The Great Leap Backward: Criminal Law Reform with the Hon Jarrod Bleijie

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Abstract

On 3 April 2012, the Honourable Member for Kawana, Jarrod Bleijie MP, was sworn in as Attorney-General for Queensland and Minister for Justice. In the period that followed, Queensland's youngest Attorney-General since Sir Samuel Griffith in 1874 has implemented substantial reforms to the criminal law as part of a campaign to 'get tough on crime'. Those reforms have been heavily and almost uniformly criticised by the profession, the judiciary and the academy. This article places the reforms in their historical context to illustrate that together they constitute a great leap backward that unravels centuries of gradual reform calculated to improve the state of human rights in criminal justice.

I Introduction

Human rights in the criminal law were in a fairly dire state in the Middle Ages.[1] Offenders were branded with the letters of their crime to announce it to the public, until that practice was replaced in part by the large scarlet letters worn by some criminals by 1364.[2] The presumption of innocence, although developed in its earliest forms in Ancient Rome, does not appear to have crystallised into a recognisable form until 1470.[3] During the 16th and 17th centuries, it was common to charge the families of a prisoner sentenced to death a fee for their execution, but

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1 So, incidentally, was the state of juvenile justice, governmental institutions, civil and political rights, and deference to the monarchy: for a similar discussion of recent regressive reforms in Queensland in those areas, see Andrew Trotter and Harry Hobbs, 'A Historical Perspective on Juvenile Justice Reform in Queensland' (2014) 38 *Criminal Law Journal* (forthcoming); Andrew Trotter and Harry Hobbs, 'Under the Oak Tree: Institutional Reform in the Deep North' (2014) 88 *Australian Law Journal* (forthcoming); Harry Hobbs and Andrew Trotter, 'How Far Have We Really Come? Rolling Back Civil and Political Rights in Queensland' (Working Paper, 6 February 2014); Harry Hobbs and Andrew Trotter, 'Putting the "Queen" back in Queensland' (2014) 39 *Alternative Law Journal* (forthcoming).

2 See below, IV B, nn 306–10.

3 See below, I A, nn 40–2.

by the 18th century prisoners had largely been relieved of the indignity of paying for their punishment.[4]

The coercive force of the state was a common and accepted tool for extracting incriminating information until torture was abolished in England in 1640, and from the early 18th century in other parts of Europe.[5] Prosecutors were free to use a defendant's criminal history against him in a criminal trial until about 1715. It was not until 1836 that reference to such evidence was statutorily restricted to cases where it served some purpose — either to respond to credibility attacks by the defendant or as similar fact evidence.[6] Criminals whose acts sufficiently shocked the public conscience would be repeatedly punished, sometimes beyond death, with their disinterred cadavers subjected to further humiliation. This practice finally ceased in Ireland in 1837.[7]

By 1840, the concept of supervised release and reintegration of prisoners was developing, which would lead to the establishment of the parole authorities and court-ordered parole.[8] Mandatory sentences were relatively common in the 18th and 19th centuries, but the last widespread network of minimum sentences was abandoned in 1884 after it became clear that they had a tendency to cause injustice.[9] By 1915, suspended sentences had been introduced in some Australian courts, providing another means of sentencing offenders and deterring future offending.[10] Emergency legislation providing for extraordinary offences and police powers had become unfashionable.[11]

By the turn of the 21st century, the criminal law had come a long way.

Since coming to office in Queensland on 3 April 2012, Attorney-General Bleijie has, with remarkable efficiency, undone the better part of these developments in that State. From 20 June 2012, he reintroduced mandatory minimum sentences for various crimes, ranging from child sex offences to graffiti.[12] On 21 August 2012, he introduced a levy charging sentenced offenders to ensure they 'contribute to the justice system'.[13] On 15 March 2013, he announced reforms to reveal defendants' criminal histories to juries.[14] On 1 May

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4 See below, III D, nn 235–9.
5 See below, III B, nn 168–72.
6 See below, II B, nn 81–2, 9090.
7 See below, IV A, nn 260–7.
8 See below, III C, n 220.
9 See below, III A, n 124.
10 See below, III C, n 228.
11 See below, V, nn 375–9.
12 *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012* (Qld) s 7; *Criminal Law Amendment Act 2012* (Qld) ss 3, 7; *Criminal Law and Other Legislation Amendment Act 2013* (Qld) ss 47, 83; *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) ss 43, 45, 46.
13 *Penalties and Sentences and Other Legislation Amendment Act 2012* (Qld) s 37; *Penalties and Sentences Regulation 2005* (Qld) reg 8A; Queensland, *Parliamentary Debates*, Legislative Assembly, 11 July 2012, 1133 (Jarrod Bleijie).
14 Renée Viellaris, 'Queensland Attorney-General Jarrod Bleijie Backs Revealing Past Criminal Acts to Juries', *Courier Mail* (online), 16 March 2013 <http://www.couriermail.com.au/ipad/queensland-attorney-general-jarrod-bleijie-backs-revealing-past-criminal-acts-to-juries/story-fn6ck45n-1226598597812>; see also Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013 (Qld) cl 123.

2013, legislation he had introduced passed, authorising the seizure of 'unexplained wealth' and abrogating the presumption of innocence to require an explanation.[15] On 31 July 2013, he announced a plan to abolish court-ordered parole and suspended sentences.[16] On 20 August 2013, he introduced legislation to criminalise the possession of various innocuous objects during the G20 Conference and equipped police with emergency coercive powers.[17] On 21 September 2013, the Queensland government moved to establish a website to announce the identity of certain offenders to the public.[18] On 15 October 2013, he introduced legislation establishing crushing terms of imprisonment to be imposed for crimes committed in groups, which can be avoided only by providing inculpatory information.[19] On 17 October 2013, he purported to give himself power to detain sex offenders indefinitely, after the expiration of their sentence, if, in his substantially unreviewable discretion, he considered it in the public interest.[20] He has noted that there are roughly 6000 prisoners in Queensland, and room for about 500 more.[21] There are, no doubt, more reforms to come.

Each of these 'reforms' is an aspect of a broader policy to be tough on crime. There is no occasion in this article for a full exploration of the effectiveness of such a strategy: it is sufficient to observe that harsher punishments have been repeatedly and categorically demonstrated not to have the desired deterrent effect.[22] Tough-on-crime movements have failed many times before.[23] However, there is something troubling in Bleijie's approach to reform. He has frequently cited community sentiments in support of harsher criminal laws. His focus on

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15 *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013* (Qld).

16 Renée Viellaris and Robyn Ironside, 'Court-ordered Parole, Suspended Sentences May Be Dumped as State Gets Tough on Criminals', *Courier Mail* (online), 31 July 2013 <http://www.couriermail.com.au/news/queensland/courtordered-parole-suspended-sentences-may-be-dumped-as-state-gets-tough-on-criminals/story-fnihsrf2-1226688347819>.

17 *G20 (Safety and Security) Act 2013* (Qld) ('*G20 Act*').

18 Child Protection (Offender Reporting — Publication of Information) Amendment Bill 2013 (Qld) cl 6.

19 *Vicious Lawless Association Disestablishment Act 2013* (Qld); see also *Tattoo Parlours Act 2013* (Qld); *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld).

20 *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld). That power was later declared unconstitutional: *A-G (Qld) v Lawrence* [2013] QCA 364 (6 December 2013).

21 Renée Viellaris and Robyn Ironside, 'Court-ordered Parole, Suspended Sentences May Be Dumped as State Gets Tough on Criminals', *Courier Mail* (online), 31 July 2013 <http://www.couriermail.com.au/news/queensland/courtordered-parole-suspended-sentences-may-be-dumped-as-state-gets-tough-on-criminals/story-fnihsrf2-1226688347819>.

22 Kevin M Carlsmith, John M Darley and Paul H Robinson, 'Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment' (2002) 83 *Journal of Personality and Social Psychology* 284; Johannes Andenaes, 'The Morality of Deterrence' (1969) 37 *University of Chicago Law Review* 649, 655–6; David Brown, 'Mandatory Sentencing: A Criminological Perspective' (2001) 7(2) *Australian Journal of Human Rights* 31, 39–42; Donald Ritchie, 'Does Imprisonment Deter? A Review of the Evidence' (Research Paper, Sentencing Advisory Council (Vic), April 2011) 2 <https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/does_imprisonment_deter_a_review_of_the_evidence.pdf>; David Brown, 'The Limited Benefit of Prison in Controlling Crime' (2010) 22 *Current Issues in Criminal Justice* 137, 140–2.

23 See, eg, Robert G Lawson, 'Difficult Times in Kentucky Corrections — Aftershocks of a "Tough on Crime" Philosophy' (2005) 93 *Kentucky Law Journal* 305; Francis T Cullen, Gregory A Clark and John F Wozniak, 'Explaining the Get Tough Movement: Can the Public Be Blamed?' (1985) 49 *Federal Probation* 16.

'victims' rights above and beyond the offender's rights'[24] comes at the expense of proper consultation and a balanced approach to law reform. The almost uniform opposition of an overwhelming majority of interested organisations with considerable expertise has been disregarded, and a body of experts established specifically for the purpose of considering and advising on proposed sentencing reforms has been abolished.[25] As early as 1820, Frenchman Charles Cottu expressed his dismay at the English system of the time 'confiding its punishment entirely to the hatred or resentment of the injured party'.[26] It would be profoundly undesirable to return to such a time. This article traverses the historical background to each of Bleijie's proposed and legislated endeavours. These endeavours disregard lessons learnt through centuries of reform and return the criminal law to a state from which it had long and happily departed.

II A Fair Trial

The right to a fair trial is as old and as fundamental as the rule of law itself.[27] Bleijie's legislative amendments have burdened that right in various ways. For example, 26 motorcycle clubs have been declared to be criminal organisations without any inquiry by judge or jury into the extent of their criminal activity.[28] Other amendments have purported to allow any person previously subjected to a continuing detention order to be detained indefinitely without recourse to the courts if the Attorney-General considers it is 'in the public interest'.[29]

It is an essential element of due process and a fair trial that an accused be tried according to law for a clearly defined offence.[30] It is critical that a precise line be drawn between criminal and non-criminal conduct, appropriately delineating the limits of criminal conduct warranting criminal punishment.[31] Bleijie has introduced various new offences that test those limits. One example is the extension of the offence of breaching bail conditions to include a failure to participate in prescribed

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24 Bridie Jabour, 'Youth Justice Program Loses Half Its Staff', *Brisbane Times* (online), 22 November 2012 <http://www.brisbanetimes.com.au/queensland/youth-justice-program-loses-half-its-staff-20121122-29sgp.html>.

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

26 Charles Cottu, *On the Administration of Criminal Justice in England* (first published 1822, Cambridge Scholars, 2009) 37.

27 See generally Ronald Banaszak, *Fair Trial Rights of the Accused: A Documentary History* (Greenwood, 2002).

28 *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 40, sch 1, item 2.

29 *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld) s 5. That power was later declared unconstitutional: *A-G (Qld) v Lawrence* [2013] QCA 364 (6 December 2013).

30 See, eg, *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 7(1); *Kokkinakis v Greece* (1993) 17 EHRR 397 (ECtHR) [52]; *Salvatori Abuki v Attorney-General*, Constitutional Case No 2/2007 (Constitutional Court of South Africa) (witchcraft unconstitutional for ambiguity); see also by analogy *Zentai v O'Connor (No 3)* (2010) 187 FCR 495, 542 [191]; *Minister for Home Affairs of the Commonwealth v Zentai* (2012) 246 CLR 213.

31 See R A Duff et al, 'Introduction: The Boundaries of Criminal Law' in R A Duff et al, *The Boundaries of the Criminal Law* (Oxford University Press, 2010) 1, 24.

rehabilitation or treatment.[32] A breach of bail has its own consequences for the liberty of the offender and it is questionable whether there is value in criminalising it in its own right, not least because it creates ambiguities and potentially criminalises what would in other circumstances be perfectly ordinary conduct.[33] The Attorney-General has also foreshadowed extending that offence to children, punishable by up to one year of imprisonment.[34] Another example is the extended offence of trafficking in precursor substances used to manufacture dangerous drugs,[35] which comes with the difficulties associated with the criminalisation of preparatory acts.[36] The reintroduced offence of 'knowingly giving a false answer in Parliament'[37] has been criticised on the basis that it undoes reforms ensuring freedom of speech in the Parliament and the function of the democratic system.[38] In addition, for participants in a motorcycle club that has been designated as a 'criminal organisation', it is now an offence to gather in groups of three in a public place, return to their clubhouses, or recruit new members.[39]

The regressive nature of Bleijie's reforms affecting the access by the individual to a fair trial under fair laws is most clearly illustrated by two measures: the derogation from the presumption of innocence and the reversion to allowing juries to judge defendants by their past acts.

A *Unexplained Wealth Laws*

The presumption of innocence appears to have existed in its earliest form in Ancient Rome,[40] and perhaps before.[41] Writing in about 1470, Fortescue argued that 'I should indeed, prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly'.[42] This ratio became, metaphorically at

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32 *Criminal Law and Other Legislation Amendment Act 2013* (Qld) s 5, omitting s 29(2)(c) of the *Bail Act 1980* (Qld), which had provided an exemption to the offence in that section for such rehabilitative programs.

33 Nicole Myers and Sunny Dhillon, 'The Criminal Offence of Entering Any Shoppers Drug Mart in Ontario: Criminalizing Ordinary Behaviour with Youth Bail Conditions' (2013) 55 *Canadian Journal of Criminology and Criminal Justice* 187.

34 Marissa Calligeros, 'Queensland to Name and Shame Young Offenders', *Brisbane Times* (online), 26 September 2013 <http://www.brisbanetimes.com.au/queensland/queensland-to-name-and-shame-young-offenders-20130926-2uexk.html>.

35 *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013* (Qld) s 42.

36 Andrew Ashworth, 'Conceptions of Overcriminalization' (2008) 5 *Ohio State Journal of Criminal Law* 407, 414–15.

37 *Criminal Law (False Evidence before Parliament) Amendment Act 2012* (Qld) s 3.

38 The history of the development of parliamentary privilege is usefully set out in Clerk of the Parliament, Submission to the Legal Affairs and Community Safety Committee ('LACSC'), Criminal Law (False Evidence Before Parliament) Amendment Bill 2012, 27 June 2012.

39 *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 42.

40 'The general rule of law is that the burden of proof lies on the plaintiff': Caesar Flavius Justinian, *The Institutes of Justinian* (trans John Baron Moyle, Clarendon, 5th ed, 1913) Lib II, Tit xx, 4 (*Institutiones Justinian* was first published in 533). See further William Mawdesley Best, *A Treatise on Presumptions of Law and Fact, with the Theory and Rules of Presumptive or Circumstantial Proof in Criminal Cases* (T & J W Johnson, 1845) 267 §200.

