

BEYOND THE 'THREE DOGMAS OF JUVENILE JUSTICE': A RESPONSE TO WEATHERBURN, MCGRATH AND BARTELS

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I INTRODUCTION

In 'Three Dogmas of Juvenile Justice', Weatherburn, McGrath and Bartels identify three 'assumptions' or 'dogmas' about youth justice, on which they claim 'juvenile justice policy in Australia currently rests'.¹ These assumptions are:

- that contact with the court system increases the risk of further offending (ie, is criminogenic);
- that youth justice conferencing is more effective than traditional justice in reducing the risk of further offending; and
- that young people spontaneously desist from offending or 'grow out of crime'.

After assessing the evidence in support of these assumptions, and finding it lacking, the authors suggest that what they see as the current 'hands off' approach to youth justice, said to be utilised in New South Wales and other Australian jurisdictions, should be reconsidered.² Further, they propose the implementation of a new risk/needs assessment system that would identify young people at risk of developing ongoing offending behaviour at an earlier stage of their contact with the criminal justice system.

It is extremely valuable to have robust critique and debate around youth justice policy in Australia. Clearly Weatherburn, McGrath and Bartels' article was written in this spirit. However, given the influence that Weatherburn, McGrath and Bartels' article may have on youth justice policy – particularly as the authors recommend the abandonment³ of these assumptions, and 'life without

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1 Don Weatherburn, Andrew McGrath and Lorana Bartels, 'Three Dogmas of Juvenile Justice' (2012) 35 *University of New South Wales Law Journal* 779.

2 See also Natasha Wallace and Geesche Jacobsen, 'Children Reoffend as System Goes Soft', *Sydney Morning Herald* (Sydney), 28 April 2012, 1.

3 Weatherburn, McGrath and Bartels, above n 1, 780.

the dogmas⁴ – it is vital that further discussion take place on these issues. This is especially the case given that in the current political climate legislators and policy makers hardly need encouragement to implement punitive and/or unevidenced policies and practices in youth justice.⁵ Indeed, media coverage of a preliminary analysis of the data presented by Weatherburn, McGrath and Bartels was quick to conclude – perhaps incorrectly – that the New South Wales youth justice system is failing due to its being too ‘soft’.⁶ This media response indicates something of the possible unintended political consequences of proposals for youth justice policy reform and the need to be very precise about the arguments being put forward.

In this context, this article aims to contribute to the emerging conversation about the direction of youth justice in Australia; in doing so, it seeks variously to challenge, clarify, build upon, and provide further context to a number of key points made by Weatherburn, McGrath and Bartels in their dismissal of the ‘three dogmas’ of youth justice in Australia.

This article is divided into three parts. Part II critically examines each of the three assumptions about youth justice identified by Weatherburn, McGrath and Bartels, and the authors’ claim that these assumptions are ‘so widely accepted and so rarely challenged they might fairly be described as dogmas’.⁷ Part III considers whether these three assumptions can be fairly viewed as ‘the pillars on which juvenile justice policy in Australia currently rests’ as Weatherburn, McGrath and Bartels suggest.⁸ Part IV considers the way forward for youth justice policy in Australia.

II DO THESE ASSUMPTIONS CONSTITUTE DOGMAS?

In this section, we critically discuss the three assumptions identified by the authors in turn, and consider whether they can fairly be considered ‘dogmas’ in relation to youth justice policy in Australia.

A Assumption 1: That Contact with the Court System Increases the Risk of Further Offending

Weatherburn, McGrath and Bartels claim that ‘[t]he notion that contact with the court system is criminogenic underpins efforts to divert young offenders away from court’,⁹ and that this ‘dogma’ is based largely on labelling theory.¹⁰ This is not entirely accurate.

4 Ibid 806.

5 For example, both the Queensland and Northern Territory governments have recently committed to the implementation of boot camps for young offenders, despite the lack of evidence that boot camps reduce offending: see below nn 88, 89.

6 Wallace and Jacobsen, above n 2.

7 Weatherburn, McGrath and Bartels, above n 1, 779.

8 Ibid.

9 Ibid.

Rather, it must be recognised that in large part, adherence to youth justice policies that divert young people away from court are premised not on the belief that *court increases the risk of further offending* (ie, is criminogenic) but that it increases the *risk of further contact with the criminal justice system*. These are obviously related issues but they are empirically different. That is, the assumption is not about the court being criminogenic, but that contact with it increases the chances of a return visit. Such a return visit may have nothing to do with further offending.

Research suggests that young people – especially highly vulnerable groups of young people such as sex and gender diverse young people,¹¹ and young people on bail, in out-of-home care and/or from rural, regional or remote areas (and by extension Indigenous young people) – can easily become ‘caught up’ in the criminal justice system.¹² This is not necessarily the result of increased offending, but because of the heightened scrutiny they come under once ‘known’ to the system.¹³ This is problematic not only because ongoing contact with the court system can have adverse impacts on young people, their families and the wider community (eg, affecting young people’s family relationships, educational and employment opportunities, and increasing government costs), but because it increases young people’s risk of detention.¹⁴ Young people diverted under each jurisdiction’s youth justice legislation cannot be placed in juvenile detention, either on a sentenced order, or on a period of custodial remand. Having diversionary measures in place thus not only reduces young people’s contact with the court, but their risk of detention.

Even if court is not criminogenic in and of itself, as Weatherburn, McGrath and Bartels¹⁵ argue, detention certainly is.¹⁶ Further, and as discussed in more detail below, minimising young people’s contact with detention is a principle contained in a number of international human rights frameworks to which Australia is a signatory. The point here is that it is not solely (or even primarily) court *processes* that are deemed problematic in the youth justice sector, but the potential *outcomes* of court. This rationale is highlighted in particular in Victoria,

10 Ibid 780.

11 Angela Dwyer, ‘“It’s Not Like We’re Going to Jump Them”: How Transgressing Heteronormativity Shapes Police Interactions With LGBT Young People’ (2011) 11 *Youth Justice* 203; Angela Dwyer, ‘Policing Visible Sexual/Gender Diversity as a Program of Governance’ (2012) 1 *International Journal of Crime and Justice* 14.

12 Lesley McAra and Susan McVie, ‘Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending’ (2007) 4 *European Journal of Criminology* 315; Kelly Richards and Lauren Renshaw, ‘Bail and Remand for Young People in Australia: A National Study’ (Australian Institute of Criminology, forthcoming).

13 McAra and McVie, above n 12; Richards and Renshaw, above n 12.

14 Kerry Carrington and Margaret Pereira, *Offending Youth: Sex, Crime and Justice* (Federation Press, 2009)

15 Weatherburn, McGrath and Bartels, above n 1.

16 Uberto Gatti, Richard E Tremblay and Frank Vitaro, ‘Iatrogenic Effect of Juvenile Justice’ (2009) 50 *Journal of Child Psychology and Psychiatry* 991; see generally Edward P Mulvey and Carol A Schubert, ‘Some Initial Findings and Policy Implications of the Pathways to Desistance Study’ (2012) 7 *Victims & Offenders* 407.

where only the court can refer a young person to a youth justice conference (known as a ‘group conference’). Under Victoria’s group conferencing scheme, young people can only be diverted to a conference if they are facing a sentence of a community supervision order or detention.¹⁷ In Victoria, therefore, ‘diversion’ via a conference does not involve bypassing the court process at all – so in no sense do policy makers assume the court appearance itself is criminogenic; rather, young people are diverted from the potential consequences of court. This is also the case in practical terms in other jurisdictions in which referrals to youth justice conferences can be made by the Children’s Court (currently all jurisdictions except Queensland). For example, in New South Wales, more than half of referrals to conferences come from the Children’s Courts.¹⁸ A similar situation exists in the Australian Capital Territory, where during 2010–11, 50 per cent of referrals to youth justice conferences came from the Children’s Court.¹⁹

In summary, to assume that policies which minimise young people’s contact with court are based predominantly on a misunderstanding that court is criminogenic is somewhat reductive. Youth justice policy makers do not subscribe uncritically to the labelling perspective; rather, they are likely aware of the complex interplay of factors that make it difficult for young people to exit the court system once they come into contact with it, and which increase young people’s risk of detention. It follows that to assert that attempts to minimise young people’s contact with the court are based on labelling theory overlooks processes unrelated to labelling via which young people may be exposed to further adverse contact with the criminal justice system. We are not arguing that labelling is absent as a consideration in policy makers’ minds when they discuss diversion, but it is not as central as Weatherburn, McGrath and Bartels assume. Therefore, the authors’ claim that the notion that court is criminogenic constitutes a ‘dogma’ is not entirely accurate.

