ADDRESSING THE SOLUTION-FOCUSED SCEPTICS: MOVING BEYOND PUNITIVITY IN THE SENTENCING OF DRUG-ADDICTED AND MENTALLY IMPAIRED OFFENDERS

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I INTRODUCTION

In 2012, the Queensland Government closed Queensland’s solution-focused courts,1 ie, the Drug Courts, the Special Circumstances Court list (for homeless and mentally impaired offenders) and the Murri Courts. There was no public consultation process. A ministerial press release explained that the courts were ‘costly’, ‘inefficient’ and offered a ‘comparatively low return on investment’.2 In the same year, the New South Wales Government closed its Youth Drug Court, also citing the Court’s price tag.3

This article uses solution-focused courts as a case study to highlight a problem in criminal justice across many Australian jurisdictions: that is, the willingness of governments of all political persuasions to ignore research-based evidence for short-term political expediency. Freiberg describes this as ‘affective’ versus ‘effective’ justice.4 This problem has two facets: first, the willingness of governments to implement policies that poll well – often as a knee-jerk response to extraordinary incidents – despite the complete absence of...
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any evidence of efficacy. Arguably, many of these policies are simply fatuous but, perhaps, relatively benign. Second, and more problematic, is the willingness of governments to implement policies that are, according to research-based evidence, counterproductive to crime prevention goals. This phenomenon might be defensible if these policies reflected the democratic will. However, as this article will argue, empirical evidence demonstrates that assumptions about popular punitivity have exaggerated its force and given insufficient credit to the public’s capacity for nuanced differentiation between the circumstances that demand a punitive versus a rehabilitative response.

Parts II and III of this article will briefly background the issue by discussing, respectively, the problem of chronic recidivism among drug-addicted and mentally impaired offenders and the rehabilitative role of the courts and Part IV will discuss the development and modus operandi of solution-focused courts. There have been a plethora of studies of solution-focused courts in the United States (‘US’), Australia and elsewhere. Part V will present a brief synopsis of the evaluative literature, drawing on only the most rigorous of the published studies. The short and long term recidivism-reduction efficacy of, in turn, drug courts, mental health courts and neighbourhood courts will be considered along with that of an innovative and unique program, the Court Integrated Services Program (‘CISP’), which operates in mainstream Magistrates’ Courts in Victoria. Part VI will consider the cost-effectiveness of solution-focused approaches for these cohorts. It will be argued that there is an abundance of solid evidence to support both the recidivism-reduction efficacy and cost-effectiveness of solution-focused courts for substance addicted and mentally impaired offenders. Part VII will consider the evidence of popular punitivity in Australia. It will be argued that when properly informed, the public are less punitive and more supportive of rehabilitative sentencing than is commonly assumed. In Part VIII, the conclusion is posited that the evidence demonstrates that executive governments should lend their support to solution-focused court programs as part of their multi-pronged, evidence-based crime prevention strategies.

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5 Examples include: mandatory sentencing; three-strike laws; truth in sentencing; boot camps; double jeopardy exceptions; pink prison jumpsuits; bikies-only prisons; removing citizenship; cancelling welfare; and meta-data retention.

6 One example was the Queensland Government’s (subsequently abandoned) policy of pink prison jumpsuits for convicted members of outlawed motorcycle clubs: ‘Pink for Punks: Queensland Plan To Embarrass Bikies in Jail’, The Guardian (online), 21 October 2013 <http://www.theguardian.com/world/2013/oct/21/pink-for-punks-queensland-bikies>.


8 Indigenous courts will not be canvassed in this article.
II BACKGROUND

A number of innovative court-based programs have been developed over the past few decades to reduce recidivism among different categories of offenders. This global phenomenon has seen the proliferation of targeted programs including drug courts, mental health courts, neighbourhood courts, veterans’ courts, drink driving courts and prostitution courts (inter alia) in countries including the US, Canada, England, Wales, New Zealand, Germany and others.\(^9\) While these programs are relatively novel, the role of the courts in seeking to promote rehabilitation of offenders is not. Traditionally, courts have used sentencing to advance core criminal justice objectives, viz, the prevention and punishment of crime. The rehabilitation of offenders is one means by which the former purpose can be advanced. Demonstrably, that function has failed in relation to significant numbers of recidivist offenders who repeatedly cycle through the courts with offending patterns driven by substance abuse, mental impairment, and/or psychosocial disabilities. This phenomenon is so familiar to criminal courts the world over, especially those that deal with offending at the minor end of the scale, that it has attracted a label: the ‘revolving door’ phenomenon.\(^10\)

Our criminal justice system applies a bright line standard to criminal responsibility. Offenders will be held criminally responsible if they had at least some capacity to understand the nature of their own actions or to understand that those actions were morally wrong.\(^11\) The rule supports autonomy by promoting personal responsibility, but it does not accommodate the very real cognitive and psychological deficits that often affect those who suffer from mental impairment and/or substance abuse disorder. Those impairments can have a very real impact on culpability, which, according to the doctrine of proportionality, will often result in a lighter sentence. However, in many Australian jurisdictions this principle is unevenly applied and/or is contested.\(^12\)

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\(^11\) M’Naghten’s Case (1843–60) All ER Rep 229; Criminal Code Act 1995 (Cth) sch 1 s 7.3; Criminal Code 2002 (ACT) s 28; Mental Health (Criminal Procedure) Act 1990 (NSW) s 38; Criminal Code Act (NT) sch 1 s 43C; Criminal Code Act 1899 (Qld) sch 1 s 27; Criminal Law Consolidation Act 1935 (SA) s 269C; Criminal Code Act 1924 (Tas) sch 1 s 16; Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) s 20; Criminal Code Act Compilation Act 1913 (WA) sch 1 s 27.

III THE ROLE OF THE COURTS IN REHABILITATION

It is long established, uncontroversial law that courts are required to craft an appropriate sentence having regard to a limited class of legitimate criminal justice purposes (inter alia). These purposes – general and personal deterrence, denunciation, incapacitation, rehabilitation, and proportionate retributive punishment – are reflected in legislation in most Australian jurisdictions. When an offender has good prospects for rehabilitation, it is legitimate for courts to either impose a less punitive sentencing option or reduce the period of a punitive sentence. This benefits both the community and the offender.