41 See Kenneth Pennington, 'Innocent until Proven Guilty: The Origins of a Legal Maxim' (2003) 63 *Jurist* 106, 124.

42 John Fortescue, *De Laudibus Legum Anglie* (trans S B Chrimes, Cambridge University Press, 1942) ch XXVII, 65 (first published 1545–46).

least, half as favourable in the 18th century, when it was considered that 'it is better for ten guilty persons to escape than that one innocent suffer'.[43]

By 1646, the sentiment had developed that '[i]n doubtful causes one ought rather to save than to condemne'.[44] This principle assumed some practical effect in the 18th century as the discursive altercation trial between victim and accused was replaced with a formal division between prosecution and defence cases and with the advent of directed verdicts by 1743.[45] The standard of 'beyond reasonable doubt' made its first appearance in a series of treason trials in Ireland in 1798.[46] By 1868, Australian juries were instructed that 'the prisoner is presumed to be innocent until he is proven guilty'.[47]

In the 19th century, it was regarded — though not as a true presumption — as serving as 'an emphatic caution against haste in coming to a conclusion adverse to a prisoner'.[48] Evidence suggests that without such an explicit presumption, in all criminal trials 'the dice were loaded heavily against the accused'.[49] James Fitzjames Stephen noted that '[t]he jury expected from [the defendant] a clear explanation of the case against him; and if he could not give it they convicted him'.[50] A prisoner remained incompetent as a witness, deprived of representation,[51] uninformed of the charges or evidence against him, and frequently convicted following a short trial[52] on such simple evidence as the confession of an accomplice.[53] With no right of appeal, his execution would 'usually [follow] upon judgment with irreparable celerity'.[54]

By the late 19th century, the presumption of innocence came to be described in the United States as 'axiomatic and elementary', enforcement of which 'lies at the foundation of the administration of our criminal law'.[55] By the 20th century, it was recognised as a 'hallowed principle',[56] a 'golden thread' running through the

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43 William Blackstone, *Commentaries on the Laws of England* (4th ed, 1770) vol IV, ch 27, 358. See *R v Hobson* (1831) 1 Lewin 261; 168 ER 1034 (per Holyrod J).

44 Andrew Horn, *The Mirror of Justices* (1646) 240.

45 John H Langbein, *The Origins of the Adversary Criminal Trial* (Oxford University Press, 2010) 259–60.

46 John Wilder May, 'Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases' (1876) 10 *American Law Review* 642, 656.

47 *R v Phillips* (1868) 8 SCR (NSW) 54, 57 (Hargrave J).

48 James Fitzjames Stephen, *A General View of the Criminal Law of England* (Macmillan, 2nd ed, 1890) 183, cited in *Briginshaw v Briginshaw* (1938) 60 CLR 336, 352 (Starke J).

49 Carleton Kemp Allen, *Legal Duties and Other Essays in Jurisprudence* (Oxford University Press, 1931) 257–8.

50 Stephen, above n 48, 194–5.

51 Langbein, above n 45, 26–33.

52 In the Elizabethan and Jacobean periods (1558–1625), the average trial took between 15 and 20 minutes; in the 17th and 18th centuries, between 12 and 20 jury trials could be conducted per court per day; by the 19th century, the number was still between 10 and 12 per day, with jury deliberations taking only a few minutes: Langbein, above n 45, 16–20.

53 Allen, above n 49, 269.

54 Ibid.

55 *Coffin v United States* 156 US 432, 453 (1895).

56 *R v Oakes* [1986] 1 SCR 103, 119 (Dickson CJ).

intricate 'web of the English criminal law'.[57] It now finds expression in many regional and international conventions[58] and the constitutions of at least 67 states.[59]

Although the presumption of innocence is not to be considered 'unduly fragile',[60] its protections can be, and increasingly are, abrogated by statute.[61] One such category of legislation is unexplained wealth laws, which go further than confiscation of criminal proceeds by imposing on the accused the evidentiary burden to prove his or her wealth was acquired by legal means. In reversing the onus of proof, unexplained wealth laws raise the risk of 'confiscating assets from innocent people because of their breadth'.[62] Western Australia was the first Australian jurisdiction to introduce such a law,[63] which, the High Court observed, was 'draconian in its operation'.[64] Undeterred, the Northern Territory, South Australia, New South Wales and the Commonwealth followed suit.[65] Bleijie introduced legislation along the same lines in November 2012, and it came into force on 6 September 2013.[66]

The Attorney-General declared that the amendment gives 'Queensland the toughest laws in the nation for dealing with organised crime'.[67] While previous legislation allowed the seizure of assets of persons who had at least been charged

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57 *Woolmington v DPP* [1935] AC 462, 481 (Viscount Sankey LC); *Maiden v The Queen* (1991) 173 CLR 95, 128–9 (Gaudron J).

58 See, eg, *Declaration of the Rights of Man and Citizen* (France, 1789) art 9; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 11; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(2); *Convention for the Protection of Human Rights and Fundamental Freedoms*, above n 30, art 6(2); *American Convention on Human Rights*, opened for signature 22 September 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 8(2); *African Charter on Human and People's Rights (Banjul Charter)*, 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982) art 7(1)(b) <http://www.achpr.org/instruments/achpr/>; *Arab Charter on Human Rights*, League of Arab States, 22 May 2004, entered into force 15 March 2008, reprinted in 12 *International Human Rights Reports* 893 (2005), art 16; *Human Rights Act 2004* (ACT) s 22(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(1); *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*') s 11(d); *New Zealand Bill of Rights Act 1990* (NZ) s 25(c).

59 See M Cherif Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying Procedural Protections and Equivalent Protections in National Constitutions' (1993) 3 *Duke Journal of Comparative and International Law* 235, 265–7.

60 *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [45] (French CJ).

61 Regarding the constitutionality of such provisions, see *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [45] (French CJ); *Leask v Commonwealth* (1996) 187 CLR 579; *Milicevic v Campbell* (1975) 132 CLR 307. See also A J Ashworth and M Blake, 'Presumption of Innocence in English Criminal Law' (1966) 9 *Criminal Law Review* 306.

62 Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups* (2009) [5.59].

63 *Criminal Property Confiscation Act 2000* (WA).

64 *Mansfield v DPP (WA)* (2006) 226 CLR 486, 503 [50] (Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ).

65 *Criminal Property Forfeiture Act 2002* (NT); *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA); *Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010* (NSW); *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth).

66 *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013* (Qld).

67 Jarrod Bleijie, Attorney-General, 'Unexplained Wealth Laws Passed to Hit Crime Bosses' (Media Statement, 1 May 2013) <http://statements.qld.gov.au/Statement/2013/5/1/unexplained-wealth-laws-passed-to-hit-crime-bosses>.

with an offence, he explained: 'Our new unexplained wealth laws cast the net wider to capture crime bosses who are pulling the strings but have escaped charges *as there isn't enough evidence to link them to the crime*.'[68]

If satisfied there is a 'reasonable suspicion'[69] that a person has engaged in a serious crime-related activity and that any of the person's current or previous wealth was acquired unlawfully, the court must make an unexplained wealth order. Such an order must also be made if the person has acquired, without sufficient consideration, serious crime-derived property from someone else — whether or not the person knew or suspected that the property was derived from an illegal activity.[70]

Among other submissions opposing the Bill, the Queensland Council for Civil Liberties noted that under the Act, '[c]itizens are in effect to have their property put at risk on the basis of the mere suspicion of a police officer. This is the apparatus of an authoritarian State'.[71] Bleijie has announced that seized property would be sold to fund 'important programs and services for Queenslanders'.[72] It is not clear what programs those will be, but it is apparent that they will come at the expense of the presumption of innocence.

B *Admissibility of Prior Convictions*

The use of members of the public to investigate and determine criminal affairs can be traced back to the Vehmic courts of medieval Germany, and Anglo-Saxon England.[73] However, the jury trial did not become standard procedure in England until the reign of Henry II in the 12th century. The spread of the system across the country was complete with the *Assize of Clarendon* in 1166.[74] Jurors at that time were drawn from the 'vill' — a subdivision of the 'hundred', a measure of land sufficient in the Saxon era to support that number of households. They were not only allowed, but expected, to inform themselves, based on their own knowledge rather than evidence presented in court.[75] This philosophy continued until at least the 16th century, when Vaughan CJ in *Bushell's Case* acknowledged that the jury 'may have evidence from their own personal knowledge, by which they may be assured, and sometimes are, that what is deposed in Court, is absolutely false'.[76] That included knowledge of the character of the defendant, including any prior

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68 Ibid (emphasis added).

69 *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013* (Qld) s 40.

70 There is a narrow discretion for the Court to refuse, if satisfied that it is not in the public interest to do so: see *Criminal Proceeds Confiscation Act 2002* (Qld) s 89G(2).

71 Queensland Council for Civil Liberties, Submission No 3 to LACSC, *Criminal Proceeds Confiscation*, 8 September 2013 2.

72 Marissa Calligeros, 'New Laws Mean Criminals Must Prove "Unexplained Wealth"', *Brisbane Times* (online), 6 September 2013 <http://www.brisbanetimes.com.au/queensland/new-laws-mean-criminals-must-prove-unexplained-wealth-20130906-2t8t5.html>.

73 See generally Mike Macnair, 'Vicinage and the Antecedents of the Jury' (1999) 17 *Law and History Review* 537, 566–71.

74 Christopher Harper-Bill and Nicholas Vincent, *Henry II: New Interpretations* (Boydell Press, 2007) 219.

75 See for example Daniel Klerman, 'Was the Jury Ever Self-Informing?' (2003) 77 *Southern California Law Review* 123–49.

76 (1670) Vaughan 135, 147.

convictions he might have. However, by that time, a juror acting on personal knowledge was obliged to disclose it and expose himself to cross-examination.[77] The requirement that jurors be drawn locally and therefore the role of the personal knowledge of jurors gradually diminished across the Elizabethan period. Nevertheless, although jurors were eventually prohibited from acting on private knowledge, evidence of character — including of previous convictions — was regularly 'admitted without comment'.[78] Commenting on a trial held in 1653, Stephen observes that 'at this time it was not considered irregular to call witnesses to prove a prisoner's bad character in order to raise a presumption of his guilt'.[79]

Judges had begun to express concerns about evidence of prior convictions by the late 17th century, albeit on the basis of relevance rather than prejudice. In one forgery trial in 1684, the King's Bench refused to admit evidence of previous forgeries on the basis that their Lordships 'would not suffer any raking into men's course of life, to pick up evidence they cannot be prepared to answer'.[80] In a murder trial in 1692, Holt CJ refused to admit evidence of previous felonies, asking, 'Are you going to arraign his whole life?'[81] However, a review of the Old Bailey Sessions Papers suggests that the conviction of defendants based largely on their past conduct and offences remained common until about 1715, and intermittent until at least 1747.[82] That is consistent with the brevity of the trials of the day: a jury would hear several unrelated cases before it retired and was replaced with another. Even after that practice was abandoned in 1738, juries would commonly huddle together and give a verdict immediately.[83]

By the mid-18th century, the first common law predecessor of the present character evidence rule had developed, whereby 'the prosecutor cannot enter into the defendant's character, unless the defendant enable[s] him to do so, by calling his witnesses to support it'.[84] In reality, however, such was the pressure on defendants to bolster their good character that the exception swallowed the rule.[85] Nonetheless, even in such cases, the 'rule against particulars' permitted only general comments as to the defendant's character, not specific references to past crimes or convictions.[86] With the benefit of centuries of experience, the common law had decided it was best to keep prior convictions from juries.

The legislature of the day disagreed. The first statute regulating the admissibility of prior offences was passed in 1827 and allowed prosecutors to do precisely what Holt CJ had asked rhetorically more than a century earlier. It regarded previous convictions as part of the indictment, such that a prisoner

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77 *Bennett v Hundred of Hartford* (1650) Sty 233.

78 Theodore F T Plucknett, *A Concise History of the Common Law* (The Lawbook Exchange, 5th ed, 2001) 437.

79 James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol 1, 368.

80 See *R v John Hampden* (1684) 9 St Tr 1053, 1103, where the court invoked that precedent to prohibit the defence from impeaching a prosecution witness on the basis that he was an atheist.

81 *R v Henry Harrison* (1692) 12 St Tr 833, 864.

82 Langbein, above n 45, 192–5.

83 Ibid 21.

84 William Hawkins, *A Treatise of the Pleas of the Crown* (1716) vol 1, 457.

85 Langbein, above n 45, 196.

86 Ibid 197–8.

indicted for one offence was called on to answer for all previous offences.[87] The purpose was not to undermine any version of events presented by the accused, who was incompetent as a witness until the late 19th century. Rather, it was evidence of bad character that 'was freely admitted to prove his guilt',[88] just as good character evidence might prove innocence, based on 'the improbability that a person of good character should have conducted himself as alleged'.[89]

In the decade that followed, the perverse impact of such a law became evident. In 1836, legislation was introduced in England to relieve the prisoner of such hardship.[90] The preamble stated that 'doubts may reasonably be entertained, whether the practice of informing the jury of the fact of a previous conviction, was consistent with a fair and impartial inquiry'.[91] This statute contained the first version of the current rule that evidence of prior convictions is not admissible except to contradict evidence of good character led by the accused. Within two years, the exception was interpreted to extend by analogy to the case where an accused impeaches the character of a prosecution witness.[92] That state of affairs was preserved by legislation in 1851.[93] By the time the Hundred Courts — where the tradition of juries assessing guilt by extraneous evidence had been born — were superseded by the establishment of the county courts in 1867,[94] it had been accepted that a defendant should not be judged by his or her past crimes, but by the evidence supporting the present charges.

Meanwhile, the concept of tendency evidence developed somewhat independently. The *Treason Act 1695*[95] stipulated that no man be convicted of treason except by confession or on the testimony of two witnesses, a rule that duplicated itself throughout the western world, including in the *United States Constitution*.[96] In 1696, Lord Holt CJ interpreted that requirement as permitting the admission of 'such evidence as is proper and fit to prove that overt act' of treason, including past acts taken in another country.[97] However, as John Phillimore observed in his treatise, the proviso was that 'if the act has no such tendency, and is not alleged in the indictment, it ought not to be received in evidence'.[98]

The result was that a criminal record was not admissible in a proceeding unless it served some function. That rule has stood the test of time and is consistent with the current law in Queensland. Evidence of prior convictions is admissible if the accused raises good character evidence or impeaches the character of a Crown

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87 *Criminal Law Act 1827*, 7 & 8 Geo IV, c 28, s 11.

88 Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial* (Stevens & Sons, 3rd ed, 1963) 6.

89 *R v Stannard* (1837) 7 C & P 673, 674–5; 173 ER 295, 295–6.

90 *Previous Conviction Act 1836*, 6 & 7 Will IV, c 111.

91 Extracted in *R v Shrimpton* (1851) 2 Den 319, 321.

92 *R v Gadbury* (1838) 8 Car & P 676, 677–8; 173 ER 669, 670.

93 *Prevention of Offences Act 1851*, 14 & 15 Vict, c 19, s 9(a); *R v Shrimpton* (1851) 2 Den 319, 324–5 (Lord Campbell CJ).

