

Submission to the Senate Inquiry into the value of a justice reinvestment approach to criminal justice in Australia

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SCALES and the Murdoch Clinical Program

SCALES is a Community Legal Centre working predominately in the Rockingham Kwinana region south west of Perth. It has a strong track record in a human rights based approach to legal practice. This approach and the work that SCALES does has been recognized in a number of awards and commendations including a National Australian Human Rights Award¹.

Murdoch School of Law in collaboration with SCALES, runs a clinical legal education program in which students are able to work alongside SCALES's legal practitioners and Migration Agents to assist clients and contribute to law reform. This clinical program has also received many accolades, including a National Citation from the Australian Teaching and Learning Council.

This submission was prepared by the students from Murdoch's clinical program and SCALES, particularly Autumn Feuerheerd.

INTRODUCTION

SCALES welcomes the opportunity to make a submission in relation to the value of a justice reinvestment approach to criminal justice in Australia.

In response to the terms of reference, this submission will focus on juvenile criminal justice in Western Australia and will cover the following issues:

1. Why justice reinvestment?
2. How the human rights framework supports a justice reinvestment approach.
3. How a Justice reinvestment approach would better serve human rights in Western Australia.

The opportunity to make this submission is timely in that Western Australia is currently facing a crisis within juvenile detention. On the 20th of January 2013 there was a serious incident, described as a riot, at Banksia Hill; the juvenile detention facility. As a result of the incident, initially 73 young people were

¹ SCALES won the law category of the Australian Human Rights Commission's awards in 2002.

transferred to Hakea Adult prison. The rest of the male detainees were then transferred, despite never having taken part in the incident. The inappropriate nature of these facilities has resulted in many negative impacts on the young people now detained there. Some of these issues are

- Long periods of lockdown, initially for 24 hours a day.
- Limited access to family and friends through a limited visits program
- Limited access to education programs and little or no access to rehabilitation programs
- Limited food, resulting in visible weight loss in many of the boys
- Incidences of aggression and bullying from adult prison officers not trained in dealing with young people.

These conditions are in direct contravention of our human rights obligations and the provisions of the *Young Offenders Act (WA)*². SCALES respectfully suggests that the lack of choice regarding where these young people could be housed following this incident points to an over reliance on prisons. An adult prison is not an appropriate place for young people and children to be detained and this example reiterated the need to re-think the way we deal with juvenile justice and to invest more in preventative and diversionary measures.

1. Why justice reinvestment?

The criminal justice system in Western Australia is failing to adequately protect the human rights of juvenile offenders. The Western Australian prison population has increased by approximately 30% since 2007³ and the juvenile detention rate is the second highest in Australia, with indigenous detention rates between 40 and 50 times the non-indigenous rate.⁴ Western Australia's high rates of detention raise serious concerns about the protection of the rights of children, including the right to be with family⁵ and community,⁶ to have the opportunity for rehabilitation, growth⁷ and education⁸ and the right to be free from discrimination.⁹

Justice reinvestment offers a framework for a coordinated response from all levels of government to invest in community programs, services and activities that are aimed at addressing the underlying causes of crime.¹⁰ SCALES believes that a justice reinvestment approach involves genuinely treating detention as a last resort by developing a comprehensive system of prevention, diversion and rehabilitation measures. It also recognises the importance of community involvement in and ownership of solutions. This is a human rights approach to juvenile justice.

² *Young Offenders Act (1994)*, ss6-7

³ Department of Corrective Services, Government of Western Australia, Monthly Graphical Report August 2012 (6 August 2012) <http://www.correctiveservices.wa.gov.au/_files/about-us/statisticspublications/statistics/mg-report-1208.pdf> 5.

⁴ Harry Blagg, *Youth Justice in Western Australia* (Report for the Commissioner for Children and Young People WA, 17 December 2009) 24.

⁵ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> [accessed 14 March 2013], article 9.

⁶ *Ibid*, article 30.

⁷ *Ibid*, article 6.

⁸ *Ibid*, article 28.

⁹ *Ibid*, article 2.

¹⁰ Papalia, P "Justice reinvestmentJustice reinvestment – an option for Western Australia?" at <http://www.rethinking.org.nz/assets/Justice%20Reinvestment/WA%20Discussion%20Justice%20Reinvestment%20June%202010.pdf>

2. How the human rights framework supports a Justice reinvestment approach.

The human rights framework for juvenile justice is contained within the following United Nations instruments:

- the International Covenant on Economic, Social and Cultural Rights;
- the International Covenant on Civil and Political Rights and its Optional Protocols, and in particular article 6 of the Covenant;
- the Convention on the Rights of the Child, in particular, articles 3, 37, 39 and 40;
- the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules);
- the United Nations Standard Minimum Rules for Non-Custodial Measures 1990 (Tokyo Rules);
- the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines); and
- the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

The UN *Convention on the Rights of the Child* (CRC) sets out the fundamental binding principles to be reflected in the treatment of juvenile offenders. The CRC was adopted in 1989 and ratified by Australia in 1990.

