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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1 In Australia, the term 'solution-focused' courts is replacing 'problem-solving' courts because judicial officers want to avoid the suggestion that the court can or will solve the offenders' problems. The role of the court in these programs is as facilitator, to promote an offender's agency to resolve his or her own problems: Michael S King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009) 3–4.

2 Charles Kooij, Department of Justice and Attorney-General (Qld), 'Abolition of the Queensland Drug Court' (Media Release, 28 July 2012) <http://media01.couriermail.com.au/multimedia/2012/08/JAG%20press%20releases/MR%20Drug%20Court%20closure_2.doc>.

3 Adam Harvey, 'Anger as NSW Axes Youth Drug Court', *ABC News* (online), 4 July 2012 <http://www.abc.net.au/news/2012-07-03/experts-baffled-as-axe-falls-on-youth-drug-court/4108366>.

4 Arie Freiberg, 'Affective versus Effective Justice: Instrumentalism and Emotionalism in Criminal Justice' (2001) 3 *Punishment and Society* 265.

any evidence of efficacy.[5] Arguably, many of these policies are simply fatuous but, perhaps, relatively benign.[6] 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.[7] 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.[8] 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>.

7 Caroline A Spiranovic, Lynne D Roberts and David Indermaur, 'What Predicts Punitiveness? An Examination of Predictors of Punitive Attitudes towards Offenders in Australia' (2012) 19 *Psychiatry, Psychology and Law* 249, 249; Kate Warner et al, 'Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study' (Trends and Issues in Crime and Criminal Justice No 407, Australian Institute of Criminology, February 2011) 1; Karen Gelb, 'Measuring Public Opinion about Sentencing' (Report, Sentencing Advisory Council (Vic), 2 September 2008) 4 <https://www.sentencingcouncil.vic.gov.au/publications/measuring-public-opinion-about-sentencing>.

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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9 Richard D Schneider, 'Mental Health Courts and Diversion Programs: A Global Survey' (2010) 33 *International Journal of Law and Psychiatry* 201; Michael S King, 'Therapeutic Jurisprudence Initiatives in Australia and New Zealand and the Overseas Experience' (2011) 21 *Journal of Judicial Administration* 19.

10 Derek Denckla and Greg Berman, *Rethinking the Revolving Door: A Look at Mental Illness in the Courts* (Report, Center for Court Innovation, 2001) <http://www.courtinnovation.org/sites/default/files/rethinkingtherevolvingdoor.pdf>; Effie Zafirakis, 'Curbing the "Revolving Door" Phenomenon with Mentally Impaired Offenders: Applying a Therapeutic Jurisprudence Lens' (2010) 20 *Journal of Judicial Administration* 81.

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; Cri*mes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20; *Criminal Code Act Compilation Act 1913* (WA) sch 1 s 27.

12 Michelle Edgely, 'Common Law Sentencing of Mentally Impaired Offenders in Australian Courts: A Call for Coherence and Consistency' (2009) 16 *Psychiatry, Psychology and Law* 240.

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).[13] These purposes – general and personal deterrence, denunciation, incapacitation, rehabilitation, and proportionate retributive punishment – are reflected in legislation in most Australian jurisdictions.[14] 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.[15] 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.[16] 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.[17] The burden of proving good prospects of rehabilitation rests with the offender.[18] 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.[19] 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.[20] The benefit of this type of order is that it capitalises on the stress of appearing in court and facing criminal

13 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ).

14 *Crimes (Sentencing) Act 2005* (ACT) s 7(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *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).

15 *Dinsdale v The Queen* (2000) 202 CLR 321, 347–8 [81]–[84] (Kirby J), with whom Gleeson CJ, Gaudron, Gummow and Hayne JJ agreed on this point: at 329 [18] (Gleeson CJ and Hayne J), 330 [26] (Gaudron and Gummow JJ); *R v Horne* [2005] QCA 218, 9–10 (Jerrard JA); *R v Jobsz* [2013] QCA 5, [15]–[16] (de Jersey CJ); *R v Lyle* [2013] QCA 293, [19] (Philippides J).

16 Peggy Fulton Hora, *Smart Justice: Building Safer Communities, Increasing Access to the Courts, and Elevating Trust and Confidence in the Justice System* (South Australian Government, 2010) 26 <http://judgehora.com/smartjustice_LO.pdf>.

17 Jennifer Hickey and Christopher Spangaro, 'Judicial Views about Pre-sentence Reports' (Research Monograph No 12, Judicial Commission of NSW, June 1995) 45.

18 *R v Olbrich* (1999) 199 CLR 270, 281 [25] (Gleeson CJ, Gaudron, Hayne and Callinan JJ).

