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# NAMING YOUNG OFFENDERS: IMPLICATIONS OF RESEARCH FOR REFORM

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JODIE O'LEARY\*

*Recently it was reported that Queensland's Liberal National Party Government is considering proposing amendments to Queensland's juvenile justice legislation. The proposal is to expand the ability to name recidivist young offenders. This article suggests that such a proposal does not align with the evidence regarding juvenile development and offending, and will be ineffective as a deterrent, as well as increasing stigmatizing potential. The article considers whether the provisions on naming in other States and Territories are better aligned with the available evidence. It concludes that the approach taken in the majority of jurisdictions, which rests on a presumption against naming, should be considered best practice.*

Calls for criminal justice reform, involving the public naming of young offenders, are often made as part of a tough-on-crime, strong law and order, political stance. Some argue that allowing the publication of identifying details of young offenders ('naming'), provides for greater accountability and acts as a deterrent, both specifically and generally.<sup>1</sup>

In 2012 the Queensland Government was reported to be considering proposing amendments to the naming provisions in Queensland.<sup>2</sup> This was recently reiterated in the Government's 'Safer Streets Crime Action Plan – Youth Justice.'<sup>3</sup> The proposal would extend the ability for Queensland courts to name to *recidivist* young offenders. This is not the first time that the Liberal National Party has made such a proposal. Prior to the introduction of the current Queensland provisions, the then-opposition leader wanted the court's discretion to name to include recidivist non-violent young offenders who continue 'to offend and endanger the community while hiding behind the veil of anonymity.'<sup>4</sup> However, at the time of writing, further details of the Queensland Government's proposal were unclear.

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<sup>1</sup> For a brief summary of this argument see Braithwaite J, *Crime, Shame and Reintegration* (Cambridge University Press, Cambridge, 1989) pp 19-20.

<sup>2</sup> See eg, Remeikis A, 'Juvenile Offenders in Sights', *Sydney Morning Herald* (online), 15 July 2012, [www.smh.com.au/national/juvenile-offenders-in-sights-20120714-223eg.html#ixzz25LqYTqsl](http://www.smh.com.au/national/juvenile-offenders-in-sights-20120714-223eg.html#ixzz25LqYTqsl).

<sup>3</sup> Department of Justice and Attorney-General, Government of Queensland, *Safer Streets Crime Action Plan – Youth Justice* (March 2013), [www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0007/177775/safer-streets-crime-action-plan-youth-justice.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0007/177775/safer-streets-crime-action-plan-youth-justice.pdf). The Government noted that its review of the *Youth Justice Act 1992* (Qld) would examine 'expanding the existing naming laws so that the names of repeat young offenders can be made public' at 7.

<sup>4</sup> Dixon N, 'Naming Juvenile Offenders – Juvenile Justice Amendment Bill 2002 (Qld)' Research Brief No 22, Queensland Parliamentary Library, Queensland Parliament, 2002) at 10.

Queensland is not the only Australian state to revisit its naming provisions in the recent past. In 2008 the Standing Committee on Law and Justice in New South Wales considered the operation of the naming provisions in that state.<sup>5</sup> Continued appeals for reform to target young offending are unsurprising. Such rhetoric is politically expedient for a number of reasons:

1. While juveniles only comprise a small percentage of all offenders,<sup>6</sup> proportionately, persons aged between 15-19 years commit more crime than those in other age groups;<sup>7</sup>
2. Young offenders are unable to vote to voice their disapproval of policies that impact upon them; and
3. The youth justice system is sometimes perceived as a soft approach in terms of criminal justice. For example, Queensland's Attorney-General was reported as saying: 'We've heard on too many occasions young people who are coming through our courts who have just laughed at the sort of slap on the wrist that they ultimately get.'<sup>8</sup>

Yet these reasons highlight the need to exercise caution when it comes to youth justice reform. The fact that juveniles commit, proportionately, more crime than persons of other ages suggests that they face unique circumstances. Their lack of voice in important decision making also recognises that they are unique, such limitation predicated on societal concern about their immature abilities. Further, recognition of these developmental characteristics and their impact on participation in criminal behaviour underlies the special system of criminal justice for juveniles in Australia and elsewhere. Unless the reasons for treating juveniles differently have become obsolete, continued reflection on juveniles' development and their uniqueness is necessary in policy decisions about combating juvenile offending.

This article analyses the arguments for and against the naming of young offenders in light of the available criminological and developmental research. Particularly, the article considers

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<sup>5</sup> Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*, Report No 35 (April 2008) ultimately recommended that the protection afforded to juveniles against publication be maintained and further prohibitions against publication be extended to cover the period prior to charges being laid. This followed an earlier report by the New South Wales Law Reform Commission, *Young Offenders*, Report No 104 (2005) at [8.22]-[8.33] that also rebuffed any relaxation of the protection against publication. The Government supported the recommendation to maintain the protection but did not support the recommendation to extend the prohibition to the pre-charge period: New South Wales Government, *Response to the Inquiry into the Prohibition of Names of Children Involved in Criminal Proceedings: Report 35*, [www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/a6e0bf2fbb2c4cc5ca25743900104238/\\$FILE/081030%20Government%20response.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/a6e0bf2fbb2c4cc5ca25743900104238/$FILE/081030%20Government%20response.pdf).

<sup>6</sup> For example, in Queensland, between 2006 and 2012, juvenile offenders (under 17 years of age) accounted for 5.44% of the total offending population. That is, there were 66 497 juveniles who appeared before the Children's Court in that period while there were 1 156 849 adult offenders. This data was obtained from the 'Criminal Lodgements' appendices in the Annual Magistrate's Court Reports in the relevant years available at [www.courts.qld.gov.au/about/publications#Magistrates%20Court%20Annual%20Reports](http://www.courts.qld.gov.au/about/publications#Magistrates%20Court%20Annual%20Reports).

<sup>7</sup> Richards K, Australian Institute of Criminology, "What Makes Juvenile Offenders Different from Adult Offenders?" (February 2011) Trends & Issues in Crime and Criminal Justice No. 409 at 1, [www.aic.gov.au/publications/current%20series/tandi/401-420/tandi409.html](http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi409.html).

<sup>8</sup> Remeikis, n 2.

the arguments that: naming will deter future juvenile offending; and conversely, naming will label or stigmatise juveniles, cementing their place as future offenders. It is argued that the Queensland Government's proposed expansion of the naming provisions is inappropriate. The existing Australian approaches to naming juvenile offenders are assessed to determine which, if any, aligns with the available evidence about juvenile development and offending.

#### I DEVELOPMENTS IN DEVELOPMENT

As previously stated, youth justice in Australia recognises that young people's participation in crime may be affected by their developmental stage. Although there is some conflicting evidence,<sup>9</sup> it is generally thought that involvement in crime is something that most people grow out of, it is ephemeral.<sup>10</sup> Recent developmental neuroscience research illuminates some explanations for the transitory nature of juvenile offending. The adolescent period precedes full brain development. Changes around the time of puberty, leading to sensation seeking and reward orientation,<sup>11</sup>

precede the development of regulatory competence in a manner that creates a disjunction between the adolescent's affective experience and his or her ability to regulate arousal and motivation...[This] may well create a situation in which one is starting an engine without yet having a skilled driver behind the wheel.<sup>12</sup>

Steinberg further explains that changes in the brain's socio-emotional system occur in early adolescence, while changes in the cognitive control system occur later, in late adolescence or early adulthood. As such, there is a gap or period of time where there is a 'heightened vulnerability to risky and reckless behaviour.'<sup>13</sup> The Supreme Court of the United States accepted the impact of such research upon juveniles' culpability and the resulting implications for sentencing juveniles in *Roper v Simmons*, 543 US 551 (2005) and *Graham v Florida*, 130 S Ct (2011). Most recently in *Miller v Alabama*, 132 S Ct 2455 (2012) the Court

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<sup>9</sup> Weatherburn D, McGrath A and Bartels L, "Three Dogmas of Juvenile Justice" (2012) 35(3) UNSWLJ 779 at 800 review past studies with conflicting findings and present their own evidence that the majority of the 8813 juvenile offenders who were either cautioned, referred to youth justice conference or appeared in a New South Wales court in 1999 had reoffended within ten years. The limitation of this study though is that while it is clear that juveniles have reoffended, what is not clear is when. Indeed those whose initial contact was as a 10-12 year old were the most likely of any age group to be reconvicted. This could certainly have occurred prior to achieving full maturity levels.