The legitimacy of purposive sentencing suggests that courts should take more responsibility in appropriate cases to ensure that sentencing is directly concerned with effectively reducing recidivism through the use of evidence-based forensic practices. A challenge for courts is that claims made at sentencing about an offender’s commitment to rehabilitate, even if made honestly and with the best of intentions, are self-serving and speculative. The burden of proving good prospects of rehabilitation rests with the offender. However, courts have long held the power to reduce the risks involved in sentencing based on promises of future reform. At common law, following an offender’s conviction, courts can adjourn a sentence hearing and impose appropriate rehabilitative conditions to a grant of bail to allow an offender to demonstrate genuine progress towards rehabilitation. A final sentencing date can then be set, say, twelve months into the future, and if necessary, interim hearing dates can be set to ensure that the offender is complying with rehabilitative conditions. This type of common law order is known as a ‘Griffiths order’ or a ‘Griffiths remand’. Legislative sentencing and bail powers in all Australian jurisdictions are expressed broadly enough to permit courts to adopt this approach. The benefit of this type of order is that it capitalises on the stress of appearing in court and facing criminal

14 Crimes (Sentencing) Act 2005 (ACT) s 7(1); Crimes (Sentencing Procedure) Act 1999 (NSW) s 3AA; Sentencing Act (NT) s 5(1); Penalties and Sentences Act 1992 (Qld) s 9(1); Criminal Law (Sentencing) Act 1988 (SA) s 10; Sentencing Act 1997 (Tas) s 3(e); Sentencing Act 1991 (Vic) s 5(1).
19 See, eg, Griffiths v The Queen (1977) 137 CLR 293, 305–6 (Barwick CJ), 326 (Murphy J), 338–9 (Aickin J).
20 See, eg, Bail Act 2013 (NSW) s 25; Bail Act 1980 (Qld) ss 6, 8, 11, 11A; Bail Act 1977 (Vic) s 5.
sanctions to galvanise an offender’s latent desire to reform. The use of a Griffiths order, or the adjournment of final sentencing pending rehabilitative progress, removes the uncertainty of taking rehabilitation into account based on a promise. Proven rehabilitative success over a period is better able to justify a substantial sentencing discount than a speculative promise, even when supported by a detailed intervention plan.

Arguably, the most pressing rehabilitative need is among those categories of offenders who repeatedly cycle through the courts. The phenomenon, known as the ‘revolving door’, refers to repeat offenders whose lives are characterised by substance abuse, social dislocation and a pattern of regular offending. Problems such as substance abuse and mental impairment (especially when combined) are known to have criminogenic tendencies, especially when co-occurring with other psychosocial dysfunctions, such as homelessness, poverty, unemployment, low educational achievement and inadequate prosocial familial networks. Revolving door offenders are collectively responsible for a disproportionate amount of crime. As their criminal record grows, inevitably they are imprisoned at public expense. After release from prison, many return to the community with their problems unresolved, only to return to the same lifestyle and offending patterns. Because of their complex and multifarious psychosocial challenges, few of these offenders have the skills or knowledge to be able to organise the multi-pronged interventions necessary to successfully rehabilitate. That means that the power to make a Griffiths order is extremely limited in utility unless additional resources are brought into play. Solution-focused courts offer one evidence-based way of appropriately and effectively channelling those resources.

IV SOLUTION-FOCUSED COURTS

Solution-focused courts aim to assist willing offenders to treat the underlying causes of their offending through the use of evidence-based interventions

designed to resolve criminogenic dysfunctions. The solution-focused court is one model of programmatic rehabilitation which has gained widespread international popularity over the past few decades. The first modern solution-focused court was a drug court which commenced in Florida in 1989. This court was followed in 1997, again in Florida, by the first mental health court (‘MHC’). These courts were judicial initiatives, driven partly by judicial frustration with revolving door recidivism and partly by the desire of judges to help address the underlying causes of crime in their communities. It is a confronting conclusion from the fact of revolving door recidivism that traditional sentencing options have failed in their rehabilitative, personal deterrence, and community protection goals in relation to these offenders.

Since the late 1990s, solution-focused courts have multiplied exponentially. In the US, as of 2013, there were 2800 drug courts and 397 MHCs, with more in Canada, England, New Zealand, Brazil, Europe and elsewhere. In Australia, drug courts or drug court lists operate in all Australian jurisdictions excluding the two territories and (now) Queensland. Although the term MHC is

not generally used in Australia, there are also dedicated solution-focused court lists for offenders with mental impairments in all Australian jurisdictions except the two territories and (now) Queensland. Solution-focused court models are also in use in a number of jurisdictions for family violence cases, prostitution offences, war veterans’ courts, teen courts, truancy courts, welfare fraud and community courts. Western Australian Magistrate, Dr Michael King, has noted that solution-focused courts are now so widespread that they have become ‘an established part of the court systems of Australia, New Zealand, the United States, Canada, the United Kingdom and other common law jurisdictions’.

The identifiable features of solution-focused courts include early intervention, voluntary participation, personalised assessment, referral to community-based services, case management or liaison by a court-based officer, multidisciplinary team-based collaboration, use of evidence-based methods, and monitoring of the offenders’ compliance and progress towards agreed goals by a dedicated magistrate at regular review hearings. In Australia, the preferred model has been a post-adjudication model, which requires the defendant to plead guilty. Taking responsibility for offending conduct is an appropriate first step on

36 The reason that the term ‘mental health courts’ has not gained currency in Australia is to avoid confusion with, for example, Queensland’s Mental Health Court, which is jurisdictionally distinct and not involved in sentencing.


the path to rehabilitation. If the offender substantially complies with and ultimately completes the program, his or her participation will be taken into account at sentencing to reduce or eliminate the need for a punitive sentence.44

Programs have been implemented in solution-focused courts or solution-focused court lists, rather than the general lists, because the court adopts a more relaxed, less adversarial procedural approach, which is considered not to be appropriate in a mainstream court. The solution-focused approach usually involves a multidisciplinary team led by the magistrate, which includes the offender’s defence lawyer (often a dedicated Legal Aid lawyer who represents all or most defendants on the solution-focused list), a dedicated police prosecutor, and a forensic psychologist, social worker or corrections officer. In acknowledgment that rehabilitation of an offender is in everyone’s interests, the team works together to recommend the most appropriate suite of interventions to achieve that goal. During hearings, the magistrate and the offender engage directly in two-way dialogue, even if the defence lawyer is present. The magistrate uses the opportunity to motivate the offender to greater efforts to achieve his or her rehabilitative goals. This is not just small talk – the magistrate is applying evidence-based psychological expertise to create a rapport, forge a therapeutic alliance and support the offender’s reform efforts.45 It is believed that magistrates are particularly well-placed to perform this role because of their social status and authority. Often, these offenders will have never experienced an authority figure taking a personal interest in their welfare. Accordingly, the magistrate’s status enhances the subject’s own feelings of self-worth. The subject will try harder to succeed because he or she wants to perform well for the magistrate, because that magistrate has treated the offender with respect and compassion, and expressed confidence in the offender’s self-efficacy.46 Moreover, the magistrate has power over the final sentence. The possibility of a reduced sentence can act as leverage, helping the offender to internalise the desire to turn his or her life around.47

Studies have confirmed that judicial supervision is a vital element of the court-based solution-focused approach. A randomised controlled trial in the NSW Drug Court tested the proposition by assigning high-risk participants to either higher levels of judicial supervision (twice weekly) or judicial supervision as usual (weekly). The intensively supervised sample had an odds ratio of 0.57 of returning a positive drug test while on the program, compared to the control group.48 To express it another way, the intensively supervised sample were

46 Ibid 216.
almost half as likely as the control group to be found to be using drugs. These findings are consistent with the findings of US studies, confirming that the judicial officer’s supervisory role on a solution-focused program is correlated with the program’s effectiveness.49