94 *County Courts Act 1867*, 30 & 31 Vict, c 142, s 28.

95 7 & 8 Will III, c 3.

96 Art III, s 3.

97 *Rookwood's Case* (1696) 13 How St Tr 220.

98 John George Phillimore, *The History and Principles of the Law of Evidence as Illustrating our Social Progress* (1850) 245.

witness, prosecutor or co-accused.[99] Likewise, it is admissible in cases where prior convictions are sufficiently similar to the current charge that their probative value as circumstantial evidence outweighs the prejudice to the accused.[100] As the High Court has frequently noted, evidence of past convictions is 'dangerous and is to be treated with greater caution than other circumstantial evidence'.[101] The Australian Law Reform Commission has also urged caution, observing that psychological studies suggest such evidence 'will generally have little probative value and may mislead on the issue of credibility'.[102] With good reason, therefore, the law in Queensland does not allow criminal histories to be admitted in evidence simply to give juries a fuller view. It has not done so for many years.

Then, on 15 March 2013, Bleijie announced that 'allowing for criminal histories to be made available to juries … would allow for greater transparency in criminal trials'.[103] The proposal came under significant criticism. However, that criticism did not prevent, eight months later, the further step of allowing criminal histories to be released not only to jurors, but to the media at large for a broad category of persons associated with certain declared motorcycle organisations.[104] It is true that criminal histories have been left to juries in England and Wales for the last decade.[105] However, the protections and benefits granted to defendants by the criminal procedure of England and Wales differ in several respects to those in Australia and such selective comparisons are unhelpful. Empirical studies from one United States state that has gone down the same path suggest that innocent defendants who have criminal records are nearly twice as likely to be deterred from giving evidence by the fear of impeachment as those who do not.[106] The release of criminal histories to the public at large could serve no legitimate purpose and would subject defendants to a trial by media — a low point not seen since jurors were permitted to inform themselves in the 16th century. These moves in Queensland are the undoing of centuries of legal thought.

III A Just Sentence

Bleijie's tough-on-crime policy is exemplified by the amplification of the force of the criminal law. The Attorney-General has implemented greater maximum

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99 *Evidence Act 1977* (Qld) s 15(2)(c).

100 Ibid s 15(2)(a); see *Martin v Osborne* (1936) 55 CLR 367, 375; *Doney v The Queen* (1990) 171 CLR 207, 211.

101 *Sutton v The Queen* (1984) 152 CLR 528, 564 (Dawson J); see also *HML v The Queen* (2008) 235 CLR 334, 500 [505] (Kiefel J).

102 Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2006) 81 [3.11].

103 Renée Viellaris, 'Queensland Attorney-General Jarrod Bleijie Backs Revealing Past Criminal Acts to Juries', *Courier Mail* (online), 16 March 2013 <http://www.couriermail.com.au/ipad/queensland-attorney-general-jarrod-bleijie-backs-revealing-past-criminal-acts-to-juries/story-fn6ck45n-1226598597812>.

104 Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013 (Qld) cl 123.

105 *Criminal Justice Act 2003* c 44, ss 98–112. See further Rachel Tandy, 'The Admissibility of a Defendant's Previous Criminal Record: A Critical Analysis of the Criminal Justice Act 2003' (2009) 30 *Statute Law Review* 203.

106 John H Blume, 'The Dilemma of the Criminal Defendant with a Prior Record — Lessons from the Wrongfully Convicted' (2008) 5 *Journal of Empirical Legal Studies* 477.

penalties for an array of offences, including raising maximum penalties from five to seven years for graffiti offences,[107] to life imprisonment for some drug offences,[108] from 10 to 14 years for looting in a disaster area,[109] from five to 14 years for possession of child pornography,[110] and from seven to 14 years for serious assault involving spitting on a police officer.[111] For members of certain motorcycle clubs, penalties have been increased from one year to seven years for affray,[112] from three to seven years for dealing with identification information,[113] and from seven to 14 years for misconduct in relation to public office.[114] These raise serious questions of fairness: for example, does graffiti, which does not present any serious threat to any person, warrant the same penalty as attempted robbery[115] or hijacking a plane?[116]

However, Bleijie's reform extends much further, altering in various ways the operation of the criminal justice system.

A *Mandatory Minimum Sentences*

Mandatory sentencing has a long and unsuccessful history in the criminal law. In the United States, mandatory penalties existed as early as 1790 for piracy and murder, and many others for more trivial offences were introduced throughout the 1800s.[117] In the 20th century, mandatory sentences became relatively common for drug crimes.[118] With its impressive array of regimes calculated to deter and reduce crime rates, the United States eclipsed Russia as the country with the world's highest incarceration rate around the turn of the 21st century.[119]

In England, mandatory minimum transportation sentences were in place for various offences in the 18th and 19th centuries. However, Stephen reports that the 'capriciously restricted' nature of the discretion left to judges was 'to a great extent remedied' by legislation passed in 1846 that substituted maximum penalties in many of those instances.[120]

The last widespread scheme of mandatory minimum penalties in Australia was introduced in the colony of New South Wales in 1883.[121] It reportedly arose 'out of a widespread public dissatisfaction with the inadequacy and inequality of

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107 *Criminal Law and Other Legislation Amendment Act 2013* (Qld) s 15.
108 Ibid s 38.
109 Criminal Code (Looting in Declared Areas) Amendment Bill 2013 (Qld) cl 3.
110 *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013* (Qld) s 24.
111 *Criminal Law Amendment Act 2012* (Qld) s 4.
112 *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 43.
113 Ibid s 47.
114 Ibid s 44.
115 *Criminal Code* (Qld) s 412(1) (seven years).
116 Ibid s 417A(1) (seven years).
117 Christopher Mascharka, 'Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences' (2001) 28 *Florida State University Law Review* 935, 938–9.
118 Ibid 939–41.
119 Ibid 937.
120 *Central Criminal Court Act 1846*, 9 & 10 Vict, c 24, s 1; see Stephen, above n 48, 481–2.
121 *Criminal Law Amendment Act 1883* (NSW), 46 & 47 Vict, c 17.

sentences pronounced by the courts'.[122] The injustice it caused soon became manifest. One woman suffered a mandatory minimum 12 months' imprisonment after obtaining two shillings on false pretences. Another man was imprisoned for three years for killing a calf that had persistently annoyed his feeding horses. Examples such as these saw the laws labelled 'grotesquely disproportionate'.[123] Only one year later, judges were permitted to disregard them if they considered a lesser term 'ought to be awarded'.[124] In a 'sop to the public and … hardy legislators', 1891 laws retained mandatory minimum penalties for *penal servitude*, but allowed lesser sentences of *imprisonment* for the same offences.[125] By this time, there was no distinction between the two. The absurdity was 'quietly abandoned' in 1924.[126]

Mandatory life sentences and death penalties for murder aside,[127] mandatory sentencing regimes in Australia have been relatively rare since Federation. There have been only two significant examples, and both have caused significant outcry, faced constitutional challenges, and finally been substantially discontinued on the basis that they were unfair. The first was the mandatory terms introduced in Western Australia in 1996 and in the Northern Territory in 1997 of 14 days, 90 days and 12 months for first-, second- and third-time thieves and other adult petty property offenders, and similar cascading minima for juveniles.[128] They were heavily criticised for their arbitrary effect, particularly on the indigenous population.[129] The removal of judicial discretion caused, for example, the imprisonment for 28 days of a 15-year-old girl who was a passenger in a stolen vehicle, and for two years of an 11-year-old boy who stole food because he had no family care and was hungry.[130] Such injustices led to their repeal in the Northern Territory on 18 October 2001.[131]

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122 New South Wales, *Parliamentary Debates*, Legislative Council, Second Reading Speech for Sentences Mitigation Bill 1884, 20 February 1884, 1883 (W B Dalley).

123 Ibid 1896.

124 *Criminal Law Amendment Act 1884*, 47 & 48 Vict, c 18, s 1 (commonly known as the *Sentences Mitigation Act*).

125 *Criminal Law and Evidence Act 1891*, 54 & 55 Vict, c 5; see further *Crimes Act 1900* (NSW) s 442.

126 *Crimes Amendment Act 1924* (NSW) s 24(c). See generally G D Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788–1900* (Federation Press, 2002) 357–64.

127 Mandatory life penalties for murder remain in force under *Criminal Code Act 1899* (Qld) sch 1 s 305; *Criminal Code Act 1983* (NT) sch 1 s 157; *Criminal Law Consolidation Act 1935* (SA) s 11.

128 *Criminal Code Amendment Act (No 2) 1996* (WA), s 5 inserting *Criminal Code 1913* (WA) s 401(4); *Sentencing Act 1995* (NT) s 78A (repealed); *Juvenile Justice Act 1993* (NT) s 53AE (repealed). The constitutionality of these mandatory sentences was unsuccessfully challenged: Transcript of Proceedings, *Wynbyne v Marshall* (High Court of Australia, No D174 of 1997, Gaudron and Hayne JJ, 21 May 1998) (special leave refused).

129 United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, 69th sess, UN Doc A/55/40 (24 July 2000); Desmond Manderson and Naomi Sharp, 'Mandatory Sentences and the Constitution: Discretion, Responsibility and Judicial Process' (2000) 22 *Sydney Law Review* 585, 586–7.

130 Helen Bayes, 'Punishment is Blind: Mandatory Sentencing of Children in Western Australia and the Northern Territory' (1999) 22 *University of New South Wales Law Journal* 286, 288–9.

131 *Juvenile Justice Amendment Act (No 2) 2001* (NT); *Sentencing Amendment Act (No 3) 2001* (NT). Compare Western Australia, where the mandatory penalties remain in place and the summary penalties were trebled in 2004: *Criminal Law Amendment (Simple Offences) Act 2004* (WA) s 35(4). For a more detailed criticism of these laws, see Manderson and Sharp, above n 129, 586–7.

The second is the mandatory term of five years with a three-year non-parole period for people smuggling.[132] The removal of judicial discretion resulted in severe terms of imprisonment being imposed predominantly upon poor, uneducated fishermen coaxed with irresistible financial incentives to assist in a perilous sea voyage, often by doing as little as preparing subsistence food for refugees.[133] Such injustices led to criticism of the regime by judges. This included that it was 'completely out of kilter'[134] and 'savage',[135] and drew an 'exceptional' submission from the Judicial Conference of Australia ('JCA') supporting the proposed repeal of the relevant provision.[136] The Commonwealth Attorney-General took the extraordinary step of directing the Commonwealth Director of Public Prosecutions not to prosecute under the provision attracting the mandatory sentence except in certain aggravating circumstances.[137]

The difficulties with mandatory sentencing transcend the injustices associated with any one particular regime. Mandatory sentences are ineffective deterrent mechanisms.[138] Calculated as they are to depart from condign punishments arrived at through the application of developed sentencing principles, they inevitably occasion injustice. As enunciated by the JCA:

> [T]he administration of justice, through the application of established sentencing principles, can be compromised by a mandatory minimum term ... there is the practical inevitability of arbitrary punishment as offenders with quite different levels of culpability receive the same penalty.[139]

Therefore, by 2010, when the Queensland Parliament considered whether to introduce mandatory terms of imprisonment for child sex offences, the importance of reserving judicial discretion for the uncontemplated case with sufficient mitigating factors was well known. The Parliament added the proviso, 'unless there are exceptional circumstances'.[140] In support of that proviso, the then Attorney-General made the astute observation that:

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132 *Migration Act 1958* (Cth) s 236B. The constitutionality of these mandatory sentences was unsuccessfully challenged in *Magaming v The Queen* (2013) 87 ALJR 1060.

133 For a fuller survey of sentences and the offenders on which they are imposed, see Andrew Trotter and Matt Garozzo, 'Mandatory Sentencing for People Smuggling: Issues of Law and Policy' (2012) 36 *Melbourne University Law Review* 553, 558–63.

134 Transcript of Proceedings (Sentence), *R v Nafi* (Supreme Court of the Northern Territory, 21102367, Kelly J, 19 May 2011) 6.

135 Transcript of Proceedings (Sentence), *R v Hasim* (District Court of Queensland, No 1196 of 2011, Martin DCJ, 11 January 2012) 2. For several other judicial statements of disapproval, see Trotter and Garozzo, above n 133, 566–8.

136 JCA, Submission No 11 to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, 2.

137 That is, unless the person was a repeat offender or more than a crew member, captain or master of a vessel, or if a death occurred: Commonwealth, *Gazette: Government Notices*, No GN 35, 5 September 2012, 2318.

138 Judith Bessant, 'Australia's Mandatory Sentencing Laws, Ethnicity and Human Rights' (2001) 8 *International Journal on Minority and Group Rights* 369, 378. See also the various studies to this effect cited in Anthony Gray and Gerard Elmore, 'The Constitutionality of Minimum Mandatory Sentencing Regimes' (2012) 22 *Journal of Judicial Administration* 37, 38 n 5.

139 JCA, above n 136, 2.

140 *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 5.

> the strength of our legal system must be measured not only by its capacity to imprison those who transgress the law but also by whether it is sufficiently robust and fair so as to guard against injustice that might be visited upon the few.[141]

These comments were made with the passage of the same Bill that established the Sentencing Advisory Council. Sentencing law in Queensland had reached a balanced and informed equilibrium of legislative guidance and judicial discretion that permitted the dispensation of fair and appropriate penalties.

Then, on 20 June 2012, Attorney-General Bleijie introduced various mandatory minima, including mandatory life sentences and 20 years without parole for repeat sex offenders[142] and a 25-year non-parole period for the murder of a police officer.[143] The latter was contained in the same Bill that abolished the Sentencing Advisory Council, which had recommended one year earlier that much the same minimum not be included in any new scheme.[144] In subsequent months, various pieces of mandatory legislation followed, to: require all drug traffickers to serve 80 per cent of their sentences;[145] impose mandatory Graffiti Removal Orders for prescribed graffiti offences on children aged 12 years or over unless disabled;[146] create various mandatory terms of imprisonment for possession and supply of firearms;[147] and introduce the 'toughest anti-hooning laws in the nation', which allow drivers convicted of serious hooning to have their cars impounded for a first offence and crushed for a second, 'automatically rather than through court applications'.[148] In addition, members, or aspiring members, of certain motorcycle clubs specified by statute are exposed to a minimum of six months imprisonment for affray,[149] and 12 months for grievous bodily harm[150] or serious assault,[151] all without parole.

These Acts were passed with a minimum consultation time hardly indicative of a bona fide consultation process. The submissions received were almost entirely in opposition to the reforms, including submissions from the Law Society, Bar Association and Queensland Supreme Court — collectively representing every practising lawyer in the State.[152] The mandatory minima for

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141 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 August 2010, 2309 (Cameron Dick on the Penalties and Sentences (Sentencing Advisory Council) Amendment Bill).

142 *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012* (Qld) s 7.

143 *Criminal Law Amendment Act 2012* (Qld) ss 3, 7.

