Submission to the Queensland Department of Communities

Review of the *Juvenile Justice Act 1992*
Issues Paper 2007

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Introduction

This submission addresses the Queensland Government's Department of Communities Issues Paper regarding the Review of the *Juvenile Justice Act 1992* (August 2007). The Queensland University of Technology Faculty of Law has a Criminal Justice Program within the Law and Justice Research Centre. The members of this Program wish to participate in the debate on these issues which are critically important to the Queensland community at large but especially to our young people.

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Terry Hutchinson is a Senior Lecturer within the Law School. Her specialist areas are legal research training and criminal law. In 2004 she visited Canada under the auspices of an International Council for Canadian Studies Program for International Research Linkages (PIRL) Grant. This research program, based around the general topic of Children in Detention, resulted in several conference presentations and publication of papers such as T.Hutchinson and F.Martin, 'The Mental Health Implications for Unaccompanied Minors Seeking Asylum in' (2005) 1 (1) *The Journal of Migration and Refugee Issues* 1-24, T.Hutchinson and F.Martin, 'Australia's Human Rights Obligations Relating to the Mental Health of Refugee Children in Detention' (2004) 27 (6) *International Journal of Law and Psychiatry* 529-547, and T.Hutchinson and R.Smandych, 'Juvenile Justice: New legislation reflecting new directions' (2005) 23(1) *Australasian Canadian Studies* 101-148. Other research pertinent to this area includes:

T.Hutchinson, 'Being Seventeen in Queensland' (2007) 32(2) *Alternative Law Journal* 81-85.

T.Hutchinson, 'When is a Child Not a Child' (2006) 30 *Criminal Law Journal* 1-8.

T.Hutchinson and F.Martin 'Children in Criminal Detention in Australia' Paper presented at 2004 Canadian Law and Society Association Conference, Congress of Social Sciences and Humanities: Confluence: Ideas, Identities, Place, University of Manitoba June 2-4 2004.

T.Hutchinson, R.Smandych and F.Martin 'Juvenile Justice: New legislation reflecting new directions' ACSANZ Conference Sydney, 23-26 September 2004.

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Bridget has a strong interest in the intersection of human rights law with criminal justice, particularly as it relates to indigenous and young offenders. She is also currently researching issues relating to human rights and the environment.

Summary of the Observations of the QUT Faculty of Law Criminal Justice Program Group

This Discussion Paper raises many important issues. Although we are aware of the importance of taking part in the public debate on these important issues, we can only respond meaningfully on some of the issues. Our overall recommendations are as follows:

1. The Charter should refer to international human rights instruments and these principles in the Charter should be embedded in the legislation.
2. There should be a firm commitment to restorative justice in the legislation.
3. It is recommended that the *Juvenile Justice Act* provisions regarding parental responsibility should not be augmented. Increased emphasis should be given to providing more help and advice to parents in dealing with the justice system. Support should be provided to parents in order to ensure that the parents are able to fulfil their role and so that the rehabilitation of the child becomes the primary focus.
4. In order to bring the *Juvenile Justice Act* into line with Australia's human rights obligations, it is recommended that the Act be amended to require a consideration of human rights principles before any order to publish identifying information should be made. In particular, a court should consider the best interests of the young offender, and the desirability of promoting their rehabilitation, as factors deserving significant weight.
5. Queensland is at present out of step with international and national views on the age of adulthood in regard to criminal responsibility. A Regulation should be passed immediately to remedy this issue and proclaim Section 6(1) of the *Juvenile Justice Act 1992* (Qld) into force so that 17 year olds are covered by the provisions of the Act.

Some General Observations

1. The Charter of Juvenile Justice Principles

The principles purportedly underlying the operation of the *Juvenile Justice Act* (JJA) are set out in the 'Charter of Juvenile Justice Principles' in Schedule 1 of the Act. These cover issues such as vulnerability and accountability of children, diversion, fair and participatory proceedings, sentencing, the 'last resort' principle, and victim impact.

In 2001, the Queensland Commission for Children and Young People voiced some concerns about the Charter specifically that 'it did not include all the basic rights of young people in detention expressed in the United Nations' Rules'. The Commission also expressed concern that the Act did not effectively incorporate the Rules in the actual legislation as there was 'no obligation on people responsible for administration of the Act to abide by the Charter of Juvenile Justice Principles'.[1] Thus, while the Charter of Juvenile Justice Principles is a commendable first step towards protecting the fundamental rights of young offenders, the substance of the Charter, along with its legal status, fails to address adequately the rights which are guaranteed to young people under international human rights law. The punitive tenor of the current JJA Discussion Paper reinforces the need for such overriding and internationally recognised human rights principles to be more solidly entrenched within the Act.