<sup>10</sup> See discussion of this in Richards, n 7 at 2; see also Mulvey EP et al, "Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication among Serious Adolescent Offenders" (2010) 22(2) Dev Psychopathol 453 at 454 citing, inter alia, Piquero AR et al, "Assessing the Impact of Exposure of Time and Incapacitation on Longitudinal Trajectories of Criminal Offending" (2001) 16(1) J of Adolescent Res 54, who note that 'less than half of serious adolescent offenders likely will continue their adult criminal career into their 20s.' Mulvey et al's study of juveniles following court adjudication also found at 470 that 'the general trend among [serious adolescent offenders] is to reduce their level of involvement in antisocial activities.'

<sup>11</sup> For a discussion of developmental factors affecting the reward orientation of adolescents see Galvan A, "Adolescent Development of the Reward System" (2010) 4 Front Hum Neurosci 1.

<sup>12</sup> Steinberg L, "Cognitive and Affective Development in Adolescence" (2005) 9(2) Trends Cogn Sci 69. This article provides a review of the empirical research underlying this idea.

<sup>13</sup> Steinberg L, "A Social Neuroscience Perspective of Adolescent Risk-Taking" (2008) 28 Dev Rev 78 at 83.

quoted from the American Psychological Association brief that identified increasing clarity in the research that ‘adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance.’<sup>14</sup> The Court noted that ‘the science and social science supporting *Roper*’s and *Graham*’s conclusions have become even stronger.’<sup>15</sup> Those considering youth justice reform should consider the interplay of these developments and the unique position of juveniles. This article does just that, looking first at the theory of deterrence as a justification for naming young offenders.

## II DETERRING JUVENILES

Deterrence is a feature of proposals to name young offenders. To act as a specific deterrent the naming of a young offender should deter that particular juvenile from future offending. The Queensland Government’s proposed expanded ability to name may result in a similar practice to that surrounding the recording of criminal convictions. That is, once a criminal conviction has been recorded there is little argument as to why all subsequent offending should not attract a corresponding record. Likewise, once a juvenile has been named a court would be likely to again name that juvenile if they appear before the court for a subsequent offence.<sup>16</sup> Knowing this, it may be suggested that the juvenile would be less likely to reoffend. However, there is a significant flaw in this line of thought. A juvenile who has already been named once arguably has little to lose. Once named the juvenile’s reputation has already been tarnished. His or her name may potentially already appear in the public domain for all and sundry to see. The specific deterrence value could only then impact upon a juvenile offender who is on the verge of this recidivist line in the sand. It will only result from the implicit or explicit threat made by the court that if the juvenile is to appear before it again they can expect to be named.

General deterrence aims to educate would-be offenders as to the consequences of such behaviour in the hope that should they be tempted they will rationally choose to refrain. The value of naming as a general deterrent is arguably less than as a specific deterrent as the present ability to publish information, apart from identification details, means that the necessary information regarding the offence and the sentence can already be conveyed to other prospective offenders. Alternatively, it may be proposed that knowing others have been named for particular conduct provides a further level of severity to the sentence and will deter others from engaging in similar conduct for fear of attracting a similar result.

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<sup>14</sup> Brief for American Psychological Association et al as *Amici Curiae* 3, 4, cited in *Miller v Alabama*, 132 S Ct 2455 (2012) at fn 5.

<sup>15</sup> *Miller v Alabama*, 132 S Ct 2455 (2012) at fn 5.

<sup>16</sup> This has been the experience in the Northern Territory, see Duncan Chappell and Robyn Lincoln, ‘Naming and Shaming of Indigenous Youth in the Justice System: An Exploratory Study of the Impact in the Northern Territory’ (Project Report, Australian Institute of Aboriginal and Torres Strait Islander Studies, 21 May 2012) at 93, quoting a legal practitioner: ‘I guess the hard one is when someone has already been in trouble before and by that stage the court says well, no, you’ve had your opportunity you’ve been in trouble before what good would it do for us to suppress the name now.’

However, the addition of naming upon the severity of the sentence could be said to be irrelevant to deterrence, as certainty of sentence has been found to act as a deterrent rather than severity of punishment.<sup>17</sup>

Importantly, when considering either specific or general deterrence aims of naming juvenile offenders, research findings indicate that juveniles partake in dangerous or risky acts despite knowing the risks involved.<sup>18</sup> Therefore, it is arguable that despite knowing the risk that they will be caught offending and punished, even to the extent of having their names published, juvenile offenders will not be deterred. This is particularly so given that it has been found that juveniles are more capable of learning from positive consequences such as rewards rather than negative or punitive consequences of behaviour,<sup>19</sup> and because adolescents are less likely to consider long-term impacts or consequences of their behaviour.<sup>20</sup>

Put another way, in earlier literature it was theorised that juveniles are egocentric and experience an 'imaginary audience' which spurs on their Icarus-type ideations, so that they do not realise their own limitations or vulnerabilities.<sup>21</sup> Subsequent research debunked this theory, finding that juveniles (like adults) overestimate risk.<sup>22</sup> Nevertheless, knowing of the risks, juveniles in socially or emotionally exciting situations will disregard them.<sup>23</sup>

Adolescents do not 'simply rationally weigh the relative risks and consequences of their behaviour – their actions are largely influenced by feelings and social influences.'<sup>24</sup> They are more likely to be influenced by excitement or stress when making decisions, especially in

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<sup>17</sup> See discussion in Alexander T and Bagaric M, "(Marginal) General Deterrence Doesn't Work – and What it Means for Sentencing" (2011) 35 Crim LJ 269; see also McGrath A, "Offenders' Perceptions of the Sentencing Process: A Study of Deterrence and Stigmatisation in the New South Wales Children's Court" (2009) 42(1) ANZJC 24. McGrath supports earlier work of Nagin D, "Criminal Deterrence Research at the Outset of the Twenty-first Century" in Tonry M (ed), *Crime and Justice: A Review of Research* (University of Chicago Press, Chicago, 1998) and Von Hirsch A et al, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Hart Publishing, Oxford, 1999) propounding this view: at 25. The alternative argument would be that publication of names would add to the perceived certainty of punishment, especially if one considers the need for information to be transmitted for the effective operation of the concept of general deterrence.

Nevertheless, as propounded earlier, publishing information that a juvenile has been convicted and sentenced would arguably provide just as adequate information for general deterrence, without the need for naming.

<sup>18</sup> See discussion in Cauffman E and Steinberg L, "The Cognitive and Affective Influences on Adolescent Decision-Making" (1995) 68 Temple LR 1763.

<sup>19</sup> Albert D and Steinberg L, "Judgment and Decision Making in Adolescence" (2011) 21(1) J Res Adolescence 211 at 219.

<sup>20</sup> Steinberg L, "Adolescent Development and Juvenile Justice" (2009) 5 Annu Rev Clin Psycho 47 at 57.