144 Sentencing Advisory Council, *Minimum Standard Non-parole Periods: Final Report*, September 2011, 83.

145 *Criminal Law and Other Legislation Amendment Act 2013* (Qld) s 7.

146 Ibid s 47, and, in relation to juveniles with the same effect, s 83.

147 *Weapons and Other Legislation Amendment Act 2012* (Qld) s 15.

148 Explanatory Notes, Police Powers and Responsibilities (Motor Vehicle Impoundment) and Other Legislation Amendment Bill 2012 (Qld) 1–2.

149 *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 43.

150 Ibid s 45.

151 Ibid s 46.

152 See, eg, LACSC, *Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012*, Report No 2 (July 2012) 39–48, app B; LACSC, *Criminal Law Amendment Bill 2012*, Report No 3 (July 2012) 33–44, app B; LACSC, *Police Powers and Responsibilities (Motor Vehicle Impoundment) and Other Legislation Amendment Bill 2012*, Report No 24 (March 2013); LACSC, *Criminal Law Amendment Bill (No 2) 2012*, Report No 27 (April 2013).

repeat offenders have retrospective application, and the minimum non-parole periods tend to decrease supervised time for reintegration to society and increase the incidence of reoffending. These Acts disincentivise guilty pleas, resulting in more trials, occasioning more financial cost to the State, emotional cost to the victims, and longer delays for defendants in custody who may ultimately be found not guilty. In the first year of operation, such tough-on-crime measures cost the Queensland government nearly $60 million in extra incarceration costs alone and resulted in overcrowding in youth and women's prisons to the point where inmates exceeded beds.[153] The most pertinent concern, however, is the injustice these mandatory penalties could occasion on particular individuals. They could, for example: be applied to unlawful carnal knowledge in a consensual relationship; impose unduly lengthy prison terms of imprisonment on persons with an intellectual disability; apply to young, first-time drug traffickers; require a 12-year-old child ordinarily residing in rural Queensland to travel considerable distances to perform mandatory community service; allow police officers to impound, or, if for a second offence, crush a motor vehicle that has a sustained loss of traction; and withdraw judicial discretion for any number of other unforeseen cases with mitigating circumstances justifying a lesser penalty.

B *Crushing Jail Terms for Bikies*

The extraction of incriminating information by the coercive and irresistible force of the state was a common feature of the criminal law of the past. Although the infliction of pain and suffering for the purposes of punishment is as old as human society, its use to obtain information appears to have commenced with the ancient Greeks — the etymology of 'torture' can be traced to *basanos*, the Greek word for a touchstone used to test gold purity.[154] Torture was thought to be so effective in Ancient Rome that a slave's testimony was inadmissible unless torture was used in its extraction.[155]

The role of such force temporarily changed when the Germanic invaders brought trials by combat and ordeal to Europe in the 5th and 6th centuries. Although torture was a central part of trial by ordeal, it was not relied on to extract information — the intention was adjudication by God and the result did not depend on men resolving conflicting accounts.[156] Roman law was rediscovered in 12th-century Europe and trial by ordeal prohibited by the Fourth Lateran Council in 1215.[157] In 1228, the *Liber iuris civilis* of the Commune of Verona was the first to empower the ruler of the city in uncertain cases to seek evidence by various means including torture.[158]

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153 Renée Viellaris, 'Newman Government Crackdown on Crime Costing Taxpayers Extra $60m a Year', *Courier Mail* (online), 14 September 2013 <http://www.couriermail.com.au/news/queensland/newman-government-crackdown-on-crime-costing-taxpayers-extra-60m-a-year/story-fnihsrf2-1226718878958>.

154 Lisa Hajjar, *Torture and Rights* (Routledge, 2013) 14–15.

155 Edward Peters, *Torture* (Basil Blackwell Inc, 1985) 18.

156 Hajjar, above n 154, 16; John Hostettler, *Cesare Beccaria: The Genius of 'On Crimes and Punishments'* (Waterside Press, 2011) 41.

157 Sanford Levinson, *Torture: A Collection* (Oxford University Press, 2004) 94.

158 Peters, above n 155, 49.

Torture was regularly used throughout the Middle Ages to extract the names and details of accomplices.[159] In continental Europe, it was particularly crucial to procure direct evidence because the laws of proof required two eyewitnesses or a confession for conviction.[160] Pope John XXII authorised torture for the Inquisition, from 1326, to coerce witches into revealing other Satanic brides.[161] Fears of witchery were at their highest during the Black Death, which peaked in Europe between 1348 and 1350, and following the Protestant Reformation in 1517.[162] In perhaps the best indictment of the effectiveness of torture, many of the trials were founded on information provided by other 'witches', which was patently fabricated to end their suffering.[163]

In England, where juries were allowed to convict on circumstantial evidence, torture was not used systematically by the judiciary. That is not to say it was not used in certain political cases, as Blackstone put it, as 'an engine of state, not of law'.[164] When Jane Seymour caught the eye of Henry VIII in 1536, the King had Anne Boleyn's musician Marc Smeaton interrogated for four hours on the rack and a knotted chord tied around his eyes until a confession was obtained that would implicate the Queen in adultery.[165] In 1586, St Margaret Clitherow refused to enter a plea in her trial for harbouring Catholic priests and was burdened with progressively heavier stones until she was crushed under a weight of roughly 700 lbs.[166] Following the Gunpowder Plot of 1605, Guy Fawkes had his fingers crushed before being moved from the Tower to a special jail — 'the dungeon among the rats' — where the Thames at high tide would stimulate unpleasant activity among the local rodents, which 'would not, probably, delay their attack'.[167] Torture was formally abolished in England around 1640, before the Bill of Rights was passed in 1689.[168] This abolition did not however extend to *peine forte et dure*,[169] which was not discontinued until 1772, when silence was understood as a plea of not guilty.[170]

In Europe, the increased use of incarceration in the 16th and 17th centuries allowed for the development of less strict rules of proof than those applied for 'blood sanctions', and reduced reliance on torture.[171] Sweden was the first to

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159 Ibid 40–1.

160 Hajjar, above n 154, 17; Levinson, above n 157, 94–5; William Schulz, *The Phenomenon of Torture: Readings and Commentary* (University of Pennsylvania Press, 2007) 20.

161 Hajjar, above n 154, 17.

162 Ibid.

163 See, eg, Bernard Rosenthal, *Salem Story: Reading the Witch Trials of 1692* (Cambridge University Press, 1995).

164 Sir William Blackstone, *Blackstone's Commentaries* (1803) vol 4, 325.

165 Christopher Hibbert, *The Virgin Queen: A Personal History of Elizabeth I* (Tauris Parke, 2010) 17; see also Charles MacFarlane and Thomas Thomson, *The Comprehensive History of England: Civil and Military, Religious, Intellectual, and Social* (Blackie and Son, 1861) vol 1, 801.

166 David Farmer, *The Oxford Dictionary of Saints* (Oxford University Press, 5th rev ed, 2011) 95.

167 William Ainsworth, *Ainsworth's Magazine: A Miscellany of Romance, General Literature and Art*, (Chapman and Hall, 1850) vol 17, 254; see also James Sharpe, *Remember, Remember: A Cultural History of Guy Fawkes Day* (Harvard University Press, 2005) 127.

168 Sanford Levinson, *Torture: A Collection* (Oxford University Press, 2004) 100.

169 See, eg, *Standing Mute Act 1275*, 3 Edw I, c 12.

170 *An Act for the More Effectual Proceeding against Persons Standing Mute on Their Arraignment for Felony, or Piracy 1772*, 12 Geo III, c 20.

171 Levinson, above n 168, 98–9.

abolish torture in 1722, and the rest of Europe followed in the 18th and early 19th centuries.[172] In Egypt in 1798, Napoleon Bonaparte wrote to Major-General Berthier:

> The barbarous custom of whipping men suspected of having important secrets to reveal must be abolished. It has always been recognized that this method of interrogation, by putting men to the torture, is useless. The wretches say whatever comes into their heads and whatever they think one wants to believe.[173]

In recent times the use of torture has been predominantly confined to totalitarian states or times of emergency. Following the 1967 war, Israel publicly authorised 'moderate physical pressure' to assist in the identification of 'enemies of the State'.[174] In the Kennedy era in Vietnam and Latin America, the CIA was documented as extracting information by exploiting prisoners' internal conflicts, guilt or sexual inadequacy: 'The threat of coercion usually weakens or destroys resistance more effectively than coercion itself'.[175] The United Kingdom subjected Irish Catholic rebels to the notorious 'five techniques' (wall-standing, hooding, subjection to noise and deprivation of sleep and of food and drink) with the object of extracting 'the naming of others and/or information'.[176] In January 2002, following the September 11 attacks, the United States established a special detention facility at Guantánamo Bay in Cuba to detain and elicit information from Al-Qaeda members. In the course of interrogation, detainees were subjected to waterboarding, 'humiliating acts, solitary confinement, temperature extremes, use of forced positions'.[177] Then Vice-President Dick Cheney justified the use of waterboarding on the basis that it 'produced a lot of valuable information'.[178] That is, of course, not to the point. In any case, information so obtained is no more reliable now than it was 400 years ago during the Salem Witch Hunts — for example, three detainees who helpfully confessed to appearing in a video in Afghanistan with Osama bin Laden were later revealed to have been in the United Kingdom at the time it was recorded.[179]

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172 Peters, above n 155.

173 Napoleon Bonaparte, *Letters and Documents of Napoleon, Volume I: The Rise to Power* (John Eldred Howard trans, Cresset Press, 1961) 274.

174 Alice Bullard, *Human Rights in Crisis* (Ashgate, 2008) 13.

175 Central Intelligence Agency, *KUBARK Counterintelligence Interrogation* (July 1963) [Declassified and approved for release January 1997] 90.

176 *Republic of Ireland v United Kingdom*, ECHR Series A No 25 (18 January 1978) [167]. The Court found that these practices did not amount to torture, but rather to 'a practice of inhuman and degrading treatment' (at [168]), although this has been the subject of some criticism: see, eg, Anthony Cullen, 'Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights' (2003) 24 *California Western International Law Journal* 29.

177 Report by International Committee of the Red Cross on Guantánamo Bay, quoted in 'Red Cross Finds Detainee Abuse in Guantánamo', *New York Times* (online), 30 November 2004 <http://www.nytimes.com/2004/11/30/politics/30gitmo.html?_r=0>.

178 Associated Press, 'Cheney: Nothing illegal in CIA interrogations', *NBC News* (online), 1 August 2009 <http://www.nbcnews.com/id/28565549/>.

179 Karen Greenberg, *The Torture Debate in America* (Cambridge University Press, 2006) 114.

The prohibition on torture is now enshrined in an array of international instruments and has gained *jus cogens* status in international law.[180] The United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* came into force in 1987, and defines torture as including 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as … coercing him … inflicted by … a public official'.[181] The 1975 Declaration of Tokyo specifically includes the infliction of suffering 'to force another person to yield information'.[182] There is an ongoing debate about whether solitary confinement constitutes torture in and of itself.[183] The United Nations National Committee against Torture has recommended that the use of solitary confinement be limited to exceptional cases, including for the person's own protection.[184] Whether solitary confinement constitutes torture or not, it is by now well recognised that its use as a coercive measure to extract information is improper and ineffective.

Then, on 15 October 2013, Bleijie introduced legislation that would impose crushing penalties for menial offences in order to extract information.[185] Legislation has long existed to allow prisoners to procure a discount on their sentence in exchange for cooperation with authorities. Informers were paid with money or freedom for their accusations in ancient Rome, and reliance on convicted felon 'approvers' can be traced back as far as England in 1275.[186] In Queensland today, legislation allows informers to be given one sentence in open court, before the actual sentence is imposed behind closed doors to ensure their safety.[187] Such schemes have been criticised by those who suggest that those in custody have less

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[180] See generally Erika de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law' (2004) 15 *European Journal of International Law* 97; Christian Tomuschat and Jean Thouvenin, *The Fundamental Rules of the International Legal Order: 'Jus Cogens' and Obligations 'Erga Omnes'* (Brill, 2006) 337–8.

[181] Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 1(1).

[182] World Medical Association, *Declaration of Tokyo: Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment*, adopted October 1975, Preamble (defining 'torture') <http://www.wma.net/en/30publications/10policies/c18/>.

[183] Raymond Thoenig 'Solitary Confinement: Punishment within the Letter of the Law, or Psychological Torture' (1972) 1 *Wisconsin Law Review* 223; Tracy Hresko, 'In the Cellars of the Hollow Men: Use of Solitary Confinement in US Prisons and Its Implications Under International Laws against Torture' (2006) 18 *Pace International Law Review* 1. See, eg, the finding that art 7 of the *International Covenant on Civil and Political Rights* was violated by solitary confinement for 30 days: *Estrella v Uruguay*, Comm No 74/1980, United Nations Human Rights Committee, 18th Session, UN Doc CCPR/C/18D/7411980 (1980). See further the *Istanbul Statement on the Use and Effects of Solitary Confinement*, adopted 9 December 2007 at the International Psychological Trauma Symposium (2008) 18 *Journal of Rehabilitation of Torture Victims and Prevention of Torture* 63–6.

[184] UN Docs GAOR, A/53/44, 17 [156] (Norway) and GAOR, A/52/44, 34 [225] (Sweden) cited in *Garland v Chief Executive, Department of Corrective Services* [2006] QSC 245 (7 September 2006) [111].

[185] *Vicious Lawless Association Disestablishment Act 2013* (Qld); *Tattoo Parlours Act 2013* (Qld); *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld).

[186] Clifford Zimmerman, 'Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform' (1994) 22 *Hastings Constitutional Law Quarterly* 22, 81.

[187] *Penalties and Sentences Act 1992* (Qld) s 13A.

incentive to be truthful than they do to see someone convicted of a crime.[188] Whatever the validity of such criticisms, it is clear that the object of such provisions is to allow the sentencing court 'to take into account … cooperation with authorities' where defendants choose to cooperate — not to force such 'cooperation' by oppressive or coercive means.[189]

One of the Acts introduced by Bleijie characterises as a 'vicious lawless associate' anyone who commits a declared offence while a participant in an association.[190] While this is 'designed to destroy' bikies,[191] plainly there is nothing in that definition that requires such a person to be either vicious or lawless. An 'association' is any group of three people, 'associated formally or informally' and 'legal or illegal'.[192] It is for the individual to prove their group is not formed for the purpose of committing offences.[193] 'Participant' includes a person who has or seeks membership or meets more than twice with other participants.[194] The 'declared offences' range from very serious violent and sexual offences to bomb hoaxes,[195] money laundering,[196] drugs offences[197] and even unlawful sodomy.[198] Any person who commits such an offence in a group of three or more is exposed to a mandatory 15 years' additional imprisonment without parole,[199] or 25 years if a person 'exercises or purports to exercise authority' in the group.[200]

The sentence is to be served in a 'super jail' with constant monitoring, 'frequent, proactive' cell searches at least once per week, no fitness facilities and only one hour of non-contact visits with family per week.[201] In particular, if the prisoner is a 'participant'[202] in one of the motorcycle clubs deemed to be a criminal

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188 See, eg, Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice* (New York University Press, 2009) 69–82; Saundra Davis Westervelt and John Humphrey, *Wrongly Convicted: Perspectives on Failed Justice* (Rutgers University Press, 2001) 55–60; Alexandra Natapoff, 'Beyond Unreliable: How Snitches Contribute to Wrongful Convictions' (2006) 37 *Golden Gate University Law Review* 107.