1.1 The Philosophy of the Charter

From the outset, the Charter's commitment to safeguarding children's rights seems questionable. The first Principle states: "The community should be protected from offences". While this is of course true, such an opening statement sets a tone for the Charter which seems at odds with the objective of protecting the rights of young offenders. The commitment to protecting children's rights is further confused by the Charter's reference to the right of victims to be included in the process (principle 9),

[1] Queensland Commission for Children and Young People and Child Guardian, *Submission on Juvenile Justice Amendment Bill* (2001) <http://www.ccypcg.qld.gov.au/pdf/submissions/juvenile_justice_submission.pdf > at 24 October 2007; and see generally T.Hutchinson and R .Smandych, 'Juvenile Justice in Queensland and Canada: New legislation reflecting new directions' (2005) 23(1) *Australasian Canadian Studies* 101-148.

and the emphasis placed on ensuring that young offenders are held accountable for their actions (principle 8).

It is recommended that the opening statement ought to reflect the principle expressed in Article 3 of the *Convention on the Rights of the Child* (CROC) that "in all actions concerning children, the best interest of the child shall be a primary consideration". This notion is reiterated, with particular reference to juvenile justice, in the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)* which state that "the well-being of the juvenile shall be the guiding factor in the consideration of his or her case" (rule 17.1(d)). Article 40.1 of the CROC guarantees that any child who is accused of or found guilty of having infringed the penal law has a right -

> "to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

These sentiments are fundamental to the protection of the rights of children generally, and of young offenders in particular, and ought to be given an appropriately prominent position in the Charter and in the Act.

1.2 Need for Meaningful Protection through the Charter

The language used in the Charter renders its principles more recommendatory or aspirational in nature, rather than providing meaningful protection for young offenders' human rights. There are several examples within the Charter of principles which, while purporting to uphold the rights and liberties of children, are not matched by adequate guarantees within the Act. The limited enforceability of the Charter means that the rights which it apparently guarantees are in many cases not supported by legislative force. Principle 4 states that:

> "Because a child tends to be vulnerable in dealings with a person in authority, a child should be given the special protection allowed by this Act during an investigation or proceeding in relation to an offence committed, or allegedly committed, by the child."

While this statement acknowledges the important human rights principle that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection" (*Declaration on the Rights of the Child of 1924*, quoted in Preamble to CROC), it must be seen as a rather cursory acknowledgement.

The statement adds little protection to children's rights as it refers only to those (limited) protections which are already offered in the Act, and even then it only states that a child "should" receive those protections. If the Act included no special protections, then the statement would be meaningless. What is required is a specific guarantee of the rights to which a child is entitled during their involvement in criminal proceedings, and such a guarantee must be integrated into the text of the legislation, to ensure it has proper legal force.

There are other examples where the principles expressed in the Charter are not given adequate legal force in the Act:

1. Principle 11 of the Charter states that "a decision affecting a child should be made in a timeframe appropriate to the child's sense of time." This principle is not reflected anywhere in the Act.
2. Principle 12 states that "a person making a decision under this Act should consider the child's age, maturity and, where appropriate, cultural and religious beliefs and practices."

The *Beijing Rules* require a consideration of the circumstances of the offender, and emphasise that any decision under the juvenile justice system ought to be proportionate to those circumstances. In spite of the fact that the Charter refers to such matters, the Act requires such considerations only in very limited circumstances, and even then in a manner which does not afford them much weight. Section 150 of the Act states that when making a decision regarding sentencing, a court must have regard to, *inter alia*, the juvenile justice principles. While this section directs a court to refer to the principles in the Charter, there is no indication of the weight which should be given to them. Furthermore, the wording of the Principles themselves suggests that the consideration of age, maturity, cultural and religious background is not mandatory.

1.3 Important Rights omitted from Charter

The Charter also fails to protect the rights of young offenders adequately as it omits significant rights which are required by human rights law to be protected. A child's right to privacy is guaranteed under Article 40.2(b)(vii) of the CROC. However, privacy rights are not provided for by the Charter, save for Principle 20(e), which provides that a child who is detained in a detention centre under the Act should be afforded privacy that is appropriate. This statement fails to cover other stages of a child's involvement with the juvenile justice system where their right to privacy should be protected. In particular, the Charter fails to address the human rights impact of a child's being publicly identified in relation to an offence. This will be dealt with in detail below in relation to the issue of naming.

1.4 The Importance of Rehabilitation not duly Acknowledged

Neither the Act nor the Charter mentions rehabilitation as an objective of the juvenile justice system. International human rights law makes it clear that achievement of rehabilitation ought to be a primary goal of any criminal justice system, and such an aim is particularly crucial for the juvenile justice system. Article 40 of the CROC emphasises the desirability of promoting the child's reintegration into society, and the need to aid the child assume a constructive role in the community. The *International Covenant on Civil and Political Rights* states that a criminal justice system must, in the case of juvenile offenders, take account of the desirability of promoting their rehabilitation (Article 14.4) and that the essential aim of any penitentiary system should be rehabilitation (Article 10(3)). Yet the Act does not require that a court or police officer consider the impact of their decisions on an offender's prospects of rehabilitation, even when considering whether a child should be held in detention.