<sup>21</sup> Arnett J, "Reckless Behavior in Adolescence: A Developmental Perspective" (1992) 12 *Dev Rev* 339 and Elkind D, 'Egocentrism in Adolescence' (1967) 38 *Child Dev* 1025 cited in Sturman D and Moghaddam B, "The Neurobiology of Adolescence: Changes in Brain Architecture, Functional Dynamics, and Behavioral Tendencies" (2011) 35 *Neurosci Biobehav Rev* 1704 at 1705.

<sup>22</sup> For example, De Bruin WB et al, "Can Adolescents Predict Significant Life Events?" (2007) 41 *J Adolescent Health* 208 cited in Sturman and Moghaddam, n 21. See also Albert and Steinberg, n 19 at 213 for further sources supporting this proposition.

<sup>23</sup> For a discussion of the research findings in this area see Sturman and Moghaddam, n 21 at 1706.

<sup>24</sup> Steinberg, n 12 at 72.

the presence of peers,<sup>25</sup> factors which are potentially present either in isolation or in combination at the time of offending.<sup>26</sup>

Naming juvenile offenders will provide the juveniles with a real audience. This may increase the perceived reward of a risky decision to offend.<sup>27</sup> Studies show that juveniles are attracted to those engaged in antisocial behaviour,<sup>28</sup> and that juveniles consider peer interactions as highly rewarding.<sup>29</sup> As such, a juvenile may perceive the fact that they will be named as a benefit of engaging in crime rather than be deterred from doing so.<sup>30</sup>

[A] delinquent attracts the attention of peers, ... audience members take note of this phenomenon, and ... they therefore increase their delinquency in proportion to their own desire for peer attention.<sup>31</sup>

While not determinative that naming juveniles is an ineffective deterrent, it is nevertheless informative to recognise that the Australian state or territory with the most expansive naming laws, the Northern Territory,<sup>32</sup> also 'consistently rates among the highest in proportion of offending young people and has the highest proportion of young people in detention.'<sup>33</sup>

Even if one considers that deterrence is an appropriate justification, proportionality must remain the overarching principle in sentencing. In *Veen v The Queen (No 2)* (1988) 164 CLR 465 at [8] the Court confirmed an earlier decision that proportionality could not be

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<sup>25</sup> Zimring F, *American Youth Violence* (Oxford University Press, Oxford, 1998) cited in O'Brien L et al, "Adolescents Prefer More Immediate Rewards When in the Presence of their Peers" (2011) 21(4) J Res Adolescence 747 at 747.

<sup>26</sup> See discussion in Steinberg L, "Risk Taking in Adolescence: New Perspectives from Brain and Behavioural Science" (2007) 16(2) Curr Dir Psychol Sci 55 at 56-57.

<sup>27</sup> Interviews reported in Chappell and Lincoln, n 16 at 95, expressed this issue: 'I know there was this issue about gangs... that there were names released in that whole process, you know front page, this person has been arrested and that person has been charged, you know it kind of turned them into mini-Gods...they were quite happy for them to be getting that kind of publicity, kind of generating this name for themselves.' However, the fact that adolescents are more attracted to immediate rewards suggests that any perception of a future benefit like this may not be at the forefront of juvenile's minds. For research regarding the adolescent's preference for immediate rewards see Steinberg L et al, "Age Differences in Future Orientation and Delay Discounting" (2009) 80 Child Dev 28.

<sup>28</sup> See discussion in Steinberg L n 20 at 57 citing Moffitt (1993); see also Rebellon C, "Do Adolescents Engage in Delinquency to Attract the Social Attention of Peers? An Extension and Longitudinal Test of the Social Reinforcement Hypothesis" (2006) 43 J Res Crime Delinq 387 at 402.

<sup>29</sup> Csikszentmihalyi M, Larson R and Prescott S, "The Ecology of Adolescent Experience" (1977) 6 J Youth Adolescence 218 cited in O'Brien et al, n 25 at 751.

<sup>30</sup> Crofts T and Witzleb N, "'Naming and shaming' in Western Australia: Prohibited Behaviour Orders, Publicity and the Decline of Youth Anonymity" (2011) 35 Crim LJ 34 at 41.

<sup>31</sup> Rebellon, n 28 at 403.

<sup>32</sup> Those laws are discussed in detail below.

<sup>33</sup> O'Leary J et al, *Submission in Response to the Safer Streets Crime Action Plan – Youth Justice* (28 June 2013) at 10, [lawgovpolicy.files.wordpress.com/2013/07/yjrd-submission.pdf](http://lawgovpolicy.files.wordpress.com/2013/07/yjrd-submission.pdf) referring to the Australian Bureau of Statistics, *Recorded Crime Offenders – 2001 – 2012* (2013) [www.abs.gov.au/ausstats/abs@.nsf/Products/778845BE359BD2E2CA257B1F00100FFB?opendocument](http://www.abs.gov.au/ausstats/abs@.nsf/Products/778845BE359BD2E2CA257B1F00100FFB?opendocument) and Australian Institute of Health and Welfare, *Juvenile Detention Population in Australia* (2012) Juvenile Justice Series No. 11, [www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129542551](http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129542551).

jeopardised to protect ‘society from the risk of recidivism on the part of the offender.’ Although that decision related to the appropriate length of an order of imprisonment, the same could be said about increasing the severity of punishment through naming an offender. The Queensland Government apparently wants to make the punishment of juveniles more than a ‘slap on the wrist.’ The Government sees some retributive value in naming. There is therefore a danger that the proposed amendment, which would target recidivist actors rather than their specific acts, could lead to inconsistent, disproportionate outcomes. In addition, juveniles, by virtue of their developmental immaturity, are usually less blameworthy and, compared to adults, not as culpable for their offending.<sup>34</sup> Adding naming to another sentence order could potentially ignore this distinction. To avoid this, courts may ameliorate a sentence taking into account the detrimental effect of naming.<sup>35</sup> This may result in a reduced sentence, which could undermine the rehabilitative purposes of the juvenile justice system.<sup>36</sup>

As articulated in the Supreme Court of the United States ‘the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.’<sup>37</sup> Naming is ineffective as a deterrent and its combination with other orders may render the result potentially disproportionate to the crime. Nevertheless, proponents for naming may argue that such orders are not punitive in nature.<sup>38</sup> After all, they will say, naming is par for the course in adult courts. Even so, there are other negative impacts of naming juveniles related to labelling them as an offender.

### III A PUBLIC LABEL AS AN OFFENDER

The main criticism of naming juvenile offenders is that doing so will further label a juvenile as criminal and such stigmatisation will be a recurring self-fulfilling prophecy. As Tannenbaum suggested ‘[t]he person becomes the thing he is described as being.’<sup>39</sup> Labelling has been said to negatively alter an individual’s identity and exclude them from conventional groups and activities.<sup>40</sup> The more who know about the criminal behaviour the less likely the person will be able to reintegrate into society and the more attractive the pull

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<sup>34</sup> See discussion about the value of retribution for juveniles in *Roper v Simmons*, 543 US 551 (2005), 571.

<sup>35</sup> See *Application by John Fairfax Publications Pty Ltd re MSK, MAK, MMK and MRK* [2006] NSWCCA 386 (1 December 2006) [18] ‘where, as part of a distinct statutory process, public shaming is to occur, that could influence the sentencing judge to ameliorate the sentence that would otherwise be appropriate.’

<sup>36</sup> An example of this is reported in Chappell and Lincoln, n 16 at 83, in the quote from an interviewee that a juvenile – ‘walked away with a good behaviour bond because there had been so much naming in the media, that was mentioned as punishment that he had already received, and that was unquantifiable.’ Good behaviour bonds are traditionally not thought of as particularly rehabilitative, unlike supervised orders such as probation.