189 Queensland, *Parliamentary Debates*, Legislative Assembly, 4 December 1996, 4876 (Denver Beanland, on Second Reading of Criminal Law Amendment Bill 1996 (Qld)).

190 *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 5(1)(a)–(c).

191 'Outlaw motorcycle gang members to be sent to bikie-only prison at Woodford Correctional Centre as part of Newman Government's push against bikies', *Courier Mail*, 15 October 2013.

192 *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 3(d).

193 Ibid s 5(2).

194 Ibid s 4(a)–(d).

195 Ibid sch 1; *Criminal Code 1899* (Qld) s 321A.

196 *Vicious Lawless Association Disestablishment Act 2013* (Qld) sch 1; *Criminal Proceeds Confiscation Act 2002* (Qld) s 250.

197 *Vicious Lawless Association Disestablishment Act 2013* (Qld) sch 1; *Drugs Misuse Act 1986* (Qld) ss 5–9; *Weapons Act 1990* (Qld) ss 50(1), 50B(1), 65(1).

198 *Vicious Lawless Association Disestablishment Act 2013* (Qld) sch 1; *Criminal Code 1899* (Qld) s 208.

199 *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 7(1)(a)–(b).

200 Ibid s 6(c), 7(1)(c).

201 Campbell Newman and Jarrod Bleijie, '"Super Jail" for Criminal Bikie Gangs' (Media Statement, 15 October 2013) <http://statements.qld.gov.au/Statement/2013/10/15/super-jail-for-criminal-bikie-gangs>.

202 The term 'participant' is extraordinarily broad and includes anyone who 'seeks to … be associated with' the organisation, or 'who attends more than one … gathering of persons who participate in the affairs of the association in any way': *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) s 42, inserting ss60A–60C into the *Criminal Code* (Qld).

organisation,[203] that person must be kept in high or maximum security,[204] medically examined at least once a month,[205] and they can be moved from prison to prison without any right of review or reconsideration.[206] Such prisoners' food and personal property are 'strictly limited', their personal calls and mail monitored, and phone calls limited to 42 minutes per week.[207] They are required to wear fluorescent pink jumpsuits.[208] They will spend 22 hours a day in solitary confinement.[209] There was a view of the outside from some prison windows until a 'sight-screening barrier' was constructed in December 2013; now the only view is of a grey wall.[210]

Even once on parole, a 'vicious lawless associate' can be required to give urine or blood samples at any time,[211] confined to a certain place and required to wear a tracking device.[212] If such a person argues that they are not a participant in one of the deemed organisations, the 'criminal intelligence' that suggests they are can be presented to the court in their absence; if the court determines that the information presented is not 'criminal intelligence', it can be withdrawn and must not be released or considered.[213] So 'extremely harsh'[214] are the conditions of detention that Applegarth J took them into account — in particular the aspect of solitary confinement — in reducing sentences of five months of imprisonment to four weeks,[215] and six months to six weeks.[216]

There are many self-evident problems with such extreme punishments and secretive and unaccountable processes. However, most relevantly, one of the stated aims of the Act is 'encouraging vicious lawless associates to cooperate with law

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[203] See text at above n 28.

[204] Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013 (Qld) cll 11–12 inserting in particular *Corrective Services Act 2006* (Qld) ss 12(1B), 13(1B).

[205] Ibid cl 14 inserting in particular *Corrective Services Act 2006* (Qld) s 65C.

[206] Ibid cl 15 inserting in particular *Corrective Services Act 2006* (Qld) s 71(5).

[207] Southern Queensland Correction Centre Detention Unit Management Policy quoted in *Callanan v Attendee X* [2013] QSC 340 (12 December 2013) [28].

[208] Ibid; see also Adam Davies, 'Jailed Bikies May Be Dressed in Fluoro Pink Jumpsuits', *Sunshine Coast Daily* (online), 22 October 2013 <http://www.sunshinecoastdaily.com.au/news/jailed-bikies-may-be-dressed-fluoro-pink-jumpsuits/2058717/>.

[209] *Callanan v Attendee X* [2013] QSC 340 (12 December 2013) [33].

[210] Statement of Corrective Services quoted in Renée Viellaris, 'Metal Walls Erected Outside Prison Cells of Bikies at Arthur Gorrie Correctional Centre', *Courier Mail* (online), 19 December 2013 <http://www.couriermail.com.au/news/queensland/metal-walls-erected-outside-prison-cells-of-bikies-at-arthur-gorrie-correctional-centre/story-fnihsrf2-1226786181867>.

[211] Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013 (Qld) cl 13 inserting in particular *Corrective Services Act 2006* (Qld) s 41(1)(c).

[212] Ibid cl 16 inserting in particular *Corrective Services Act 2006* (Qld) s 267A(3).

[213] Ibid cl 18 inserting in particular *Corrective Services Act 2006* (Qld) s 350A.

[214] *Callanan v Attendee X* [2013] QSC 340 (12 December 2013) 14 [49]–[50], [54]–[55]; *Callanan v Attendee Y* [2013] QSC 341 (12 December 2013) 13 [49], 14 [50], [54]–[55]; *Callanan v Attendee Z* [2013] QSC 342 (12 December 2013) 12 [47], 13 [52]–[53].

[215] *Callanan v Attendee X* [2013] QSC 340 (12 December 2013), 6 [19], 13–15 [46]-[59]; *Callanan v Attendee Y* [2013] QSC 341 (12 December 2013) 6 [19], 14–15 [46]–[59].

[216] *Callanan v Attendee Z* [2013] QSC 342 (12 December 2013) 5 [18], 12–14 [45]–[57]. See further David Murray, 'Prison Too Tough for Bikies, says Supreme Court Judge Justice Peter Applegarth', *Courier Mail*, 17 December 2013 <http://www.couriermail.com.au/news/queensland/prison-too-tough-for-bikies-says-supreme-court-judge-justice-peter-applegarth/story-fnihsrf2-1226784475595>.

enforcement agencies'.[217] Bleijie declared in Parliament that this 'lever to induce informants to cooperate is a very important part of the punishment regime'. It is designed to 'drive a wedge into the membership so that morale is broken'.[218]

C *Court-Ordered Parole and Suspended Sentences*

In Australia, the concept of early release was first used on Norfolk Island in 1840 with the indeterminate sentence as a means of incentivising prisoners to good conduct and mitigating the depraved conditions of that penal colony.[219] Prisoners on Norfolk Island would commit murder in order to be transferred to Sydney for trial, in the hope of escaping. So frequent were such murders that witnesses at the subsequent trials had seen so many men 'cut up like hogs by a butcher' that they could not necessarily remember the one in question. In those desperate circumstances, prisoners were granted marks for good behaviour with which they might purchase their freedom.[220]

Similar Victorian legislation enacted shortly after Federation created a system of remission determined according to behaviour in gaol.[221] With the development of 'reformatory prisons' for the detention of habitual criminals[222] came provision for the release of a person on an indeterminate sentence on parole for a period of two years and, if of good behaviour, for that person's sentence to be annulled.[223] The clear purpose was to facilitate rehabilitation.[224] Queensland's first parole board was established in 1937 to make recommendations to the Governor-in-Council, but it did not assume responsibility for determination of early, supervised release until 1959.[225] Its focus was, and continues to be, the reduction of recidivism and reintegration in the community. In 2006, courts were given the power, in appropriate cases, to order a parole date at the time of sentence, rather than leaving it to the discretion of an administrative body.[226]

Court-ordered parole is essential in cases where it is appropriate to give the offender a light at the end of the tunnel. It is particularly critical in the case of shorter sentences[227] where there may not be time for a parole application to be filed, considered and determined by the eligibility date. This is particularly relevant in light of the practice that parole applications are not considered while an appeal

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217 *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 2(2)(c).

218 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3155 (Jarrod Bleijie).

219 See, eg, Fiona Doherty, 'Indeterminate Sentencing Returns: The Invention of Supervised Release' (2013) 88 *New York University Law Review* 958, 964–70. See generally Norval Morris, *Maconochie's Gentlemen: The Story of Norfolk Island and the Roots of Modern Prison Reform* (Oxford University Press, 2002).

220 Frederick Howard Wines, *Punishment and Reformation: An Historical Sketch of the Rise of The Penitentiary System* (Thomas Y Crowell, 1895) 188–91.

221 *Prisons Act 1903* (Vic) s 21(8).

222 See, eg, *Prisons Act Amendment Act* 1918 (WA) s 64A.

223 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 February 1918, 355 (Robert Robinson, Attorney-General).

224 Western Australia, *Parliamentary Debates*, Legislative Council, 16 October 1918, 639 (Hal Colebatch, Colonial Secretary).

225 *Offenders' Probation and Parole Act 1959* (Qld).

226 *Corrective Services Act 2006* (Qld) s 497.

227 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 941 (J C Spence).

is on foot: it would be troubling to force offenders into a choice whether to contest perceived injustices at trial at the potential expense of determination of their suitability for supervised liberty.

Suspended sentences came into existence in Australia as early as 1915.[228] In Queensland, they were contained in sentencing legislation passed in 1992[229] and are a well-established part of the sentencing system that may properly deter offenders from reoffending. Despite public protest — emerging largely from confusion with terminology — they are part of a spectrum of effective tools in doing so.[230]

Bleijie has announced a plan to abolish both court-ordered parole and suspended sentences. He did not consult judges, the legal profession or even his own Cabinet before making that proposal.[231] With roughly 30 per cent of those sentenced in the past three years receiving a suspended sentence, and nearly half receiving court-ordered parole, such a reform would potentially increase prison populations markedly.[232] Further, such a move would leave all decisions on parole to the Parole Board. Bleijie has also suggested removing the right of judicial review of Parole Board decisions after the Police Union president said the police were 'tired of dangerous prisoners getting out of jail after a judicial review'.[233] It need hardly be stated that judicial review does not entail the remaking of the decision of the Parole Board, but only affects a decision of the Board if it erred in law; nor that the jurisdiction of the High Court to review decisions affected by jurisdictional error cannot be ousted under the *Constitution*.[234]

D *Offender Levy*

It is a long time since prisoners had forced upon them the indignity of paying for their own punishment. Offenders condemned to death, though once said to have tipped executioners to ensure a swift demise, were also charged for their services. During the reformation of the Swiss Confederation in 1528, sentenced to death was one unfortunate 'highly respected gentleman, of the name of Sand, whose widow was, according to the custom of a barbarous age, obliged to pay the executioner, who, we are told, went himself for the wages'.[235] The fate of one Muslim convert

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228 *Crimes Act 1915* (Vic); although they were excluded with the passage of the *Crimes Act 1958* (Vic) and not reintroduced until 1986.

229 *Penalties and Sentences Act 1992* (Qld) pt 8.

230 See generally Arie Freiberg and Victoria Moore, 'Suspended Sentences and Public Confidence in the Justice System' (Paper presented at the Sentencing Conference, National Judicial College of Australia, ANU College of Law, February 2008).

231 Viellaris and Ironside, above n 21.

232 Ibid.

233 Renée Viellaris, 'State Attorney-General Jarrod Bleijie's Plans to Scrap Judicial Reviews for Prisoners Worries Civil Libertarians', *Courier Mail* (online), 26 August 2013 <http://www.couriermail.com.au/news/queensland/state-attorneygeneral-jarrod-bleijie8217s-plans-to-scrap-judicial-reviews-for-prisoners-worries-civil-libertarians/story-fnihsrf2-1226703706358>.

234 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

235 Rev H Burgess, *The Journal of Sacred Literature and Biblical Record* (Mitchell & Son, 1858) vol 7, 31.

during the expulsion of the Moriscos from Spain during the early 17th century is illustrative:

> [The] Inquisitor of Valencia, having ordered a great Number of Moriscoes to be whipt publickly, one of their Number, that had escaped the Rod refus'd to pay the Executioner his Fee when he demanded it of him; telling him that he had done nothing for it; and having by that means obtain'd the Honour, as he reckon'd it, of being severely whipp'd, he paid the Executioner his Wages very cheerfully.[236]

During the 17th century, in continental Europe executioners sourced their right to payment from a quasi-medical status. In a dispute in 1694, a woman was reportedly ordered to pay an executioner for bandages.[237] In 18th-century France, the guillotine was reserved for those who could afford the luxury.[238] Such debasing fees had largely disappeared by the 20th century, although they reappeared briefly in Nazi Germany with the practice of sending invoices for the cost of the bullets to the widows of those executed.[239]

Prisons were required to be productive, leading to the development of hard labour, which later evolved into pure punishment, justified on other grounds such as rehabilitation and deterrence.[240] Convicts were a major source of productive labour in colonial Australia, although by the time hard labour was abolished in Queensland in 1988[241] it was 'designed primarily as punishment', and 'characterised by hard, repetitive labour and was often deliberately purposeless'.[242] It was by this time recognised that punishment was a duty of the State, conducted at its expense.

However, since 21 August 2012, any adult offender sentenced in Queensland Courts is liable to pay a levy of between $100 and $300.[243] The levy is not an order of the court and does not form part of any sentence, but is designed to 'ensure that offenders contribute to the justice system and to addressing the harm that their crimes cause'.[244] It must be paid whether or not a conviction is recorded, and is not subject to fee waiver provisions.[245] It also operates retrospectively.[246] It has been noted that such a levy would 'incentivise police officers to charge more

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236 Michael Geddes, *Miscellaneous Tracts: In Three Volumes* (J Churchill, 1714) 96.

237 Pieter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression: From a Preindustrial Metropolis to the European Experience* (Cambridge University Press, 1984) 31–2.

238 John Carven, 'Martyrs for the Faith' (1987) 8 *Vincentian Heritage Journal* 101, 102.

239 Robin O'Neil, 'Belzec — the "forgotten" death camp' (1998) 28 *East European Jewish Affairs* 49, 54.

240 Ian Marsh, John Cochrane and Gaynor Melville, *Criminal Justice: An Introduction to Philosophies, Theories and Practice* (Psychology Press, 2004) 41.

241 *Corrective Services Act 1988* (Qld).

242 Queensland Prison Industries, *A Review of Corruption Risks* (August 2000) 4.

243 *Penalties and Sentences and Other Legislation Amendment Act 2012* (Qld) s 37; *Penalties and Sentences Regulation 2005* (Qld) reg 8A.