B Assumption 2: That Restorative Justice Measures Reduce Reoffending Better than Traditional Criminal Justice Measures

Weatherburn, McGrath and Bartels claim that ‘[t]he assumption that RJ [restorative justice] is more effective than traditional justice in reducing reoffending explains why restorative justice occupies such a central place in Australian diversionary schemes’, and that this misguided adherence to restorative justice measures constitutes a ‘dogma’ in Australian youth justice

17 The *Children, Youth and Families Act 2005* (Vic) enables a child’s participation in a group conference if the court is considering imposing a sentence of probation or a youth supervision order. Section 414 of the Act allows the court to defer sentencing for a period not exceeding four months so that a conference can be held and a report prepared for the court. See Department of Human Services Victoria, *Youth Justice Conferencing Fact Sheet* <http://www.dhs.vic.gov.au/__data/assets/pdf_file/0005/660272/General-group-conference-factsheet.pdf>.

18 Noetic Solutions, ‘A Strategic Review of the New South Wales Juvenile Justice System’ (Report for the Minister of Juvenile Justice, Noetic Solutions, April 2010) 52 [193].

19 Community Services Directorate, ‘Annual Report 2010–11’ (Community Services, ACT Government, September 2011).

policy. However, we are not convinced that restorative justice does actually occupy such a central place in youth justice diversionary schemes, or that its place in youth justice policy is based on its capacity to reduce offending.

First, the claim that restorative justice 'occupies such a central place' in youth diversionary schemes is itself contestable. Youth justice conferences are used infrequently in New South Wales and some other jurisdictions.²⁰ Indeed, Weatherburn, McGrath and Bartels' own data show that less than seven percent of young people from the 1999 cohort received a youth justice conference as their index disposition (67.7 per cent received a caution and 25.6 per cent appeared in court). Noetic Solutions' 2010 review of the juvenile justice system in New South Wales found that only about three per cent of all juvenile persons of interest in New South Wales are referred to a youth justice conference by police. The proportion of juvenile persons of interest referred to a youth justice conference is low for both male (4 per cent) and female (2 per cent) young people, and for both Indigenous (4 per cent) and non-Indigenous (3 per cent) young people.²¹ The review²² also found that police referrals to youth justice conferences vary significantly across Local Area Commands. This suggests that, for police at least, commitment to restorative justice measures occupies a more 'central place' in youth diversion in some locations than others. Moreover, there are strict limitations on both the type and seriousness of offences for which young people can be referred to a conference. In New South Wales, for example, under section 35 of the *Young Offenders Act 1997* (NSW), offences that cause death, sexual assault offences, traffic offences where the young person is old enough to hold a license, breaches of apprehended violence orders, and most drug offences are excluded. The 'central place' occupied by youth justice conferencing – in the youth justice system as a whole, or within diversionary schemes specifically – might therefore be understood as more conceptual and symbolic than practical.

Second, in an 'examination of the key juvenile justice legislation around Australia', which aimed to provide 'examples of the [three] assumptions',²³ Weatherburn, McGrath and Bartels provide little evidence of a belief in the capacity of restorative justice to reduce reoffending. The sections of text from legislation and parliamentary debates that they cite in support of their argument contain few references to the perceived capacity of youth justice conferencing to reduce reoffending. For example, while the authors argue that 'all three assumptions ... were invoked in the second reading speech for the *Youth Justice Act 1997* (Tas)',²⁴ they go on to provide evidence of this claim in relation to two of the 'dogmas' (ie, that contact with the court system is criminogenic; and that

20 Noetic Solutions, above n 18, 15 [53]; Kelly Richards, 'Juveniles' Contact with the Criminal Justice System' (Monitoring Report No 7, Australian Institute of Criminology, 2009) 52–65.

21 Noetic Solutions, above n 18, 16 [54].

22 Ibid 16 [56].

23 Weatherburn, McGrath and Bartels, above n 1, 781.

24 Ibid 787.

most young people grow out of crime). The evidence proffered in support of the remaining ‘dogma’ –that restorative justice is more effective than traditional justice in reducing reoffending – is as follows:

The proposed legislation is designed to create a system based on restorative justice in cases where the harm needs to be put right. ... The legislation is based on young persons being held responsible for their actions, together with promoting the idea of diverting young people away from court in the first instance.²⁵

This demonstrates parliamentarians’ concerns about young people being held accountable, making amends and repairing harm, and minimising their contact with the criminal justice system – some of the same concerns that prompted the emergence of restorative justice measures for young people around Australia and internationally. However, the authors provide no support here for their contention that a ‘dogma’ about the capacity of restorative justice to reduce offending underpinned the introduction of this legislation.

Indeed, for only two jurisdictions – Victoria and Queensland – do the authors provide any evidence of the influence of the ‘dogma’ that restorative justice measures reduce reoffending better than traditional justice measures on youth justice legislation. In Victoria, the capacity of the Children, Youth and Families Bill 2005 (Vic) to ‘prevent recidivism’ was to be ‘boosted by the incorporation of group conferencing into the bill ... Group conferencing aims to ... reduce the likelihood that they [young people] will reoffend’.²⁶ In Queensland, one of the potential benefits of youth justice conferencing to the community is ‘fewer offences being committed’.²⁷ The authors provide no further evidence in support of their claim that a misguided assumption about the capacity of youth justice conferencing to reduce recidivism constitutes a ‘dogma’ or underpins youth justice in Australian jurisdictions.

This is not to suggest that such views do not exist among youth justice policy makers, practitioners and others in the youth justice sector; clearly, they do.²⁸ What the authors inadvertently highlight in their attempt to provide evidence of this ‘dogma’, however, is the sheer diversity of aims that legislators had in mind in implementing youth justice conferencing. As has been recognised elsewhere, the restorative justice movement, of which youth justice conferencing is just one manifestation, had numerous, diverse antecedents, and was premised on numerous, diverse aims.²⁹ As the authors’ own examples demonstrate, some key aims of youth justice conferencing around Australia were: reducing government spending on youth justice; minimising young people’s contact with the criminal

25 Ibid.

26 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1375 (Sherryl Garbutt), quoted in Weatherburn, McGrath and Bartels, above n 1, 784.

27 *Youth Justice Act 1992* (Qld) s 30(4)(d), quoted in Weatherburn, McGrath and Bartels, above n 1, 785.

28 See, eg, Youth Justice Coalition, Submission No 24 to Department of Attorney-General and Justice (NSW), *Review of the Young Offenders Act 1997 and the Children Criminal Proceedings Act 1987*, 9 December 2011.

29 See generally George Pavlich, *Governing Paradoxes of Restorative Justice* (Glasshouse Press, 2005); Kelly Richards, ‘*Rewriting History*’: *Towards a Genealogy of ‘Restorative Justice’* (PhD thesis, University of Western Sydney, 2007).

justice system; empowering victims and communities to participate in the criminal justice process; repairing the harm caused by youth offending; and holding young people accountable for their offending. Other key aims included: enhancing due process for young people; building community confidence in the criminal justice system; involving parents of young offenders in the criminal justice process; giving victims a voice; creating a system better able to respond to offending by Indigenous young people; and addressing some of the identified shortcomings of the traditional court system (eg, by giving offenders an active role to play).³⁰

For example, in introducing the new youth justice conferencing scheme in New South Wales, the then Attorney-General Jeff Shaw stated that:

Conferences are focused upon the young person taking positive action to put right the wrong they have done. ... At a conference, young people are required to consider and articulate what they have done, face their extended family and the victim, and actively participate in analysing and making decisions about their offending behaviour. ... The participation of the young offender's parents or guardians is important as a means of empowering families to play a role in and take more responsibility for their child's behaviour.³¹

Restorative justice is thus premised on what might seem less tangible objectives than reducing reoffending, such as enhancing 'accountability', 'empowerment', 'participation' and 'voice'. Importantly, and as discussed in more detail below, many of these aims reflect normative concerns about how young people in trouble with the law should be responded to, rather than a predominantly empirically reductive 'what works' approach aimed at reducing future offending.

