

REHABILITATING YOUNG ADULT OFFENDERS

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I. INTRODUCTION

Youth justice systems in various jurisdictions around the world cater for children and young people up to the age of 18 years. While there are marked differences in the minimum age of criminal responsibility across jurisdictions ranging from seven to 14 years of age (or older in rare circumstances) in most jurisdictions (Cipriani 2009), there are greater similarities with regards to the upper age limit of youth justice systems. Eighteen years is generally the standard upper age for youth justice systems (Pease and Tseloni 1996), resulting in a delineation between youth justice and adult criminal justice systems.

There is no magical maturation that takes place at this age (Stone 2019). A young person on turning 18 years does not magically acquire greater insight, wisdom and restraint (Loeber and Farrington 2012). They are not blessed with any greater ability to plan or to understand the consequences of their actions. Consequently, this division between youth justice and adult criminal justice systems has been increasingly criticized and the cliff-edge between the two systems should be considered a slope (Stone 2019).

Developments in neuroscience have been especially relevant to these criticisms. Developments in neuroscience, termed the “neuroscientific turn” (Brewster 2020) suggest that brain development does not finish until mid-twenties, which suggests that the protections afforded to children and young people in youth justice systems might usefully be applied to young adults. Capacity for insight, understanding of consequences of behaviour and ability to plan, among other skills, develop over time as brain development and maturity occurs.

This paper will explore some of the key features of youth justice systems, noting that they are far from homogenous, and how many aspects of these youth justice systems might be extended to young adults. A small number of examples where young adult offenders are treated in broadly similar ways to young offenders will be considered here. The paper will then conclude with consideration of some of the challenges facing jurisdictions who would seek to apply some of the approaches and methods used in youth justice systems to those adult offenders.

II. COMMON KEY FEATURES OF YOUTH JUSTICE SYSTEMS

Numerous protections and provisions operate in youth justice systems in recognition of the greater vulnerabilities of children and young people (Richards 2011). For example, a minimum age of criminal responsibility is set in recognition that children below a particular age, determined in each jurisdiction, do not have the capacity to know that their behaviour is unlawful (Cipriani 2009). This means that young children cannot be held criminally responsible. Many youth justice systems have legislative provisions that protect the identity of the children and young people who enter their youth justice systems so that any stigma associated with their offending does not haunt them into their futures (Richards 2011). Many jurisdictions have legislative provisions that allow for offences committed as children or young people to be cleared at the time they turn 18 years of age, if not completely expunged from their criminal records (although some jurisdictions have seen attacks and dismantling of these provisions over time (Kurlychek and Shah 2018)). Many jurisdictions will have legislative guidance to protect children and young people in their dealings with police, including needing an adult to be present at the time of police interview and for children

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and young people to be held separately to adults in police cells (Council of Europe 2010). Legislative and policy directions establishing diversionary measures to keep children and young people out of the formal youth justice system have a long history in many jurisdictions (Scharf 1978) and have a general pattern of evidence that is positive (Wilson, Brennan and Olaghère 2018). Separate specialist children’s courts operate to deal with matters involving children and young people (Cashmore 2013). This serves to reduce the potential for contamination through children and young people mixing with adult defendants. Legislation guiding the operation of youth justice systems routinely emphasizes rehabilitation, whereas adult sentencing provisions will invariably emphasize individual and general deterrence, among other sentencing principles (Stone 2019). Separate youth detention facilities ensure that children and young people remanded in or sentenced to custody do not interact with adult prisoners or inmates. This again serves to reduce risks of contamination (Richards 2011), as well as protecting vulnerable children and young people from violence and intimidation which might occur if co-housed with older inmates. These and other provisions and protections are hallmarks of youth justice systems which recognize the vulnerabilities of children and young people and their reduced culpability for their behaviour.

Many of these provisions are broadly consistent with the various international conventions and guidelines for children and young people in conflict with the law, such as the United Nations Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

III. “NEUROSCIENTIFIC TURN”

Significant developments in neuroscience in recent years have shed light on brain development, challenging previous assumptions about the period over which brain development occurs. There is now general agreement that brain development largely slows in the mid-twenties.

Prior to this time, there are a range of behaviours that might be impacted through the development of the brain, particularly the prefrontal cortex. Logical reasoning, abstract reasoning, and intellectual abilities develop through adolescence and late adolescence. Their development of logical and abstract reasoning potentially places young people as more vulnerable to peer pressure, less able to anticipate consequences or judge risks, and they have less life experience to draw on when making critical decisions (Schmidt, Rap and Liefwaard 2020).