244 Queensland, *Parliamentary Debates*, Legislative Assembly, 11 July 2012, 1133 (Jarrod Bleijie).

245 Explanatory Notes, Penalties and Sentences and Other Legislation Amendment Bill 2012, 4.

246 The levy applies 'in relation to an offence for which the offender is sentenced after the commencement, even if the offence was committed, or the offender was charged with or convicted of the offence, before the commencement': *Penalties and Sentences Act 1992* (Qld) s 224.

people with more crimes',[247] and that it would be likely to impact the most vulnerable members of society hardest.[248]

Such levies are not unprecedented. Northern Ireland, England and Wales, New Zealand, Canada, and all Australian states and territories except for Western Australia and Victoria have introduced offender levies.[249] However, most of these jurisdictions allow for the levy to be reduced or waived entirely in case of hardship, and in some jurisdictions the levies accumulate revenue for victims of crime funds. There is no suggestion that either is or will be the case in Queensland.

Funding of the justice system is a core function of government, for which taxes are paid. It is not only undesirable but unnecessary to put that burden on defendants.[250] However, Bleijie has clarified that the offender levy is 'not a fee'.[251] The distinction is a fine one, and is not easily reconcilable with the fact that the same Act also amended, for the first time, s 704 of the *Criminal Code*.[252] That section had, since 1899, provided that '[n]o fees can be taken in any court of criminal jurisdiction or before any justice from any person who is charged'.

IV A Fresh Start

A *Executive Detention of Sexual Offenders*

In earlier times, the sentence imposed — even if capital punishment — was not necessarily the end of the punishment. As early as 411 BC, execution was considered not enough for oligarchic plotters — afterwards, their bones were scattered as deliberate humiliation.[253] There are a number of examples in the Old Testament of criminals being stoned to death, and their corpses then burnt as

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247 Queensland Law Society, Submission No 2 to the LACSC, *Inquiry into the Penalties and Sentences and Other Legislation Amendment Bill 2012*, 17 July 2012, 2.

248 Heather Douglas, University of Queensland, Submission No 1 to the LACSC, *Inquiry into the Penalties and Sentences and Other Legislation Amendment Bill 2012* (13 July 2012) 1. See also the submissions on that inquiry of the Queensland Law Society, above n 247, 4; Queensland Council for Civil Liberties, Submission (No 13, 17 July 2012), 3; Bar Association of Queensland (No 18, 18 July 2012) 2; Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (No 8, 17 July 2012) 2–3; Queensland Public Interest Law Clearing House Incorporated (No 6, 17 July 2012) 1–3.

249 *Justice Act 2011* (Northern Ireland) ss 1–6; *Criminal Justice Act 2003* (UK) ss 161A, 161B; *Sentencing Act 2002* (NZ) ss 105A–105J; *Criminal Code*, RSC 1985, c C-46, s 737; *Victims of Crime Act 2001* (SA) s 32; Victims of Crime (Fund and Levy) Regulations 2003 (SA) sch 1; *Victims of Crime Assistance Act 2006* (NT) ss 60–1; Victims of Crime Assistance Regulations 2007 (NT) reg 26; *Victims Support and Rehabilitation Act 1996* (NSW), ss 78–9; Victims Support and Rehabilitation (Compensation Levy) Notice 2011 (NSW) 2011 No 344 cl 2; *Victims of Crime Act 1994* (ACT) ss 24–6; *Victims of Crime Compensation Act 1994* (Tas) ss 3, 5, 6.

250 Queensland Law Society, above n 247, 3.

251 *Penalties and Sentences and Other Legislation Amendment Act 2012* (Qld) s 17; *Criminal Code Act 1899* (Qld) s 704(2).

252 Heather Douglas and April Chrzanowski, 'A Consideration of the Legitimacy and Equity of Queensland's Offender Levy' (2013) 24 *Current Issues in Criminal Justice* 318, 324.

253 James Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford University Press, 2003) 28.

further punishment.[254] The prohibition on double punishment appears to have developed as early as Saint Jerome, who in 391 AD found the principle in a biblical passage stating that 'affliction shall not rise up the second time'.[255] That passage is preceded by a warning that 'he will make an utter end', which rather explains why no further punishment could be imposed.

Whatever the content of that biblical prohibition, it does not appear to have developed into a strong maxim for many years to follow. In 897 AD, the body of Pope Formosus — who had fallen in and out of political favour over the previous 25 years — was disinterred and tried by his successor Stephen VI for violating various church canons. For his crimes he had three fingers cut off. Better fortune would follow for Formosus, who was later dug up once again, dressed in full papal vestments and restored to full honours, after Stephen was imprisoned and strangled in his cell.[256] Dominican priest Bernard Gui had at least 88 dead heretics exhumed so they could be burnt for their sins during the inquisition between 1307 and 1324.[257] Vlad the Impaler was beheaded in 1476, after his death. Richard III was hanged by Henry VII after his death in 1485. [258] Oliver Cromwell was dug up on the restoration of Charles II in 1660 to be hung, drawn and quartered.[259]

The practice of gibbeting, although apparently designed under Roman law 'as a comfortable sight to the friends and relations of the deceased',[260] served, in 15th-century Paris, the function of 'extend[ing] the punishment beyond the initially painful moments of death to the indignity of public decomposition'.[261] In 1723, when Jacob Saunders was convicted of a particularly cold-blooded robbery and murder, the authorities were faced with the problem that the robbery alone was a capital offence — for the murder, they hung his corpse in chains after his execution.[262] Various other methods of corpse mutilation remained common until the 1830s.[263] Particular felons would be 'insulted in extraordinary ceremonies' or subjected to 'burking' — the 'final indignity' of dissection by surgeons.[264] Even the popular enthusiasm for punishment turned on post-mortem humiliation — such events were often accompanied by riots.[265] Post-punishment practices were out of

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254 See, eg, *The Holy Bible: According to the Authorized Version, Containing the Old and New Testaments: with Original Notes, and Pictorial Illustration*s (Charles Knight & Co, 1836) vol 1, 305 (note to Leviticus 20:14).

255 *The Bible*, Nahum 1:9; see George Thomas, *Double Jeopardy: The History, the Law* (New York University Press, 1998) 72.

256 Joseph Cummins, *History's Great Untold Stories: Obscure Events of Lasting Importance* (Pier 9, 2006) 14–18.

257 Brian Pavlac, *Witch Hunts in the Western World: Persecution and Punishment from the Inquisition through the Salem Trials* (ABC-CLIO, 2009) 42.

258 Cummins, above n 256, 18.

259 Graeme R Newman, *The Punishment Response* (Transaction Publishers, 1978) 132.

260 Basil Montagu, *The Opinions of Different Authors upon the Punishment of Death* (Longman, Hurst, Rees, and Orme, 1809) vol 1, 191.

261 Albrecht Classen and Connie Scarborough, *Crime and Punishment in the Middle Ages and Early Modern Age* (Walter de Gruyter, 2012) 161.

262 Frank McLynn, *Crime and Punishment in Eighteenth Century England* (Routledge, 2013) 43.

263 Antony E Simpson, 'Spectacular Punishment and the Orchestration of Hate: The Pillory and Popular Morality in Eighteenth-Century England' in Robert Kelly and Jess Maghan (eds), *Hate Crime: The Global Politics of Polarization* (Southern Illinois University Press, 1998) 177, 180.

264 Ibid 180–1.

265 Ibid.

fashion by the time the House of Lords sought to revive them for Ireland in 1837.[266] Although the Bill passed the House, the law never came into force — one contemporaneous author suggesting that 'its authors had not the courage, after the exposure of its merits, to submit it to the King'.[267]

In colonial Australia, it was not uncommon for habitual criminals, and particularly for sex offenders, to be exposed to further incarceration to supplement the sentence imposed in respect of the crimes committed, although rationales varied over time. In 1907, Victorian legislation was passed, allowing for the indefinite detention of 'habitual criminals' who had two prior convictions, to facilitate their reformation.[268] The Western Australian equivalent, passed 11 years later, sought to enhance that purpose by removing the requirement for prior convictions, 'enabl[ing] the reform to begin before the offender has developed into what is called an habitual criminal'.[269] The indeterminate sentence was said to be for the benefit of the prisoner — it 'cannot increase the sentence'[270] — and would allow the authorities to ensure the prisoner's release as soon as he or she was ready.[271] Unsurprisingly, this was not always the case — in early 2011, for example, the Legal Aid Commission of Western Australia stumbled across one intellectually disabled man who had been incarcerated for 23 years on one such sentence for a crime carrying a maximum penalty of 20 years. His immediate release was ordered following an urgent appeal to the High Court.[272]

In the United States in the 1930s, there was a rise in the popularity of civil commitment legislation to safeguard the community through the continued imprisonment of certain sex offenders beyond the end of their sentences.[273] However, such legislation had been repealed in roughly half the states by 1990 and had fallen into disuse in most of the remainder, in large part due to a dawning realisation of the dangers and uncertainties of preventive detention.[274] Around the same time, Victoria and then New South Wales introduced preventive detention legislation specifically aimed at single individuals who had caught the public's

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266 See 'Attempt to Revive in Ireland the Law for Hanging in Chains', *English Chronicle*, 27 August 1833, reproduced in Society for the Diffusion of Information on the Subject of Capital Punishments, *The Punishment of Death: A Selection of Articles from the Morning Herald with Notes* (Elder Hatchard-Smith, 1837) 143.

267 See 'Attempt to revive in Ireland the Law for Hanging in Chains Continued — This Barbarous Attempt Defeated', *English Chronicle*, 27 August 1833, reproduced in Society for the Diffusion of Information on the Subject of Capital Punishments, *The Punishment of Death: A Selection of Articles from the Morning Herald with notes* (Elder Hatchard-Smith, 1837) 146.

268 *Indeterminate Sentences Act 1907* (Vic) s 4.

269 Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 September 1918, 342 (Robert Robinson); Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 February 1918, 355 (Robert Robinson).

270 Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 October 1918, 568 (Robert Robinson).

271 Ibid 566–7 (Robert Robinson).

272 *Yates v The Queen* (2013) 247 CLR 328.

273 See, eg, Edwin Sutherland, 'The Sexual Psychopath Laws' (1950) 40 *Journal of Criminal Law and Criminology* 542; Raquel Blancher, 'Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill' (1995) 46 *Mercer Law Review* 889.

274 Brian Bodine, 'Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and an Unwise Policy Choice' (1990) 14 *University of Puget Sound Law Review* 105, 105.

attention: Garry David and Gregory Kable. The law imprisoning the latter was found to be invalid by the High Court;[275] the former died after three years in prison.[276]

In 2003, Queensland passed legislation allowing the Attorney-General to apply to the Supreme Court for a continuing detention order for offenders serving a sentence for a sexual offence involving violence or against children.[277] Those laws, however heavily criticised,[278] were at least restricted by considerations of risk and overtly required that the measure adopted be the minimum necessary for the protection of the community. A continuing detention order could only be made if the Supreme Court was satisfied, by acceptable, cogent evidence and to a high degree of probability,[279] that the 'prisoner [was] a serious danger to the community ... [and] there [was] an unacceptable risk that the prisoner [would] commit a serious sexual offence'.[280] Orders had to be reviewed annually.[281]

It is well established that detention in custody 'can generally only exist as an incident of the exclusively judicial power of adjudging and punishing criminal guilt'.[282] There are certain, limited, exceptions — arrest on a warrant to ensure presence at trial, subject to bail; mental illness; quarantine of infectious disease; or immigration detention.[283] In other cases, persons 'disaffected or disloyal' might be detained during wartime for public safety.[284] It appears, for the moment at least, that such detention may even be indefinite.[285] Detention without adjudication of criminal guilt, or in addition to a sentence served, is a serious measure and has been occasioned only in such limited categories and with reference to clearly defined criteria that are subject to judicial review.

On 17 October 2013, Bleijie introduced legislation conferring on himself the power to ensure the indefinite detention of anyone if he is 'satisfied' that detention is 'in the public interest'.[286] The power is unconstrained and the concept of 'public interest', as developed elsewhere, is very broad.[287] The person must then

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275 *Kable v DPP (NSW)* (1996) 189 CLR 51. See also Kable's unsuccessful suit for false imprisonment following that decision: *NSW v Kable* (2013) 87 ALJR 737.

276 Paul Fairall, 'Violent Offenders and Community Protection in Victoria — The Gar[r]y David Experience' (1993) 17 *Criminal Law Journal* 40.

277 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 5, read with the schedule ('*DPSOA*').

278 See, eg, Patrick Keyzer and Sam Blay, 'Double Punishment? Preventive Detention Schemes under Australian Legislation and Their Consistency with International Law: The Fardon Communication' (2006) 7 *Melbourne Journal of International Law* 407.

279 *DPSOA* s 13.

280 Ibid s 13(2).

281 Ibid s 27.

282 *Chu Kheng Lim* (1992) 176 CLR 1, 27 (Brennan, Deane, Dawson JJ).

283 Ibid 28 (Brennan, Deane, Dawson JJ).

284 *War Precautions Regulations 1915* (Cth) r 55(1); see *Lloyd v Wallach* (1915) 20 CLR 299; *Ex parte Walsh* [1942] ALR 359; *Little v The Commonwealth* (1947) 75 CLR 94.

285 *Al-Kateb v Godwin* (2004) 219 CLR 562; cf *Plaintiff M47/2012 v Director General of Security* (2012) 86 ALJR 1372, 1404 [120] (Gummow J), 1479 [533] (Bell J).

286 *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld) inserting *Criminal Law Amendment Act 1945* (Qld) pt 4: see especially s 22(1).

287 *O'Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 86 ALJR 1019, 1027 [30] (French CJ and Kiefel J); *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 87 ALJR 682, 692 [40]–[42] (French CJ, Crennan and Bell JJ).

be detained until detention is 'no longer in the public interest'.[288] The courts can only be involved in the case of jurisdictional error — the minimum constitutionally necessary.[289] According to Bleijie, the decision to enact the amendments 'was made following careful consideration with community safety at the forefront of our minds', noting '[t]his legislation will be reserved for the worst of the worst'.[290]

Plainly enough, he meant Robert John Fardon,[291] whose release from preventive custody had been ordered three weeks earlier.[292] Fardon had been detained in preventive custody for three and a half years from two days before the expiry of his sentence in June 2003[293] to his release on a supervision order with some 32 conditions in December 2006.[294] He breached that order on 4 May 2008 by addressing year 11 students at a Brisbane school in a pre-arranged visit with his support worker, and on 11 July 2007 by allowing a neighbour, also subject to a supervision order, to use his car at 9.30 pm in contravention of his curfew.[295] He was taken back into custody until his conditions of release were varied and suitable accommodation could be found. He then remained at controlled liberty until April 2008, when he allegedly raped an intellectually impaired woman. Although an acquittal was entered on appeal,[296] he remained in custody until December 2013.[297] In those five and a half years, his release under supervision was ordered three times,[298] but on each occasion that order was stayed[299] and, until the recent decision, reversed on appeal.[300] It is now 24 years since Fardon has committed a sexual offence and 10 years since his full sentence expired.