V THE EFFICACY OF SOLUTION-FOCUSED COURT METHODS

There has been extensive research into the efficacy of solution-focused courts and, in particular, into drug courts and MHCs. For many years, researchers were saying that more research was needed to prove the effectiveness of the solution-focused model in reducing recidivism. Of the hundreds of research studies, many were criticised for poor methodological design, which undermined their findings, but the criticisms also drove a wave of more methodologically rigorous studies.50

Meta-analyses based on a substantial number of these more rigorous court evaluation studies now permit conclusions to be expressed more confidently. For example, Aos, Miller and Drake conducted a meta-analysis of 57 drug court evaluation studies51 and found an average recidivism reduction effect of eight per cent. That is, the drug court offenders were rearrested at a rate eight per cent less than members of control groups who were processed as normal through the general criminal lists.52 Another meta-analysis conducted by Gutierrez and


50 Wundersitz, above n 44, 48–50. Randomised control trials are the acknowledged gold standard in research quality, but in criminology, these trials face a number of ethical, legal and practical constraints, especially in a context where medical treatment is made available to those in the study group and not those in the control group: David P Farrington and Brandon C Welsh, ‘Randomized Experiments in Criminology: What Have We Learned in the Last Two Decades?’ (2005) 1 Journal of Experimental Criminology 9, 10, 22.

51 Steve Aos, Marna Miller and Elizabeth Drake, ‘Evidence-Based Public Policy Options To Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates’ (Report No 06–10–1201, Washington State Institute for Public Policy, October 2006) 1 <http://www.wsipp.wa.gov/ReportFile952>. The meta-analysis conducted by Aos, Miller and Drake had many features designed to ensure rigour. Studies were only included if they had a comparison group (ie, studies were excluded where the relevant comparison was participants’ pre- and post-rates of offending). Studies were also excluded if program non-completers (drop-outs and terminees) were excluded from analysis. Studies were only included if they used an independently verifiable criminal justice outcome measure. For studies with more than one outcome measure, the researchers used the broadest (eg, arrests, rather than convictions). The studies included randomised control trials and quasi-experimental study designs, although the latter were only included if sufficient information was provided on key variables, such as age, gender and criminal history, to ensure validity of the comparison between the groups: at 19–20.

52 Ibid 8.
Bourgon used a different methodology, also designed to ensure rigour. This study (which did include some of the studies analysed in the Aos, Miller and Drake study) found an almost identical average effect size of 8.4 per cent.

Another criticism of the body of evaluative drug court research was that poor program design or poor standards of treatment in some programs led to poorer than expected outcomes, which in meta-analyses would skew outcomes of other programs which faithfully implemented evidence-based practices. Gutierrez and Bourgon addressed this concern by assessing drug court treatment quality by measuring the adherence of the treatment programs to the ‘Risk-Need-Responsivity’ (‘RNR’) model of offender rehabilitation. RNR is a well-accepted model of offender rehabilitation which is backed by numerous studies confirming its efficacy.

The RNR model has three defining principles:

- **risk** – the intensity of intervention is matched to the offender’s risk of reoffending;
- **need** – the program is customised to meet the offender’s criminogenic needs; and
- **responsivity** – the program is customised to suit the offender’s personal learning style.

The drug courts in question varied according to how many of the three RNR principles they implemented: ‘In terms of reductions in recidivism, adherence to none, one or two of the [RNR] principles corresponded to a 5%, 11% and 31% reduction in recidivism respectively’. The study demonstrated that adherence to the requirements of evidence-based practice results in increased efficacy.

One important limitation to the body of drug court research was the relatively short follow-up periods of many of the studies. Follow-up studies on long-established drug courts are now permitting analysis of recidivism over longer periods.

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53 Gutierrez and Bourgon analysed 96 studies involving 103 drug courts. All studies had comparison groups, although not all used randomised control groups. The Collaborative Outcome Data Committee, Public Safety Canada, *Guidelines for the Evaluation of Sexual Offender Treatment Outcome Research: Part 2: COGD Guidelines* (Report, April 2007) (‘COGD Guidelines’) were used to assess study design. The COGD Guidelines are a 20-item instrument developed specifically for the purposes of rating the quality of evaluative studies of sex offender treatment programs. Some minor modifications were made for the change in context. The COGD Guidelines produce a global study quality rating based on bias and confidence. The researchers identified and excluded from analysis studies that failed to meet minimum standards of rigour. The final analysis was conducted on the remaining 25 acceptable studies: Leticia Gutierrez and Guy Bourgon, ‘Drug Treatment Courts: A Quantitative Review of Study and Treatment Quality’ (Research Report, Public Safety Canada, December 2009) 1, 4, 8 <http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2009-04-dtc/2009-04-dtc-eng.pdf>.

54 Ibid 9, 12–13.

55 Ibid 2.


57 Andrews, Bonta and Wormith, above n 56, 735.

58 Gutierrez and Bourgon, above n 53, 12. None of the drug courts in these studies implemented all three principles.
periods of time. For example, the Multnomah County Drug Court in Oregon was established in 1991, making it the second oldest drug court in the US. Administrative data was available for the entire drug court eligible population in the County, uniquely permitting analysis of the entire cohort of 11,102 individuals rather than a sample. The recidivism rates of participants in the drug court from 1991–2001 (n = 6,502) were compared with eligible non-participants (n = 4,600) and statistically corrected for variations in age, gender, race and two years prior offending history. Analysis of the 14-year follow-up period found that drug court participants were significantly less likely to be rearrested for a drug offence in every year except the 14th, where the small overall numbers of rearrests made the difference non-significant. For all offence types, drug court participants were nearly 30 per cent less likely to be arrested than non-participants for seven years following entry into the drug court.

Another 10-year study found significant but much smaller effect sizes. The study’s authors consider that the small effect sizes were able to support a conclusion of ‘some success in … reducing recidivism among its participants over an extended follow-up period’. However, later cohorts produced stronger short-term effects, leading the authors to conclude that the weak long-term effect size might be a reflection of the low graduation rates during the drug court’s first year of operation, while program rules and service delivery were still under development.

Almost all experts now agree that the accumulated evidence is overwhelming – adequately funded and properly implemented drug courts and MHCs do indeed reduce recidivism. The Justice Programs Office at American University has collated the results (and methodologies) of 150 evaluations of US drug courts and has found that, collectively, they support the proposition that drug courts are effective in reducing recidivism when compared either to randomised control groups or to the offenders’ own prior histories of offending. In light of the evidence, the US National Association of Drug Court Professionals has declared

60 Ibid 13, 23.
63 Ibid 27.
65 Ibid 51.
66 Ibid.
68 Justice Programs Office, American University, Recidivism and Other Findings Reported in Selected Evaluation Reports of Adult Drug Court Programs Published: 2000 – Present (Research Report, 2014) <http://jpo.wrlc.org/handle/11204/3686>. 
the conclusion – that drug courts significantly reduce drug use and crime, and that they do so with substantial cost savings – to be proven ‘beyond a reasonable doubt’. Independent research in Australia has also confirmed that drug courts do reduce recidivism, including research into the efficacy of Queensland’s recently closed drug courts.