19 See, eg, *Griffiths v The Queen* (1977) 137 CLR 293, 305–6 (Barwick CJ), 328 (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.[21] 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.[22]

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.[23] 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.[24] 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

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21 Astrid Birgden and Tony Ward, 'Pragmatic Psychology through a Therapeutic Jurisprudence Lens: Psycholegal Soft Spots in the Criminal Justice System' (2003) 9 *Psychology, Public Policy, and Law* 334, 334–5.

22 *R v Horne* [2005] QCA 218.

23 Tara D Warner and John H Kramer, 'Closing the Revolving Door? Substance Abuse Treatment as an Alternative to Traditional Sentencing for Drug-Dependent Offenders' (2009) 36 *Criminal Justice and Behavior* 89; Denckla and Berman, above n 10.

24 Jason Payne and Antonette Gaffney, 'How Much Crime is Drug or Alcohol Related? Self-Reported Attributions of Police Detainees' (Trends and Issues in Crime and Criminal Justice No 439, Australian Institute of Criminology, May 2012) 1; Jason Payne, 'Recidivism in Australia: Findings and Future Research' (Report No 80, Australian Institute of Criminology, 2007) xiii <http://www.aic.gov.au/publications/current%20series/rpp/61-80/rpp80.html>; Senate Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health – From Crisis to Community: First Report* (2006) 333, 335; Tamara Walsh, 'From Park Bench to Court Bench: Developing a Response to Breaches of Public Space Law by Marginalised People' (Final Report, Faculty of Law, Queensland University of Technology, QPILCH Homeless Persons' Clinic and Rights in Public Space Action Group, September 2004) 25–9.

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.[25] The first modern solution-focused court was a drug court which commenced in Florida in 1989.[26] This court was followed in 1997, again in Florida, by the first mental health court ('MHC').[27] 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.[28] 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[29] and 397 MHCs,[30] with more in Canada,[31] England,[32] New Zealand, Brazil,[33] Europe[34] and elsewhere. In Australia, drug courts or drug court lists operate in all Australian jurisdictions excluding the two territories and (now) Queensland.[35] Although the term MHC is

25 Schneider, above n 9; King, 'Therapeutic Jurisprudence Initiatives', above n 9.

26 'Introduction' in Bruce Winick and David Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 4.

27 Ginger Lerner-Wren, 'Broward's Mental Health Court: An Innovative Approach to the Mentally Disabled in the Criminal Justice System' in National Center For State Courts, *Future Trends in State Courts 1999–2000 Edition* (2000) 4 <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/spcts/id/184>.

28 Hora, above n 16, 10, 26. Hora is a retired judge of the Superior Court of California and a former Drug Treatment Court judge. In 2010, Hora spent 12 weeks in Australia as part of the South Australian Government's 'Thinkers in Residence' program: at ii–iii; Greg Berman and John Feinblatt, 'Problem-Solving Courts: A Brief Primer' (2001) 23 *Law and Policy* 125.

29 Office of Justice Programs, Department of Justice (US), 'Drug Courts' (Report NCJ 238527, June 2015) <https://ncjrs.gov/pdffiles1/nij/238527.pdf>.

30 Gregg Goodale, Lisa Callahan and Henry J Steadman, 'What Can We Say about Mental Health Courts Today?' (2013) 64 *Psychiatric Services* 298, 299.

31 Emily Slinger and Ronald Roesch, 'Problem-Solving Courts in Canada: A Review and a Call for Empirically-Based Evaluation Methods' (2010) 33 *International Journal of Law and Psychiatry* 258.

32 Jane Winstone and Francis Pakes, 'Process Evaluation of the Mental Health Court Pilot' (Research Paper No 18/10, Ministry of Justice (UK), September 2010) <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/mhc-process-evaluation.pdf>.

33 King, 'Therapeutic Jurisprudence Initiatives', above n 9, 19.

34 E Rely VîlcicĂ et al, 'Exporting Court Innovation from the United States to Continental Europe: Compatibility between the Drug Court Model and Inquisitorial Justice Systems' (2010) 34 *International Journal of Comparative and Applied Criminal Justice* 139.

35 The Drug Court of Victoria operates in Melbourne: Magistrates' Court (Vic), *Drug Court* <https://www.magistratescourt.vic.gov.au/drug-court>. The Drug Court of NSW operates in Sydney, Parramatta and Toronto: Drug Court (NSW), *Homepage* <http://www.drugcourt.justice.nsw.gov.au/>. The Drug Court of South Australia operates in Adelaide: Courts Administration Authority (SA), *Drug Court* <www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Drug-Court.aspx>. The Perth Drug Court and the Children's Court Drug Court operate in Western Australia: Department of the Attorney-General (WA), *Drug Court* <www.courts.dotag.wa.gov.au/D/drug_court.aspx?uid=5227-1163-1055-5774>.

not generally used in Australia,[36] there are also dedicated solution-focused court lists for offenders with mental impairments in all Australian jurisdictions except the two territories and (now) Queensland.[37] Solution-focused court models are also in use in a number of jurisdictions for family violence cases,[38] prostitution offences,[39] war veterans' courts, teen courts, truancy courts, welfare fraud[40] and community courts.[41] 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'.[42]

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.[43] 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.