The legislation purported to perpetuate punishment for those who had already served sentences adjudged condign for the crimes committed. It did so based on a discretionary, unconstrained and largely unreviewable power of the

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288 *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld) s 6, inserting *Criminal Law Amendment Act 1945* (Qld) ss 22B(1)(b), 22F(1).

289 Ibid ss 22B(1)(b), 19(b), 22K; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

290 Jarrod Bleijie, 'New Legislation to Protect the Community' (Media Statement, 16 October 2013) <http://statements.qld.gov.au/Statement/2013/10/16/new-legislation-to-protect-the-community>.

291 Jarrod Bleijie, 'Labor's Law Lets Robert John Fardon Out' (Media Statement, 6 December 2013) <http://statements.qld.gov.au/Statement/2013/12/6/labors-law-lets-robert-john-fardon-out>.

292 *A-G (Qld) v Fardon* [2013] QSC 264 (27 September 2013).

293 *A-G (Qld) v Fardon* [2003] QSC 200 [1] (9 July 2003) (interim order and dismissing constitutional argument); *A-G (Qld) v Fardon* [2003] QSC 331 (2 October 2003) (further interim orders); *A-G (Qld) v Fardon* [2003] QSC 379 (6 November 2003) (ordering indefinite detention); *A-G (Qld) v Fardon* [2005] QSC 137 (11 May 2005) (detention continued on review); [2006] QSC 005 (Philippides J) (application to rescind for lack of review dismissed). See also the failed constitutional challenge brought in intervening period: *A-G (Qld) v Fardon* (2004) 223 CLR 575.

294 *A-G (Qld) v Fardon* [2006] QSC 275 (27 September 2006) (judgment); *A-G (Qld) v Fardon* [2006] QSC 336 (8 November 2006) (orders); *A-G (Qld) v Fardon* [2006] QCA 512 (4 December 2006) (appeal dismissed).

295 *A-G (Qld) v Fardon* [2007] QSC 299 (19 October 2007) [8]–[9].

296 *R v Fardon* [2010] QCA 317 (12 November 2010).

297 *A-G (Qld) v Fardon* [2013] QCA 365 (6 December 2013).

298 *A-G (Qld) v Fardon* [2011] QSC 128 (20 May 2011); *A-G (Qld) v Fardon* [2013] QSC 12 (13 February 2011); *A-G (Qld) v Fardon* [2013] QSC 264 (27 September 2013).

299 *A-G (Qld) v Fardon* [2011] QCA 111 (3 June 2011); *A-G (Qld) v Fardon* [2013] QCA 16 (14 February 2013); *A-G (Qld) v Fardon (No 2)* [2013] QSC 276 (4 October 2013) (refusing stay); [2013] QCA 299 (10 October 2013) (granting stay).

300 *A-G (Qld) v Fardon* [2011] QCA 155 (1 July 2011); *A-G (Qld) v Fardon* [2013] QCA 64 (28 March 2013) (Muir and Gotterson JJA, Atkinson J dissenting).

Executive. It was immediately condemned as offensive to the separation of powers.[301] On 6 December 2013, the Queensland Court of Appeal found that the *Criminal Law Amendment (Public Interest Declarations) Act 2013* was invalid under the *Kable* principle as repugnant to the functions of the Supreme Court as a repository of federal jurisdiction.[302] In a related judgment on the same day, the Court dismissed Bleijie's appeal against Fardon's release.[303] Bleijie immediately foreshadowed a High Court appeal, and, warned that if that was not fruitful, he would 'look at other options'.[304] However, in response to legal advice from the Queensland Solicitor-General, Acting Attorney-General David Crisafulli announced in January that the government had abandoned plans to launch an appeal. Crisafulli said in a statement: 'We have done more than any other government to keep Robert John Fardon behind bars, but our legal advice is that we just can't win in the High Court'.[305]

B *Publishing Offenders' Details*

The practice of requiring offenders to declare their crimes to the public was well known to the ancient and medieval criminal law. In Ancient Rome, criminals would be branded with a hot iron on their foreheads with a letter denoting their crimes.[306] By the 4th century, under Constantine I, such facial disfigurement was outlawed and branding was confined to the less prominent hand, arm or leg.[307] Branding of criminals was abolished in Britain in 1779. In their colonies, the French continued to brand slaves who assembled for impermissible purposes (including in celebration of marriage) with the fleur de lys,[308] and prisoners condemned to *travaux forcés* with 'TF', until 1832.[309] At times in the 19th century, both the British and United States armies branded deserters.[310]

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301 Queensland, *Parliamentary Debates*, Legislative Assembly, 16 October 2013, 3298–9 (Anna Palaszczuk).

302 *A-G (Qld) v Lawrence* [2013] QCA 364 (6 December 2013); see also *Kable v DPP* (NSW) (1996) 189 CLR 51.

303 *A-G (Qld) v Fardon* [2013] QCA 365 (6 December 2013) [44].

304 Jarrod Bleijie, 'Attorney-General Takes Action on Fardon Release' (Media Statement, 8 December 2013) <http://statements.qld.gov.au/Statement/2013/9/27/attorneygeneral-takes-action-on-fardon-release>.

305 'Sex Offender Robert Fardon to Stay Out of Jail after Qld Government Abandons High Court Appeal', *ABC News* (online), 15 January 2014 <http://www.abc.net.au/news/2014-01-15/qld-abandons-high-court-appeal-over-sex-offenders/5202298>.

306 See, eg, *The Acts of Sharbil*, reproduced in Philip Schaff, *The Ante-Nicene Fathers: Translations of the Writings of the Fathers Down to AD 325* (Charles Scribner's Sons, 1903) vol 8.

307 Jean Baptist Lewis Crevier, *The History of the Roman Emperors: From Augustus to Constantine* (trans John Mills, F C & J Rivington, 1814) vol 10, 132–3.

308 Carolyn E Fick, *The Making of Haiti: The Saint Domingue Revolution from Below* (University of Tennessee Press, 1990) 53; see also Letters Patent of December 1723, First Supplement of the Code of the Isle of France, Part VII, *Of the Police*, art 31.

309 Jonathan Daly, 'Russian Punishments in the European Mirror' in Susan P McCaffray and Michael Melancon (eds), *Russia in the European Context, 1789–1914: A Member of the Family* (Palgrave Macmillan, 2005) 165.

310 Samuel Dickson, *Chrono-Thermalist: The Forbidden Book, with New Fallacies of the Faculty: Being the People's Medical Enquirer* (Simpkin, Marshall, 1851) vol 2, 345; Robert Fantina, *Desertion and the American Soldier, 1776–2006* (Algora, 2006) 41.

Blasphemers, drunkards and other lesser criminals were condemned to wear the first letter of their crime in scarlet and 'in publique view' as early as 1364.[311] This practice continued through to 1780 in colonial America, where the scope of such advertisements included 'A' for adultery or 'I' for incest.[312] However, the practice of requiring civilian offenders who had already endured their punishment or served their sentence to warn their neighbours of their presence appears largely to have ceased before Australia was colonised.

Legislation enacted in Queensland in 1989 required certain child sex offenders to report their addresses to police.[313] The Attorney-General could then inform anyone with 'a legitimate and sufficient interest',[314] which might include neighbours and employers.[315] A proposal made for more stringent requirements in 1997 was never passed,[316] but the provisions were expanded to cover more information and a longer period of time in 1999.[317] Yet only 12 orders were made in the 10 years following their introduction,[318] and no application for the release of such information to the public has ever been made.[319]

Before being elected to government, Bleijie had 'call[ed] for tougher reporting requirements and more powers for police to better protect the community from these vile offenders',[320] including 'giv[ing] police the power to name missing sex offenders'.[321] When Western Australian became the first state to set up a publicly available sex offenders register on the internet, Bleijie commented that he was not 'averse to the idea', although it was not a priority at that time.[322]

Then, on 12 September 2013, the Queensland government introduced a Bill to establish such a website.[323] Under the legislation, the Police Commissioner may publish identifying information and a photograph of the person on the website if

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311 Alice Earle, *Curious Punishments of Bygone Days* (Herbert S Stone & Co, 1896) 94–5.

312 Committee on Psychiatry and Law, *Psychiatry and Sex Psychopath Legislation: the 30s to the 80s* (Group for the Advancement of Psychiatry, 1977) 849; see further Rosalind Kelly, 'Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing — Are They Constitutional?' (1989) 93 *Dickinson Law Review* 759.

313 *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 70.

314 *Criminal Law Amendment Act 1945* (Qld) s 20.

315 Queensland, Director of Public Prosecutions, *Guideline to Crown Prosecutors and Legal Officers of the Office of the Director of Public Prosecutions and Others Acting on My Behalf, issued by the Director of Public Prosecutions pursuant to s 11(1)(a) of the Director of Public Prosecutions Act 1984: Regarding Section 19 of the Criminal Law Amendment Act 1945–1989*, 28 April 1997.

316 Criminal Law (Sex Offenders Reporting) Bill 1997 (Qld).

317 *Criminal Law Amendment Act 1999* (Qld) ss 4–7.

318 Queensland, *Parliamentary Debates*, Legislative Assembly, 10 June 1999, 2473 (M J Foley).

319 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 May 1999, 1993 (M J Foley).

320 'Pedophile Attacked Kids while Dodging Cops', *Sydney Morning Herald* (online), 14 April 2011 <http://news.smh.com.au/breaking-news-national/pedophile-attacked-kids-while-dodging-cops-20110414-1depk.html>.

321 Jarrod Bleijie, 'Labor's Weak Child Sex Offender System Fails Again' (undated) <http://jarrodbleijie.com.au/news/labors-weak-child-sex-offender-system-fails-again>.

322 Brooke Baskin, 'State Government say "No" to sex offenders site", *Courier Mail* (online), 17 October 2012 <http://www.couriermail.com.au/news/queensland/state-government-say-no-to-sex-offenders-site/story-e6freoof-1226497324837>.

323 Child Protection (Offender Reporting — Publication of Information) Amendment Bill 2013 (Qld) cl 6, inserting in particular *Child Protection (Offender Reporting) Act 2004* (Qld) s 74AE.

they do not comply with reporting conditions.[324] More troubling, however, is the automatic publication of the personal information and photographs of all persons subject to a supervision order under the *DPSOA*, unless that order provides otherwise.[325] Of course, no such order currently provides otherwise. The website may also publish the photograph and details of certain repeat offenders, or perhaps most concerning, any person who has at any time been convicted of an offence punishable by imprisonment for five years or more, if the Attorney-General is satisfied that the person poses a risk to the sexual safety of children.[326]

This reporting system is aimed at remedying community concern about the most serious offences. However, it applies to a much broader category of offences, such as selling pornography to a 15-year-old, drink spiking, calling in a bomb hoax or dangerous driving.[327] When a preventive detention regime for sex offenders was introduced, the then Attorney-General said that it would be 'applied to only a small group of prisoners — the most dangerous sex offenders in our prison system'.[328] That did not turn out to be the case — by 2009, there were 840 offenders in custody and 600 on community supervision.[329] In an application brought one month after his election, Bleijie succeeded in extending the reach of the *DPSOA*, ensuring the indefinite detention of a 22-year-old man convicted of a minor sexual assault with no evidence of physical pain.[330] Fortunately, as the *DPSOA* is not of an entirely discretionary application — rather, it involves a number of jurisdictional facts subject to judicial interpretation in a manner that does not interfere with basic rights, freedoms or immunities[331] — the decision was overturned and the injustice avoided on appeal.[332] It is not clear that those individuals publicised on the website would have the same fortune.

If the historical analogy or the troubling breadth of the proposed scheme is not deterrent enough to passing the legislation, then the experience of other jurisdictions should be. To be sure, Australia is not the first place that such 'scarlet letter' laws have been introduced. The greatest precedent for their resurfacing is in the United States. Otherwise, sex offender registers have been implemented in Austria, Canada, France, Japan, Ireland, Kenya, Korea and the United Kingdom; but of those, only certain Canadian provinces and Korea have a community

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[324] Ibid inserting in particular *Child Protection (Offender Reporting) Act 2004* (Qld) s 74AF.

[325] Ibid inserting in particular *Child Protection (Offender Reporting) Act 2004* (Qld) s 74AG(1)(a).

[326] Ibid inserting in particular *Child Protection (Offender Reporting) Act 2004* (Qld) s 74AG(1)(b)–(c).

[327] *Criminal Code* (Qld) ss 228(2)(a), 316A(1), s 321A(2), s 328A(2).

[328] Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2003, 5127 (R J Welford).

[329] Queensland, Corrective Services, *DPSOA Fact Sheet*, January 2009, 2 <http://www.correctiveservices.qld.gov.au/About_Us/The_Department/Probation_and_Parole/Managing_sex_offenders_in_the_community/DPSOA_FactSheet_QA.pdf>.

[330] *A-G (Qld) v Tilbrook* [2012] QSC 128 (11 May 2012); *Tilbrook v A-G (Qld)* [2012] QCA 279 (19 October 2012) [22]–[23].

[331] See generally *Lacey v A-G (Qld)* (2011) 242 CLR 573, 582–3 [18] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[332] *Tilbrook v A-G (Qld)* [2012] QCA 279 (19 October 2012). Another decision was overturned on the same day, the Court of Appeal finding that preventative detention could not apply to offenders entrapped by officers posing as children on the internet, such offences not being 'against children': *Dodge v A-G (Qld)* [2012] QCA 280 (19 October 2012). Bleijie's application for special leave to appeal to the High Court was dismissed: *A-G (Qld) v Dodge* [2013] HCATrans 132 (6 June 2013).

notification system.[333] Certain discrete registration regimes came into existence in the United States in the 1930s and 1940s.[334] In Oregon in 1987, a child molester was given a suspended sentence on the condition that he post signs on his front door and car, reading, in three-inch capital letters, 'dangerous sex offender, no children allowed'.[335] In 1989, a federal registration scheme was enacted following the abduction of an 11-year-old boy, although neither his body nor his abductors were ever found.[336] However, none of these cases required the advertisement of an offender's identity to the public.

In 1994, convicted paedophile Jesse Timmendequas lured Megan Kanka into a house and brutally raped and murdered her.[337] In a climate of fear, New Jersey enacted laws that required community notification. The scope of notification expanded the higher the level of risk associated with the offender — from police only, to schools, the media, and, at the highest level of alert, door-to-door neighbour notification.[338] Predictably, the community reacts adversely to such notification. The fear promoted by mugshots often exceeds the risk posed by the offender — who, it should be remembered, will by this time have served his sentence in full. One man rumoured to have been a child molester was targeted by neighbours, who posted signs outside his house and flooded his apartment, forcing him to move out, before it was revealed that his only conviction was for gross indecency — some 19 years earlier.[339]

V A Concerning Future

For most of their history, baked beans have gone unnoticed by the criminal law. Haricot beans were introduced to Europe from Native America in the 16th century.[340] They were used in 'bean hole' cooking, common in logging camps in Maine, and canned beans with pork: one of the early convenience foods. The first serious controversy came when this was attacked by consumers for not containing sufficient pork, until the United States Food and Drug Administration authoritatively determined that it 'has for years been recognised … that [it] contains very little pork'.[341] The first recipe for baked beans was published in 1829

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333 Christopher King, 'Sex Offender Registration and Notification Laws at Home and Abroad: Is an International Megan's Law Good Policy?' (2011) 15 *City University of New York Law Review* 117, 130.