Moreover,

Psychological functions that are relevant in the context of criminal culpability and responsibility, such as inhibition (constraining impulses) and the suppression of interferences (risk-taking behaviour), are not fully developed until after the 20th year of life ... The higher executive functions of the brain, such as planning, verbal memory and impulse control, are only fully developed around the age of 25 (Schmidt, Rap and Liefwaard 2020: 175).

This neuroscientific evidence helps, at least partially, explain the age-crime curve, which suggests elevated levels of offending from mid-teens to mid-twenties (Farrington 1996). This age-crime curve has a long history, with the first recorded example published in 1831 (Matthews and Minton 2018), and widespread replication, meaning that it goes beyond a single jurisdiction or socio-cultural context, although recent youth crime declines in various countries has prompted some to question the static nature of the age-crime curve (Matthews and Minton 2018).

Nonetheless, on the basis of the “neuroscientific turn”, there have been calls to expand the types of provisions common to youth justice systems to young adult offenders.

IV. INITIATIVES FOR YOUNG ADULT OFFENDERS

With the growing recognition that young adults are also continuing to experience brain development, there have been calls to variously extend some of these common features of the youth justice system to young adults. Those in favour of doing so not only cite developments in neuroscience to support these claims, but also note changes in social dynamics that now see many young adults, at least in some parts of the world, experiencing a protracted adolescence, at least in the sense of remaining in education longer and staying in the family home until they are older (Arnett 2004). This, some argue, highlights a reduced taking of responsibilities that in prior generations would have been acquired much earlier in life. This, it might be argued, is evidence of the need to extend some of the protections from youth justice systems to those in the early twenties.

Some jurisdictions have adopted or are experimenting with initiatives reflecting these concerns. In Australia, there are a number of relevant examples of policies and systems established to respond to the needs of young adults. In the Australian state of Victoria, there has been a “dual track” system for many decades (Victorian Sentencing Advisory Council 2019). This system allows young adults (aged 18-21 years) to serve their custodial sentence in a Youth Justice Centre as opposed to an adult prison if the young adult is thought to be particularly impressionable, lacking in maturity, or thought to be vulnerable to undesirable influences in an adult prison. This system is thought to recognize the continuing development of the young adult’s brain and that young adults also generally have good prospects of rehabilitation. Thus, the system also recognizes that adult prisons may not be the best at fostering such development and rehabilitation.

However, if a young adult does continue to offend and they are further incarcerated, they might be held in Port Phillip Prison in Victoria, which has a specialist youth unit (“Penhyn”) for young adult inmates aged 18-25 years of age who are first time offenders with no criminal record (Victorian Sentencing Advisory Council 2019). Similar prison programmes operate in other Australian jurisdictions, in an effort to separate more vulnerable inmates from the general prison population.

Australian jurisdictions also have various forms of diversion and specialist courts (for example, drug courts and Aboriginal-specific courts, as well as specific treatment initiatives connected to courts for family violence and gambling) for those in possession of illicit drugs or whose offending is related to their drug use. Many of these are not specifically designed for young adults, but given the well established age-crime curve, see a significant proportion of participants being young adults. There have been calls from some Australian scholars to extend diversion interventions such as police cautions to adults (Thompson et al 2014), again with a focus on young adults. Similar arguments are raised as have been advocated by those in the youth justice area promoting diversion. Less formal interventions have been shown to be effective at diverting people away from formal criminal justice interventions and are cost-effective when compared with the costs of running court systems (Wang and Weatherburn 2018).

Beyond Australia, various jurisdictions have embraced similar provisions. The Netherlands has famously extended aspects of the youth justice system to capture young adults (up to the age of 23 years). Other European countries, such as Germany, have also adopted broadly similar provisions (Farrington, Loeber and Howell 2012). These arrangements provide greater flexibility to relevant courts when sentencing a young adult. This can mean that young adults are sentenced to serve a period of a custodial sentence in a youth facility rather than an adult prison (Schmidt, Rap and Liefwaard 2020).

In addition to these somewhat system-level structures that treat young adults as still maturing and developing rather than completely matured individuals, there are a variety of correctional interventions that vie for attention. Some, such as the Risk-Needs-Responsivity (RNR) model, have amassed a body of positive empirical analysis, while others, such as the Good Lives Model, continues to be promoted for its more holistic framing of people in conflict with the law, but perhaps has less clear evidence of success (Lösel 2012). Each of these two major approaches are described briefly here.

The RNR model employs an offence-focused approach to rehabilitation activities. The RNR model stipulates that there are four criminogenic needs that have the greatest correlation with offending behaviour (the Big Four) – antisocial personality pattern, pro-criminal attitudes, social supports for crime and a history

of antisocial behaviour. Additionally, there are another four peripheral needs that contribute to offending behaviour – problematic family relationships and circumstances, problems at school or work, lack of pro-social leisure activities and substance abuse (Bonta and Andrews 2007).