37 Magistrates' Court (Vic), *Guide to Specialist Court and Court Support Services* (Information Guide, June 2014) 6 <https://www.magistratescourt.vic.gov.au/sites/default/files/Default/Guide%20to%20SCCSS%20-%202%20June%202014%20%28final%20version%29.pdf>; Neil Donnelly, Lily Trimboli and Suzanne Poynton, 'Does CREDIT Reduce the Risk of Re-offending?' (Crime and Justice Bulletin No 169, NSW Bureau of Crime Statistics and Research, May 2013) 1; Grace Skrzypiec, Joy Wundersitz and Helen McRostie, 'Magistrates Court Diversion Program: An Analysis of Post Program Offending' (Report, Office of Crime Statistics and Research (SA), August 2004) <http://www.ocsar.sa.gov.au/docs/evaluation_reports/MCDP2.pdf>; Michael Hill, 'Hobart Magistrates Court's Mental Health Diversion List' (2009) 18 *Journal of Judicial Administration* 178. WA has separate lists for people with mental illness and intellectual disability: Magistrates Court (WA), *Specialist Courts* (25 July 2013) <www.magistratescourt.wa.gov.au/S/specialist_courts.aspx?uid=1152-1596-2359-5684>.

38 Emma Birdsey and Nadine Smith, 'The Domestic Violence Intervention Court Model: A Follow-Up Study' (Crime and Justice Bulletin No 155, NSW Bureau of Crime Statistics and Research, January 2012) 1.

39 Jelena Popovic, 'Court Process and Therapeutic Jurisprudence: Have We Thrown the Baby Out with the Bathwater?' [2006] (Special Series) *eLaw Journal: Murdoch University Electronic Journal of Law* 60, 71 <http://elaw.murdoch.edu.au/archives/issues/special/court_process.pdf>.

40 Rachel Porter, Michael Rempel and Adam Mansky, 'What Makes a Court Problem-Solving? Universal Performance Indicators for Problem-Solving Justice' (Report, Center for Court Innovation, February 2010) <http://www.courtinnovation.org/sites/default/files/What_Makes_A_Court_P_S.pdf>.

41 Neighbourhood Justice Centre, Department of Justice (Vic), *Evaluating the Neighbourhood Justice Centre in Yarra: 2007–2009* (Publication, 2010) <http://library.bsl.org.au/jspui/bitstream/1/3713/1/njc_evaluation_main_document.pdf>.

42 King, 'Therapeutic Jurisprudence Initiatives', above n 9, 21.

43 Bureau of Justice Assistance, Department of Justice (US), and National Association of Drug Court Professionals, 'Defining Drug Courts: The Key Components' (Drug Courts Resource Series Report NCJ 205621, January 1997); Michael Thompson, Fred Osher and Denise Tomasini-Joshi, 'Improving Responses to People with Mental Illnesses: The Essential Elements of a Mental Health Court' (Report, Bureau of Justice Assistance, Department of Justice (US), 2008) <https://csgjusticecenter.org/wp-content/uploads/2012/12/mhc-essential-elements.pdf>; Porter, Rempel and Mansky, above n 40.

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

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44 Zafirakis, above n 10, 86; Joy Wundersitz, 'Criminal Justice Responses to Drug and Drug-Related Offending: Are They Working?' (Technical and Background Paper No 25, Australian Institute of Criminology, May 2007) 20–1. <http://www.aic.gov.au/publications/current%20series/tbp/21-40/tbp025.html>.

45 Michelle Edgely, 'Solution-Focused Court Programs for Mentally Impaired Offenders: What Works?' (2013) 22 *Journal of Judicial Administration* 207, 214–15.

46 Ibid 216.

47 Ibid 212–14.

48 Craig G A Jones and Richard I Kemp, 'The Strength of the Participant-Judge Relationship Predicts Better Drug Court Outcomes' (2014) 21 *Psychiatry, Psychology and Law* 165, 169, 171–2.

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 drug 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 studies[51] 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

49 Douglas B Marlowe et al, 'Matching Judicial Supervision to Clients' Risk Status in Drug Court' (2006) 52 *Crime and Delinquency* 52; David S Festinger et al, 'Status Hearings in Drug Court: When More Is Less and Less Is More' (2002) 68 *Drug and Alcohol Dependence* 151.

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/ReportFile/952>. 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.[53] 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.[54]

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.[55] 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.[56] 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.[57]

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'.[58] 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

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: CODC 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.