Moreover, the growing empirical evidence now shows that restorative justice practices, including youth justice conferencing, have met many of these varied objectives. Weatherburn, McGrath and Bartels³² themselves acknowledge that restorative justice measures are popular with crime victims. As Sherman and Strang have identified, the evidence is fairly consistent that victims are more satisfied with restorative justice measures than they are with court processes.³³ Hayes and Daly³⁴ demonstrated that while two thirds of victims who participated in a conferencing process believed the offender would again be in trouble with the criminal justice system, 90 per cent thought the government should nonetheless keep the conferencing system. This demonstrates that support for

30 See, eg, Young Offenders Bill 1997 (NSW); see generally Pavlich, above n 29; Richards, above n 29; Hennessey Hayes and Kathleen Daly, 'Youth Justice Conferencing and Reoffending' (2003) 20 *Justice Quarterly* 725.

31 New South Wales, *Parliamentary Debates*, Legislative Council, 21 May 1997, 8960–2 (Jeff Shaw).

32 Weatherburn, McGrath and Bartels, above n 1, 807.

33 Lawrence W Sherman and Heather Strang, 'Restorative Justice as a Psychological Treatment: Healing Victims, Reintegrating Offenders' in Graham J Towl and David A Crighton (eds), *Forensic Psychology* (British Psychological Society and Blackwell Publishing, 2010) 398; see also Don Weatherburn and Megan Macadam, 'A Review of Restorative Justice Responses to Offending' (2013) 1 *Evidence Base* 1 for a critical review of the evidence about victim satisfaction with restorative justice.

34 Hayes and Daly, above n 30, 757.

restorative justice is not inextricably linked with assumptions about its capacity to reduce reoffending. Restorative justice measures also meet many of the other aims on which they were premised; for example, by definition, they provide opportunities for a range of parties excluded from court processes to have a voice and to actively participate in the criminal justice process. Youth justice conferences have also been shown, on the whole, to be more cost-effective than court.³⁵

The point here is that while a perceived capacity to reduce reoffending was undoubtedly among the premises upon which youth justice conferencing was established, the appeal of restorative justice is much broader than this allows, and the commitment to it cannot be understood solely or even primarily as a result of a misguided adherence to this assumption. While Weatherburn, McGrath and Bartels are right to suggest that youth justice conferencing has become a taken for granted part of youth justice systems (although it should be noted that court-referred conferences have recently been abolished in Queensland),³⁶ these wider benefits no doubt form part of the enduring attractiveness of restorative justice measures.

Thus while Weatherburn, McGrath and Bartels are correct in their summation of the evidence about the limited capacity of youth justice conferencing to significantly reduce reoffending (as has long been recognised in the evaluation literature on restorative justice measures),³⁷ they incorrectly assume that the strong support for youth justice conferencing is premised primarily on a misguided assumption about its capacity to reduce reoffending.

The authors also incorrectly state that youth justice conferencing (and the ‘dogma’ that it reduces reoffending better than traditional justice) is ‘derived from Braithwaite’s theory of reintegrative shaming.’³⁸ While the theory of reintegrative shaming and the practice of restorative justice are in some ways compatible³⁹ – with Braithwaite even later wishing he had called his theory ‘restorative shaming’⁴⁰ – they emerged quite independently of one another, with restorative practices emerging at least as early as the 1970s,⁴¹ well before

35 Andrew Webber, ‘Youth Justice Conferences Versus Children’s Court: A Comparison of Cost-Effectiveness’ (Crime and Justice Bulletin No 164, NSW Bureau of Crime Statistics and Research, August 2012).

36 Legal Affairs and Community Safety Committee, Queensland Parliament, *Report No. 18: Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012* (2012) 46.

37 Jeff Latimer, Craig Dowden and Danielle Muise ‘The Effectiveness of Restorative Justice Practices: A Meta-analysis’ (2005) 85 *The Prison Journal* 127; Paul McCold and Benjamin Wachtel, ‘Restorative Policing Experiment: The Bethlehem Pennsylvania Police Family Group Conferencing Project’ (Report, Community Service Foundation, May 1998).

38 Weatherburn, McGrath and Bartels, above n 1, 780.

39 However, there are some critical differences. For example, while restorative justice is centrally concerned with repairing harm to victims, Braithwaite’s theory is concerned with reforming offenders rather than assisting victims: Kelly Richards, ‘Taking Victims Seriously? The Role of Victims’ Rights Movements in the Emergence of Restorative Justice’ (2009) 21 *Current Issues in Criminal Justice* 302, 309.

40 John Braithwaite, ‘Restorative Justice and a Better Future’ (1996) 76 *The Dalhousie Review* 9, 15.

41 Kathleen Daly and Russ Immarigeon, ‘The Past, Present, and Future of Restorative Justice: Some Critical Reflections’ (1998) 1 *Contemporary Justice Review* 21; Richards, above n 29.

Braithwaite's⁴² theory of reintegrative shaming. While the parliamentary debate about Young Offenders Bill 1997 (NSW) makes mention of the theory of reintegrative shaming,⁴³ to state that the theory underpins youth justice conferencing is Australia is ahistorical, and significantly overstates the influence of Braithwaite's theory.

Further, the authors' claim that Braithwaite's theory 'suggests that diversion, with or without RJ, ought to be more effective in promoting law-abiding behaviour than stigmatising and degrading offenders (as courts are alleged to do)'⁴⁴ is a misinterpretation of Braithwaite's theory. The theory of reintegrative shaming posits that criminal justice processes that are 'disintegrative' (ie, stigmatising) are more likely to result in offending than 'reintegrative' (ie, non-stigmatising) processes; it is not, however, premised on labelling theory. Indeed, Braithwaite openly refutes Tannenbaum's famous précis of labelling theory – that 'the way out [of increasing the risk of reoffending] is through a refusal to dramatize the evil. The less said about it the better. The more said about something else, still better'.⁴⁵ Braithwaite states that:

No statement could be more starkly contradictory to that which is argued in this book. We will come to the position here that, with certain qualifications, 'the more said about crime the better', that low crime societies are those that do 'dramatize the evil'.⁴⁶

Thus the theory of reintegrative shaming has little to do with diversion. On the contrary, it stresses the importance of censuring offending behaviour. While Braithwaite⁴⁷ argues that labelling theory helpfully highlighted the 'dangers of overreacting to deviance that might be transient if left alone', he also accuses labelling theory of fostering a 'debilitating nihilism'. In other words, while it may be prudent not to overreact to some types of offending that may be transient if left alone, in many cases, intervention in the form of censure is precisely what is needed: '[w]ould it really be counterproductive to label as criminal a drug manufacturer who bribed a health minister to have a ban lifted on a profitable pharmaceutical, or to label a rapist as criminal?'⁴⁸ Ultimately, Braithwaite argues – quite in contrast to diversion – that 'societies imbued with the ideology of labeling theory will be excessively apathetic about non-trivial crime; to be effective against crime, societies need to be interventionist in a communitarian sense, to be intolerant of crime'.⁴⁹

Therefore while the theory of reintegrative shaming highlights the dangers of stigmatising criminal justice processes, it argues that such processes ought to be

42 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989).

43 See, eg, New South Wales, *Parliamentary Debates*, Legislative Council, 18 June 1997, 10493 (Ian Cohen).

44 Weatherburn, McGrath and Bartels, above n 1, 780.

45 Braithwaite, above n 42, 17.

46 *Ibid.*

47 *Ibid.* 20.

48 *Ibid.*

49 *Ibid.* 20–1.

made reintegrative. It does not argue that these processes should be done away with altogether via diversion.