The evidence in relation to MHCs, although less voluminous, is equally cogent. There are myriad studies of individual MHCs which demonstrate their effectiveness, along with meta-analyses, and longitudinal studies. Again, the Australian experience has been that, like their US counterparts, MHCs have been effective in reducing recidivism.

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69 Douglas B Marlowe, ‘Research Update on Adult Drug Courts’ (Need to Know Brief Series, National Association of Drug Court Professionals, December 2010) 1.
The Drug Court and MHC models are not the only way of implementing solution-focused court approaches to targeted offenders. Another model is the community court model. One such court operates in the Melbourne suburb of Collingwood, serving the inner-suburban city of Yarra.76 The Neighbourhood Justice Centre Court (‘NJC’) hears criminal cases involving residents and civil cases that affect the local community. The provision of a dedicated magistrate promotes stability and allows for decisions to be informed by strong local knowledge. Various community services are co-located at the courthouse, which supports the use of the solution-focused approach for offenders, facilitates victim support and transforms the court into a community hub.77

An evaluation found that over the 2007–09 period:

- recidivism rates over an 18-month follow-up period were 34 per cent, compared to 41 per cent for a comparison group dealt with in mainstream courts – a seven per cent reduction;
- the completion rate of community based orders was 75 per cent, compared to a state-wide average of 65 per cent;
- NJC offenders completed an average of 105 hours of unpaid community work, compared to a state-wide average of 68 hours; and
- comparing crime in the city of Yarra in the two years prior to establishment of the NJC, with crime in the two-year period after establishment, crime had fallen by 12 per cent, including falls of 38 per cent in car thefts; of 26 per cent in residential burglaries; and of 20 per cent in other (mainly commercial) burglaries.78

Solution-focused programs can also be delivered from mainstream courts. Conventionally, these programs are targeted at offenders with a lower risk of reoffending than those targeted by solution-focused courts, or at those whose needs are less acute. Victoria’s CISP is Australia’s most flexible mainstream solution-focused program. CISP is offered in magistrates’ courts at Melbourne, Sunshine and the Latrobe Valley to recidivist offenders with drug or alcohol problems, mental impairment, homelessness, disability, or inadequate familial support, which has contributed to their offending. The breadth of the target group is managed with a multidisciplinary case management team co-located in the court building who refer CISP participants to services such as drug and alcohol rehabilitation, mental health treatment, housing and other services related to their psychosocial and criminogenic needs. A qualified caseworker conducts a risk assessment which is used to assist the magistrate to determine the most appropriate of three available levels of intervention. The lowest risk group, ‘Community Referral’, receive simple referrals (as the name suggests), with no

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76 New York also has a community court, the Red Hook Community Justice Center in New York: Center for Court Innovation, Red Hook Community Justice Center <http://www.courtinnovation.org/project/red-hook-community-justice-center>.
78 Neighbourhood Justice Centre, above n 41, 10.
case management or judicial monitoring. A placement into the ‘Intermediate’ or ‘Intensive’ levels will determine the degree of supervision and perhaps also the duration of participation, up to the four-month maximum.79 An evaluation in 2009 found that a sample of 200 CISP completers over the two-year follow-up period had 10 per cent lower recidivism rates than a matched control group.80

A number of other rehabilitation programs are delivered from mainstream magistrates’ courts across Australia, ie, the general criminal lists. These programs are often known by acronyms, such as CREDIT, MERIT, QMERIT, CISP, POP, STIR, CARDS and CADAS.81 As with the dedicated solution-focused courts, an offender’s satisfactory performance on the program is taken into account and may result in a sentence reduction or in some cases, the discharge of the matter. Generally, these programs have produced positive results.82 A detailed examination of the effectiveness of these programs is doubtless beyond the reader’s forbearance, but the New South Wales MERIT program, as an illustrative example, is worth a brief mention. MERIT is a drug diversion initiative available in the 65 New South Wales Local Courts with the busiest criminal caseloads.83 MERIT provides three months of drug and alcohol abuse treatment to defendants whilst on bail. An evaluative study followed participants for two years after being accepted into the program. Compared to members of a control group, MERIT program completers were 12 per cent less likely to reoffend. When all MERIT participants (ie, including non-completers) were compared to the control group, they were 4 per cent less likely to reoffend, although this outcome was not considered to be statistically significant.84 The most recent available data shows that 71.3 per cent of offenders accepted onto the MERIT program completed, having met all program requirements, which is the highest rate since the program’s inception.85


81 The full names of these programs are: Court Referral of Eligible Defendants into Treatment (NSW) (‘CREDIT’); Court Referral and Evaluation for Drug Intervention and Treatment (NT) (‘CREDIT’); Court Referral and Evaluation for Drug Intervention and Treatment and Bail Support Program (Vic) (‘CREDIT’); Magistrates Early Referral into Treatment (NSW) (‘MERIT’); Queensland Magistrates Early Referral into Treatment (Qld) (‘QMERIT’); Court Integrated Services Program (Vic) (‘CISP’); Pre-sentence Opportunity Program (WA) (‘POP’); Supervised Treatment Intervention Regime (WA) (‘STIR’); Court Assessment and Referral Drug Scheme (SA) (‘CARDS’); Court Alcohol and Drug Assessment Service (ACT) (‘CADAS’).


VI THE COST-EFFECTIVENESS OF SOLUTION-FOCUSED METHODS

Research has also demonstrated that drug courts and MHCs are cost-effective. Although drug court and MHC programs can appear to be expensive, they save money in the medium and long term. Many US studies have demonstrated that drug courts and MHCs are cost-effective because of the costs saved from imprisonment and reduced levels of offending. These studies might not be relevant to the Australian context where costs are different. A number of costs studies have, however, been undertaken in Australia. Their findings are qualified insofar as not all costs and savings can be reliably quantified. At least two Australian studies have attempted to assess cost-effectiveness broadly by including savings from reduced levels of criminal activity as well as the saved costs of imprisonment. The costs measured were the costs of the solution-focused court programs including court time, and assessment and health and other services delivered by external agencies. A cost–benefit analysis was conducted by PricewaterhouseCoopers as part of CISP evaluation (discussed in the previous section) based on the finding of a 10 per cent reduction in recidivism among participants. Benefits were assessed using scenarios which respectively assumed that the 10 per cent reduction remained constant for 30 years, five years and (involving no assumption) just the two-year period of the evaluation. Using that most conservative two-year period, on a net present value basis, the CISP saved taxpayers $2091574, which equates to a cost–benefit ratio of 1.7. Most of that saving involved saved costs of imprisonment. If the recidivism rate of CISP completers remained lower than comparable offenders beyond the two-year period, naturally, the savings would be greater.

A 2006 review of the Perth Drug Court (‘PDC’) quantified the savings from reduced recidivism by collating the type and comparative frequency of offences

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87 See, eg, Carey and Finigan, above n 86, 46. Carey and Finigan include savings from reduced levels of victimisation as an additional ‘point of interest’, but not all US cost–benefit evaluations include this measure because the benefits accrue privately: at 46.