56 D A Andrews, James Bonta and J Stephen Wormith, 'The Risk-Need-Responsivity (RNR) Model: Does Adding the Good Lives Model Contribute to Effective Crime Prevention?' (2011) 38 *Criminal Justice and Behavior* 735, 736, quoting Tony Ward and Shad Maruna, *Rehabilitation: Beyond the Risk Paradigm* (Routledge, 2007) 74.

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.[59] 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.[60] The recidivism rates of participants in the drug court from 1991–2001 (n = 6502) were compared with eligible non-participants (n = 4600) and statistically corrected for variations in age, gender, race and two years prior offending history.[61] 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.[62] 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.[63]

Another 10-year study found significant but much smaller effect sizes.[64] 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'.[65] 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.[66]

Almost all experts now agree that the accumulated evidence is overwhelming – adequately funded and properly implemented drug courts and MHCs do indeed reduce recidivism.[67] 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.[68] In light of the evidence, the US National Association of Drug Court Professionals has declared

59 Michael W Finigan, Shannon M Carey and Anton Cox, 'The Impact of a Mature Drug Court over 10 Years of Operation: Recidivism and Costs' (Final Report, Office of Research and Evaluation, National Institute of Justice (US), April 2007) 9 <https://www.ncjrs.gov/pdffiles1/nij/grants/219225.pdf>.

60 Ibid 13, 23.

61 Ibid 23, 25–6.

62 Ibid 28.

63 Ibid 27.

64 Juliette R Mackin et al, 'Baltimore City District Court Adult Drug Treatment Court: 10-Year Outcome and Cost Evaluation' (Report, Office of Problem-Solving Courts (MD), June 2009) 21–2 <http://npc research.com/wp-content/uploads/Baltimore_City_District_10_Year_Outcome_Cost_06092.pdf>.

65 Ibid 51.

66 Ibid.

67 See, eg, Goodale, Callahan and Steadman, above n 30, 298–9; Vîlcică et al, above n 34, 144; King, 'Therapeutic Jurisprudence Initiatives', above n 9, 23; Michelle Edgely, 'Why Do Mental Health Courts Work? A Confluence of Treatment, Support and Adroit Judicial Supervision' (2014) 37 *International Journal of Law and Psychiatry* 572.

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'.[69] Independent research in Australia has also confirmed that drug courts do reduce recidivism,[70] including research into the efficacy of Queensland's recently closed drug courts.[71]

The evidence in relation to MHCs, although less voluminous, is equally cogent. There are myriad studies of individual MHCs which demonstrate their effectiveness,[72] along with meta-analyses,[73] and longitudinal studies.[74] Again, the Australian experience has been that, like their US counterparts, MHCs have been effective in reducing recidivism.[75]

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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.

70 See, eg, Don Weatherburn et al, 'The NSW Drug Court: A Re-evaluation of Its Effectiveness' (Crime and Justice Bulletin No 121, NSW Bureau of Crime Statistics and Research, September 2008); Bronwyn Lind et al, 'New South Wales Drug Court Evaluation: Cost-Effectiveness' (Report, NSW Bureau of Crime Statistics and Research and Centre for Health Economics Research and Evaluation, 2002) 40, 48, 54 <http://www.bocsar.nsw.gov.au/Documents/l15.pdf>; Elissa Corlett, Grace Skrzypiec and Nichole Hunter, 'Offending Profiles of SA Drug Court Pilot Program "Completers"' (Evaluation Report, Office of Crime Statistics and Research (SA), February 2005) 18; Department of the Attorney-General (WA), *A Review of the Perth Drug Court* (Report, November 2006) 25.

71 Jason Payne, 'The Queensland Drug Court: A Recidivism Study of the First 100 Graduates' (Research and Public Policy Series No 83, Australian Institute of Criminology, 2008) 53; Toni Makkai and Keenan Veraar, 'Final Report on the South East Queensland Drug Court' (Technical and Background Paper No 6, Australian Institute of Criminology, July 2003) 41.

72 There are too many to cite, but among those from the past decade are: Shelli B Rossman et al, 'Criminal Justice Interventions for Offenders with Mental Illness: Evaluation of Mental Health Courts in Bronx and Brooklyn, New York' (Final Report, National Institute of Justice, February 2012) <http://www.urban.org/publications/412603.html>; Kelly Frailing, 'How Mental Health Courts Function: Outcomes and Observations' (2010) 33 *International Journal of Law and Psychiatry* 207; Marlee E Moore and Virginia Aldigé Hiday, 'Mental Health Court Outcomes: A Comparison of Re-arrest and Re-arrest Severity between Mental Health Court and Traditional Court Participants' (2006) 30 *Law and Human Behavior* 659; Kelly O'Keefe, 'The Brooklyn Mental Health Court Evaluation: Planning, Implementation, Courtroom Dynamics, and Participant Outcomes' (Research Report, Center for Court Innovation, September 2006) <www.courtinnovation.org/sites/default/files/BMHCevaluation.pdf>; Merith Cosden et al, 'Evaluation of the Santa Barbara County Mental Health Treatment Court with Intensive Case Management' (University of California, July 2004) <http://web.archive.org/web/20100920215059/http://consensusproject.org/downloads/exec.summary.santa.barbara.evaluation.pdf>.

