a police officer may now apply to a Childrens Court Magistrate for permission to take the fingerprints and palmprints of a child charged with, but not arrested for, an offence. This amendment has proved controversial.[54] In much the same vein as extensions to the power of arrest discussed above, the taking of identifying particulars is highly intrusive. Where such material is obtained in the absence of a formal arrest it also becomes potentially unjust. Fingerprinting and palmprinting provide the police with more than just the material which may tend to prove or disprove the involvement of an individual in a crime. The entire process is itself symbolic. It is marked with the stamp of authority, and epitomises the coercive nature of justice. For these reasons their use ought always to have regard for the dignity and self-respect of those from whom the particulars are obtained. Indeed, as has been noted above, Article 40(1) of the Convention on the Rights of the Child places great emphasis upon the treatment of children in a manner which promotes their sense of dignity and worth, and which reinforces their respect for the human rights and fundamental freedoms of others. Equally important is the desire to preserve the privacy of an accused child, as is clearly contemplated by Article 40(2)(vii) of the CRC.

It is regrettable therefore that the legislation not only allows such particulars to be taken from a child, but that it requires that the necessity for utilising the measure need only be proved on a balance of probabilities.[55] The court need only satisfy itself that (a) someone has committed the charged offence; (b) there is evidence of an identifying particular of the offender that is of the same type as the identifying particular which the applicant seeks to take from the child; (c) the child is reasonably suspected of being the offender; and (d) the order is necessary for the proper conduct of the investigation of the offence. Though the discharge of law enforcement must not be unnecessarily impeded neither should such discharge be manipulated to unfairly disadvantage an individual whom the police have not even arrested. If identifying particulars are required, then the arrest mechanism should be utilised. It is not a sufficient justification[56] to suggest that the amendment is in fact intended to reduce the incidence of arrest when, as noted above, other amendments appear to encourage the opposite outcome.

7. Life Sentences

Section 45(4) of the amending Act empowers a court presided over by a Judge, in which a child has been found guilty of a serious offence, to sentence that child for a

53 Section 8 of the amending Act inserts ss.10-10C under a new Part 1B, Division 2 of the *Juvenile Justice Act*.
54 See *supra* n.3.
55 Section 10(6).
56 See *Juvenile Justice Legislation Amendment Bill 1996: Explanatory Notes* August 1996 at 5.

period up to and including the maximum of life. This amends s.121(3) of the *Juvenile Justice Act* pursuant to which a previous maximum of fourteen years was applicable. Such a sentence may only be imposed where the offence involves violence against a person, and where the court considers the offence to be particularly heinous having regard to all the circumstances. The change is undoubtedly supported by prevailing public opinion. It is questionable, however, whether the benefits of further incarceration can be said to outweigh the foreseeable disadvantages. Certainly, they cannot be said to facilitate the child's inevitable release and reintegration into society.

Given his or her age, the central consideration in punishing juveniles under international human rights instruments is rehabilitation. This is specifically required by Article 14(4)[57] of the ICCPR and Rule 17.1(a)[58] of the Beijing Rules. Such an approach is also supported by certain pragmatic concerns. On the one hand, there will be a considerable economic cost in maintaining the juvenile's incarceration for such an extended period. And on the other, there must be recognition of the fact that detention centres are little more than criminogenic schools for juvenile offenders. A life sentence can only lead the child to be released as a greater, more educated criminal than he or she was when originally sentenced, or at the very least render him or her a social misfit. Whilst there is an immediate public interest in ensuring that those who perpetrate particularly heinous crimes are punished in a manner which reflects society's condemnation, measures to give effect to such disapproval must be carved with one eye upon their social ramifications. There can be little service to the public interest if by meeting the current political agenda for crime and punishment, individuals are punished in a manner which renders them more dangerous or a greater burden for society at a later stage.

8. Presence and Liability of Parents

Two further areas worth noting are the insertion of a new s.56A,[59] and the amendments to ss 197 and 198 of the *Juvenile Justice Act*.[60] Section 56A empowers the court to require the attendance of a parent of a child against whom proceedings are being conducted. The provision specifically makes it an offence to contravene a notice to attend, rendering the parent liable to a fine.[61] While this provision would appear to be in line with the new government's emphasis upon parental and juvenile

57 Article 14(4) provides:
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

58 Rule 17.1(a) states:
17.1 The disposition of the competent authority shall be guided by the following principles:
(a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society....

59 Inserted by s.22 of the Act.

60 Amended by ss.62 and 63 respectively of the Act.

61 Section 56A(6).

responsibility, it is unfortunate that it has chosen to reinforce this policy with a pecuniary penalty. Recognition of the low socio-economic status of most offenders' families should have militated against such an option, or at the very least made the maximum fine applicable somewhat less substantial.[62] Further, while Article 3(2) of the CRC recognises that parents are to be encouraged to fulfil their duties to provide competent supervision and control of their children, it cannot be said to support this new measure. Although parents who fail to attend court as required might be said to have been neglectful, such inaction does not warrant their being made criminally liable.