The obligations set out in CRC are elaborated on by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice “Beijing Rules,” the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty which provide member states with comprehensive guidelines on how to uphold the human rights of juveniles in the justice system. These instruments form part of Australia’s obligations under the CRC as they have been adopted by the Committee on the Rights of the Child as filling out the content of the CRC itself.¹¹

A fundamental feature of these instruments is the recognition that juvenile offenders are different to adult offenders and so should be managed in a way which takes into account their inexperience, immaturity and increased capacity for rehabilitation.¹² In particular, it is emphasised that the juvenile justice system should consider the best interests of the child at all times¹³ and to this end, detention should always be a last resort.¹⁴

A justice reinvestment approach to juvenile justice can better serve human rights by aiming to reduce the use of detention through community-focused preventative, diversionary and rehabilitative strategies.

3. How a justice reinvestment approach would better serve human rights in Western Australia.

¹¹ Above, n 4.

¹² Richards K 2011. What makes juvenile offenders different from adult offenders? *Trends & Issues in Crime and Criminal Justice* no. 409. Canberra: Australian Institute of Criminology. <http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi409.aspx>

¹³ Above n4, article 3.

¹⁴ UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")* : resolution / adopted by the General Assembly., 29 November 1985, A/RES/40/33, available at: <http://www.unhcr.org/refworld/docid/3b00f2203c.html> [accessed 14 March 2013], Rule 19.1

Despite the fact that the objectives and principles of juvenile justice set out in *Young Offenders Act 1994* (WA) reflect some of the principles of the *Beijing Rules*,¹⁵ the system established by the act does not adequately protect the human rights of juvenile offenders. This submission will address the following human rights issues in Western Australia:

- The limited availability and under use of diversionary options
- The overrepresentation of indigenous offenders in the criminal justice system
- Mandatory sentencing laws

The limited availability and under use of diversionary options

The *UN Convention on the Rights of the Child* (the CRC) recognises the importance of diverting young offenders from the formal processes of the criminal justice system. Article 40.3 of the CRC states:

States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

The *Beijing Rules* also state:

Rule 11.1: Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority.

19.1: The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.

Whilst the *Young Offenders Act 1994* (WA) establishes a diversionary system of police cautioning and referrals to a juvenile justice team, there are a number of concerns about the operation of this system.¹⁶ These concerns include:

- The use of discretion in police cautioning and referrals is not addressed adequately in the legislation.¹⁷
- There are insufficient controls and checks on police discretion to arrest and remand children in custody.¹⁸
- There is limited availability of Juvenile Justice Teams in rural and remote regions, resulting in a lack of an alternative to detention in these areas.

¹⁵ *Young Offenders Act* (1994), ss6-7.

¹⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, 2001 Social Justice Report.

¹⁷ *Ibid.*

¹⁸ Above n3, p6.

The overrepresentation of indigenous offenders in the criminal justice system

A further human rights issue is that the diversionary system established by the Youth Offenders Act has not been successful in reducing the number of indigenous children being placed before the courts.¹⁹ The Auditor General for Western Australia highlighted this issue in a report in 2008:²⁰

“In the period 2002-03 to 2006-07, we estimate that police directed indigenous young people away from court in 41 per cent of instances in which indigenous young people had formal police contact. In the same period, police directed non-indigenous young people away from court in 64 per cent of instances in which they had formal contact with police.”

A more recent review of juvenile justice by the Price Consulting Group (2009) also noted that in Western Australia in 2007 roughly 80% of non-Aboriginal young people were being diverted from court, while only 55% of young Aboriginal people were diverted. There is no evidence to suggest that Aboriginal youth offending is significantly more serious than that of non-Aboriginal young people.²¹

The Aboriginal and Torres Strait Islander Social Justice Commissioner assessed the operation of Western Australia’s diversionary system as not meeting human rights principles and found that the introduction of juvenile justice teams and the cautioning system have not lived up to expectations of a restorative approach.²² In particular, the system does not live up to the human rights principles of racial equality and community involvement in relation to indigenous Australians.²³

A justice reinvestment and human rights approach to these issues requires greater investment in diversionary options, particularly in regional areas to prevent juveniles being sent to metropolitan detention centres to be held on remand. This can result in prolonged separation from family and country, the impact of which cannot be underestimated. Increased involvement of indigenous communities in the planning and implementation is also required.