73 Christine Marie Sarteschi, *Assessing the Effectiveness of Mental Health Courts: A Meta-analysis of Clinical and Recidivism Outcomes* (PhD Thesis, University of Pittsburgh, 2009) <http://d-scholarship.pitt.edu/9275/1/CMSarteschiAug2009Dissertation.pdf>; Lauren Almquist and Elizabeth Dodd, 'Mental Health Courts: A Guide to Research-Informed Policy and Practice' (Report, Council of State Governments Justice Center (US), 2009) <https://www.bja.gov/Publications/CSG_MHC_Research.pdf>.

74 Henry J Steadman et al, 'Effect of Mental Health Courts on Arrests and Jail Days: A Multisite Study' (2011) 68 *Archives of General Psychiatry* 167; Padraic J Burns, Virginia Aldigé Hiday and Bradley Ray, 'Effectiveness 2 Years Postexit of a Recently Established Mental Health Court' (2013) 57 *American Behavioral Scientist* 189; Virginia A Hiday and Bradley Ray, 'Arrests Two Years after Exiting a Well-Established Mental Health Court' (2010) 61 *Psychiatric Services* 463; Dale E McNiel and Renée L Binder, 'Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence' (2007) 164 *American Journal of Psychiatry* 1395; Rossman et al, above n 72.

75 Skrzypiec, Wundersitz and McRostie, above n 37; Esther Newitt and Victor Stojcevski, 'Mental Health Diversion List' (Evaluation Report, Magistrates Court (Tas), May 2009) <http://www.magistratescourt.tas.gov.au/divisions/criminal__and__general/mental_health_diversion>.

The Drug Court and MHC models are not the only of 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

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>.

77 See Victorian Government, *Neighbourhood Justice Centre* (8 February 2016) <http://www.neighbourhoodjustice.vic.gov.au/>.

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]

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79 See generally Stuart Ross, University of Melbourne, 'Evaluation of the Court Integrated Services Program' (Final Report, Magistrates' Court (Vic), December 2009) <http://www.magistratescourt.vic.gov.au/publication/evaluation-court-integrated-services-program>.

80 Ibid 113–15.

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').

82 King, 'Therapeutic Jurisprudence Initiatives', above n 9, 26.

83 Local Court (NSW), *Annual Review 2014* (2015) 22 <http://www.localcourt.justice.nsw.gov.au/Documents/2014%20Local%20Court%20Annual%20Review.pdf>.

84 Rohan Lulham, 'The Magistrates Early Referral into Treatment Program' (Crime and Justice Bulletin No 131, NSW Bureau of Crime Statistics and Research, February 2009) 8.

85 Mark Howard and Kristy Martire, 'The Magistrates Early Referral into Treatment (MERIT) Program: 2010 Annual Report', (Attorney-General and Justice (NSW), July 2012) 22 <http://www.merit.justice.nsw.gov.au/Documents/2010_annual_report.pdf>.

VI THE COST-EFFECTIVENESS OF SOLUTION-FOCUSED METHODS

Research has also demonstrated that drug courts and MHCs are cost-effective.[86] 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.[87] 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.[88] 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 $2 091 574, 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.[89]

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

86 For a sample of the United States studies on cost-effectiveness, see Center for Families, Children and the Courts, Judicial Council of California, *California Drug Court Cost Analysis Study* (Research Summary, May 2006) <http://www.courts.ca.gov/documents/cost_study_research_summary.pdf>; M Susan Ridgely et al, 'Justice, Treatment, and Cost: An Evaluation of the Fiscal Impact of Allegheny County Mental Health Court' (Technical Report, RAND Corporation, 2007) <http://www.rand.org/content/dam/rand/pubs/technical_reports/2007/RAND_TR439.pdf>; Shannon M Carey and Mark Waller, 'California Drug Courts: Costs and Benefits – Phase III' (Report, Judicial Council of California, January 2009); Shannon M Carey et al, 'California Drug Courts: Outcomes, Costs and Promising Practices: An Overview of Phase II in a Statewide Study' (2006) 38 *Journal of Psychoactive Drugs* 345; Shannon Carey and Michael Finigan, 'A Detailed Cost Analysis in a Mature Drug Court Setting: A Cost–Benefit Evaluation of the Multnomah County Drug Court' (Report, National Institute of Justice, July 2003) <https://www.ncjrs.gov/pdffiles1/nij/grants/203558.pdf>.