89 PricewaterhouseCoopers, above n 88, 19–21.
committed by the PDC cohort; averaging the cost of those offences into a unit cost; and conservatively calculating savings based on the avoidance of just one act of recidivism. These were added to the saved costs of imprisonment and community supervision; and compared to direct PDC court costs plus the external costs of assessment, treatment, and service delivery. The review found that the PDC delivered substantial costs savings, paid for itself quickly and delivered better community safety outcomes. The CISP and PDC evaluations’ findings of significant financial benefits are additionally conservative because many other types of future savings were not factored in, such as police, prosecutorial, court and health system costs, and the costs of victimisation. The wider economic benefits of offender rehabilitation were also disregarded, such as the flow-on effects of employment.

Other Australian cost-effectiveness studies identified for this research have similarly omitted many of the hard-to-calculate variables from their calculations. Significantly, it seems that more of the savings and benefits than the costs were omitted. The following studies manage to identify the costs of drug court processing fairly inclusively but rely on savings of the cost of a prison sentence on the index offence/s as a proxy for all savings and benefits. Accordingly, the studies do not take into account any savings or benefits from reduced levels of offending, including the costs savings of policing, prosecutions, court processing, victimisation, health care, and the financial benefits that flow to offenders, victims and the community of improved health and productivity.

A 2014 evaluation of the Drug Court of Victoria (‘DCV’) found that the DCV was cheaper than imprisonment and more effective in terms of reducing recidivism. For example, KPMG calculated the costs of the DCV per participant to be $32,210 in comparison to the averaged imprisonment costs per matched control group offender, which were $197,000. Thus, while the unit cost of the

90 Department of the Attorney-General (WA), above n 70, 33–4. The use of just one recidivist act is conservative because most of the cohort commits multiple offences: at 34.
91 Ibid 28–34.
92 Ibid 35–6.
93 Ibid 28.
95 KPMG, above n 94, 92–3; Stephen Goodall, Richard Norman and Marion Haas, Centre for Health Economics Research and Evaluation, ‘The Costs of NSW Drug Court’ (Crime and Justice Bulletin No 122, NSW Bureau of Crime and Statistics and Research, September 2008) 1, 9, 13–14; Crime Research Centre, University of Western Australia, above n 94, 9.
DCV is high in comparison with other modes of court processing, it saved the state imprisonment costs of $1 212 840 over a two-year period.96 Studies of the Drug Court of New South Wales (‘DCNSW’) in 2002 and 2008 found that the DCNSW was more cost-effective than traditional case processing and sentencing in preventing future offending.97 The first study in 2002 found that the effect size, while significant, was not large.98 Subsequent amendments to DCNSW practice improved screening, lowered the threshold for removing non-performing participants, and increased levels of monitoring and support.99 The second study, in 2008, found that rates of recidivism had improved. The drug court participants were 17 per cent less likely than controls to commit any offence; 30 per cent less likely to commit a violent offence; and 38 per cent less likely to commit a drug offence; during the follow-up period.100 In relation to cost-effectiveness, the second study found that the changes in practice resulted in lower costs of $114 119 per participant.101 Overall, compared to processing and sentencing as usual, the study found that DCNSW resulted in a net saving over the study period of $1.758 million per annum.102

To summarise: sentencing for the purpose of promoting the rehabilitation of appropriate offenders is part of the traditional crime prevention role of courts. Solution-focused courts and methods are one relatively novel way that courts are fulfilling this function in relation to drug-addicted and mentally impaired offenders. There is now an abundance of methodologically rigorous evidence to show that properly resourced, evidence-based solution-focused court programs can achieve better recidivism outcomes in relation to ‘revolving door’ offenders than processing offenders through courts in the usual way. There is emerging evidence that suggests that the effects could be long term. There is also a growing body of reliable evidence that solution-focused methods are more cost-effective than traditional processing of revolving door offenders, and thus, achieve costs savings for taxpayers as well as decreased levels of victimisation.

Is the public generally aware of the existence and achievements of solution-focused courts? Have governments loudly trumpeted these policy success stories? In Australia, the answer to both questions is probably no. Sadly, as Sarre has noted, governments have become too sensitised to the risk of negative spin to

96 KPMG, above n 94, 6. The DCV participant costs include external agency and corrections costs, including the cost of imprisonment sanctions. An average of 23 sanction days was incurred per participant and the estimated daily cost of imprisonment used by the evaluation was $270. Thus, to the direct DCV costs per participant of $26 000, an extra $6210 in imprisonment costs have been added: at 6, 91–2.
97 Lind et al, above n 70, 40, 54, 62; Weatherburn et al, above n 70, 12; Centre for Health Economics Research and Evaluation, above n 94, 8.
98 Weatherburn et al, above n 70, 2, citing Lind et al, above n 70.
99 Weatherburn et al, above n 70, 3–4.
100 Ibid 9.
101 Centre for Health Economics Research and Evaluation, above n 94, 7, 23, 33.
102 Ibid 8, 26, 33.
boast of anything but their punitive criminal justice policies, even when policies actually succeed in reducing crime.\textsuperscript{103}

The next section of this article considers the evidence of popular support for punitive criminal justice policies. Arguably, governments would be democratically justified in implementing punitive policies over more effective evidence-based policies, if they reflected the considered preferences of a majority of citizens.

VII POPULAR PUNITIVITY: RETRIBUTION OR REHABILITATION?

In May 2014, following the implementation by the Queensland Government of a raft of controversial criminal justice measures,\textsuperscript{104} the Legal Affairs and Community Safety Committee (‘the Committee’) of the Queensland Parliament announced an inquiry into strategies to prevent and ‘curb criminal activity, reduce rates of recidivism, and build a safer community’.\textsuperscript{105} One of the matters that concerned the Committee in relation to solution-focused courts was the low level of public confidence in courts generally; the perception putatively held in the community that courts were soft on crime, and the belief that drug-addicted and mentally impaired offenders used their addictions and/or impairments as an excuse to avoid a deserved punitive sentence.\textsuperscript{106} In a representative democracy it is entirely legitimate for governments and opposition parties to take public attitudes into account in formation of policy, provided, arguably, they do so in a

\textsuperscript{103} Rick Sarre, ‘We Get the Crime We Deserve: Exploring the Disconnect in “Law and Order” Politics’ (2011) 18 James Cook University Law Review 144, 159–60.