Mandatory Sentencing

Western Australia’s mandatory sentencing laws violate human rights and are not supported by a justice reinvestment approach. The “three strikes” law applies to children between ages 10 and 17 and requires a 12 month sentence in a juvenile facility for the third or subsequent strike of home burglary.²⁴ In

¹⁹ Ibid

²⁰ Auditor General of Western Australia, *The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994* (4/2008)

Human Rights Brief no 5 (2001) Human Rights Commission, available at http://humanrights.gov.au/human_rights/briefs/hrbrief5.pdf

²¹ Above n3, p7.

²² *Justice Report 2011*, Human Right and Equal Opportunity Commission, Sydney, 2002, http://www.humanrights.gov.au/social_justice/sj_report/sjreport01/index.html

²³ Ibid.

²⁴ Criminal Code Compilation Act 1913 (WA) s401(4) and (5).

addition, recent laws have imposed mandatory detention terms for youths aged over 16 years convicted of assault occasioning bodily harm on police, ambulance and public transport officers.²⁵

These laws have impacted disproportionately on Indigenous people with Aboriginal juveniles making up 81 per cent of all identified 'three strikes' juvenile cases. This compares to comprising a total of 33% of all offenders before the Children's Court.²⁶

Western Australia's mandatory sentencing laws breach Article 37(b) of the UN Convention on the Rights of the Child which states that: "[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be ... used only as a measure of last resort and for the shortest appropriate period of time". Further, the disproportionate impact of these laws on indigenous juveniles goes against human rights principles in relation to racial discrimination.

In addition, the mandatory sentencing laws do not meet the following human rights guidelines:

- interests of the child as a primary consideration (article 3.1, Convention on the Rights of the Child (CROC))
- Children require special measures of protection (article 24, International Covenant on Civil and Political Rights (ICCPR))
- A variety of dispositions must be available for child offenders (article 40.4, CROC)
- Rehabilitation and reintegration of a child offender should be the essential aim. A child offender should be treated in a manner which takes into account his or her age (article 40.1, CROC).

The case of a child who received two sets of 12 month detention orders for stealing food from houses because he was hungry and had very little family care highlights how these laws do not allow for the interests of the child to be a primary consideration.²⁷

A justice reinvestment approach involves addressing the underlying causes of crime, such as poverty; substance abuse or mental illness by implementing a range of community based preventative, diversionary and rehabilitative measures.

Justice reinvestment approach in action

There are a number of initiatives in Western Australia that provide examples of a justice reinvestment approach in action. One example is the Youth Justice Centres created in the regional areas of Geraldton and Eastern Goldfields to provide a more effective way of helping to divert young people away from the criminal justice system. These centres bring together a range of government departments and rely on information sharing across departmental boundaries and links to the local community.²⁸ The Geraldton

²⁵ Ibid, s318 (2).

²⁶ Submission to the United Nations Committee on the Rights of the Child for their Day of General Discussion on the Rights of Indigenous Children: issue 3, Law and public order, including juvenile justice, Human Rights and Equal Opportunity Commission; Australia 2002, http://humanrights.gov.au/social_justice/croc/sub3.htm

²⁷ Bayes, H, "Punishment is Blind": Mandatory Sentencing of Children in Western Australia and the Northern Territory (1999) Vol. 5 No. 1 *UNSW Law Journal Forum* 14, 15.

²⁸ Above n 9.

initiative has seen the establishment of a Youth Night Outreach Program, culturally appropriate and community supported diversionary activities²⁹ and the provision of safe housing to prevent juveniles being unnecessarily sent to Perth on remand.³⁰ Anecdotal evidence suggests the scheme is having success with reductions in children being remanded to detention centres in Perth.³¹

This initiative reflects the principles of justice reinvestment and is in line with the human rights framework. However, a more comprehensive and coordinated national response is required to ensure that the Australia's juvenile justice system conforms to Australia's human rights obligations.

4. **Conclusion**

SCALES believes that the value of a justice reinvestment approach to criminal justice is that it better protects the human rights of children and young people. Justice reinvestment provides a framework for a comprehensive and coordinated approach to juvenile justice from all levels of government and the community. SCALES calls for the Federal Government to take a leadership role in the implementation of justice reinvestment, particularly in coordinating funding for youth justice diversion and rehabilitation services.

Recommendation

SCALES recommends the establishment of a National Partnership Agreement for Justice reinvestment, which obliges all jurisdictions to contribute funding and undertake actions to implement justice reinvestment, with a focus on improving early intervention and diversionary programs, and increasing community ownership and involvement.

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²⁹ Geraldton 'Geraldton Comprehensive Youth Program' Shared Responsibility Agreement (SRA), Australian Government, <http://www.indigenous.gov.au/sra/search/srsearch.aspx>, accessed 14 March 2013.

³⁰ Above n9.

³¹ Above n3.