In summary, while Weatherburn, McGrath and Bartels usefully highlight the taken for granted nature of restorative justice measures in Australia's youth justice systems, they significantly overemphasise the limited role it actually plays in most jurisdictions. Moreover, they mistakenly suggest that this is the result of its perceived capacity to reduce reoffending rather than its broader benefits and its reflection of broader normative concerns. Further, they mistakenly assert that restorative justice measures for young people are premised on a theory that supports diversion, whereas in fact the theory of reintegrative shaming neither necessarily supports diversionary measures nor underpins youth justice conferencing. It cannot be concluded, therefore, that the capacity of youth justice conferencing to reduce reoffending is a 'dogma' on which 'juvenile justice policy in Australia currently rests'.⁵⁰

C Assumption 3: That Young People Spontaneously Desist from Offending or 'Grow Out of Crime'

The third assumption identified by Weatherburn, McGrath and Bartels is that 'left to their own devices, most juveniles grow out of crime. In other words, juvenile involvement in crime is for the most part transient and self-limiting'. To refute this 'dogma', the authors present data on reoffending by 8813 young people who had their first known formal contact with the criminal justice system (ie, caution, conference or court appearance) in 1999.⁵¹ The reoffending of this cohort of young people was followed for a 10 year period.⁵² The data show that 57.6 per cent of the young people reoffended (ie, had a court appearance at which they were convicted of one or more offence) during the 10 years following their initial contact with the justice system in 1999. The proportion of the young people who reoffended during this time varied according to the type of initial contact they had with the criminal justice system; 53.1 per cent of those cautioned reoffended, compared with 60.9 per cent of those conferenced and 68.5 per cent of those sent to court.⁵³ The authors argue that these results 'are hardly consistent with the notion that offending by juveniles coming into contact with the criminal justice system is largely transient'.⁵⁴

When it comes to rebutting the 'dogma' that most young people grow out of crime, however, Weatherburn, McGrath and Bartels are somewhat disingenuous. As becomes clear in their discussion of their data on young people's commitment to offending, the question they are really addressing is not the 'dogma' they articulate at all. Rather, they are interested in the question of desistance of only those young people who come into contact with the criminal justice system.

50 Weatherburn, McGrath and Bartels, above n 1, 779.

51 Ibid 801 ff.

52 Ibid 802.

53 Ibid 805.

54 Ibid.

Indeed, they recognise that offending by those young people who do *not* come into contact with the criminal justice system is likely to be transient.⁵⁵ This is an important distinction as it essentially means that the 'dogma' as expressed remains true – that is, it remains the case that 'left to their own devices, most juveniles grow out of crime ... juvenile involvement in crime is for the most part transient and self-limiting'.⁵⁶ Moreover, it remains true for 42 per cent of those who do come into the criminal justice system according to Weatherburn, McGrath and Bartels' own data. To some extent, this refutes the authors' claim that '[t]he evidence ... suggests that transient offenders have little, if any, contact with the criminal justice system'.⁵⁷ Indeed, according to their own data, for nearly half (42 per cent) of young people who have formal contact with the criminal justice system, offending is transient.

A number of caveats should also be borne in mind by policy makers interpreting Weatherburn, McGrath and Bartels' data. One issue that should be considered when making sense of the data is the use of the mean number of court appearances at which a young person was convicted of one or more offences. It is obviously helpful to know the mean (in this case, four), and this measure is often reported in studies of young people's contact with the criminal justice system.⁵⁸ Given that, it has been shown repeatedly that a small proportion of young people commit a disproportionate amount of offences;⁵⁹ however, it is possible that the mean may be skewed. If this is the case, Weatherburn, McGrath and Bartels' findings may obscure a group of young people who offend a small number of times (eg, two or three) but who could not be considered persistent offenders, and who may not be in need of intensive intervention. In light of this, it would be useful for the range and median number of court appearances resulting in conviction(s) to be made public. This would further assist those in the youth justice sector to develop appropriate responses to young people in contact with the criminal justice system.

It should also be borne in mind that the mean number of court appearances at which a young person was convicted of one or more offences provides insight only into the quantity of young people's recidivism; the nature or seriousness of

55 Ibid 800.

56 Ibid 779.

57 Ibid 800.

58 See, eg, Grace Skrzypiec, 'Young People Born in 1984: Offending Behaviour of Juveniles Apprehended at Least Once' (Research Findings, Office of Crime Statistics and Research, Government of South Australia, 2005).

59 Jiuzhao Hua, Joanne Baker and Suzanne Poynton, 'Generation Y and Crime: A Longitudinal Study of Contact with NSW Criminal Courts before the Age of 21' (Crime and Justice Bulletin No 96, NSW Bureau of Crime Statistics and Research, August 2006); Michael Livingston et al, 'Understanding Juvenile Offending Trajectories' (2008) 41 *The Australian and New Zealand Journal of Criminology* 345; Jayne Marshall, 'Juvenile Offending Trajectories: A South Australian Study' (Office of Crime Statistics and Research, Government of South Australia, 2006); Frank Morgan and Julie Gardner, 'Juvenile Justice 1' (Research Bulletin No 6, Office of Crime Statistics and Research, Government of South Australia, May 1992); Torbjorn Skardhamar, 'Reconsidering the Theory of Adolescent-Limited and Life-Course Persistent Anti-social Behaviour' (2009) 49 *British Journal of Criminology* 863; Skrzypiec, above n 58.

reoffending is unknown. Although it is unlikely that trivial offences feature heavily among the reoffending reported by Weatherburn, McGrath and Bartels (as court appearances, rather than cautions or conferences were used as the measure of reoffending), information about the severity of reoffending among young people would be helpful to youth justice professionals responsible for developing appropriate interventions for young people.

It is also vital to take into account the social context of young people's contact with the criminal justice system, and the realities of some young people's lives that often fail to be recognised in quantitative analyses of young people's reoffending such as that presented by Weatherburn, McGrath and Bartels. A number of points should be considered in this regard.

First, in recent years, there has been increased emphasis on ensuring young people's bail compliance in New South Wales and other jurisdictions.⁶⁰ The NSW Police Force's submission⁶¹ to the New South Wales Law Reform Commission's review of the *Bail Act 1978* (NSW) stated that bail compliance checks increased by approximately 400 per cent between January 2007 and September 2010. Although technical breaches of bail are not classed as offences under the *Bail Act 1978* (NSW) (and therefore do not contribute towards reoffending data as is the case in some other jurisdictions), the intensive scrutiny of young people on bail is likely to result in offences committed by young people being recorded that may not have otherwise come to the attention of police.

Second, research consistently demonstrates that young people in out-of-home care are over-represented in the youth justice system.⁶² There are numerous reasons for this over-representation,⁶³ but an important reason to consider in the context of this discussion is that young people in out-of-home care come under a high level of scrutiny, and are vulnerable to having their 'offending' detected by police.⁶⁴ As one stakeholder interviewed for Richards and Renshaw's study⁶⁵ of young people and bail put it, 'young people in their family environment are disciplined by their parents, whereas young people in a care setting are disciplined by the criminal justice system'. Other stakeholders interviewed for

60 Anthony Dowsley and David Hurley, 'Night Curfews in Victoria to Drive Down Crime', *Herald Sun* (Melbourne), 17 August 2011; Noetic Solutions, above n 18; Julie Stubbs, 'Re-examining Bail and Remand for Young People in NSW' (2010) 43 *The Australian and New Zealand Journal of Criminology* 485; UnitingCare Burnside, 'Releasing the Pressure on Remand: Bail Support Solutions for Children and Young People in New South Wales' (UnitingCare Burnside, July 2009); Katrina Wong, Brenda Bailey and Diana T Kenny, 'Bail Me Out: NSW Young People and Bail' (Youth Justice Coalition, February 2010).

61 NSW Police Force, 'NSW Police Force Response to the NSW Law Reform Commission Paper "Bail – Questions for Discussion"' (Response, NSW Police Force, 2011) 35.

62 Katherine McFarlane, 'From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System' (2010) 22 *Current Issues in Criminal Justice* 345; Philip Mendes, 'A Structural Analysis of Young People Leaving State Care' (2008) 3(1) *Communities, Children and Families Australia* 69–79.

63 Judy Cashmore, 'The Link Between Child Maltreatment and Adolescent Offending: Systems Neglect of Adolescents' (2011) 89 *Family Matters* 31.