\textsuperscript{104} Among the measures already introduced by the Queensland Government were: Youth Boot Camps (to replace, inter alia, court-referred youth justice conferencing); disbanding in 2012 of the Sentencing Advisory Council established in 2010; increases in sentences, including new mandatory and mandatory minimum sentences (including for sex offenders who could already be subject to continuing detention under the \textit{Dangerous Prisoners (Sex Offenders) Act 2003} (Qld)); the criminalisation of various types of conduct related to criminal organisations (purportedly to be directed at outlaw motorcycle gangs) including anti-association laws; the introduction of sweeping and draconian powers including rights of warrantless entry by police; presumption of lawfulness of police conduct; the admissibility as evidence of anonymous police intelligence; restrictions of appeal rights; reversal of the onus of proof; membership, including past membership, of outlawed organisations being an aggravating factor in a range of other offences, thus activating much more severe and mandatory minimum sentences; and tougher bail laws. See generally Department of Justice and Attorney-General (Qld), \textit{Safer Streets Crime Action Plan – Youth Justice: Have Your Say} (Report, March 2013) (<http://www.justice.qld.gov.au/__data/assets/pdf_file/0007/177755/safer-streets-crime-action-plan-youth-justice.pdf>); \textit{Vicious Lawless Association Disestablishment Act 2013} (Qld); \textit{Youth Justice (Boot Camp Orders) and Other Legislation Amendment Act 2012} (Qld).


considered and responsible way.\textsuperscript{107} Victoria and New South Wales both have independent statutory bodies to conduct research into, inter alia, public attitudes on sentencing.\textsuperscript{108} Queensland established its own Sentencing Advisory Council in 2010, which, like its southern counterparts, had the statutory functions of conducting research into public attitudes and educating the public on sentencing matters.\textsuperscript{109} That agency was abolished, along with the solution-focused courts, by the incoming Queensland Government in 2012.\textsuperscript{110} The question then arises as to what is really known about the public’s attitude on this topic, or indeed, whether there even is such a monolithic thing as a ‘public attitude’ on the sentencing of drug-addicted and mentally impaired offenders.\textsuperscript{111} This section explores the available research into public attitudes in Australia and considers whether punitive policies putatively based on community attitudes are democratically justified.

It should be noted that ‘law and order’ politics is not just a Queensland phenomenon – all Australian polities have experienced this phenomenon repeatedly over the past few decades.\textsuperscript{112} It should also be observed that there is no consensus about whether politicians, in spruiking ‘tough on crime’ rhetoric, are cynically manufacturing public punitivity; exploiting a media-confected moral panic about crime; or merely expressing an innate and near universal desire to punish those who break social norms.\textsuperscript{113} What is clear, is that politicians believe the public to be supportive of tougher responses to crime, including harsher sentences for offenders.\textsuperscript{114}

Certainly, there is a foundation for these beliefs. There have been decades of opinion polls across Australia conducted by respected research organisations,

\begin{footnotesize}
\begin{enumerate}
\item[108] These bodies are: the New South Wales Sentencing Council, established under the Crimes (Sentencing Procedure) Act 1999 (NSW) pt 8B; and the Sentencing Advisory Council (Vic), established under the Sentencing Act 1991 (Vic) pt 9A. New South Wales also has the Bureau of Crime Statistics and Research (‘BOCSAR’), which is a research agency within the Department of Attorney-General and Justice.
\item[109] Penalties and Sentences Act 1992 (Qld) pt 12, as inserted by Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010 (Qld) s 8.
\item[110] Criminal Law Amendment Act 2012 (Qld) s 17.
\item[114] See, eg, Legal Affairs and Community Safety Committee, above n 105, 238–9.
\end{enumerate}
\end{footnotesize}
which show that the public believe that sentences should be tougher.\textsuperscript{115} The Australian Election Study (AES), for example, has been conducted by the Australian National University (‘ANU’) and its partner universities around the time of every federal election since 1987.\textsuperscript{116} Several thousand participants are randomly drawn from electoral rolls in each state and territory and the AES survey questionnaire sent to prospective participants by post.\textsuperscript{117} Another study, the Australian Survey of Social Attitudes (‘AuSSA’), is a statistically representative national survey mailed to over 10 000 participants drawn from the electoral rolls in each state and territory. The AuSSA has been conducted by the Centre for Social Research at the ANU in 2003, 2005 and 2007,\textsuperscript{118} building on data collected by the predecessor National Social Science Surveys (‘NSSS’), conducted on numerous occasions between 1984 and 2001.\textsuperscript{119} Each of these respected studies has repeatedly found that a sizeable majority of Australians are of the view that courts are too lenient with offenders and that tougher sentences are warranted.\textsuperscript{120} The most recent AES in 2013 found that 70 per cent of Australians agree or strongly agree with the decontextualised proposition that ‘people who break the law should be given stiffer sentences’. That result is remarkably consistent with the result – 71 per cent – found by the 2007 AuSSA when it asked an almost identical question.\textsuperscript{121} Interestingly, when the results of these studies are tracked over time, they reveal a decline in support for stiffer sentences from a high point of 88 per cent in 1987, to 71 per cent in 2004. Since then, support for harsher sentencing (punitivity) has remained stable.\textsuperscript{122}

These general findings are backed by the first major national survey since the 1980s that specifically focused on sentencing and punitivity.\textsuperscript{123} While


\textsuperscript{116} School of Politics and International Relations, ANU College of Arts and Social Sciences, Australian Election Study (31 December 2015) Australian National University <http://aes.anu.edu.au/home>.


\textsuperscript{121} McAllister and Cameron, above n 117, 58.

\textsuperscript{122} Ibid; Indermaur and Roberts, ‘Perceptions of Crime and Justice’, above n 120, 154–5.

methodological limitations of the AuSSA, the AES and the NSSS made comparisons between jurisdictions unreliable, this study was specifically designed to compare punitivity across jurisdictions.\textsuperscript{124} Despite quite significant differences in rates of imprisonment across Australia,\textsuperscript{125} levels of punitivity were relatively uniform. Western Australia was the only jurisdiction with a statistically significant variation from levels of punitivity elsewhere, but the study’s authors caution that the effect size was small. Based on responses to seven items, each with a five-point Likert response scale, a punitivity score of between seven and 35 was assigned. Western Australia was the most punitive jurisdiction (24.94), but less than 1.2 ahead of the Australian mean (23.75). Queensland came in at 24.23. The three states with the lowest scores were New South Wales, Victoria and South Australia, all with scores under 24.\textsuperscript{126} An interesting correlation is that these are the three states with independent institutions specifically tasked with educating the public about sentencing matters.\textsuperscript{127}

Despite these seemingly unambiguous findings, there are some cogent reasons for not taking Australian punitivity at face value. The first is methodological. While sampling might be randomised and representative, the non-response rates are high, creating a risk of distortion.\textsuperscript{128} While there is no agreed benchmark, a non-response rate of over 50 per cent risks the integrity of the data because non-respondents might be relevantly different from respondents.\textsuperscript{129} More problematically, top-of-the-head responses to decontextualised survey questions can be unstable, hence unreliable, especially on complex topics. Green, drawing on Yankelovich’s work, distinguishes between the concepts of opinion and reflective public judgment, arguing that the latter is more considered than the former, more enduring, more likely to be based on knowledge and experience and more mutually consistent with other attitudes on related matters.\textsuperscript{130} Another problem is acquiescent response bias, which results