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.

88 PricewaterhouseCoopers, 'Economic Evaluation of the Court Integrated Services Program (CISP): Final Report on Economic Impacts of CISP' (Report, Department of Justice (Vic), November 2009) 7–9 <https://www.magistratescourt.vic.gov.au/sites/default/files/Default/cisp_economic_evaluation_final_report.pdf>; Department of the Attorney-General (WA), above n 70, 28–31.

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.[90] 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.[91] The review found that the PDC delivered substantial costs savings, paid for itself quickly and delivered better community safety outcomes.[92] 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.[93]

Other Australian cost-effectiveness studies identified for this research have similarly omitted many of the hard-to-calculate variables from their calculations.[94] 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.[95]

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.

94 Those studies were: KPMG, 'Evaluation of the Drug Court of Victoria: Final Report' (Report, Magistrates' Court of Victoria, 18 December 2014) <http://www.magistratescourt.vic.gov.au/news/drug-court-victoria-evaluation-released>; Centre for Health Economics Research and Evaluation, 'The Costs of NSW Drug Court: Final Report' (Report, NSW Bureau of Crime Statistics and Research, November 2008) <http://www.directionsact.com/pdf/drug_news/DrugCourt_CHERE.pdf>; Crime Research Centre, University of Western Australia, *WA Diversion Program – Evaluation Framework (POP/STIR/IDP): Final Report* (Report, Drug and Alcohol Office (WA), May 2007) <http://www.dao.health.wa.gov.au/portals/0/DAO/Info%20and%20resources/Full%20Report.pdf>; Lind et al, above n 70.

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.[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,[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'.[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.[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

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.

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 *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), *Safer Streets Crime Action Plan – Youth Justice: Have Your Say* (Report, March 2013) <http://www.justice.qld.gov.au/__data/assets/pdf_file/0007/177775/safer-streets-crime-action-plan-youth-justice.pdf>; *Vicious Lawless Association Disestablishment Act 2013* (Qld); *Youth Justice (Boot Camp Orders) and Other Legislation Amendment Act 2012* (Qld).

105 Legal Affairs and Community Safety Committee, Queensland Parliament, *Inquiry on Strategies To Prevent and Reduce Criminal Activity in Queensland: Report No 82* (2014) 2 <https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/CrimeInquiry2014>.

106 Ibid 238–9; Evidence to Legal Affairs and Community Safety Committee, Queensland Parliament, Southport, 28 July 2014, 34 (Sean Choat MP) <http://www.parliament.qld.gov.au/documents/committees/LACSC/2014/CrimeInquiry2014/trns-ph-28Jul2014.pdf>.

considered and responsible way.[107] Victoria and New South Wales both have independent statutory bodies to conduct research into, inter alia, public attitudes on sentencing.[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.[109] That agency was abolished, along with the solution-focused courts, by the incoming Queensland Government in 2012.[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.[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.[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.[113] What is clear, is that politicians believe the public to be supportive of tougher responses to crime, including harsher sentences for offenders.[114]

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

107 See generally Spiranovic, Roberts and Indermaur, 'What Predicts Punitiveness?', above n 7, 249; Kate Warner et al, 'Gauging Public Opinion on Sentencing: Can Asking Jurors Help?' (Trends and Issues in Crime and Criminal Justice No 371, Australian Institute of Criminology, March 2009) 1; Gelb, 'Measuring Public Opinion', above n 7, 4.

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.

109 *Penalties and Sentences Act 1992* (Qld) pt 12, as inserted by *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 8.

110 *Criminal Law Amendment Act 2012* (Qld) s 17.

111 Stephen Monterosso, 'Punitive Criminal Justice and Policy in Contemporary Society' (2009) 9 *Queensland University of Technology Law and Justice Journal* 13, 24.

112 Jude McCulloch, 'Campaigns Fuelled by Fear', *The Canberra Times* (online), 5 August 2013 <http://www.canberratimes.com.au/comment/campaigns-fuelled-by-fear-20130804-2r7l1.html>; Sarre, above n 103, 153–4.

113 Sarre, above n 103; Enver Solomon, 'Is the Press the Real Power behind Punitivism?' (2005) 59 *Criminal Justice Matters* 34; Monterosso, above n 111; Chief Justice Wayne Martin, 'Popular Punitivism – The Role of the Courts in the Development of Criminal Justice Policies' (2010) 43 *Australian and New Zealand Journal of Criminology* 1; Karen Gelb, 'Predictors of Punitiveness: Community Views in Victoria' (Research Report, Sentencing Advisory Council (Vic), July 2011) 1.