64 Gretchen Ruth Cusick et al, 'Crime During the Transition to Adulthood: How Youth Fare as they Leave Out-of-Home Care (Research Report submitted to the US Department of Justice, 2010).

65 Richards and Renshaw, above n 12.

the study described working with young people whose criminal histories were comprised entirely of offences committed in group homes. One reason for this increased scrutiny appears to be the limited experience and capability of some staff to deal with young people with challenging behaviours, and the consequent reliance on police to resolve issues that occur within out-of-home care residences.⁶⁶ Coupled with the close scrutiny of young people on bail, it is not difficult to imagine how young people in out-of-home care might rapidly accumulate numerous criminal convictions.

Third, it has been suggested in the literature that some young people come under intensive scrutiny by the criminal justice system if they have family members with criminal histories:

'Criminal' families may be more closely monitored by criminal justice agencies and social services, with the result that any transgressions are more likely to come to official attention than would be the case for other families who are not known to police and therefore unlikely to be subject to any official bias.⁶⁷

Fourth, research suggests that young people from non-metropolitan areas come under increased scrutiny by police in comparison with those from large metropolitan centres, as these young people easily become 'known' to police who work in small, sparsely populated areas.⁶⁸ Coupled with an often poor service provision environment, this close scrutiny can result in young people from rural, regional and remote areas finding it impossible to exit the justice system.

It therefore appears that certain groups of young people – including those on bail, in out-of-home care, from families known to the criminal justice system, and/or from non-metropolitan areas – come under a higher level of scrutiny than other young people in trouble with the law. While it may be the case that these young people are likely to reoffend (certainly it is the case that young people in out-of-home care often have histories of maltreatment that underpin their offending),⁶⁹ it is also the case that due to this scrutiny, these young people's offences are more likely to be detected and recorded. This context is important to recognise when interpreting Weatherburn, McGrath and Bartels's findings.⁷⁰ It is especially critical to recognise when considering reoffending by Indigenous young people that they are over-represented among young people on bail, in out-

66 Ibid.

67 Vanessa Goodwin and Brent Davis, 'Crime Families: Gender and the Intergenerational Transfer of Criminal Tendencies' (Trends & Issues in Crime and Criminal Justice No 414, Australian Institute of Criminology, May 2011) 3.

68 Richards and Renshaw, above n 12.

69 Anna Stewart, Susan Dennison and Elissa Waterson, 'Pathways from Child Maltreatment to Juvenile Offending' (Trends and Issues in Crime and Criminal Justice No 241, Australian Institute of Criminology, October 2002); see generally Lesley McAra and Susan McVie, 'Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transitions and Crime' (2010) 10 *Criminology and Criminal Justice* 179.

70 It is also important to recognise that the nature of the criminalisation of young people's behaviour is not static, but changes over time. This also undoubtedly impacts the data on youth offending.

of-home care,⁷¹ and in some non-metropolitan and many rural and remote centres. In short, while it is concerning that more than half of young people reoffend, and are reconvicted on four occasions on average, it should be acknowledged that while some of this reoffending is genuine, in other cases, it is an artefact of measures employed by the criminal justice system and social service agencies. This is an important distinction to make, as it suggests that the policy response recommended by Weatherburn, McGrath and Bartels⁷² – ie, intensive intervention with young people deemed risky – may not be the most appropriate response.

This view is supported by findings from the Edinburgh Study of Youth Transitions and Crime, a longitudinal research study of approximately 4300 young people who commenced secondary school in Edinburgh in 1998.⁷³ Findings from this study show that even when controlling for a range of relevant variables, the strongest predictor of a young person being charged by police during the previous year was having previous police charges:

Children who reported that they had been charged in previous years were *over seven times* more likely to be charged at age 15 than were children with no such history – a factor that is completely independent of their current involvement in serious offending and their more recent history of police adversarial contact.⁷⁴

McAra and McVie's work therefore demonstrates that some cohorts of young people in trouble with the law – principally those known to the criminal justice system and/or related agencies – are subject to a higher level of criminal justice intervention than other young people with similar offending profiles: 'selection effects at each stage of the youth justice process mean that certain categories of young people – "the usual suspects" – become propelled into a repeat cycle of referral into the system whereas other equally serious offenders escape the tutelage of agencies altogether.'⁷⁵

Statistics on young people's patterns of recidivism should therefore not be taken as objective 'truths' about young people's reoffending, but as a reflection of a complex interplay of factors including, but not limited to, the frequency and nature of the young person's offending. The contention of the New South Wales Bureau of Crime Statistics and Research⁷⁶ that 'juveniles arrested by police ... tend to be among the more persistent of offenders (which is why they get caught)' is therefore a limited interpretation. In some instances, young people's repeat reconvictions may be a reflection of the intensive scrutiny that some young people – McAra and McVie's 'usual suspects'⁷⁷ – come under following

71 Australian Institute of Health and Welfare, 'Child Protection Australia 2010–11' (Child Welfare Series 53, Australian Institute of Health and Welfare, 2012).

72 Ibid 806.

73 McAra and McVie, above n 12.

74 Ibid 327 (emphasis in original).

75 Ibid 319.

76 New South Wales Bureau of Crime Statistics and Research, Submission No 9 to Department of Attorney-General and Justice (NSW), *Review of the Young Offenders Act 1997 and the Children (Criminal Proceedings) Act 1987*, 12 December 2011, 2.

77 McAra and McVie, above n 69, 319.

an initial contact with the youth justice system. These young people may therefore not be intractable offenders in need of intensive intervention as Weatherburn, McGrath and Bartels suggest; indeed, for some young people it appears that intervention is central to the problem of subsequent repeat convictions.

This does not necessarily mean that young people's reoffending is not genuine, or that it doesn't have serious consequences for victims and communities, or that it should be ignored or even tolerated. It does mean, however, that the recidivism of certain groups of young people – in some cases, the most vulnerable young people – will come to the notice of authorities more readily than that of others. While such differences can be obscured by quantitative analyses of reoffending such as Weatherburn, McGrath and Bartels', they are important for those in the youth justice sector to understand.

Finally, while the authors refute the 'dogma' that contact with the criminal justice system is criminogenic, the authors' own data could be interpreted as demonstrating that contact with the criminal justice system has the effect of increasing the risk of future contact. In fact the authors' data could be read as reinforcing the very argument that they seek to reject: that left to their own devices, most young people do desist, and that having contact with the criminal justice system will decrease their capacity to desist.

III ARE THESE 'DOGMAS' REALLY 'PILLARS' OF YOUTH JUSTICE POLICY IN AUSTRALIA?

The authors argue that these three 'dogmas' (that court is criminogenic; that restorative justice reduces offending better than court; and that most young people grow out of crime) are 'the pillars on which juvenile justice policy in Australia currently rests.'⁷⁸ Further, the authors argue that collectively, these so-called 'dogmas' underpin a diversionary or 'hands off' approach to youth justice in Australia.⁷⁹ This section makes two related points in this regard: that policies of diversion for young people are premised on far broader concerns than these three assumptions; and that youth justice in Australia is premised on far broader (at times competing) rationales than merely diversion.

First, it should be recognised that policies of diversion for young people are premised on much broader considerations than the three 'dogmas' identified by Weatherburn, McGrath and Bartels. Diversionary measures have been implemented in response to a wide range of offence types⁸⁰ for both adults and

78 Weatherburn, McGrath and Bartels, above n 1, 779.

79 Ibid. See also New South Wales Bureau of Crime Statistics and Research, above n 73; Wallace and Jacobsen, above n 2.

80 See, eg. Garner Clancey and John Howard, 'Diversion and Criminal Justice Drug Treatment: Mechanism of Emancipation or Social Control?' (2006) 25 *Drug and Alcohol Review* 377; Caroline Titcomb, Jane Goodman-Delahunty and Berenike Waubert De Puisseau, 'Pretrial Diversion for Intrafamilial Child Sex Offending: Does Biological Paternity Matter?' (2012) 39 *Criminal Justice and Behavior* 552.

young people,⁸¹ in most western criminal justice systems. Although diversion is a key feature of youth justice systems in particular, policies of diversion are in general based on wide-ranging aims, including cost savings and ensuring efficiency of criminal justice processes.