\textsuperscript{124} Ibid 373–4.
\textsuperscript{125} The study draws on Australian Bureau of Statistics data from 2009 showing rates of imprisonment per 100 000 adults ranging from 74.8 (ACT) to 260.5 (WA), plus a significant outlier of 657.6 (NT): ibid 374.
\textsuperscript{126} Ibid 375, 378–9.
\textsuperscript{127} Ibid 373. Those institutions are the NSW Sentencing Council, the Sentencing Advisory Council (Vic) and the Courts Administration Authority (SA).
\textsuperscript{128} Eg, 8133 surveys were returned for AuSSA 2007 from an initial sample of 20 000: Roberts and Indermur, ‘What Australians Think about Crime and Justice’, above n 120, 3. In 2013, the AES had a response rate of 42.5 per cent; School of Politics and International Relations, ANU College of Arts and Social Sciences, Election (Voter) Studies (30 March 2015) Australian National University <http://aes.anu.edu.au/election-voter-studies>. Baruch suggests that acceptable response rates for survey research with general populations fall between 40 per cent and 80 per cent: Yehuda Baruch, ‘Response Rate in Academic Studies – A Comparative Analysis’ (1999) 52 Human Relations 421, 434; see also Yehuda Baruch and Brooks C Holtom, ‘Survey Response Rate Levels and Trends in Organizational Research’ (2008) 61 Human Relations 1139, 1140.
Addressing the Solution-Focused Sceptics

from the tendency, negatively correlated with education, to respond to survey questions affirmatively. Gelb also notes that questions calling for a Likert agreement with a statement such as, ‘people who break the law should be given stiffer sentences’ are highly artificial because they conceal real-world constraints, such as the budgetary costs of imprisonment.

The second problem with punitiveness findings derived from surveys is that the public is poorly informed on criminal justice matters and its views on sentencing are underpinned by a number of fundamental misconceptions. First, despite a general decline in rates of crime, repeated studies show that Australians believe that crime is constantly increasing, especially violent crime. Additionally, Australians overestimate the proportion of crime that involves violence; overestimate levels of recidivism; underestimate the proportion of offenders imprisoned; underestimate maximum penalties and have extremely poor levels of knowledge about alternatives to imprisonment. The holding of these misconceptions about crime are the strongest predictors of punitiveness, stronger than any demographic variable, and, surprisingly, stronger than victim status. A related problem concerns the generalisability of punitiveness findings to all types of offending. A Canadian study showed that when answering a question about sentencing generally, a disproportionate number of respondents had been thinking of violent or repeat offenders, and that these respondents were much more likely than other respondents to think that sentences were too lenient.

The highly plausible conclusion reached by Gelb and many other researchers in the field, is that punitiveness findings reached via decontextualised surveys are merely a ‘methodological artefact’.

Some researchers have attempted to build a more nuanced understanding of Australian attitudes to crime and sentencing. In 2009 and 2010, a team led by Geraldine Mackenzie conducted an Australia-wide research study which generated qualitative and quantitative data about attitudes towards sentencing and public confidence in the courts.139 ‘Phase I’ of the project was designed to provide baseline data about first, public confidence in the courts and sentencing, and second, about sentencing and punishment (punitive). A stratified random sample of more than 6000 Australians from all jurisdictions participated in telephone interviews using multiple items and five-point Likert scales to test these attitudes.140 Unsurprisingly, majorities were not confident that offenders are appropriately punished (56 per cent), nor confident that courts give punishments which fit the crime (53 per cent).141 Interestingly, in the same interview, a similar majority (57 per cent) agreed that judges impose appropriate sentences most of the time.142 The punitive measures were even clearer. Convincing majorities agreed that offenders should be given stiffer sentences (66 per cent); that courts are too soft on offenders (67 per cent); and that rehabilitation is not taken seriously by offenders (64 per cent).143 Participants also expressed confidence in the efficacy of tougher punishment as a crime prevention measure. Participants agreed that high crime rates indicate that punishments are not severe enough (57 per cent); that the tougher the sentence, the less likely offenders are to commit more crime (52 per cent); and that the most effective response to crime is harsher sentences (60 per cent).144

However, once participants were asked to think about different types of crime, support for tougher sentencing became less clear. For example, while 79 per cent thought sentences were too lenient for violent crime, only 51 per cent thought so for drug crime, including for sale and possession.145 And when presented with alternatives to prison, majorities agreed that fewer prison sentences should be given to non-violent offenders (55 per cent); and that instead of prison: young offenders should have programs to develop job skills, values and self-esteem (80 per cent); mentally ill offenders should have treatment (82 per cent); drug-addicted offenders should have an intensive program of rehabilitation and counselling (66 per cent); and non-violent offenders should be given community corrections orders (64 per cent).146 Researchers concluded that the participants indeed demonstrated relatively high levels of punitivity; that they lacked confidence in sentencing; and wanted harsher penalties. But the participants also supported alternatives to prison in a range of circumstances,

139 Mackenzie et al, above n 138.
140 Ibid 48–9, 51. ‘Phase I’ of the project achieved an overall response rate of 67 per cent: at 50.
141 Ibid 51. ‘Not confident’ includes ‘not very’ and ‘not at all’ confident.
142 Ibid. ‘Agreed’ includes ‘strongly’ agreed.
143 Ibid 52.
144 Ibid. ‘Agreed’ includes ‘strongly’ agreed.
145 Ibid 53.
suggesting that public opinion is more nuanced than portrayed by top-of-the-head opinion polling.  

Some researchers have attempted to discover what the public thinks when presented with detailed information about real cases. In Lovegrove’s Victorian study, the judges involved in sentencing four cases involving six offenders presented information to groups of participants formed from 471 individuals. These ordinary, but relatively serious cases included multiple rapes of a young woman at knifepoint; intentionally causing serious injury (‘ICSI’) involving multiple stabbings of two men by a young couple; embezzlement of more than $1,000,000 from an employer by a senior manager and his female subordinate; and an armed robbery of $1100. The information was orally presented to the groups in narrative form and included details about the offence and its sequelae for the victim, as well as the offenders’ antecedents and the circumstances of mitigation. Care was taken to ensure that the offenders were portrayed as real people. All had strong claims in mitigation. The judges then presented each group with information about sentencing principles, practices, and options. Participants were then asked to devise the appropriate sentence. Each participant privately and anonymously delivered his or her written sentence to the researcher, and the judge then informed the group of the actual sentence ordered. A focus group was then conducted where participants discussed their reasons for sentence. These discussions revealed that many of the participants had been moved by the mitigating factors, and especially those that implied need for treatment and good prospects for rehabilitation. A comparison between the judges’ sentences and the participants’ median sentences revealed that the participants were, overall, more lenient than the judges, for almost all offences. The courts’ sentences in years of non-parole periods of imprisonment, for the rape, the armed robbery and the male embezzlement offender respectively were: 6, 4.5 and 3.5. The participants’ median sentences for the same offences were: 4.9, 1.9 and 2. The percentage of participants whose sentences were more lenient than the judges’ for those offences were, respectively, 63 per cent, 86 per cent and 71 per cent. The exception was the sentence for the male ICSI offender. The judge’s three-year sentence was lower than the participants’ median of 3.2 years and only 35 per cent of participants’ sentences were lower than the court’s. Both female offenders avoided imprisonment. The female embezzlement offender was given a two-year suspended sentence and the female ICSI offender sentenced to