114 See, eg, Legal Affairs and Community Safety Committee, above n 105, 238–9.

which show that the public believe that sentences should be tougher.[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.[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.[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,[118] building on data collected by the predecessor National Social Science Surveys ('NSSS'), conducted on numerous occasions between 1984 and 2001.[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.[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.[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.[122]

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

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115 Karen Gelb, 'Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing' (Research Report, Sentencing Advisory Council (Vic), 2006) 5 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Myths%20and%20Misconceptions%20Public%20Opinion%20Versus%20Public%20Judgment%20about%20Sentencing.pdf>; Spiranovic, Roberts and Indermaur, 'What Predicts Punitiveness?', above n 7, 249.

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>.

117 Ian McAllister and Sarah M Cameron, 'Trends in Australian Political Opinion: Results from the Australian Election Study, 1987–2013' (Research Report, Australian National University, 2014) 124–5 <http://aes.anu.edu.au/publications/aes-trends>.

118 Rachel Gibson et al, 'Introduction' in Shaun Wilson et al (eds), *Australian Social Attitudes: The First Report* (UNSW Press, 2005) 1, 6–7.

119 Australian Data Archive, *The National Social Science Surveys (NSSS)* (7 February 2013) <https://www.ada.edu.au/social-science/nsss>.

120 David Indermaur and Lynne Roberts, 'Perceptions of Crime and Justice' in Shaun Wilson et al (eds), *Australian Social Attitudes: The First Report* (UNSW Press, 2005) 141, 142; Lynne Roberts and David Indermaur, 'What Australians Think about Crime and Justice: Results from the 2007 Survey of Social Attitudes' (Research and Public Policy Series No 101, Australian Institute of Criminology, 2009) 18; McAllister and Cameron, above n 117, 58.

121 McAllister and Cameron, above n 117, 58.

122 Ibid; Indermaur and Roberts, 'Perceptions of Crime and Justice', above n 120, 154–5.

123 A telephone survey was conducted with a stratified random sample of 6005 participants: Lynne D Roberts, Caroline Spiranovic and David Indermaur, 'A Country Not Divided: A Comparison of Public Punitiveness and Confidence in Sentencing Across Australia' (2011) 44 *Australian and New Zealand Journal of Criminology* 370, 372, 375–6 ('*A Country Not Divided*').

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.[124] Despite quite significant differences in rates of imprisonment across Australia,[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.[126] An interesting correlation is that these are the three states with independent institutions specifically tasked with educating the public about sentencing matters.[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.[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.[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.[130] Another problem is acquiescent response bias, which results

124 Ibid 373–4.

125 The study draws on Australian Bureau of Stastics 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.

126 Ibid 375, 378–9.

127 Ibid 373. Those institutions are the NSW Sentencing Council, the Sentencing Advisory Council (Vic) and the Courts Administration Authority (SA).

128 Eg, 8133 surveys were returned for AuSSA 2007 from an initial sample of 20 000: Roberts and Indermaur, '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.

129 JoLaine Reierson Draugalis, Stephen Joel Coons and Cecilia M Plaza, 'Best Practices for Survey Research Reports: A Synopsis for Authors and Reviewers' (2008) 72(1) *American Journal of Pharmaceutical Education* article 11, 4 <http://www.ajpe.org/doi/pdf/10.5688/aj720111>.

130 David A Green, 'Public Opinion versus Public Judgment about Crime' (2006) 46 *British Journal of Criminology* 131, 132.

from the tendency, negatively correlated with education, to respond to survey questions affirmatively.[131] 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.[132]

The second problem with punitivity 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,[133] repeated studies show that Australians believe that crime is constantly increasing, especially violent crime.[134] 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.[135] The holding of these misconceptions about crime are the strongest predictors of punitivity, stronger than any demographic variable, and, surprisingly, stronger than victim status.[136] A related problem concerns the generalisability of punitivity 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.[137] The highly plausible conclusion reached by Gelb and many other researchers in the field, is that punitivity findings reached via decontextualised surveys are merely a 'methodological artefact'.[138]

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131 Dorothy Watson, 'Correcting for Acquiescent Response Bias in the Absence of a Balanced Scale: An Application to Class Consciousness' (1992) 21 *Sociological Methods and Research* 52, 52, 54, 83.

132 Gelb, 'Measuring Public Opinion', above n 7, 10.

133 Australian Institute of Criminology, 'Australian Crime: Facts and Figures 2013' (Australian Crime: Facts and Figures No 16, Australian Institute of Criminology, 2014) iii, v.