Somewhat in contrast, the “Good Lives Model” emphasizes the importance of a holistic and therapeutic approach to rehabilitation (Ward & Maruna 2007). It focuses on “human goods”, such as agency, quality relationships and a purpose-filled life, to reduce the risk of reoffending, therefore moving beyond a risk focus. This approach appeals to some criminal justice practitioners because it does not just frame young adult offenders as offenders but rather as people with wants, needs, skills and wishes.

Other approaches to young adult offender rehabilitation exist and individual jurisdictions will have their own approaches to rehabilitating young adult and other offenders. Models of this kind often arise from particular legal and cultural contexts and attempts to apply them need to consider these and related issues.

V. CHALLENGES OF EXTENDING PROVISIONS OF YOUTH JUSTICE SYSTEMS TO YOUNG ADULTS

While all of this makes good sense, I would argue that there are a number of challenges associated with making this shift toward less punitive interventions for young adult offenders. The first relates to the current state of youth justice systems in various jurisdictions. Many jurisdictions have youth justice systems that struggle to achieve the standards and norms established in various international conventions and are areas requiring substantial reform if they are to meet these standards (Reddy and Redmond 2018). This makes it difficult to contemplate expanding the system to capture young adult offenders. This is especially the case when many jurisdictions have, over time, seen a hardening of the distinction between youth justice and adult criminal justice systems. In the spirit of “law and order” and “tough on crime” policy (Garland 2000), some jurisdictions have passed laws to trigger transfers from youth justice to adult custody at 18 years of age, rather than keeping young adults in youth custodial facilities as might have been the case historically. In the Australian state of New South Wales, reports over many years highlighted the significant number of over 18 year-olds in youth detention. Legislative amendments now allow for transfer for more young people to adult custodial facilities when they turn 18. Thus, the movement to extend the reach and/or principles of youth justice systems to capture young adults is working against the recent tide of legislative and policy reform in some jurisdictions.

Secondly, youth justice systems are generally considerably more expensive for governments than adult systems (NSW Auditor General 2017). Extending the reach of a youth justice system potentially increases the costs for governments in administering the various youth justice and adult correctional systems. While there might be grounds to argue that providing greater opportunities for young adults to stay in the youth justice system ultimately saves money by delivering better reoffending outcomes and being potentially less traumatic, there will be challenges to mounting arguments for this to occur if it results in initial increased expenditure. Invariably, governments and treasury departments have finite resources and their willingness to extend youth justice-like provisions to young adults might be tempered by any additional costs.

Thirdly, youth justice custodial facilities grapple with managing the very different developmental needs of children and young people and struggle to separate them according to developmental need, offending history, status (that is remand versus sentenced to custody), gender and the like. These issues are likely to be exacerbated if older detainees are housed in custodial facilities with quite young children.

Moreover, various inquiries have shown that children and young people in custody have often experienced forms of assault and sexual assault (Royal Commission into Institutional Responses to Child Sexual Abuse 2017). Child safe guidelines and frameworks have been developed to protect children and young people in custody. Extending the age range of those held in the same facility will invariably create additional management and security challenges that will need to be carefully managed.

With these challenges in mind, I would argue that there is considerable merit to working to improve prevention and diversion measures to keep young adults out of the criminal justice system for as long as

possible. Noting that the age-crime curve suggests a significant decline in offending of those nearing 24 or 25 years, there is likely to be considerable human and financial benefit for prolonging their entry into the criminal justice system. This means working to extend existing diversionary measures, such as cautioning schemes, conferencing programmes, treatment referrals and the like to cover young adults. Simultaneously investing in prevention efforts and providing strong post-release support services for young people leaving custody will help in reducing the contact young adults have with the criminal justice system. Prioritizing employment and housing support in any post-release arrangements is important and ever more so with pressure on limited housing stock in some jurisdictions and poor employment outcomes for ex-detainees or inmates (Mills, Latimer, Gordon, Groot and Milne 2021).