1.5 In Conclusion

The Charter makes no reference to international human rights law. While some of the principles clearly draw on notions of rights and freedoms as contained in human rights documents, the Charter is phrased so that it can not be construed as a "bill of rights". The Charter states that a child "should be treated with respect and dignity" (Principle 3) and that the juvenile justice system "should uphold the rights of children" but it falls short of stating that a young offender has a right to any of the principles contained in the Charter. As a result the level of protection of rights offered by the Charter is minimal.

2. Philosophy and Policy behind Juvenile Justice in Queensland [2]

During the nineteenth century, young people were dealt with as if they were adults.[3] Thereafter, the main principle guiding juvenile justice in Australia up until the late 1970s was the 'welfare model' of justice, sometimes referred to as the 'child-saving movement'.[4] Characteristics identified with the welfare model include more informal hearings and a key role for welfare workers. Children were sometimes deemed to be neglected and placed under the care of welfare which resulted in indeterminate outcomes and uncertainty in sentence. This resulted in a lack of due process rights, and was characterised by a doctrine of paternalism.[5] There tended to be a blurring of the juvenile offenders with those children deemed to be neglected, uncontrollable or homeless which led to injustices.

By the late 70's criticisms of the welfare model began to mount and a growing 'law and order' lobby argued for a more rigorous 'just deserts' approach to juvenile offending. The primary concern became the protection of the community and policy changed so that young people were held accountable for their actions, with their overall welfare being viewed as a secondary consideration.[6] The focus became the offence rather than the offender.[7] This led to more formality in Children's Court proceedings and the Queensland *Juvenile Justice Act 1992* reflects these principles.[8] The public's view of being tough on juvenile offenders has often been inflamed by misinformed media reports of increasing crime rates. The ALRC Report cautioned in 1997 that 'Community perceptions that youth crime is rampant have lead to particularly punitive legislative developments in many jurisdictions. These

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[2] Many of these issues were canvassed originally in T.Hutchinson and F.Martin 'Children in Criminal Detention in Australia' (paper presented at Canadian Law and Society Association Conference, Congress of Social Sciences and Humanities: Confluence: Ideas, Identities, Place, University of Manitoba June 2-4 2004).

[3] I. O'Connor, K. Daly and L. Hinds, "Juvenile Crime and Justice in Australia." In N. Bala, J. Hornick, H. Snyder and J. Paetsch (eds), *Juvenile Justice Systems: An International Comparison of Problems and Solutions*, (2002) 231.

[4] K. Hazlehurst, *Crime and Justice: An Australian Textbook in Criminology*, (1996).

[5] *Ibid*, 117-118

[6] I. O'Connor, K. Daly and L, Hinds, above, n. 3, 232.

[7] Australian Institute of Health and Welfare, *Juvenile justice and youth welfare: a scoping stud* (1998) 5.

[8] R. Hill and L. Roughley 'Public consultation and juvenile justice reform: A Queensland case study' (1997) 32(1) *Australian Journal of Social Issues* 21-36.

developments are harmful to children and endanger community safety'.[9] They note that: 'The levels of children's court appearances and formal diversions from the juvenile justice system have remained stable for the last fifteen years. Despite this there is a public perception that youth crime is increasing. This 'moral panic' is mirrored in and fuelled by media stories of a juvenile crime wave and by political rhetoric'.[10] These tend to inflame public sentiment and encourage tougher legislation. However, is this in the best interests of the children caught in the justice net – or indeed in society's long term interests?

The amendments to the Queensland legislation which came into force in 2003 seem to reflect a revised approach to youth justice - restorative justice. This approach may have been prompted by the high levels of incarceration of disadvantaged groups and was aimed at healing and the 'shared social citizenship' of offender and victim.[11] The process includes youth justice conferencing, (sometimes referred to as re-integrative shaming, or transformative justice), though it also provides more voice to the victims of juvenile crime. The genesis for conferencing processes was in New Zealand where family group conferencing was first developed based on traditional Maori practices.[12] Australian academic John Braithwaite's theory of reintegrative shaming[13] (1989 Crime shame and reintegration) argued that 'traditional criminal justice sanctions shame without offering reconciliation' and that this is 'alienating and crime-reinforcing.'[14] South Australia was the first Australian state 'to establish a legislative framework for conferencing (1993) and to use conferences routinely in youth justice (1994)'.[15] By 2002, these principles were being espoused in decisions in the Children's Court and were incorporated in the amended legislation in 2003.[16] They had also been part of the 1997 ALRC recommendations: **'**The national standards for

[9] Australian Law Reform Commission, *Children's involvement in criminal justice processes*, Report number 84, (1997) 18.3, <www.austlii.edu.au/au/other/alrc/publications/reports/84/18.html> at 24 October, 2007.
[10] *Ibid*
[11] Australian Institute of Health and Welfare, above, n. 7, 5.
[12] P. Condliffe, 'Conferencing – challenging the parameters of the criminal justice system' (1998) August *Proctor* 10.
[13] J. Braithwaite, *Crime, Shame and Reintegration*, (1989).
[14] *Ibid.*
[15] H. Hayes and K. Daly 'Youth Justice Conferencing and Reoffending' (2003) 20 (4) *Justice Quarterly* 725-725 at 726
[16] Queensland Children's Court, *Annual Report* (2001-2002) 3.; *R v. Tran; Ex parte Attorney-General* [2002] QCA 21 per Richards J.