134 Gelb, 'Predictors of Punitiveness', above n 113, 18; Lucy Snowball and Craig Jones, 'Public Confidence in the New South Wales Criminal Justice System: 2012 Update' (Crime and Justice Bulletin No 169, NSW Bureau of Crime Statistics and Research, November 2012) 8; Warner et al, 'Public Judgement on Sentencing', above n 7, 3; Indermaur and Roberts, 'Perceptions of Crime and Justice', above n 120, 142; Lynne D Roberts and David Indermaur, 'Predicting Punitive Attitudes in Australia' (2007) 14 *Psychiatry, Psychology and Law* 56, 62; Brent Davis and Kym Dossetor, '(Mis)perceptions of Crime in Australia' (Trends and Issues in Crime and Criminal Justice No 396, Australian Institute of Criminology, July 2010) 1–3.

135 Warner et al, 'Public Judgement on Sentencing', above n 7, 3; Gelb, 'Predictors of Punitiveness', above n 113, 13; Davis and Dossetor, above n 134, 2–3.

136 Roberts and Indermaur, 'Predicting Punitive Attitudes in Australia', above n 134, 58–9.

137 Anthony N Doob and Julian V Roberts, 'Sentencing: An Analysis of the Public's View of Sentencing' (Report, Department of Justice (Canada), 1983), cited in Gelb, 'Predictors of Punitiveness', above n 113, 12–13.

138 Gelb, 'Predictors of Punitiveness', above n 113, 12, 20; Karen Gelb, 'More Myths and Misconceptions' (Research Report, Sentencing Advisory Council (Vic), September 2008) 4 <https://www.sentencingcouncil.vic.gov.au/publications/more-myths-and-misconceptions>; Geraldine Mackenzie et al, 'Sentencing and Public Confidence: Results from a National Australian Survey on Public Opinions towards Sentencing' (2012) 45 *Australian and New Zealand Journal of Criminology* 45, 46–7.

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 (punitivity). 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 punitivity 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.
146 Ibid 53–4. The measure of lenience includes 'a little too lenient' and 'much too lenient'. 'Agreed' includes 'strongly' agreed.

suggesting that public opinion is more nuanced than portrayed by top-of-the-head opinion polling.[147]

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.[148] 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.[149] 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.[150] All had strong claims in mitigation.[151] 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.[152] 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.

148 Austin Lovegrove, 'Sentencing and Public Opinion: An Empirical Study of Punitiveness and Lenience and Its Implications for Penal Moderation' (2013) 46 *Australian and New Zealand Journal of Criminology* 200, 204–6.

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.

150 Lovegrove, 'Sentencing and Public Opinion', above n 148, 204–5.

151 Lovegrove, 'Putting the Offender Back into Sentencing', above n 149, 43.

152 Ibid 53; Lovegrove, 'Sentencing and Public Opinion', above n 148, 206.

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]

153 Austin Lovegrove, 'Public Opinion, Sentencing and Lenience: an Empirical Study Involving Judges Consulting the Community' (2007) (October) *Criminal Law Review* 769, 775–6.
154 Warner et al, 'Gauging Public Opinion', above n 107, 1–2.
155 Ibid 4.
156 Ibid 2, 4.
157 Warner et al, 'Public Judgement on Sentencing', above n 7, 4.
158 Ibid 4–5.

This Australian research is supported by overseas research which has made similar findings.[159] 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.[160] 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.[161]

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.[162]
>
> 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.[163] 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.[164] The only violent crime to buck that trend is sexual assault.[165] 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).[166]

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159 See Lovegrove, 'Putting the Offender Back into Sentencing', above n 149, 40; Gelb, 'More Myths and Misconceptions', above n 138, 7–10.

160 Karen Gelb, 'Sentencing Matters: Alternatives to Imprisonment: Community Views in Victoria' (Research Report, Sentencing Advisory Council (Vic), March 2011) 10 <https://www.sentencingcouncil.vic.gov.au/publications/alternatives-to-imprisonment>.

161 Ibid 9.

162 Richard M Nixon, *In the Arena: A Memoir of Victory, Defeat and Renewal* (Simon and Schuster, 1990) 214.

163 Australian Bureau of Statistics, *Prisoners in Australia, 2014* (10 December 2015) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2014~Main%20Features~Key%20findings~1>.

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.[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.[168] Due to prison overcrowding, prisoner health problems have increased and those health problems are transferred to society when the prisoner is released.[169] The Committee concluded that the rate of imprisonment in Australia has now reached 'an unacceptable level'.[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.[171] Research also demonstrates that even greater recidivism reduction effects can be achieved with stronger adherence to evidence-based rehabilitative programs.[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.[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.[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-

167 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 7 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index>.

168 Ibid 19.

169 Ibid 21, 23–5.

170 Ibid 17.

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

172 Gutierrez and Bourgon, above n 53, 12–13.

173 Legal Affairs and Community Safety Committee, above n 105.

174 Roberts, Spiranovic and Indermaur, 'A Country Not Divided', above n 123, 371, 374, 379–80.

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