Fundamentally, in youth justice, the diversionary approach reflects the view that young people should be treated differently than adults, due to their limited life experience and maturity and also because they are likely to be more malleable to positive influences and interventions. Diversionary measures reflect notions including that young people deserve a second chance, a parsimonious and proportionate response, and a chance to participate and have a voice in criminal justice proceedings, as reflected in the United Nations frameworks that relate to youth justice.⁸² These are *normative*, not *instrumental* concerns.

While Weatherburn, McGrath and Bartels attempt to demonstrate (with varying degrees of success, as described above) that the three ‘dogmas’ they identify have influenced the introduction of diversionary youth justice policies in each of Australia’s jurisdictions, their overview of the ways in which these ‘dogmas’ underpin youth justice legislation is so narrowly focused as to silence broader normative concerns altogether. Thus although their overview aims to provide an ‘emphasis on examples of the assumptions ... especially in relation to the preference for diversion and RJ measures,’⁸³ it cannot be said to provide an adequate ‘examination of the key juvenile justice legislation around Australia’.⁸⁴

Youth justice legislation around Australia clearly illustrates the wide range of normative concerns that policies of diversion are designed to address. For example, in introducing the Young Offenders Bill 1997 (NSW), the then Attorney-General stated that ‘the new scheme established by this [B]ill aims to ensure a measured and appropriate response to the range of juvenile offences.’⁸⁵ The introduction of the then *Juvenile Justice Act 1992* (Qld) was premised on myriad concerns about the operation of the youth justice system, including enhancing accountability of young offenders, enhancing procedural fairness and consistency in sentencing, moving from a ‘welfare’ to a ‘justice’ approach to youth justice, and reducing Indigenous over-representation.⁸⁶ For example, the

81 See, eg, Evelyn Harvey et al, ‘The Efficacy of Diversion and Aftercare Strategies for Adult Drug-Involved Offenders: A Summary and Methodological Review of the Outcome Literature’ (2007) 26 *Drug and Alcohol Review* 379; Dominique E Roe-Sepowitz et al, ‘Adult Prostitution Recidivism: Risk Factors and Impact of a Diversion Program’ (2011) 50 *Journal of Offender Rehabilitation* 272; Titcomb, Goodman-Delahunty and Waubert De Puisseau, above n 80.

82 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Dec 40/33, UN GAOR, 40th sess, 96th plen mtg, Supp No 53, UN Doc A/RES/40/33 (29 November 1985); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *United Nations Guidelines for the Prevention of Juvenile Delinquency*, GA Res 45/112, 45th sess, 68th plen mtg, UN Doc A/RES/45/122 (14 December 1990); *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990).

83 Weatherburn, McGrath and Bartels, above n 1, 781.

84 *Ibid.*

85 New South Wales, *Parliamentary Debates*, Legislative Council, 21 May 1997, 8962 (Jeff Shaw).

86 Queensland, *Parliamentary Debates*, Legislative Assembly, 18 June 1992, 5922–8 (Anne Warner).

then Minister for Family Services and Aboriginal and Islander Affairs, Anne Warner, stated the following during the second reading of the Juvenile Justice Bill 1992 (Qld):

The provisions recognise that children may be vulnerable when being dealt with by persons in authority, such as police and court officials. Diversion of children from the court's criminal justice system is encouraged, wherever possible. Proceedings for offences should be conducted in a fair and just way, allowing opportunities for the child and parents to participate in and understand proceedings. It is imperative that children who commit offences must be held accountable and be encouraged to accept responsibility for offending behaviour. They must also be given the opportunity to develop responsible and socially acceptable behaviour. Decisions affecting children should be made and implemented in time frames which children can understand. Due consideration should be given to age, maturity and cultural background of children affected by this legislation.⁸⁷

Similarly, the *Children, Youth and Families Act 2005* (Vic), which formalised group conferencing for young people, was premised on broad normative considerations, including 'enshrining children and young people's best interests at the heart of all decision making and service delivery' and 'encouraging the participation of children, young people and their families in the decision-making processes that affect their lives'.⁸⁸

As these examples illustrate, diversion in youth justice systems is premised on far broader concerns than the three 'dogmas' put forward by Weatherburn, McGrath and Bartels.

Second, the authors' proposition that the pillars of youth justice policy in Australia are premised on these three assumptions essentially reduces the complex patchwork of youth justice policy to diversion alone. While policies and practices based on diversion are unquestionably key features of youth justice systems in Australia, there are other (sometimes competing) measures that exist alongside this approach. Recent calls to introduce mandatory sentencing for young people in Victoria,⁸⁹ and to repeal the principle of detention as a last resort for young people in Queensland⁹⁰ and the introduction of boot camps in Queensland⁹¹ and the Northern Territory⁹² demonstrate competing approaches to young offenders – often premised not on diversion but on a populist 'get tough' mentality.

Further, diversionary measures bypass some groups of young people in trouble with the law altogether. For example, in many jurisdictions, young people who breach bail conditions cannot be dealt with via diversionary measures, and

87 Ibid 5923 (Anne Warner).

88 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1368 (Sherryl Garbutt).

89 Sentencing Advisory Council, Victoria, 'Statutory Minimum Sentences for Gross Violence Offences' (Report, Sentencing Advisory Council, Victoria, October 2011).

90 Department of Justice and Attorney-General (Qld), 'Safer Streets Crime Action Plan – Youth Justice' (Have Your Say, Department of Justice and Attorney-General (Qld), March 2013).

91 Department of Justice and Attorney-General (Qld), 'Youth Boot Camp Program Models' (Report, Department of Justice and Attorney-General (Qld), February 2013).

92 John Elferink, 'Youth Boot Camp Consultation Continues' (Media Release, 22 February 2013).

are instead dealt with via arrest.⁹³ As has been documented elsewhere, more than half of young people in detention in Australia are on remand (ie, unsentenced).⁹⁴ The exclusion of these young people from diversionary mechanisms has been identified as one driver of high rates of young people on remand.⁹⁵ Research has also found (as discussed in more detail below) that Indigenous young people are often not diverted and proceed to court more quickly than non-Indigenous young people.⁹⁶

The critical point here is that in reducing youth justice to three ‘dogmas’, the authors construct an image of youth justice as predominantly welfare oriented, and concerned with minimising young people’s contact with the criminal justice system at any cost. While minimising young people’s contact with the system is undoubtedly a key concern, as discussed above, this is not the sole thrust of youth justice systems in Australia. Rather, sound responses to young offenders are regularly under attack from, amongst other things, governments eager to implement populist, ‘get tough’ strategies that are likely to result in more young people in detention.

Too often, approaches to youth justice, and we would include in this some of the suggestions from Weatherburn, McGrath and Bartels, tend to be instrumental to the point that they overlook the normative function of youth justice. Such approaches ignore the emerging evidence around normative regulation and procedural justice.⁹⁷ This research suggests that confidence in the criminal justice system, which is strongly related to compliance with the law,⁹⁸ can be best generated when those who come into the contact with the justice system clearly understand the processes they are engaged in, and are treated fairly and transparently.⁹⁹ This is also in line with arguments made by Arie Freiberg¹⁰⁰ who suggests the criminal justice system has to work on both effective and affective levels. While effective outcomes reflect the instrumentalism of incapacitating or deterring offenders, affective responses refer to the symbolic, expressive or moral dimension of justice.

93 Richards and Renshaw, above n 12.

94 Australian Institute of Health and Welfare, ‘Juvenile Detention Population in Australia 2012’ (Juvenile Justice Series No 11, Australian Institute of Health and Welfare, 2012) vii.

95 Richards and Renshaw, above n 12.

96 Troy Allard et al, ‘Police Diversion of Young Offenders and Indigenous Over-representation’ (Trends & Issues in Criminal Justice No 390, Australian Institute of Criminology, March 2010); Chris Cunneen, ‘Community Conferencing and the Fiction of Indigenous Control’ (1997) 30 *The Australian and New Zealand Journal of Criminology* 292; Lucy Snowball, ‘Diversion of Indigenous Juvenile Offenders’ (Trends & Issues in Crime and Criminal Justice No 355, Australian Institute of Criminology, June 2008).