juvenile justice should stress the importance of rehabilitating young offenders while acknowledging the importance of restitution to the victim and the community'.[17]

Policies aimed at rehabilitation would seem to be more in line with current social research. It is worrying therefore that the tenor of the Issues Paper that has been released seems to be suggesting that the legislation in some respects be wound back to a 'just deserts' framework. This is reflected in the choice of issues for discussion including some more draconian options such as electronic monitoring and curfews, expansion of parental responsibility, naming of offenders, and increased accountability for children who offend. We note that the submission does state at page 3 that, 'The Issues Paper briefly outlines some strategies that have been prominent in relation to youth justice. They are included in the issues paper to stimulate submissions and do not indicate proposed government policy'. Hopefully any change in the philosophy and policy underlying the legislation would not take place without extensive recourse to current studies in child offending, welfare and rights. In particular the recent study on juvenile recidivism in Australia emphasise the importance of a more thoughtful approach to the issues.[18]

[17] Australian Law Reform Commission, above, n. 9, 18.34.
[18] J. Payne *Recidivism in Australia: findings and future research* Australian Institute of Criminology Research and Public Policy Series No 80 2007.

Parental Responsibility

3. Should orders for parental responsibility be expanded? Please explain your answer.

4. Are there any other comments you would like to make on orders for parental responsibility?

The provisions on parental responsibility should not be expanded. The provisions are in Part 7 Division 16 of the JJA. They are limited to a payment of compensation. Section 258 provides that:

'(2) The court may decide to call on a parent of the child to show cause, as directed by the court, why the parent should not pay the compensation' if, according to s1, 'it appears to a court, on the evidence or submissions in a case against a child found guilty of a

personal or property offence, that—

(a) compensation for the offence should be paid to anyone; and

(b) a parent of the child may have contributed to the fact the offence happened by not adequately supervising the child; and

(c) it is reasonable that the parent should be ordered to pay compensation for the offence.'

According to the Act s9, compensation covers –

'(a) loss caused to a person's property whether the loss was an element of the offence charged or happened in the course of the commission of the offence; or

(b) injury suffered by a person, whether as the victim of the offence or otherwise, because of the commission of the offence.'

Under s259(12), 'the chief executive (child safety) can not be ordered to pay compensation', so these provisions do not apply to children who are wards of the state. In addition, according to s260 (1) 'An amount of compensation ordered to be paid under section 259, and any amount of costs ordered to be paid, is a debt owed by the parent to the person in whose favour the order is made.'

Parental responsibility laws have been on the political agenda in many common law jurisdictions for some time, largely hinging on a 'tough' response to juvenile crime

portrayed in the press. A US study published in 2004 examined the public support for imposing punishment and blaming parents for crimes committed by children. The empirical evidence found that the public placed some responsibility on parents but there was less support for blaming or punishing the parents.[19] In addition, a 2007 Australian study using hypothetical scenarios to examine how parents attribute responsibility when their child commits an illicit act, found that 'greater responsibility is attributed to the child than the parent'.[20] The issues and research surrounding parental responsibility have been addressed well by a 2006 NSW Study.[21] The arguments for such laws are set out there.

These are that:

- Inadequate parenting is a strong predictor of juvenile crime,
- Measures are needed to force parents to supervise and control their children,

Arguments against these orders include:

'1. Legal sanctions will not be the solution to inadequate parenting because inadequate
parenting is often the result of incapacity to parent properly because of problems such as
poverty, long working hours, drug abuse, and mental illness.

2. Punishing parents is likely to increase tensions and financial hardship in families already in crisis. This is likely to be counterproductive in attempting to prevent juveniles from offending. It may also result in a parent harming their child.

3. Better parenting is unlikely to prevent a child from continuing to offend because:

    a. There is often a range of other factors that cause children to offend.

    b. At this stage, many parents are unlikely to be able to control their children.

4. Instead of blaming parents for being irresponsible it would be more effective to provide them with support, at an early stage, and to reduce socio-economic disadvantage.'[22]

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[19] E. Brank and V. Weisz 'Paying for the crimes of their children: Public support of parental responsibility' (2004) 32 *Journal of Criminal Justice* 465.

[20] N. White, M. Augoustinos and J. Taplin 'Parental responsibility for the illicit acts of their children: Effects of age, type and severity of offence' (2007) 59 (1) *Australian Journal of Psychology* 43.

[21] L. Roth, *Parental Responsibility Laws* NSW Parliamentary Library Research Service, Briefing Paper No 7/06 (2006).

[22] *Ibid*, 39.