<sup>37</sup> *Roper v Simmons*, 543 US 551 (2005), 571.

<sup>38</sup> Such a justification was provided for upholding the constitutional validity of sex offender registration laws in various states in the United States: see Kushner I, “Megan’s Law: Branding Juveniles as Sex Offenders” (2004) 23 Dev Mental Health L 10.

<sup>39</sup> Tannenbaum F, *Crime and the Community* (Ginn, Boston, 1938) p 20, cited in Braithwaite, n 1 at 17.

<sup>40</sup> Bouffard LA and Piquero NL, “Defiance Theory and Life Course Explanations of Persistent Offending” (2010) 56 Crime Delinquency 227 at 232.



of deviant groups who will provide alternative support. The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('Beijing Rules')<sup>41</sup> embedded this theory in Rule 8:

8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to him or her by the process of labelling.

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.<sup>42</sup>

The commentary to this rule stresses that

[y]oung persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal".<sup>43</sup>

This theory has been reconceptualised and refined subsequent to the General Assembly's adoption of the *Beijing Rules*. Braithwaite, for example, provides a distinction between negative stigmatising labelling and what he posits as reintegrative shaming. His concept, similarly to the defiance theory advanced by Sherman, suggests that particular contextual factors may influence whether the sanctions imposed increase the risk of reoffending or whether they provide an adequate deterrent. To be reintegrative, Braithwaite notes that the shame must be attached to the act rather than the actor.<sup>44</sup> The shaming must precede 'efforts to reintegrate the offender back into the community of law-abiding or respectable citizens',<sup>45</sup> which aim to reduce the appeal of the criminal subculture or group.<sup>46</sup> Shame attached to any sanction is more likely to have a positive impact if the offender is intertwined within interdependent relationships or is bonded firmly to others in their community.<sup>47</sup> In support, Sherman discusses various empirical studies which found that 'sanctions cause more crime among social out-groups and less crime among social in-

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<sup>41</sup> *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UN GAOR, 40<sup>th</sup> sess, 96<sup>th</sup> plen mtg, UN Doc A/RES/40/33 (29 November 1985).

<sup>42</sup> The right to privacy regarding juveniles accused of criminal offences is enshrined in the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40(2)(b)(vii).

<sup>43</sup> *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UN GAOR, 40<sup>th</sup> sess, 96<sup>th</sup> plen mtg, UN Doc A/RES/40/33 (29 November 1985), commentary to Rule 8.

<sup>44</sup> Braithwaite, n 1 at 101, similarly see Sherman L, "Defiance, Deterrence and Irrelevance: A Theory of the Criminal Sanction" (1993) 30 J Res Crime Delinq 445 at 460 who notes that defiance occurs when the 'offender defines the sanction as stigmatizing and rejecting a person, not a lawbreaking act.' Although note the research of McGrath, n 17 at 40 which found no support for Braithwaite's proposition that reintegrative shaming would be less damaging than labelling *per se*.

<sup>45</sup> Braithwaite, n 1 at 100.

<sup>46</sup> Braithwaite, n 1 at 102.

<sup>47</sup> Braithwaite, n 1 at 81 suggests that deterrence is more effective where persons are in relationships of interdependency and Sherman, n 44 at 460 argues that persons are defiant if they are poorly bonded.

groups.<sup>48</sup> Recent research partially substantiates Sherman's theory, finding that those offenders who perceived a sanction as unfair and who were poorly bonded 'experienced higher rates of offending and slower desistance over the life course compared to those who perceived their treatment as fair or were well bonded.'<sup>49</sup>

Naming recidivist juveniles in the way proposed by the Queensland Government is not reintegrative. The proposal would remove the emphasis from the nature of the crime, and instead focus on the actor. It is unclear whether the proposal includes corresponding efforts to ensure the offender is not further isolated from the community. But there is nothing to suggest that publication would be controlled to be orientated towards the juvenile's immediate community with whom they are interdependent. Instead, the media's ability to publish identifying material makes the impact far reaching and impersonal. Having the naming provisions apply to some juvenile offenders but not others, even in relation to a similar offence, may result in perceptions of unfair treatment among those named. The impact on recidivist juvenile offenders, who are often poorly bonded,<sup>50</sup> and whose fall back support network will necessarily be a deviant social out-group, can only be stigmatising and have the converse result to the desired reduction in offending.

The negative impacts of labelling are not confined to naming. Labelling can occur at other stops along the way, such as from the arrest and appearance at court. A New South Wales study, specific to that state's Children's Court, found offenders did not perceive their experience in court stigmatising of itself.<sup>51</sup> Findings that juvenile offenders are not necessarily stigmatised by court appearances may be because specialised Magistrates and other actors in children's courts attempt to use language that avoids associated stigma. Such a favourable environment in a children's court, along with the inability of the media to name juvenile offenders, may partially explain why juveniles have not experienced courts to be any more stigmatising than conferences. On the other hand, naming by an unconstrained media, who often fancy portraying juvenile offenders with emotive language, would seem to be more likely to stigmatise a juvenile.

McGrath found that where a juvenile did feel stigmatised they were more likely to reoffend.<sup>52</sup> This supports earlier research, which found that feelings of shame (attached to

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<sup>48</sup> Sherman, n 44 at 450-453; see also Bernburg JG, Krohn MD and Rivera GJ, "Official Labeling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test of Labeling Theory" (2006) 43 J Res Crime Delinq 67 at 77 whose research supports 'the hypothesis that juvenile justice intervention is associated with increased probability of subsequent involvement in deviant networks.'

<sup>49</sup> Bouffard and Piquero, n 40 at 244.

<sup>50</sup> Bonding may result from employment stability, marriage and higher levels of educational attainment, see discussion in Bouffard and Piquero, n 40 at 236.

<sup>51</sup> McGrath, n 17 at 39. Although note that the author identifies at 39 that the methodology, which involved questioning juveniles immediately after sentence, may have resulted in an underestimation of the levels of stigmatisation as 'it may be ... that feelings of stigmatisation take longer to emerge, and only become apparent when the young person has a chance to experience the disapprobation of their family and peers in the days and weeks following the court appearance.'

<sup>52</sup> McGrath, n 17 at 35, 39-40.

both stable and global personal characteristics that are perceived to be difficult to change) lead to higher rates of recidivism.<sup>53</sup> Naming offenders will ‘promote feelings of shame ... by implying that criminal behaviour cannot be altered.’<sup>54</sup>

The results from empirical research conducted around community notification of sex offenders may be extrapolated and have some application to the naming of juvenile offenders. That research notes that ‘registration and community notification appears to have little effect on sex offender recidivism.’<sup>55</sup> While these laws arguably go a step further than public naming, which is generally an option for adult accused anyway, impacts such as negative psychological and social consequences that attached to community notification could also apply to juvenile offenders who are named at the whim of media organisations or others.<sup>56</sup> For example, juveniles may experience interruptions to their schooling due to published information regarding their offending, which may in turn impact on their employment opportunities.<sup>57</sup> Such harmful impacts, which often impede rehabilitation,<sup>58</sup> when combined with questionable evidence of deterrence, may be justified in some respects by the high levels of public support for community notification laws,<sup>59</sup> and the need for public safety. However, contrarily, the public has expressed support for the rehabilitative aims of the juvenile justice system.<sup>60</sup>

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<sup>53</sup> Hosser D, Windzio M and Greve W, “Guilt and Shame as Predictors of Recidivism: A Longitudinal Study with Young Prisoners” (2008) 35 *Crim Justice Behav* 138 at 148.

<sup>54</sup> Hosser et al, n 53 at 149.