147 Ibid 56–7.
149 Ibid 205; Austin Lovegrove, ‘Putting the Offender Back into Sentencing: An Empirical Study of the Public’s Understanding of Personal Mitigation’ (2011) 11 Criminology and Criminal Justice 37, 43.
151 Lovegrove, ‘Putting the Offender Back into Sentencing’, above n 149, 43.
20 months of youth training. Almost identical sentences were selected by 77 per cent (median two years) and 54 per cent (median two years) of participants.153

A related research approach designed to overcome the notion of an abstracted offender was conducted in Tasmania. This two-year project asked juries about sentencing in the case they had just heard. After delivering the verdict, participating jurors were invited by the presiding judge to remain to hear sentencing submissions. Before the judge passed sentence, ‘Stage One’ participants were asked to complete a short questionnaire requiring them to nominate the appropriate sentence.154 The results allowed a direct comparison between the punitivity of judges and jurors in the particular cases. Across all offence types, jurors were marginally less punitive than the judges. Exactly 50 per cent of participants selected a less severe sentence than that imposed by the judge, while 46 per cent selected a more severe sentence. There was variation among types of offences. For sex offences, the jurors’ selected ‘sentence was more severe than the judge’s in 53 [per cent] of cases’ and in 47 per cent of cases involving non-sexual violence. Conversely, the jurors’ sentence was less severe than the judges’ in 66 per cent of property offence cases and, in drug offence cases, the jurors were evenly split between being more and less severe than the judge.155

In ‘Stage Two’ of Warner’s research, the participants were sent the judge’s sentencing remarks indicating the actual sentence imposed and a short booklet about crime trends and sentencing. The jurors were asked to read these before completing another questionnaire. Aggregating offence types, more than 90 per cent of respondents agreed that the judge’s actual sentence was (very or fairly) appropriate.156 There was an interesting contrast between the jurors’ views about sentencing generally and in the case they sat on. Despite 66 per cent considering that sentences for violent offences were too lenient, only 35 per cent wanted a more severe sentence in their own case. Despite 70 per cent considering that sentences were too lenient for sex offences, only 46 per cent wanted a more severe sentence in their own case.157 Follow up after Stage Two revealed that the jurors’ earlier views that sentencing was too lenient had moderated somewhat, but differentially, according to offence type. Jurors no longer considered sentences for property offences to be too lenient, were less likely to view sentences for violent offences to be too lenient, but retained their views that sentences for sex offences were too lenient. It is unclear whether the change of views arose from the experience of witnessing a case and the sentencing process, or the provision of crime and sentencing information, or some combination of both.158

156 Ibid 2.4.
158 Ibid 4–5.
This Australian research is supported by overseas research which has made similar findings. The research also accords with Australian research which demonstrates that a majority of people are supportive of alternatives to prison, and especially for mentally impaired, drug-addicted, young and non-violent offenders. And, when presented with a forced choice between building more prisons and making greater use of alternatives to prison, 74.3 per cent of respondents to a Sentencing Advisory Council (Vic) study preferred the latter.

Collectively, the research demonstrates that when informed, the public are not as unambiguously punitive as has been commonly believed. Research that delves beyond a top-of-the-head response demonstrates that the Australian public are more nuanced in their attitudes to sentencing and are open to the use of rehabilitative sentencing alternatives, such as those offered by solution-focused courts.

**VIII CONCLUSION**

Taking uninformed voters where they want to go is easy. Taking them where they should go is the role of the leader. To make what is unpopular popular is the supreme test of leadership.

Richard Nixon (1990)

In 2014, the Australian imprisonment rate grew to a ten-year high of 185.6 per 100 000 adult population, representing an increase of 16.9 per cent from the 2004 rate of 158.8. From 1996 when national crime data collection and publication began until 2012, the Australian Institute of Criminology has recorded gradual overall declines in the number of reported homicides, assaults, robberies and all recorded categories of property crime. The only violent crime to buck that trend is sexual assault. The increase in this category is likely to reflect an increased willingness to report sexual assaults, because rates of sexual assault victimisation are the same now as they were in 1996 (following an increase during the first decade of this century).

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161 Ibid 9.
164 Australian Institute of Criminology, above n 133, 2, 4.
165 Ibid 2. The number of abductions increased between 1996 and 1998, remained relatively stable within a small range for the ensuing decade, and have generally declined from 2008 to 2012: at 2.
166 Ibid 6.
An Australian Senate committee report has noted the increase in rates of imprisonment, despite falling crime rates.\textsuperscript{167} The increase in prisoner numbers is placing justice systems under an increasing financial burden. Recurrent expenditure on prisons in Australia amounted to $2.4 billion in 2011–12.\textsuperscript{168} Due to prison overcrowding, prisoner health problems have increased and those health problems are transferred to society when the prisoner is released.\textsuperscript{169} The Committee concluded that the rate of imprisonment in Australia has now reached ‘an unacceptable level’.\textsuperscript{170}

This article has argued that courts have a traditional and legitimate role in promoting the rehabilitation of offenders as part of their sentencing function. There is now an abundance of rigorous research proving the effectiveness of solution-focused courts in reducing recidivism among targeted groups of offenders, including drug-addicted and mentally impaired offenders. One important limitation of the overall body of research was that in most cases, analysis periods were only two or three years, resulting in uncertainty about long term effects. More longitudinal research is needed, but emerging evidence now suggests that effects could continue beyond a decade after entry onto a solution-focused program.\textsuperscript{171} Research also demonstrates that even greater recidivism reduction effects can be achieved with stronger adherence to evidence-based rehabilitative programs.\textsuperscript{172} Moreover, solution-focused courts are much more cost-effective than traditional criminal justice processing and sentencing dispositions. Despite knowledge of the abundant research to support those claims, the Queensland Parliamentary Committee charged with identifying strategies to prevent and reduce crime failed to recommend the reopening of Queensland’s hastily closed solution-focused courts.\textsuperscript{173}

Australia’s eight jurisdictions have a diversity of penal policies, and yet, research in Australian states and territories reveals only minor differences in levels of public punitivity. That strongly suggests that penal policies are not a reflection of public attitudes but are instead, political initiatives devised for and sold to a largely uninformed, and putatively punitive electorate.\textsuperscript{174} This article has challenged the uncritical acceptance of the ‘punitive public’. Research reveals that for certain types of offences and offenders, Australians are open to the use of rehabilitative sentencing alternatives, such as those offered by solution-focused courts. Executive governments should, arguably, lend their support to solution-


\textsuperscript{168} Ibid 19.

\textsuperscript{169} Ibid 21, 23–5.

\textsuperscript{170} Ibid 17.

\textsuperscript{171} Finigan, Carey and Cox, above n 59, 13; Mackin et al, above n 64, 51.

\textsuperscript{172} Gutierrez and Bourgon, above n 53, 12–13.

\textsuperscript{173} Legal Affairs and Community Safety Committee, above n 105.

focused court programs as part of their multi-pronged, evidence-based crime prevention strategies.