The case of *R –v- CB & KE*[23] is an example of a situation under this legislative provision. The parents of two juvenile offenders were ordered to pay $1000 each as compensation to the victim of their children's crime. The offenders were in their early teens and were indigenous. In situations such as this, what happens if the parents cannot meet the payments? It would seem that a parenting order, if filed in the Magistrate's Court, can be enforced like any other order of the Magistrate's Court under Chapter 19 of the *Uniform Civil Procedure Rules*. That gives the court a range of options for issuing enforcement warrants, including redirecting earnings, seizing and selling property. What might be the effect of such an order? At the very least, more monetary pressure may heighten tension in a household. Surely there are other options that would be more effective and indeed more 'supportive' to the parents, and therefore more likely to result in a more optimistic prognosis for the young offender, than extending the state powers to punish parents for 'bad parenting'.

Parental Responsibility and Human Rights

In line with the fundamental principles of human rights as they relate to young people, international law on juvenile justice emphasizes that a parent or guardian's involvement in the process should be for the best interests of their child. While the *Beijing Rules* state that a parent or guardian is entitled to participate in juvenile justice proceedings, the focus is on the child's interests. Therefore, a parent or guardian may be compelled to attend proceedings where it is considered necessary. At the same time, an authority may deny a parent or guardian permission to attend proceedings where their exclusion is considered necessary in the interests of the child (Rule 15.2).

In comparison, Principle 10 of the Charter of Juvenile Justice states that "a parent of a child should be encouraged to fulfil the parent's responsibility for the care and supervision of the child." While this is of course an important consideration, the focus should at all times be on the best interest of the child concerned, rather than on enforcing parental duties, or requiring parents to take responsibility for another's actions – in this case their children's.

[23] [2005] QDC 227

Furthermore, Principle 10 states that parents or guardians should be supported in their efforts to fulfil their responsibilities. It is not clear what support is in fact offered to parents in this regard by the Act.

The provisions of the Act should more fully reflect human rights principles and ensure guided support is offered to the parent where appropriate to fulfil their role effectively.

Naming

5. Should the naming of a young offender be allowed in a broader range of circumstances? Please explain your answer.

The JJA allows courts to publish identifying information about a child offender where the child has been convicted of a serious violent offence (s234). A District or Supreme Court may order the publication of a child's identifying particulars where:

- it makes a detention order for a serious life offence;
- which involves commission of violence against a person;
- Court considers the offence particularly heinous; and
- it is in the interests of justice to do so.

When the provisions were being introduced, the Submission from the Commission for Children and Young People (Qld) was not supportive of this amendment for the following reasons:

> '• the interest of the victim or the victim's family is not advanced by publication of the offender's identity as these parties already have a right to know who the offender is;
>
> • publication is unlikely to have a deterrent effect as the offender has been sentenced to a set period of detention and the publication may actually elevate the young person to "hero status" amongst the young person's peers in detention;
>
> • the young person may be adversely affected by the publication on release and may be subject to adverse vigilante action outside the legal framework for dealing with young offenders as highlighted by the Bolger case in the United Kingdom;

> • publication may have the effect of being contrary to the Juvenile Justice Principles that state that a child should be dealt with in a way that allows the child to be reintegrated into the community; and
>
> • innocent parties such as the young person's family and friends, in particular, siblings who are children, may be subject to vilification and victimisation' (Queensland 2001).

The Children's Court Annual Report noted that while '[t]hese changes have received a great deal of media attention, and indeed the topic was frequently mentioned in the parliamentary debate', '[a]ny impression that the change in the law will lead to a significant increase in the publication of names of juvenile offenders is wrong.[24] More specifically, the Report notes that:

> Firstly, the new provision s.191C does not apply to a Children's Court constituted by a Children's Court Magistrate. In statistical terms that means that for the current year 92% of young offenders will be unaffected by the provision. Secondly, a Court may only allow publication if the child is found guilty of a serious offence that is a life offence, involving the commission of violence against a person, and which in the Court's opinion is a particularly heinous offence… It can be seen therefore that the section will apply to only a very small number of offenders. Even if all these preconditions are satisfied, the Court retains an overriding discretion based on the 'interests of justice'.[25]

Alongside this change there was an expansion of the 'confidentiality/publication provisions with increased penalties for breaching these provisions'.[26] To date only one serious juvenile offender, a 17 year old named following a triple murder in April 2007, has been named.[27]

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[24] Queensland Children's Court, above n. 16
[25] *Ibid* at 4.
[26] Queensland Department of Families and Legal Aid, *Juvenile Justice: A Practitioner's Guide* (2003) 6.
[27] ABC News, *Juvenile 'named and shamed' for triple murder*, 3 April, 2007 www.abc.net.au/news/stories/2007/04/03/188855.html at 17 October 2007