<sup>55</sup> Lasher MP and McGrath RJ, “The Impact of Community Notification on Sex Offender Reintegration: A Quantitative Review of the Research Literature” (2012) 56(1) *Int J Offender Ther* 6 at 7.

<sup>56</sup> The negative psychological consequences experienced by participants in the community notification program included ‘loss of friends, feeling lonely and isolated, embarrassment and loss of hope.’ The negative social consequences included job loss, negative impacts on accommodation arrangements and harassment or threats against the offender or their family and loss of social supports: Lasher and McGrath, n 55 at 20.

<sup>57</sup> See discussion in Bernburg JG and Krohn MD, “Labeling, Life Chances, and Adult Crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime in Early Adulthood” (2003) 41 *Criminology* 1287.

<sup>58</sup> There is evidence linking these negative consequences to increased rates of reoffending: see Freeman N and Sandler J, “The Adam Walsh Act: A False Sense of Security or an Effective Public Policy Initiative?” (2010) 21 *CPJR* 31 cited in Lasher and McGrath, n 55 at 23.

<sup>59</sup> See discussion in Lasher and McGrath, n 55 at 9.

<sup>60</sup> See eg, Piquero A and Steinberg L, “Public Preferences for Rehabilitation Versus Incarceration of Juvenile Offenders” (2010) 38 *J Crim Just* 1 at 5 which found that generally the public was willing to pay more in taxes for rehabilitation than incarceration. See also, Elizabeth Moore, NSW Bureau of Crime Statistics and Research, *Restorative Justice Initiatives: Public Opinion and Support in New South Wales* (2012) Bureau Brief – Issue Paper 77, [www.bocsar.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/BB77.pdf/\\$file/BB77.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/BB77.pdf/$file/BB77.pdf): where telephone surveys with 2530 NSW residents found that measures such as better supervision of juveniles, better mental health care, treatment for drug addiction and for binge drinking were perceived as being more effective at preventing crime and disorder than a prison sentence. Note that this study did not confine the questions to juvenile offenders. However, the study cites Pali B and Pelikan C, “Building Social Support for Restorative Justice: Media, Civil Society and Citizens” (2010) *European Forum for Restorative Justice*, which provides that support for restorative justice measures is greater for juvenile offenders. For other examples of public responses to naming and shaming see [www.facebook.com/townsvillebulletin/posts/501179889896471](https://www.facebook.com/townsvillebulletin/posts/501179889896471) and [www.goldcoast.com.au/article/2012/07/18/432255\\_col-mcclelland-opinion.html](http://www.goldcoast.com.au/article/2012/07/18/432255_col-mcclelland-opinion.html) where the responses are mixed.

Applying punitive sanctions to juveniles increases recidivism and negatively influences their development and mental health.<sup>61</sup> Recidivism is a consequence of the label, which limits the ability of the juvenile to be reintegrated into society. Recording of criminal convictions for juveniles is legislatively restricted on a similar basis.<sup>62</sup> Courts are reluctant to record a conviction against a juvenile lest it impact on their ability to find employment and their chance to become a contributing member of society; limited opportunity for employment is one of the main predictors of recidivism.<sup>63</sup> Allowing naming effectively removes the protection afforded by the non-recording of convictions. Employers may simply engage in an internet search to uncover entries where the prospective employee is named. Such disclosure of information would not be subject to the limitations inherent in a criminal record. A criminal record is often restricted to dates that a person appeared before the court, title and date of the offence, name of the court and the sentence imposed.<sup>64</sup> A media (or other) report naming the offender may potentially reveal much more information about the crime and, as the media would not be subject to the same level of oversight as required for the recording of an entry onto a criminal record, the information could be incorrect.

Naming could create more problems than those it attempts to address. Although there is evidence to suggest that simply appearing in court does not stigmatise juveniles, the same cannot be said for naming, particularly if the Queensland Government's proposal is adopted. Authorising the media to have control over material that has the potential to harm juveniles, who may otherwise have had an opportunity to mature and reform, is misguided. The question this article now considers is: whether any of the existing approaches of Australian states or territories to naming are better tailored to the evidence presented above?

#### IV AUSTRALIAN APPROACHES TO IDENTIFYING JUVENILE OFFENDERS

In most Australian jurisdictions children's criminal courts are closed to the public.<sup>65</sup> However, even then, representatives of the media are usually permitted to attend either by right or

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<sup>61</sup> Fagan 'Juvenile Crime and Criminal Justice: Resolving Border Disputes' (2008) 18(2) *The Future of Children* 81. See also Greenwood PW, *Changing Lives: Delinquency Prevention as Crime Control Policy* (University of Chicago Press, Chicago, 2006).

<sup>62</sup> For example, Queensland courts who are considering whether to record a conviction against a juvenile must have regard to the 'impact the recording of a conviction will have on the child's chances of – (i) rehabilitation generally; or (ii) finding or retaining employment': *Youth Justice Act 1992* (Qld), s 184(1)(c).

<sup>63</sup> Pager D, "The Mark of a Criminal Record" (2003) 108 *Am J Sociol* 937.

<sup>64</sup> The information available depends upon the jurisdiction. The information above is what is readily available on the Queensland Criminal History. However, it has been said that '[t]he information kept usually includes court appearances, convictions and penalty, bonds and findings of guilt where a conviction was not recorded, charges, matters awaiting hearing, police intelligence and traffic infringements': Naylor B, "Do Not Pass Go: The Impact of Criminal Record Checks on Employment in Australia" (2005) 30 *AltLJ* 174 at 176.

<sup>65</sup> *Children's (Criminal Proceedings) Act 1987* (NSW), s 10 – although the Court may direct that the Court be open: s 10(1)(a), see eg, *AE v The Queen* [2010] NSWCCA 203 (10 September 2010) where the Court noted at [39] that 'There is no need for special circumstances to be shown: it is sufficient that the court exercises its discretion in the circumstances of the particular case, bearing in mind the underlying purpose of s 10'; *Children's Court Act 1992* (Qld), s 20(1) (however note that this provision does not apply to a judge hearing a matter upon indictment: s20(5)); *Youth Court Act 1993* (SA), s 24; *Youth Justice Act 1997* (Tas), s 30 (however

upon application.<sup>66</sup> In jurisdictions where the right to attend is legislated there is usually provision to exclude media representatives in particular circumstances.<sup>67</sup> In the Northern Territory, Victoria and Western Australia children's courts are not closed, however, upon application, or on the court's own volition, can be closed or can require the exclusion of particular categories of persons (such as media representatives).<sup>68</sup> As such, assuming that general deterrence is necessary and/or justified for juvenile offenders, the media's ability to attend and publish information, other than identifying information, is adequately framed for this purpose in Australia. For more serious offences, media representatives can be and are permitted to attend as exceptions to the rule in closed courts or because a court is open. For example, in *AE v The Queen* [2010] NSWCCA 2003 (10 September 2010) the Court considered that given the seriousness of the offence (robbery in company with wounding), the accused's age of 17 years, and the protection provided by the prohibition on the publication of his name, the principle of open justice favoured opening the court. Yet in most jurisdictions the court retains the discretion to exclude persons or close the court should other interests be at stake.

As to naming juveniles, there are three broad approaches taken in the Australian states and territories: the expansive approach, the approach that provides for an exception to the prohibition against naming for serious offences and the approach that retains a presumption against naming.

#### *A The Expansive Approach*

When media representatives *are* permitted to attend court there is generally a prohibition against publication of any identifying material related to juvenile offenders.<sup>69</sup> The situation in the Northern Territory is an exception. There publication is permitted unless the court

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this provision relates only to Magistrates Courts (youth justice division): s 3; *Court Procedures Act 2004* (ACT), s 72.