97 Jonathan Jackson and Jason Sunshine, ‘Public Confidence in Policing: A Neo-Durkheimian Perspective’ (2007) 47 *British Journal of Criminology* 214; Tom R Tyler (ed), *Legitimacy and Criminal Justice: International Perspectives* (Russell Sage Foundation, 2007).

98 Jason Sunshine and Tom R Tyler, ‘The Role of Procedural Justice and Legitimacy in Public Support for Policing’ (2003) 37 *Law & Society Review* 513.

99 Mike Hough et al, ‘Procedural Justice, Trust and Institutional Legitimacy’ (2010) 4 *Policing* 203.

100 Arie Freiberg, ‘Affective Versus Effective Justice: Instrumentalism and Emotionalism in Criminal Justice’ (2001) 3 *Punishment and Society*, 265.

In summary, this article argues that an appropriate approach to youth justice is one that takes into account both normative (ie, how should young people in trouble with the law be treated?) and instrumental (ie, what works to prevent and reduce young people's offending and reoffending?) concerns. While instrumentally, an effective way to reduce youth crime in the short term would be to simply incarcerate all problematic young people, normatively, this would be unacceptable, as it is a disproportionate response and contravenes Australia's international human rights obligations amongst other things. Basing youth justice policy solely on instrumental factors would undermine the critical normative, procedural and affective roles of youth justice.

IV THE WAY FORWARD

We have argued above that in contrast to Weatherburn, McGrath and Bartels' suggestion, the three 'dogmas' of youth justice they present ought not to be 'abandoned'.¹⁰¹ In this final section we consider the authors' recommendations for a way forward for youth justice policy, and propose instead a renewed focus on primary crime prevention in place of the individualistic model they champion.

Weatherburn, McGrath and Bartels argue that one way forward for youth justice in Australia is to identify potential persistent offenders through the use of 'risk assessment and needs assessment tools'¹⁰² early in the young person's cycle of contact with juvenile justice authorities. That is, that young people should be screened for risk of reoffending 'after two separate police warnings, cautions or conferences within some specified period'.¹⁰³ They rightly note that the point of such intervention must balance a number of objectives of the system and rationalities of intervention. Moreover, the preliminary model they articulate does not appear to fundamentally rely on the disassembling or paring back of diversionary measures such as cautions and conferences.

We have no essential problem with the application of a risk/needs assessment approach per se. Indeed, as critical authors such as Ward and Maruna argue, the approach can see the offender restored as the site of intervention as well as a return to rehabilitation under a set of evidence based principles.¹⁰⁴ Moreover, such tools have been shown to be able to more accurately identify the types of programs that might be effective (or not) with specific offenders than traditional forms of subjective assessment. Indeed, O'Malley¹⁰⁵ points out that such instruments are examples of where the mobilisation of risk can be much more 'optimistic' than the original rather bleak visions of 'actuarial justice'¹⁰⁶ foretold.

101 Weatherburn, McGrath and Bartels, above n 1, 780.

102 Ibid 807.

103 Ibid.

104 Tony Ward and Shadd Maruna, *Rehabilitation: Beyond the Risk Paradigm* (Routledge, 2007).

105 Pat O'Malley, *Crime and Risk* (Sage, 2010).

106 See Malcolm M Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and its Implications' (1992) 30 *Criminology* 449.

Of course such instruments are not without inherent dangers, and much has been written about the problems of accuracy in regard to variables such as gender, ethnicity, and setting – as Weatherburn, McGrath and Bartels rightly concede.¹⁰⁷ With this comes the inherent capacity of such instruments to identify false positives and negatives, and the logic of risk suggests there may be a tendency to err on the side of false positives rather than the latter.¹⁰⁸ Mulvey and Schubert's prospective longitudinal study of 1354 serious young offenders in two American cities found that among this cohort, very few variables from the extensive array considered were able to independently predict which young offenders would persist which would desist.¹⁰⁹

More worrying though is the suggestion of moving this risk/needs assessment process further forward in the criminal justice process. As the authors suggest, this will no doubt have the effect of increasing the number of court appearances by young people. Such an increase is, however, constructed as largely unproblematic by the authors given their rejection of the 'dogma' that 'contact with the court system is criminogenic'. As we have argued, this 'dogma' should not be rejected so brazenly. Moreover, while Weatherburn, McGrath and Bartels argue that 'left to their own devices, human beings are generally poor judges of risk'¹¹⁰ in reference to police and courts and their capacity to direct an offender to an appropriate intervention, the real question is whether there is a place for risk assessment at this front end of the system. To our minds such an intervention is coming dangerously close to the forms of illiberal 'pre-crime' interventions negatively identified by Lucia Zedner.¹¹¹ If, as we suggest, these 'dogmas' cannot be rejected in the ways the authors claim, such interventions could turn out to be themselves criminogenic.

These interventions would also likely affect Indigenous young people disproportionately. As Cunneen¹¹² has argued more broadly:

One of the problems of this [at risk] approach in relation to understanding the relationship between Indigenous young people and juvenile justice is that the approach tends to focus on simple multi-factoral analysis which lists protective and risk factors found to be statistically associated with offending behaviour. There is a tendency to ignore the *generative* social processes that give rise to and exacerbate particular 'risk factors'.

Cunneen further problematises the still subjective nature of risk/needs assessment tools and how these tend to normalise the nuclear family while problematising as risks a range of lifestyle factors and living conditions that might equate closely with many Indigenous young people's lived realities. As he

107 Weatherburn, McGrath and Bartels, above n 1, 807.

108 McAra and McVie, above n 69, 184.

109 Edward P Mulvey and Carol A Schubert, 'Some Initial Findings and Policy Implications of the Pathways to Desistance Study' (2012) 7 *Victims & Offenders* 407. See also Aldis L Putnins, 'Assessing Recidivism Risk among Young Offenders' (2005) 38 *The Australian and New Zealand Journal of Criminology* 324.

110 Ibid 807.

111 Lucia Zedner, 'Pre-crime and Post-criminology?' (2007) 11 *Theoretical Criminology* 261.

112 Chris Cunneen, 'Changing the Neo-colonial Impacts of Juvenile Justice' (2008) 20 *Current Issues in Criminal Justice* 43, 52 (emphasis in original).

puts it, '[r]isk assessment represents the ascendancy of "individualised" models of youth offending – the tools substitute individual histories for the historical dynamics of societies'.¹¹³ As a result of this range of criticisms, we would thus be extremely cautious about going down such a path.

Instead, we want to emphasise an issue raised implicitly by Weatherburn, McGrath and Bartels' article, but given little attention by them: that is, the importance of early intervention by way of primary crime prevention. In some cases, assessing young people's risk once they have repeated contact with the youth justice system will mean waiting until it is too late. Evidence suggests that in some cases, children have 'offended' and are known to police before they reach the age of criminal responsibility (currently 10 years in all Australian jurisdictions).¹¹⁴ Kaila reported in the *Sunday Herald Sun*, for example, that data from Victoria Police indicate that in the five years prior to 2012, 288 children under the age of legal responsibility had been investigated for 305 serious offences:

The statistics show 254 boys and 34 girls, aged nine and under, were processed for 11 sex crimes, including rape, 36 burglaries, five counts of stealing a motor vehicle, three drug possessions, or using drugs, and three counts of being armed with weapons or explosives.¹¹⁵

Further, Skrzypiec's birth cohort study of all young people born in South Australia in 1984 found that the likelihood of being apprehended by police for a minor offence as a first contact increased with age; conversely, the likelihood of being apprehended for a serious offence as a first contact decreased with age.¹¹⁶ Taken together with the evidence that some young people 'offend', sometimes seriously, before they reach the age of criminal responsibility, this suggests that early intervention by means of primary prevention is vital. As McAra and McVie argue, such an approach is also vital because of the potential for risk assessment tools to produce false positives, and because of the 'danger that early targeting of children and families may serve to label and stigmatize these individuals and thereby create a self-fulfilling prophecy.'¹¹⁷ Further, while the evidence may well have improved around a number of tertiary interventions (eg, Multisystemic Therapy, Aggression Replacement Training),¹¹⁸ this evidence comes primarily from the United States, and there is little evidence that such programs have been

113 Ibid 53.

114 In each Australian jurisdiction, young people aged 10 to 13 years (inclusive) are considered to be *doli incapax*, or incapable of crime. In practical terms this means that a rebuttable presumption exists meaning that until a young person turns 14, the onus is on the prosecution to prove that the young person was able at the time of the offence to adequately distinguish between right and wrong. Only when this can be proven can a contested trial involving a young person result in conviction. See Gregor Urbas, 'The Age of Criminal Responsibility' (Trends and Issues in Crime & Criminal Justice No 181, Australian Institute of Criminology, November 2000).