This issue is also a controversial aspect of the Canadian legislation. Provisions (in Part 6) relate to the publication of information on criminal cases involving young persons. Initially, during the first years of the operation of youth courts under the *Young Offenders Act (YOA)* (in effect from 1984 to March 2003), access to information on youth court cases was tightly restricted. Subsequent amendments to the YOA decreased the privacy protections afforded young persons.[28] Part 6 of the *Youth Criminal Justice Act 2002* (Canada) contains several sections that further erode the principle of the accused young person's right to privacy. The YCJA contains the general provision that 'No person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.' The Act also contains a number of exceptions to this general rule. These include cases: (1) in which the information relates to a young person who is subject to an adult sentence; (2) in which the information relates to a young person who is subject to a youth sentence for a serious criminal offence, and an application is not made to ban the publication of information about the young person, and (3) where the publication of information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community (Section 1(2)(c)). Part 6 of the YCJA also contains provisions which allow a youth court judge to permit the publication of information that identifies a young person who is alleged to have committed an indictable offence, 'if there is reason to believe that the young person is a danger to others' and if 'publication of the information is necessary to assist in apprehending the young person.' In general, these and other sections of the YCJA relating to the publication of identifying information about young persons represent a significant departure from the provisions contained in the YOA. One indication of the controversy raised by this change is revealed in the fact that on the eve of the implementation of the YCJA in April 2003, the government of the province of Quebec made a formal reference to the Quebec Court of Appeal challenging the constitutionality of Part 6 of the YCJA along with several other parts of the Act, to which the Quebec Court of Appeal responded with the opinion that the Part 6 of the Act along with specific provisions concerning the imposition of presumptive adult

[28] N. Bala, *Young Offenders Law* (1997) 215-217.

sentences, could be considered unconstitutional, and in violation of the Canadian *Charter of Rights and Freedoms*.[29]

Naming & human rights

As outlined above, the principles for dealing with young people accused of having committed criminal offences are well established in international human rights law. These principles include protecting the privacy of young offenders, and ensuring that, wherever possible, young people are given the support they need to achieve successful rehabilitation and be reintegrated into the community.

Article 16 of the *Convention on the Rights of the Child* protects children from arbitrary interference with their privacy. In relation to criminal proceedings, Article 40.4 guarantees that a young person's privacy is protected at all stages of the process. (Art 40.2 (b) (vii))

This right is clarified by Rule 8 of the *Beijing Rules* which states that:

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

8.2 "In principle, no information that may lead to the identification of a juvenile offender shall be published."

The negative impact of publicly identifying a young person who has been accused or convicted of an offence has been well-documented. "Naming and shaming" young offenders can cause serious psychological harm. It has a negative impact on a young person's chances of future employment, and in some cases has even led to harassment and ostracism, and even verbal and physical abuse.[30] There is a real risk of "re-

[29] Quebec, Court of Appeal, Reference Re Bill C-7, (2003); Barnhorst (2004); S.Anand and N. Bala (2003).

[30] D. Carrick, *Naming and Shaming Juvenile Offenders,* ABC News Online, 3 October 2006, <http://www.abc.net.au/rn/lawreport/stories/2006/1752189.htm> at 17 September, 2007.
J. von Doussa, 'An update on the work of the Human Rights and Equal Opportunity Commission' (paper presented at the Northern Territory Anti-Discrimination Commission, Darwin, 31 October 2006).

victimisation" of young offenders, or even of inciting community vigilante action, particularly those who have been accused or convicted of serious offences.[31]

While some advocates of naming juvenile offenders claim that it represents an acceptance of culpability and is therefore a necessary step in a young offender's rehabilitation and in the healing of the community, the effectiveness of this rationale is questionable.[32] Relying on these notions of restorative justice is problematic for, as Chappell and Lincoln point out, restorative justice works best when it takes the form of well-managed interactions between the parties, rather than public identification of the offender, which can humiliate and stigmatise, and in fact hinder rehabilitation rather than promote it.

There is little evidence to suggest that naming and shaming is effective as a deterrent against future offending, or that it serves any other legitimate objective which might justify its use in the face of the clear evidence of its negative effect on children's rights.[33]

In a recent decision in the Northern Territory – where naming of juveniles is allowed unless a court orders otherwise[34] - the Court of Appeal recognised that, in exercising its discretion to suppress the identity of juvenile offenders, it was important to:

> "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 and acts negatively towards their rehabilitation." [35]

Although section 234 of the *Juvenile Justice Act* allows the publication of identifying information only in limited circumstances, based on the seriousness of the offence, a

[31] D. Chappell and R. Lincoln, 'Abandoning identity protection for juvenile offenders' (2007) 18(3) *Current Issues in Criminal Justice* 481 [The article is drawn from material expressed in an opinion by Duncan Chappell presented on 30 October 2006, on behalf of the defendants, to the Court of Criminal Appeal in the application by *John Fairfax Publishing Pty Ltd v MMK, MRK and others*.]'
[32] D. Carrick, above n. 29; D. Chappell and R. Lincoln, *ibid.*
[33] J. von Doussa, above, n. 29.
[34] Section 50 *Youth Justice Act* (2005) NT; D. Carrick, above n. 29. J. von Doussa, above, n.29.
[35] *MCT v McKinney & Ors* [2006] NTCA 10 at [20] cited in J. von Doussa, above, n. 29.

court is not specifically required to consider the best interests of the child, or the impact that naming would have on their prospects of rehabilitation. Rather, a court can make the order where it considers that doing so would be in the interests of justice.