<sup>66</sup> By right in: *Children's (Criminal Proceedings) Act 1987* (NSW), s 10(1)(b); *Youth Court Act 1993* (SA), s 24(1)(f)(ii); *Court Procedures Act 2004* (ACT), s 72(1)(i). By application in: *Children's Court Act 1992* (Qld), s 20(2)(c): allows the court to permit a representative of the mass media to be present; *Youth Justice Act 1997* (Tas), s 30(1)(n): allows other persons to be present if the court considers the 'interests of justice' require their presence.

<sup>67</sup> *Children's (Criminal Proceedings) Act 1987* (NSW), s 10(1)(b): media representatives can attend unless the court otherwise directs. Such an order was made in *R v AA, AS, MH & OM* [2009] NSWDC 25 (20 February 2009) (and confirmed in the same case in *R v AA, AS, MH & OM* [2009] NSWDC 40 (27 February 2009) in unique circumstances in which the juveniles concerned had been earlier identified (although perhaps inadvertently) in the media and given that the prohibition on publication may have been ineffective to protect the juveniles' identity in that instance); *Youth Court Act 1993* (SA), s 24(2): the court may exclude persons if it considers it 'in the interests of the proper administration of justice' to do so. The exception is the Australian Capital Territory, which does not provide statutorily for the exclusion of the media.

<sup>68</sup> *Children, Youth and Families Act 2005* (Vic), s 523(2): allows full or partial closure upon application; *Children's Court of Western Australia Act 1988* (WA), s 31(1): allows a court to make such an order where the 'interests of a child may be prejudicially affected'; *Youth Justice Act 2005* (NT), s 49(2): allows a court to make such an order where it would best serve justice.

<sup>69</sup> *Criminal Code 2002* (ACT), s 712A; *Children's (Criminal Proceedings) Act 1987* (NSW), s 15A; *Youth Justice Act 1992* (Qld), s 301; *Young Offenders Act 1993* (SA), s 13; *Youth Justice Act 1997* (Tas), s 31; *Children, Youth and Families Act* (Vic), s 534; *Children's Court of Western Australia Act 1988* (WA), s 35.

orders otherwise.<sup>70</sup> Such an order will usually only be considered upon the application of the accused's lawyer. However, it is not accurate to say that 'because the Court is open to the public unless otherwise ordered, there is a presumption in favour of the defendant's name being published which can only be displaced if the circumstances are exceptional.'<sup>71</sup> Rather, the court has an unfettered discretion and once good reasons are presented to justify suppression of a juvenile's identity the court must

weigh in the balance the fact now almost universally acknowledged by international conventions, State legislatures and experts in child psychiatry, psychology and criminology, that the publication of a child offender's identity often serves no legitimate criminal justice objective, is usually psychologically harmful to the adolescents involved and acts negatively toward their rehabilitation.<sup>72</sup>

The appeal in *MCT v McKinney* (2006) 18 NTLR 222 was from a decision by the Chief Magistrate refusing to make an order for non-publication regarding a juvenile, aged 14/15 at the time of offending, who had no previous convictions and had pleaded guilty to a number of offences.<sup>73</sup> The appeal was allowed. An order prohibiting publication was made considering the abovementioned factors, because publication of identifying material would potentially 'be detrimental to his employment prospects and ... adversely affect his rehabilitation' and because there was an absence of evidence that the offender represented a continuing danger to the community.<sup>74</sup>

On the face of the legislation, the Northern Territory approach is the most controversial. It is in this jurisdiction that, potentially, publication of identification material is the most likely, and naming has indeed occurred.<sup>75</sup> The onus seems to remain largely on an accused (or their representative) to prevent publication, however, the court has shown it is alive to the research discussed above, especially the impacts of labelling. In addition, Chappell and Lincoln reported that even when there was a right to publish, the media often refrained, either because of the ethical constraints of individual journalists, the policy of their organisation, or purely for practical reasons.<sup>76</sup>

The retention of judicial discretion to close the court at least provides some protection against indiscriminate application of naming, allowing proportionality to remain at the forefront of the court's decision. One question though whether the court's discretion may have been exercised differently had MCT been a repeat offender, leaving the media with

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<sup>70</sup> *Youth Justice Act 2005* (NT), s 50(1).

<sup>71</sup> *MCT v McKinney* (2006) 18 NTLR 222 at [18].

<sup>72</sup> *MCT v McKinney* (2006) 18 NTLR 222 at [20]. The Court expressly accepted the approach of *R v Lee* (1993) 1 WLR 103 at 110.

<sup>73</sup> 2 x Stealing; 1 x Assault; 1 x Assault Occasioning Bodily Harm; 2 x Unlawfully Damaging Property and 1 x Robbery.

<sup>74</sup> *MCT v McKinney* (2006) 18 NTLR 222 at [30](7)-(8).

<sup>75</sup> See discussion of the Northern Territory experience in Chappell and Lincoln, n 16.

<sup>76</sup> Chappell and Lincoln, n 16 at 75-83.

virtually unbridled ability to publish his details and providing therefore a barrier to his rehabilitation.<sup>77</sup> Chappell and Lincoln found that media reporting on juvenile crime in the Northern Territory was ‘exemplified by peaks and troughs’ and various factors, such as whether journalists were present and interested, whether the story was newsworthy, and the nature of competing material, led to inconsistency of treatment.<sup>78</sup> Such inconsistency may result in offender perceptions of unfairness, which is antithetical to the idea of reintegrative shaming. Relinquishing control of naming to the media also demonstrates a significant problem in attributing a deterrence justification, either specific or general, above and beyond those problems previously identified.<sup>79</sup> That is, if the media are left to choose whether to communicate the outcome the deterrence purpose will potentially be undermined. Apart from these issues, the Northern Territory experience provides anecdotal evidence in support of the negative impacts of labelling discussed above, including affects on ‘education, employment, and ongoing contact with the juvenile justice system.’<sup>80</sup>

### B *The Serious Offence Exception Approach*

Queensland and New South Wales both prohibit naming, with exceptions allowed by court order in cases involving certain serious crimes.<sup>81</sup>

In Queensland the exception to non-publication applies to juveniles charged with particularly heinous life offences, involving the commission of violence, where the court considers it would be in the interests of justice to allow publication.<sup>82</sup> That jurisdiction requires regard to be paid to, inter alia, community protection needs and the impact of publication on the juvenile’s rehabilitation.<sup>83</sup> Life offences that may involve violence in Queensland include offences such as murder, manslaughter, intent to cause grievous bodily harm, rape and robbery with violence. The courts have explained particularly heinous as ‘odious, highly criminal, infamous’<sup>84</sup> or ‘reprehensible.’<sup>85</sup> Determining whether an offence is particularly heinous requires the court to consider all the circumstances of the offence, including the juvenile’s role in it.<sup>86</sup> This approach can potentially recognise that the nature of adolescent development may reduce a juvenile’s culpability.

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<sup>77</sup> Chappell and Lincoln, n 16 at 93 report an interview with a lawyer who noted that ‘I have had quite a few kids had their names suppressed but it is almost always because it is very early on in the piece like their first offence.’

<sup>78</sup> Chappell and Lincoln, n 16 at 75.

<sup>79</sup> O’Leary J and Lincoln R, ‘Look Before Leaping into a Human Rights Quagmire’ on *Centre for Law Governance and Public Policy Blog* (17 July 2012), [lawgovpolicy.com/2012/07/17/look-before-leaping-into-a-human-rights-quagmire/#more-68](http://lawgovpolicy.com/2012/07/17/look-before-leaping-into-a-human-rights-quagmire/#more-68).