References

- Arnett, J. (2004) *Emerging Adulthood: The winding road from the late teens through the twenties*, Oxford University Press, New York.
- Bonta, J., Andrews, D. A. (2007) *Risk-need-responsivity model for offender assessment and rehabilitation*, Public Safety Canada: Ottawa.
- Brewster, D. (2020) 'Not wired up? The Neuroscientific Turn in Youth to Adult (Y2A) Transition Policy', *Youth Justice*, Vol. 20, No. 3: 215-234.
- Cashmore, J. (2013) 'Juvenile Justice: Australian Court Responses Situated in the International Context', in Sheehan, R. and Borowski, A. (eds) *Australia's Children's Courts Today and Tomorrow*, Springer, Dordrecht.
- Cipriani, D. (2009) *Children's Rights and the Minimum Age of Criminal Responsibility*, Routledge, London.
- Council of Europe (2010) *Guidelines of the Committee of Members of the Council of Europe on child-friendly justice*, Council of Europe Publishing - <https://rm.coe.int/16804b2cf3>
- Farrington, D. (1996) *Understanding and Preventing Youth Crime*, Joseph Rowntree Foundation, York.
- Farrington, D., Loeber, R. and Howell, J. (2012) 'Young Adult Offenders: The Need for More Effective Legislative Options and Justice Processing', *Criminology and Public Policy*, Vol. 11, No. 4: 729-750.
- Garland, D. (2000) 'The Culture of High Crime Societies: Some Preconditions of Recent Law and Order Policies', *British Journal of Criminology*, Vol. 40, No. 3: 347-375.
- Kurlychek, M. and Shah, R. (2018) 'The Hidden Consequences of Visible Juvenile Records', in Huebner, B. and Frost, N. (eds) *Handbook on the Consequences of Sentencing and Punishment Decisions*, Routledge, Boca Raton.
- Loeber, R. and Farrington, D. (2012) 'Introduction' in Loeber, R. and Farrington, D. (eds) *From Juvenile Delinquency to Adult Crime: Criminal Careers, Justice Policy and Prevention*, Oxford University Press, New York.
- Lösel, F. (2012) 'What works in correctional treatment and rehabilitation for young adults?', in Lösel, F., Bottoms, A. and Farrington, D (eds) *Young Adult Offenders: Lost in Transition?*, Routledge, London.
- Matthews, B. and Minton, J. (2018) 'Rethinking one of criminology's 'brute facts': The age-crime curve and the crime drop in Scotland', *European Journal of Criminology*, Vol. 15, No. 3: 296-320.
- Mills, A., Latimer, C., Gordon, G., Groot, S. and Milne, B. (2021) 'More than a roof? A critical review of post-prison housing provision in Aotearora/New Zealand', *New Zealand Sociology*, Vol. 36, No. 1: 1-24.
- NSW Auditor General. (2017). *Report on Justice 2017*. The NSW Auditor General's Report – Financial Audit.

- Pease, K. and Tseloni, A. (1996) 'Juvenile-Adult Differences in Criminal Justice: Evidence from the United Nations Crime Survey', *The Howard Journal*, Vol. 33, No. 1: 40-60.
- Reddy, J. and Redmond, S. (2018) *Improving the Measurement of Effectiveness in the Irish Youth Justice System: International Review of Youth Justice Systems*, Research Evidence into Policy, Programmes and Practice Project, University of Limerick.
- Richards, K. (2011) 'What makes juvenile offenders different from adult offenders?', *Trends and Issues in Crime and Criminal Justice*, No. 409, Australian Institute of Criminology, Canberra.
- Royal Commission into Institutional Responses to Child Sexual Abuse 2017, *Final report recommendations*, <https://www.childabuseroyalcommission.gov.au>
- Scharf, P. (1978) 'Towards a Philosophy for the Diversion of Juvenile Offenders', *The Journal of Juvenile and Family Court Matters*, Vol. 29, No. 1: 13-20.
- Schmidt, E., Rap, S. and Liefwaard, T. (2020) 'Young Adults in the Justice System: The Interplay between Scientific Insights, Legal Reform and Implementation in Practice in the Netherlands', *Youth Justice*, Vol. 21, No. 2: 172-191.
- Stone, N. (2019) 'The View From the Cliff Edge: Patrolling the Juvenile-Adult Age Boundary', *Youth Justice*, Vol. 19, No. 2: 158-169.
- Thompson, C., Stewart, A., Allard, T., Chrzanowski, A., Luker, C. and Svetcic, J. (2014) 'Examining adult-onset offending: A case for adult cautioning', *Trends and Issues in Crime and Criminal Justice*, No. 488, Australian Institute of Criminology, Canberra.
- Victorian Sentencing Advisory Council (2019) *Rethinking Sentencing for Young Adult Offenders*, Victorian Sentencing Advisory Council, Melbourne - https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-11/Rethinking_Sentencing_for_Young_Adult_Offenders.pdf
- Wang, J. and Weatherburn, D. (2018) 'Are police cautions a soft option? Reoffending among juveniles cautioned or referred to court', *Australian and New Zealand Journal of Criminology*, Vol. 52, No. 3: 334-347.
- Ward, T. and Maruna, S. (2007) *Rehabilitation: Beyond the risk paradigm*, Routledge, London.
- Wilson, D., Brennan, I. and Olaghere, A. (2018) 'Police-initiated diversion for youth to prevent future delinquent behaviour: a systematic review', Campbell Collaboration Systematic Review.