It appears therefore that an order to allow the publication of identifying information under s234 is intended to be used under the Act as a punitive mechanism (indeed its inclusion in Part 7 would seem to confirm this) rather than as a means to ensure public safety. This use of naming to fulfil penal objectives of retribution and deterrence is inconsistent with the principles of international human rights law dealing with young offenders.

Both the CROC and the *Beijing Rule*s require that the best interests of the young offender be a primary or guiding consideration at all stages of the criminal justice process. By not including the welfare of the child as a matter which must be considered by a court in determining whether to order the publication of identifying information, the *Juvenile Justice Act* does not conform to Australia's international human rights obligations.

As recognised by the court in the *McKinney* case (above), the public identification of young offenders can hinder the rehabilitation process. There is an obvious public interest in rehabilitating young offenders, and we should act to ensure that it is not jeopardised by publishing information which might identify them. Where the naming of an offender leads to stigmatisation, there is evidence of a negative impact on their rehabilitation.[36]

Under human rights law, rehabilitation is an essential aim of any criminal justice system. Article 14.4 of the *International Covenant on Civil and Political Rights* (ICCPR) states that: "In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation." Article 40.1 of the *Convention on the Rights of the Child* also states that a child has a

[36] D. Chappell and R. Lincoln, above, n. 30..

right to be treated in a way which encourages their reintegration and their assuming a constructive role in society.

Despite this obligation, there is no requirement under s234 of the JJA for a court to consider the impact that an order to publish identifying information would have on the young person's chances of rehabilitation.

The circumstances in which the public identification of juvenile offenders is allowed should be carefully controlled. At all times, the best interest of the young person must be considered and due weight given to the impact that their identification will have on their well-being and their prospects of rehabilitation. Naming should not be used as a punitive device, but used only in those circumstances where it is necessary in the interests of public safety, and where such needs outweigh the duties to protect the privacy rights of young people, and to provide them with a real chance of rehabilitation and reintegration into society.

In order to bring the *Juvenile Justice Act* into line with Australia's human rights obligations, it is recommended that the Act be amended to require a consideration of human rights principles before any order to publish identifying information should be made. In particular, a court should consider the best interests of the young offender, and the desirability of promoting their rehabilitation, as factors deserving significant weight.

Reducing remand levels

9. What changes to policy or legislation could reduce the number of young people on remand?

10. Are there any other comments you would like to make on reducing remand levels?

Canada's Kim Pate has commented that 'to my mind, it is vitally important that we recognize that involvement in the criminal justice system is more indicative of the extent to which one is marginalized than it is of one's criminality'.[37]

Despite the amended legislation, injustice and apparently inappropriate handling of children, seems to be still taking place in Queensland. In 1992, the National Youth Affairs Research Scheme report stated that 'When a child is taken into custody in Queensland, General Instruction 9.167(a) requires that in all instances the parent or guardian must, if practicable, be notified,'[38] but on the 4th May 2004, it was reported in the local press that an 11 year old indigenous boy had been held in custody for writing his name on a footpath in the far north Queensland Gulf town of Normanton. The boy was basically arrested for graffiti, not given bail, nor offered proper representation in court. No Department of Families representative had been involved, his parents had not been contacted in order to attend his hearing, he had been transported 500km in a police utility 'cage' from Normanton to Mount Isa and held in a watchhouse or prison for two nights.[39] Despite pleas by his mother, the child was not allowed to sit in the empty utility passenger seats and use a seatbelt for the long journey, but instead placed in the 'prisoner's cage' in the back.[40] What threat did the child pose to warrant this treatment? He appeared in court represented by a Mount Isa Legal Aid lawyer, pleaded guilty, was bailed and placed in an Aboriginal hostel for three weeks before being sent to Brisbane for 12 months probation in the custody of

[37] K. Pate 'Response This Woman's Perspective on Justice. Restorative? Retributive? How about Redistributive?' (1994) <http://www.elizabethfry.ca/perspect.htm> at 24 October 2007.
[38] C. Alder, I. O'Connor, K. Warner and R. White *Perceptions of the treatment of juveniles in the legal system***,** National Youth Affairs Research Scheme **(**1992) <http://www.acys.utas.edu.au/nyars/pdfs/pdfs-perceptions/perceptions.pdf> at 24 October 2007.
[39] *Courier Mail* (Brisbane), 4 May, 2004, 1, 4.
[40] T.Koch,'Cage incident shames Australia' *Courier Mail* (Brisbane) 8 May, 2004, 25.