<sup>80</sup> Chappell and Lincoln, n 16 at 91.

<sup>81</sup> *Youth Justice Act 1992* (Qld), s 301(1)-(2); *Children’s (Criminal Proceedings) Act 1987* (NSW), ss 15A, 15C.

<sup>82</sup> *Youth Justice Act 1992* (Qld), s 234(2).

<sup>83</sup> *Youth Justice Act 1992* (Qld), s 234(2).

<sup>84</sup> *R v Gwilliams* [1997] QCA 389 (31 October 1997).

<sup>85</sup> *R v Maygar; ex parte A-G (Qld); R v WT; ex parte A-G (Qld)* [2007] QCA 310 (28 September 2007) at [74].

<sup>86</sup> For example in *R v WT; ex parte A-G (Qld)* [2007] QCA 310 (28 September 2007) at [78] it was noted that ‘[t]he question is whether all the circumstances of the murder show that the child’s offence was particularly

Along with the requirement of heinousness, the interests of justice discretion, retained by the judge, significantly and appropriately narrows the ambit of offences to which the exception allowing publication could apply. Since the introduction of the legislation in 2002, publication has been rare.<sup>87</sup> In *R v SBU* [2012] 1 Qd R 250 the decision to name a juvenile convicted of murder, who was aged 14 at the time of the offence, was overturned on appeal, recognising the potential detriment of labelling. The Court took into account the seriousness of the offending but stated that ‘the community also has an interest in the applicant’s rehabilitation, which would likely be prejudiced by allowing the publication of his identifying information.’<sup>88</sup> However, the exclusion of 17 year olds from the juvenile justice system in Queensland may partly explain the scarcity of publication orders in that jurisdiction. Those who are 17 are automatically exposed to publication in the same way as adults, despite the fact that developmentally they may still lag behind.

The New South Wales exception allows a court to authorise publication relating to a juvenile charged with a serious children’s indictable offence, such as homicide; an offence punishable by life or 25 years (eg, manslaughter, intent to wound or cause grievous bodily harm, robbery whilst armed with a dangerous weapon); or aggravated sexual assault.<sup>89</sup> To determine whether to authorise publication the court must have regard to:

- (a) the level of seriousness of the offence concerned,
- (b) the effect of the offence on any victim of the offence and (in the case of an offence that resulted in the death of the victim) the effect of the offence on the victim’s family,
- (c) the weight to be given to general deterrence,
- (d) the subjective features of the offender,
- (e) the offender’s prospects of rehabilitation,

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heinous, not whether the child is criminally responsible with others for an offence which is particularly heinous. In this case, those circumstances included the fact that he was acting under compulsion, had good reason to fear for his life and to seek to mollify Maygar and Woodman, and the fact that his conduct was not perceived as threatening by the other hostages.’ This meant that WT’s offence was not considered particularly heinous and he was not named.

<sup>87</sup> It was reported in 2010 by Ironside R, ‘Michael Thompson’s Killer Walks Free, Paul de Jersey Calls for Serious Juvenile Offenders to be Named’, *The Courier Mail* (online), 22 October 2010, [www.couriermail.com.au/news/queensland/michael-thompsons-killer-walks-free-paul-de-jersey-calls-for-serious-juvenile-offenders-to-be-named/story-e6freoof-1225941980968](http://www.couriermail.com.au/news/queensland/michael-thompsons-killer-walks-free-paul-de-jersey-calls-for-serious-juvenile-offenders-to-be-named/story-e6freoof-1225941980968) that three juveniles had been named: Woodman (a juvenile co-offender of Maygar and WT was named, although as noted above, WT was not); Whitehouse; and Rowlingson: see *R v Rowlingson* [2008] QCA 395 (9 December 2008). All three were charged with murder (with Woodman charged with multiple offences, including rape).

<sup>88</sup> *R v SBU* [2012] 1 Qd R 250 at [38].

<sup>89</sup> *Children’s (Criminal Proceedings) Act 1987* (NSW), s 15C(1). For the other serious children’s indictable offence see s 3 ‘Definitions’.



(f) such other matters as the court considers relevant having regard to the interests of justice.<sup>90</sup>

This power to name was exercised in the notorious case of *R v Milat & Klein* [2012] NSWSC 634 (8 June 2012), where the accused was one month shy of 18 at the time of murdering a friend. An earlier version of a similar provision of the *Children's (Criminal Proceedings) Act 1987* (NSW) was also considered in *Application by John Fairfax Publications Pty Ltd re MSK, MAK, MMK and MRK* [2006] NSWCCA 386 (1 December 2006). In that case the Court of Criminal Appeal refused to allow publication of the offender's identifying particulars for charges of aggravated sexual assault in company. However, the decision was based on a jurisdictional limitation rather than a substantive one. Spigelman CJ noted that

[t]he heinous nature of the systematic course of predatory conduct indicates that this is an appropriate case in which the additional element of public shaming could fulfil the function of retribution and also the function of general deterrence that criminal sentences are designed to serve. There may well be a strong case for the exercise of the discretion.<sup>91</sup>

Although Spigelman CJ also expressed that 'the power to authorise publication should not be exercised for the purpose of punishment',<sup>92</sup> the references to retribution and general deterrence earlier in the decision, and the requirement to consider general deterrence in the legislation, militate against this. As previously explained, general deterrence is not an appropriate justification for naming. Further, the absence of the requirement of heinousness, suggests that the New South Wales provisions could apply more broadly to juveniles than the Queensland legislation.<sup>93</sup>

The legislation in both Queensland and New South Wales attempts to ensure that the public interest is satisfied but that considerations of proportionality are not overwhelmed. It does so by confining the application of naming to particularly serious offences, which are generally going to attract lengthy periods of imprisonment and have convictions recorded regardless. This way also ensures that there is more consistency and less selectivity regarding who is subjected to the potential publication order. As required by Braithwaite's reintegrative shaming approach, the emphasis in those states is appropriately focused on the offence rather than the offender. However, the obvious downfall is that named offenders are not going to be reintegrated into their community. Instead they will be incarcerated with others from a deviant out group and may relish their criminal reputation.

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<sup>90</sup> *Children's (Criminal Proceedings) Act 1987* (NSW), s 15C(3).

<sup>91</sup> *Application by John Fairfax Publications Pty Ltd re MSK, MAK, MMK and MRK* [2006] NSWCCA 386 (1 December 2006) at [9].

<sup>92</sup> *Application by John Fairfax Publications Pty Ltd re MSK, MAK, MMK and MRK* [2006] NSWCCA 386 (1 December 2006) at [18].

<sup>93</sup> Although the author's research did not reveal a significant difference between the number of juveniles named in New South Wales and those in Queensland.

Any desirable feelings of guilt and associated accountability that may be felt upon entry into institutional life will likely dissipate by the time of their release.<sup>94</sup>

### *C The Presumption Against Naming Approach*

The most common approach to naming, followed in the Australian Capital Territory,<sup>95</sup> South Australia,<sup>96</sup> Tasmania,<sup>97</sup> Victoria,<sup>98</sup> and Western Australia,<sup>99</sup> is a presumption against publication. Generally the publication of a juvenile's identity is prohibited, with specific exceptions. One exception is where consent to publish has been provided once a juvenile has become an adult.<sup>100</sup> The more common exception authorises the court to permit publication.<sup>101</sup>

Applications have been made to the President of the Children's Court in Victoria to approve publication.<sup>102</sup> One such application, relating to bail variation proceedings for the alleged offences of causing a public nuisance and making child pornography, was unsuccessful.<sup>103</sup> The Court quoted Justice Rehnquist who stressed that naming juvenile offenders 'may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths' prospects for adjustment in society and acceptance by the public.'<sup>104</sup> President Grant remarked in the course of the judgment that he did not know of any orders permitting publication since the most recent iteration of the legislation.<sup>105</sup> He explained that there were two orders under the previous equivalent provision. One was made to protect the community from an escaped juvenile regarded as a risk. The other was done with the consent of the juvenile and his family. The Judge elucidated that naming would not be restricted to only these types of cases, but they were 'examples, of cases that move beyond mere "public interest."' <sup>106</sup>

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<sup>94</sup> Such a result was found in Hosser, Windzio and Greve, n 53.