115 Jon Kaila, 'Kids Getting Away with Serious Crimes Including Rape and Arson', *Sunday Herald Sun* (Melbourne), 29 January 2012.

116 Skrzypiec, above n 58.

117 McAra and McVie, above n 69, 189.

118 Weatherburn, McGrath and Bartels, above n 1, 806.

successful for Indigenous young people.¹¹⁹ For example, a trial of Multisystemic Therapy conducted in Western Australia was recently abandoned as it did not successfully engage with Indigenous families and had not achieved the results expected.¹²⁰ This is an important consideration given the heavy over-representation of Indigenous young people in the criminal justice system, particularly at the most severe end.¹²¹ Indeed, while there may be some justification for interventions to be focused on the individual, as Weatherburn, McGrath and Bartels propose, it is clear that early intervention in the form of primary, community-based prevention initiatives is also warranted.

It has also been suggested in the literature that some young people have numerous informal contacts with police before their first formal contact,¹²² and that this may help explain what Cunneen calls the ‘bifurcation’ of the youth justice system¹²³ – that is, the finding that Indigenous young people often bypass diversionary measures and proceed to court more quickly than non-Indigenous young people.¹²⁴ How much of this informal contact occurs before young people reach the age of criminal responsibility is unknown. The data from Victoria Police described above suggest, however, that this occurs in some cases. This may help explain why ‘even those whose first known contact with the justice system was a police caution managed to accumulate an average of 3.6 further court appearances at which they were convicted of one or more offences.’¹²⁵ It also again underscores the importance of early intervention via primary prevention, and raises the issue of the role of a wide range of service agencies, as described in more detail below.

While it may be trite to highlight the importance of primary prevention strategies, acknowledging the need for primary prevention measures alongside the secondary and tertiary measures recommended by Weatherburn, McGrath and Bartels has important implications for the future direction of youth justice. Specifically, primary prevention is not the remit of statutory youth justice agencies in Australia; these agencies are responsible for supervising young people subject to youth justice conferencing, and/or under supervision (either in the community or in detention). It is therefore unsurprising that ‘most of the money spent by juvenile justice agencies goes on keeping young people in custody.’¹²⁶ A key issue that warrants attention is the potential role of other agencies – such as child protection, health, education, housing, community

119 See Kelly Richards, Lisa Rosevear and Robyn Gilbert, *Promising Interventions for Reducing Indigenous Juvenile Offending* (Indigenous Justice Clearinghouse, 2011); Jacqueline Stewart et al, ‘Indigenous Youth Justice Programs Evaluation’ (Paper presented at Australasian Youth Justice Conference, National Convention Centre Canberra, 21 May 2013).

120 Richards, Rosevear and Gilbert, above n 119.

121 Australian Institute of Health and Welfare, above n 94, vii.

122 Allard et al, above n 96.

123 Chris Cunneen, ‘Community Conferencing and the Fiction of Indigenous Control’ (1997) 30 *Australian and New Zealand Journal of Criminology* 292.

124 Allard et al, above n 96; Snowball, above n 96.

125 Weatherburn, McGrath and Bartels, above n 1, 804.

126 *Ibid* 809.

services and family support¹²⁷ – in preventing young people's offending and contact with the criminal justice system. If it is the case that it is too late to intervene in the offending trajectories of young people once they come into formal contact with the criminal justice system, and that young people are often dual or multiple 'clients' of these systems,¹²⁸ then the role of these agencies in preventing this contact should be closely examined.

V CONCLUSION

The aims of this article were to contribute to the emerging conversation about the future of youth justice in Australia, to highlight the importance of Weatherburn, McGrath and Bartels' analysis (which calls into question some of the taken for granted assumptions of youth justice), and to urge that this analysis is interpreted cautiously and critically.

We have argued that the three assumptions that Weatherburn, McGrath and Bartels critique cannot fairly be considered 'dogmas' of youth justice in Australia. In relation to the first 'dogma' (that court is criminogenic), we have argued that in part, the enduring adherence to diversion is premised not on the belief that court increases the likelihood of further *offending*, but that it increases the likelihood of further *contact with the criminal justice system*. Further, it is not primarily court *processes* that youth justice policy makers deem problematic, but the potential *outcomes* of court. These issues are especially relevant to groups of young people with highly complex needs, such as those on bail and/or in out-of-home care, and Indigenous young people.

In relation to the second 'dogma' (that restorative justice measures reduce reoffending better than traditional criminal justice measures), we have argued that while a perceived capacity to reduce reoffending was among the premises upon which youth justice conferencing was established in Australian jurisdictions, the commitment to restorative justice for young people cannot be understood as a result of a misguided adherence to this assumption. Rather, the wider objectives of restorative justice – including less tangible aims such as providing opportunities for 'empowerment', 'participation' and 'voice' – form part of the enduring attractiveness of restorative justice measures.

In relation to the third 'dogma' (that young people 'grow out of crime'), we have posited that this remains true – even for nearly half of those young people who have a formal contact with the criminal justice system.

127 Adam Sutton, Adrian Cherney and Rob White, *Crime Prevention: Principles, Perspectives and Practices* (Cambridge University Press, 2008).

128 Emma Ogilvie, 'Chronic Offenders and "Poly-Users": Young People's Use of Social Infrastructure' (Research Report, Criminology Research Council, 2000); Stewart, Dennison and Waterson, above n 69; Rob White, 'Youth Offending in Relation to Young People as Multiple Service Users' (Scoping Paper, Criminology Research Council, March 2003).

We have also contested Weatherburn, McGrath and Bartels'¹²⁹ claim that collectively, these 'dogmas' underpin or are the 'pillars' of the diversionary focus of youth justice systems in Australia. Diversion in the youth justice system, we have argued, fundamentally reflects normative, procedural and affective concerns about providing a parsimonious, fair and transparent response to youth offending. Further, we have argued that by constructing youth justice in Australia as a 'hands off' model, the authors overlook the realities of other influences – especially 'get tough' strategies that inform the realities of some young people's contact with the criminal justice system. We also have concerns, already reflected in media reporting of the authors' work, that their characterisation of the system as 'hands off' can feed into an uncivil public debate and politics of law and order.

As such, we have argued that while debate should be welcomed on the future direction of youth justice, in contrast with Weatherburn, McGrath and Bartels's suggestion, the three 'dogmas' of youth justice that they present should not be 'abandoned'. Further, while we are largely unconcerned about the authors' suggestion of implementing a risk assessment approach in general terms, we recommend that caution be exercised around their suggestion to implement this process early in the criminal justice process. While we essentially agree with the authors' recommendation of intervening early in young people's offending trajectories, we are wary of interventions that focus too heavily on individual young people and their families, given that such interventions may result in further contact with the criminal justice system – particularly for Indigenous young people. We urge instead a renewed focus on primary prevention measures aimed at the whole community, as well as on the potential role of a wide range of service providers in preventing offending by young people. We would agree with the conclusions made in the recent Edinburgh Study of Youth Transitions and Crime that '[t]he challenge facing policy makers and practitioners is to tackle [the needs of young offenders] in ways which are not stigmatizing and criminalizing and in ways which maximize diversion wherever possible'.¹³⁰

Debates about the future of youth justice in Australia need to be based on issues beyond instrumental assessments of 'what works'; not only can such assessments be misleading, they can overlook a range of other normative principles that do and should underpin youth justice policy.

129 Weatherburn, McGrath and Bartels, above n 1, 779.

130 McAra and McVie, above n 69, 202.