an uncle.[41] Perhaps this is an isolated incident but it is worthwhile bearing this case in mind when we are considering the amended legislation and espoused doctrine of restorative justice on which it lays claim to be based.[42] After all, the police are required to notify parents once the child is arrested, charged or detained.[43] Under s9E, the child must be accompanied by an adult, parent, guardian or solicitor when being questioned. However, it has been contended that no timely notification was given to the parents of the indigenous boy in our case study, and this is despite the legislative provisions and the clear recommendations of the ALRC Report in 1997:

'The national minimum standards for juvenile justice should provide that police should inform a young suspect's carers or the relevant community services department, whichever is most appropriate in the particular circumstances, of his or her whereabouts as soon as possible after he or she is detained'.[44]

Surely this was an appropriate case for bail? Children were removed from the operation of the *Bail Act* 1980 following public controversy about detaining very young children in watchhouses.[45] The onus is on the prosecution to show the child poses an unacceptable risk. A court must grant bail unless the *Juvenile Justice Act* or another act requires detention. It is interesting to note at this point some statements from the Australian Law Reform Commission Report on bail which are relevant to the casestudy under discussion:

'Evidence suggests that police and courts may be more reluctant to grant bail to Indigenous young people than to other children despite the Royal Commission into Aboriginal Deaths in Custody recommendation that juveniles should only be detained in police lockups in exceptional circumstances'.[46]

Yet another recommendation from the Commission seems to have been ignored in the recent case too:

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[41] M. Wenham, 'Injustice knows no age barrier' *Courier Mail* (Brisbane) 5 May, 2004, 19.
[42] T.Hutchinson and F.Martin 'Children in Criminal Detention in Australia' (paper presented at Canadian Law and Society Association Conference, Congress of Social Sciences and Humanities: Confluence: Ideas, Identities, Place, University of Manitoba June 2-4 2004).
[43] Section 22, *Juvenile Justice Act*
[44] Australian Law Reform Commission, above, n. 9, 18.96.
[45] Queensland Children's Court, above n. 19, 5.
[46] Australian Law Reform Commission, above, n. 9. 18.167, footnote 385.

'The Inquiry considers that all children should be legally represented during bail applications. This view is supported by the National Children's Youth Law Centre and the NSW Youth Justice Coalition'.[47]

Without being aware of more than a few issues about this incident, and treating it simply as a case study, there would seem to be reason to suggest further studies need to be undertaken to gauge the way in which the present provisions regarding bail and parental notification and involvement in juvenile justice processes are being implemented in practice.

[47] *Ibid*, 18.165

Other aspects of the youth justice system that are not addressed in this Issues Paper.

17 year olds and the JJA

Under the *Juvenile Justice Act*, a person is defined as a child if they have not yet turned 17 years (JJA, ss5, 6). This means that once a person turns 17 they are treated as an adult for the purposes of the criminal law. This is contrary to the practice in the other states of Australia and to the provisions of CROC. Several reports have suggested the situation should be changed.

As Judge O'Brien points out in the 2002-2003 Children's Court Annual Report, 'Section 6 of the Act does contain provision for the age of 18 to be fixed by regulation but this provision has never been utilised'. The Report also notes the disjunction between this situation and the prevailing social and legal framework, 'In Queensland, young people are not lawfully permitted to vote or to drink alcohol until they reach the age of 18, yet, at the age of 17, their offending exposes them to the full sanction of the adult criminal laws. There are I believe real concerns involved with the potential incarceration of 17 year olds with more seasoned and mature adult offenders'.[48] This view reflects that of the ALRC 1997 report which recommended that there be consistency and that: 'The age at which a child reaches adulthood for the purposes of the criminal law should be 18 years in all Australian jurisdictions'. At present, in Queensland, children are dealt with in the adult criminal system once they turn 17. From 1 July 2005, the age will be 18 in all the other Australian states.[49]

The Commission for Children and Young People has also commented on this anomaly in regard to age in the Queensland system, arguing that 'serious consideration should be given to extending the scope of the … Act to children who are 17 years.' It also noted that the United Nations Committee on the Rights of the Child stated that Australia should comply with this requirement. However, the Commission was aware of the resource/infrastructure implications that would be involved in raising the application of the youth justice system to all young people

[48] Queensland Children's Court, above n. 16, 5.
[49] G. Urbas, "The Age of Criminal Responsibility." Canberra: Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice, No 181 (2000) 3, <http://www.aic.gov.au/publications/tandi/ti181.pdf> at 24 October 2007.

under 18, and considered that move towards achieving this goal be made over a number of years.[50]

Appended to this Submission are two published papers written by Terry Hutchinson that argue for a change in the provisions.

> T.Hutchinson, 'Being Seventeen in Queensland' (2007) 32(2) *Alternative Law Journal* 81-85.
>
> T.Hutchinson, 'When is a Child Not a Child' (2006) 30 *Criminal Law Journal* 1-8

The Submissions to this Review from Youth Affairs Network Queensland and Youth Advocacy Centre also support a change to bring the situation for 17 year olds in Queensland into line with other jurisdictions in Australia. We support the reasoning and recommendations in these two Submissions on this issue.

[50] Queensland Commission for Children and Young People, above, n. 1, 3.