Similar criticism is applicable to the amendments to ss 197 and 198 of the *Juvenile Justice Act*. These outline, respectively, the power of the court to issue a show cause notice to a parent, and to conduct a show cause hearing. Specifically, they are directed toward establishing whether or not a parent has in some way contributed to the child's criminality by not adequately supervising the child. In the event that such neglect is established, s.198 permits the court to require the parent to pay compensation.[63] One pleasing aspect of the amendments is the government's decision not to alter the burden of proof in establishing parental neglect. Such an intention had been earlier canvassed in its proposed amendments, the suggestion being that the court should satisfy itself of the parent's neglect on the balance of probabilities.[64] However, while the burden of proof has not been altered, the factors which must be proved have been amended. Prior to the amendments, s.197(1) required proof "that *wilful failure* on the part of the parent of the child to exercise proper care of, or supervision over, the child was likely to have *substantially* contributed to the commission of the offence..." (emphasis added). The provision has now been simplified. In addition to requiring the court's satisfaction that compenstation should be paid "to anyone" the court now need only be satisfied that:

> Section 197(1)...
> (a) ...; and
> (b) a parent *may have contributed* to the fact the offence happened by not *adequately* supervising the child; and
> (c) it is reasonable that the parent should be ordered to pay compensation for the offence.

Apart from the substantial issues surrounding the parent's ability to restrain a recalcitrant child, these requirements would undoubtedly be satisfied with greater ease than was the case prior to the amendments. Looked upon as a whole, the amendments directed towards ensuring parental responsibility are understandable in the current political climate but accord less well with international benchmarks

62 Section 56A(6) stipulates that the maximum penalty is 50 penalty units.
63 The maximum compensation payable is 67 penalty points (at present $5000).
64 See *Proposed Changes to the Juvenile Justice Act*, Queensland Department of Justice and Attorney General, July 1996 at 8.

protecting the human rights of children. Indeed, the provisions in Part 5, Division 11 of the *Juvenile Justice Act* were previously criticised as providing "the potential of criminalising not only the child, but the whole family"[65]; the new amendments do not answer this criticism.

9. Conclusion

It is perhaps too easy to be critical of policy initiatives of the sort included in *the Juvenile Justice Legislation Amendment Act* 1996 (Qld). Juvenile justice is a notoriously challenging area for governments. The need to balance progressive policies with the rigours imposed by an often punitive and frustrated public is one that all governments find difficult. Nevertheless, while some of the new amendments should be thoroughly supported (such as community conferencing), others are in need of qualification or openly contravene internationally recognised rights of children. Of primary concern are amendments in relation to:

I. The use in evidence of past police "cautions" issued against young offenders;
II. Arrest;
III. Fingerprinting in the absence of an arrest;
IV. The availability of life sentences; and
V. Criminal liability of parents for the criminal conduct of their children.

The Queensland government is aware of the potential ramifications of failing to comply with its international obligations.[66] Following Australia's adoption of the First Protocol to the International Covenant on Civil and Political Rights individuals complaining that their rights have been infringed may complain to an international committee for resolution of the matter. In Australia this happened most recently in the case of Nicholas Toonen in relation to Tasmanian laws criminalising male homosexual activity. That resulted in a finding against Australia and the introduction of Federal legislation to overrule Tasmanian State laws.[67]

While there is no individual complaint mechanism in the case of the Convention on the Rights of the Child, the Commonwealth Joint Standing Committee on Foreign Affairs, Defence and Trade monitors obligations under the CRC.[68] International scrutiny is provided by the United Nations Special Rapporteur on the Rights of Children. Perhaps even more importantly, if Australian State governments do not pay heed to Australia's international obligations it is difficult for the Commonwealth government to exert pressure for compliance in the international arena.

65 I O'Connor 'Spare the Rod?: New laws, old visions' (1993) 18 *Alternative Law Journal* 8 at 10.
66 See Queensland *Hansard* 6 August 1996 at 2057-58.
67 See the *Human Rights (Sexual Conduct) Act* 1994 (Cth).
68 See Joint Standing Committee on Foreign Affairs, Defence and Trade *A Review of Australia's Efforts to Promote and Protect Human Rights* Australian Government Publishing Service November 1994 at Chapter 9.

Of course, despite the fact that Queensland's juvenile justice legislation is moving towards a more justice oriented model, the impact on the practice of juvenile justice may be very small.[69] The theoretical repositioning of juvenile justice in Queensland may not greatly affect the way the system operates nor the impact it has on children.

Nonetheless, we believe that the amendments will prove electorally popular among a public tired of juvenile crime. But we also hope that the Attorney-General will keep his promise to review the impact of the new amendments to the *Juvenile Justice Act* after 12 months operation.[70] Perhaps in this way, with the possibility of ongoing reform in the area, the government will take the opportunity to fine tune its juvenile justice policies.

69 Cunneen & White, *supra* n.8 at 193 speculate that the outcome of various recent amendments in juvenile justice legislation among the Australian States may be negligible.

70 See the Second Reading speech of the Attorney General and Minister for Justice, the Hon. DE Beanland, *supra* n.13 at 1558.