<sup>95</sup> *Criminal Code 2002 (ACT)*, s 712A.

<sup>96</sup> *Young Offenders Act 1993 (SA)*, s 63C.

<sup>97</sup> In Tasmania, restrictions on reporting in the Magistrates (Youth Justice Division) Court is provided for in the *Youth Justice Act 1997 (Tas)*, s 31, but this restriction is extended to the Supreme Court and other Magistrates Courts for proceedings relating to juveniles charged with offences: s 108.

<sup>98</sup> *Children, Youth and Families Act 2005 (Vic)*, s 534. The words 'a report of ... a proceeding in any other court arising out of a proceeding in the Court [being the Children's Court]' would seem to encompass certain offences that must be dealt with in higher courts (such as the Supreme Court) see: *R v SJK & GAS* [2011] VSC 431 (2 September 2011) at [7]. Those courts may also order suppression of identifying material within their respective jurisdictions.

<sup>99</sup> See *Children's Court of Western Australia Act 1998 (WA)*, s 35(1). However, note that the presumption does not usually apply in the case of Supreme or District Court proceedings against a juvenile: s 35(2). See further discussion below.

<sup>100</sup> *Criminal Code 2002 (ACT)*, s 712A(3)(a).

<sup>101</sup> In South Australia and Tasmania the *Young Offenders Act 1993 (SA)*, s 63C(2) and the *Youth Justice Act 1997 (Tas)*, s 31(2) allows the court to permit publication on such conditions it thinks fit.

<sup>102</sup> In accordance with the *Children, Youth and Families Act 2005 (Vic)*, s 534(1)(a).

<sup>103</sup> *HWT v AB* [2008] VChC 3 (20 May 2008).

<sup>104</sup> *HWT v AB* [2008] VChC 3 (20 May 2008) at [24].

<sup>105</sup> *HWT v AB* [2008] VChC 3 (20 May 2008) at [21].

<sup>106</sup> *HWT v AB* [2008] VChC 3 (20 May 2008) at [21].

In Western Australia the situation is complicated by the different provisions that apply depending on whether the juvenile elects to proceed in the Children's Court or in the other superior courts with a judge a jury. In the Children's Court the presumption remains against publication, unless otherwise ordered by the Supreme Court.<sup>107</sup> The Supreme Court can allow publication after considering the interests of the child (including their age, safety or well-being) and the public interest (including in public safety, the apprehension of escapees and the prevention or detection of crime).<sup>108</sup> Such an order was made for a juvenile who escaped from detention while serving a sentence for two counts of manslaughter.<sup>109</sup>

Where the juvenile elects to proceed in another superior court, the presumption is in favour of publication unless the public interest and interests of the child dictate that publication should *not* be permitted and a suppression order is granted.<sup>110</sup> The judiciary has condemned this legislative distinction in successive judgments.<sup>111</sup> Research for this article uncovered three judgments relating to this section. Publication was permitted in one case and refused in the other two.<sup>112</sup> When it was refused, the justification offered was based on the detrimental impacts of labelling on the juvenile's rehabilitation. For example, in *R v MJM* (2000) 24 SR (WA) 253 at 255 [8] where the accused (who were at least 17) were charged with unlawful detention and multiple counts of aggravated sexual assault, Muller J said:

Publication of the names of the juveniles carries the potential of damaging their reputation in the wider community and possibly jeopardising their chances of rehabilitation... publication of their names will stigmatise them to the point where their chances of rehabilitation might be jeopardised.

The distinction that exists in Western Australia is undesirable. There is no principled reason for the difference between children's courts and other courts dealing with juveniles. Both courts deal with juveniles, who are unique from adults. The presumption against publication available in the Western Australian Children's Court and in Victoria, South Australia, Tasmania and the Australia Capital Territory, is more in line with the research that suggests little support for naming as a deterrent and instead acknowledges the stigmatising effects and their negative impact on juveniles' rehabilitation efforts. The presumption against publication has appropriately confined publication to very rare occasions where a juvenile provides immediate danger to the community, such as upon escape.

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<sup>107</sup> *Children's Court of Western Australia Act 1998* (WA), s 35(1). Non-publication is also circumvented in some respects where a juvenile is subject to Prohibited Behaviour Order: as discussed in Crofts and Witzleb, n 30.

<sup>108</sup> *Children's Court of Western Australia Act 1998* (WA), s 36A.

<sup>109</sup> *The Commissioner of Police v A Child* [1992] WASC 2088 (3 September 1992).

<sup>110</sup> *Children's Court of Western Australia Act 1998* (WA), s 35(2).

<sup>111</sup> See *R v H (A Child)* (1995) 83 A Crim R 350 and within that a reference to *R v Crimp* [1995] WASC 304 (5 May 1995).

<sup>112</sup> In *R v Crimp* [1995] WASC 304 (5 May 1995) referred to in *R v H (A Child)* (1995) 83 A Crim R 350, the Court refused to make a suppression order. In *R v H (A Child)* (1995) 83 A Crim R 350, a juvenile convicted of murder, who was not yet 15, and did not have a record was not named. The Court accepted counsel's submission that H had already been psychologically devastated by the publicity already surrounding the case. Publication was also refused in *R v MJM* (2000) 24 SR (WA) 253.

## V ALIGNING REFORM WITH RESEARCH

Any reform to juvenile justice must be evidence-based.<sup>113</sup> Of course it is not only juvenile justice that would benefit from policy informed by evidence. However, the ramifications of implementing reforms that evidence suggests could potentially be harmful and offer little by way of achieving the social goal of reducing reoffending is especially problematic for juvenile offenders. Getting it wrong for these offenders could potentially exacerbate reoffending rates, not only for juveniles but also as they grow into adults. There is a danger that the transient juvenile offender population will become entrenched and move into the adult system as they mature.

The Queensland Government's proposal to expand the naming laws to recidivist juvenile offenders does not align with the developments that have been made in research relating to juvenile development and offending. Based on this research, naming recidivist juveniles is ineffective as a deterrent and instead could prove stigmatising and work against the rehabilitative goal of the juvenile justice system; a goal that is in the public's interest.

Certainly the Northern Territory experience does not bode well for the proposed measure in Queensland. Based on the reports of the number of juveniles named, some may describe Queensland's current approach as somewhere between the expansive approach in the Northern Territory and the jurisdictions, like Victoria, where there is a presumption against naming. The current Queensland approach still offers little by way of deterrent impact and could potentially harm the juvenile's future prospects. However, at least it is confined strictly in its legislative application, attaches to the offence rather than the offender and allows for individualisation through judicial oversight. If nothing else, it is preferable to maintain the status quo in Queensland. However, if the Queensland Government contemplates evidence-based policy it should learn from the majority of other Australian jurisdictions, which retain a strict presumption against naming (with exceptions that are usually required to go beyond appeals to mere public interest in knowing the identity of the offender, instead, for example, requiring some pressing concern for public safety.) Those jurisdictions demonstrate best practice.

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<sup>113</sup> See Stewart A, Allard T and Dennison S (eds), *Evidence Based Policy and Practice in Youth Justice* (Federation Press, Sydney, 2011).