334 Wayne Logan, 'Megan's Law as a Case Study in Political Stasis' (2011) 61 *Syracuse Law Review* 371, 374–5.

335 *State v Bateman*, 94 Or App 449 (1987).

336 King, above n 333, 120.

337 For a comprehensive discussion see Ernie Allen and Nadine Strossen, 'Megan's Law and the Protection of the Child in the On-Line Age' (1998) 35 *American Criminal Law Review* 1319.

338 *Megan's Law*, Pub L No 104–45, 110 Stat 1345 (1996) (codified as amended at 42 U.S.C. § 14071 (2006)). See further Philip Witt, 'Sex Offender Risk Assessment and the Law' (1996) 24 *Journal of Psychiatry & Law* 343, 359–60.

339 Blancher, above n 273, 918–19.

340 Michael Black, J Derek Bewley and Peter Halmer (eds), *The Encyclopedia of Seeds: Science, Technology and Uses* (CAB International, 2006) 32.

341 William Grimes, 'That's What and Beans? Pork Defends Its Image', *New York Times* (online), 1 April 1998 <http://www.nytimes.com/1998/04/01/dining/that-s-what-and-beans-pork-defends-its-image.html>.

and designed to help poor families through the depression of the 1820s.[342] By 1841 they were no longer a food for the poor, but for the industrious who were 'growing rich'.[343] Heinz Baked Beans came onto the market in the United Kingdom in 1898 and enjoyed a relatively uncontroversial existence for a time. By the 1930s, they were losing their connotation of frugality and gaining one of 'health, spirituality and autonomy'.[344]

Admittedly, recent years have been slightly more turbulent. In 2007, Hugh Grant was arrested after an allegation that he assaulted the paparazzi with baked beans.[345] In 2013, a woman was jailed for 20 months after ransacking a friend's home with baked beans.[346] In light of such incidents, it could be considered alarming that, in just four days in Britain, the same number of cans of baked beans is consumed as the number of guns manufactured in the US in an entire year.[347] However, 2.3 million people in Britain continue to eat them every day,[348] for the most part without incident.

Then, on 20 August 2013, the Queensland government introduced legislation providing extraordinary powers for the policing of the G20 Heads of Government Summit in Brisbane on 15 and 16 November 2014.[349] The Explanatory Notes to the Bill admit to 'a number of provisions of the Bill that are not consistent with fundamental legislative principles'.[350] An examination of those offending provisions occupies the next 12 pages of the Explanatory Notes.[351]

The *G20 Act* prohibits a number of items, including categories of weapons as well as antique firearms, knives, swords, spear guns, blowpipes, explosive tools,

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342 Ken Albala, *Beans: A History* (Berg, 2007) 164–5.

343 Ibid 165.

344 Ibid 166.

345 Matt Weaver, 'Hugh Grant Arrested over "Baked Beans Attack"', *The Guardian* (online), 26 April 2007 <http://www.theguardian.com/uk/2007/apr/26/pressandpublishing.film>.

346 'Woman in Baked Bean and Fake Tan Attack on House', *Gloucester Citizen* (online), 30 April 2013 <http://www.gloucestercitizen.co.uk/Woman-baked-bean-fake-tan-attack-house/story-18845424-detail/story.html>.

347 Compare Heinz, 'Trivia' <http://www.heinz.co.uk/Our-Company/About-Heinz/Trivia>, with George Washington University, 'US Gun Manufacture Rate Soars as Legislation Fails, Tragedies Rise', *Face the Facts USA*, 1 May 2013 <http://www.facethefactsusa.org/facts/US-Gun-Manufacture-Rate-Soars>.

348 Christopher Hirst, 'There's More to Beanz than Heinz', *The Independent* (online), 21 February 2013 <http://www.independent.co.uk/life-style/food-and-drink/theres-more-to-beanz-than-heinz-8505766.html>; Australians are also fans of baked beans: on the Australian Cricket tour of India in 1998, Heinz Australia had a pallet of baked beans sent to Shane Warne who found the local cuisine unappetising: David Rennie, 'Warne Has Craving for Bean Feast', *ESPN Cricinfo*, 6 March 1998 <http://static.espncricinfo.com/db/ARCHIVE/1997-98/AUS_IN_IND/ARTICLES/WARNES_BEANS_06MAR1998.html>.

349 G20 (Safety and Security) Bill 2013 (Qld). Bill passed on 7 November 2013: *G20 Act*.

350 Explanatory Notes, G20 (Safety and Security) Bill 2013 (Qld) 3.

351 For more information, see the specific concerns enumerated by: the Queensland Law Society (Submission No 3 to LACSC, *G20 (Safety and Security) Bill 2013 (Qld)*, 13 September 2013); the Australian Lawyers for Human Rights (Submission No 4 to LACSC, *G20 (Safety and Security) Bill 2013 (Qld)*, 16 September 2013); Queensland Council for Civil Liberties (Submission No 5 to LACSC, *G20 (Safety and Security) Bill 2013 (Qld)*, 13 September 2013). Note also the submission by the Chamber of Commerce & Industry Queensland, noting their opposition to the Government's proposal to declare Friday 14 November a public holiday (Submission No 1 to LACSC, *G20 (Safety and Security) Bill 2013 (Qld)*, 10 September 2013).

flares and cattle prods.[352] However, the list includes more mundane items, including glass bottles or jars, eggs, reptiles and insects, two-way radios, urine, remote-controlled toy cars, manually operated surf skis, surfboards, kayaks, boats or canoes, flotation devices, and, relevantly, metal cans or tins.[353] In case anything has been omitted, a catch-all provision extends to anything 'that is not a weapon but is capable of being used to cause harm to a person'.[354] With the passage of the *G20 Act*, the can of baked beans has achieved a new level of criminality. The breadth of this provision is 'plainly absurd'.[355]

It is prohibited, without lawful excuse, to possess, attempt to take into, or use a prohibited items in a 'security area'.[356] This includes vast areas of both central Cairns and Brisbane,[357] extending from South Brisbane across Spring Hill to Breakfast Creek,[358] encompassing 'tens of thousands of homes and businesses'.[359] A child operating a remote-controlled toy car in their backyard, a family using a knife to consume food at a barbecue on South Bank, or construction workers using explosive tools to carry out their work, will have a 'lawful excuse'. However, the Bill reverses the presumption of innocence.[360] Any person carrying a tin of baked beans at Kangaroo Point is prima facie guilty of an offence and must provide a lawful excuse for their possession.

Certain searching and other coercive powers are conferred on police officers and other 'appointed persons',[361] who may be anyone who the Commissioner is reasonably satisfied 'has the necessary expertise or experience to be an appointed person'.[362] A police officer may enter and search any non-residential premises in a restricted area without a warrant in order to find that tin of baked beans.[363] They may then conduct a 'basic' or 'frisk' search on anyone in the premises, or indeed anyone attempting to enter, about to enter, in, or leaving, a security area.[364] An appointed person could search such a person's bag in certain security areas for the prohibited haricots.[365] If the police reasonably suspect that the person is in possession of a can of Heinz without lawful excuse, they may

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352 *G20 Act* s 59, sch 6.
353 Ibid items 3(n), (o); 8; 11; 5; 18(a); 15; 16; 3(m); 13(e).
354 Ibid s 59, sch 6, item 13(e).
355 Queensland Council for Civil Liberties, Submission No 5 to LACSC, *G20 (Safety and Security) Bill 2013 (Qld)*, 13 September 2013), 4.
356 *G20 Act* ss 59, 63.
357 Ibid ss 8–11, schs 1–5.
358 Ibid sch 3. Any beans served at the Breakfast Creek Hotel narrowly escape the boundaries of the declared area.
359 Josh Bavas, 'Lawyers Fear New Police Powers for Queensland G20 Events Are "Draconian" Breach of Rights', *ABC News* (online), 11 September 2013 <http://www.abc.net.au/news/2013-09-10/lawyers-fear-new-police-powers-for-brisbane-cairns-g20/4949138>.
360 *G20 Act* s 63.
361 Ibid ss 23(1), 25(1).
362 Ibid s 89(2)(b).
363 Ibid s 33.
364 Ibid ss 23(1)–(2) (restricted area), 24(1)–(2) (declared area — though a police officer or appointed person must also reasonably suspect that the person may be in possession of a prohibited item without a lawful excuse, is a prohibited person, or is an excluded person), 25(1)–(2) (motorcade area).
365 Ibid ss 23(1), 25(1), 26(1).

conduct a strip search or medical X-ray to locate the beans.[366] If the person refuses, the police officer can arrest that person without a warrant.[367] If the person is then charged with 'attempting to disrupt any part of the G20 meeting',[368] the presumption in favour of bail is reversed.[369] In any event, the Queensland courts will be closed for the week of the conference.[370]

In addition, a person can be prohibited from entry into any security area if the Police Commissioner is reasonably satisfied that he or she may disrupt any part of the G20 meeting.[371] Unless it is 'reasonably practicable to do so', the person need not be notified of the prohibition; and the list need not be made public.[372] If the person enters or is in a prohibited area, he or she is liable to be removed by police or appointed persons.[373] If the person lives in the security area, the cost of their alternative accommodation will fall to the Queensland government.[374]

The use of extraordinary police powers during G20 summits is not new. In 2010, the Ontario government came under fire for using an obscure 1939 Act,[375] which had originally been enacted to protect Ontario's hydroelectric facilities against Nazi saboteurs,[376] to pass a regulation giving police broad arrest powers during the summit.[377] This was done despite the Federal Deputy Minister of Public Safety's advice to his Provincial counterpart that existing police powers were 'sufficient'.[378] The Ontario Provincial Police also considered that additional powers were unnecessary.[379] The same could be said of the Queensland laws.[380]

With the benefit of those coercive powers, authorities 'fuelled the belief' that any person within five metres of the summit security fence would be required to provide identification and submit to a search.[381] In reality, this power could only be exercised within the security fence. In response to allegations that the widespread misunderstanding of the regulations had a chilling effect on the rights of citizens and emboldened police, Toronto Police Chief Bill Blair was

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366 Ibid ss 23–5. In a declared area, a police officer or appointed person also needs to reasonably suspect that a frisk search will not find the prohibited item, or have failed to find the prohibited item after completing a frisk search: ss 24(3)(b)(i) and (ii).

367 Ibid s 79.

368 Ibid s 82(1)(d).

369 Ibid s 82(2).

370 'Qld Chief Justice Speaks on Parole Abuse and Injecting Rooms', *ABC News* (online), 13 September 2013 <http://www.abc.net.au/news/2013-09-13/chief-justice-speaks-of-heroin-use-and-parole-abuse/4956930>.

371 *G20 Act* s 50(1), (2)(c).

372 Ibid s 51(1), (4).

373 Ibid s 54.

374 Ibid s 84.

375 *Public Works Protection Act* RSO 1990, c P55 (as amended). The law has now been repealed.

376 R Roy McMurtry, *Report of the Review of the Public Works Protection Act* (April 2011) 3, app 4.

377 Ontario Regulation 233/10 made under the *Public Works Protection Act* RSO 1990 c P55. This regulation was passed, and repealed with such haste that it did not appear in the Gazette until five days after it had been revoked: McMurtry, above n 376, 13. See further Kent Roach, 'Editorial: Learning from the G20 Reports' (2012) 59 *The Criminal Law Quarterly* 1.

378 McMurtry, above n 376, app 7.

379 Ibid 10–11.

380 See *Police Powers and Responsibilities Act 2000* (Qld) ch 19, pt 2.

381 Rob Ferguson, 'Exclusive: Province to Scrap Secret G20 Law', *The Star* (online), 28 April 2011 <http://www.thestar.com/news/gta/g20/2011/04/28/exclusive_province_to_scrap_secret_g20_law.html>.

unrepentant, explaining that he 'was trying to keep the criminals out'.[382] During the summit, 1100 people were arrested, of whom 779 were released without charge, 204 had charges stayed, withdrawn or dismissed, and 40 others ended without a conviction. By contrast, more than 30 police officers were recommended for full disciplinary hearings.[383]

The history of emergency legislation is characterised by legislative excess in times of panic and emergency. Fear has never been a good legislator.[384] In his powerful dissent in *Korematsu v United States*,[385] Jackson J warned that every emergency power, once conferred 'lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need'.[386] It is positive that the G20 legislation will expire on 17 November 2014,[387] but the potential for excesses of the Canadian variety is concerning.

VI Conclusion

Bleijie and his government are cutting red tape,[388] green tape,[389] and blue tape.[390] To this we would add the 'golden thread' of the presumption of innocence[391] and the various other strands of gold tape meticulously woven over the course of centuries to restrain criminal proceedings from impinging upon human rights and ensure the fair administration of criminal justice. This article has traversed history to illustrate centuries of improvement to the criminal justice system and to human rights — undone with each snip of the legislative scissors.

The development of a government website to publish the photos of sex offenders is reminiscent of scarlet letters laws dating back to 1364. Unexplained wealth laws serve to further unravel the presumption of innocence, which the common law began weaving as early as 1468 and had more or less perfected by 1935. The introduction of an offender levy is akin to charges imposed on prisoners

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382 Ibid.

383 Queensland Council for Civil Liberties, Submission No 5 to LACSC, *G20 (Safety and Security) Bill 2013 (Qld)*, 13 September 2013, 2.

384 See generally Catherine L Carpenter, 'Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country' (2010) 58 *Buffalo Law Review* 1.

385 323 US 214 (1944) (removal of 110,000 Japanese Americans into internment camps without charge was constitutional). This decision has been described as 'one of the worst decisions in history': Erwin Chemerinsky, '*Korematsu v United States*: A Tragedy Hopefully Never to Be Repeated' (2011) 39 *Pepperdine Law Review* 163, 166.

386 *Korematsu v United States* 323 US 214, 246 (1944).

387 *G20 Act* s 101.

388 See Queensland Treasury and Trade, 'List of Queensland Red Tape Reduction Initiatives as at 30 June 2013', 30 June 2013 <http://www.treasury.qld.gov.au/office/knowledge/docs/regulatory-reform-reducing-regulatory-burden/list-key-red-tape-reduction-initiatives.pdf>; see further *Liquor and Gaming (Red Tape Reduction) and Other Legislation Amendment Act 2013* (Qld).

389 Queensland Government, Department of Environment and Heritage Protection, 'Greentape Reduction', 20 August 2013 <http://www.ehp.qld.gov.au/management/greentape/index.html?utm_source=General&utm_campaign=1b890b732c-BCC_composting_and_worm_farming_workshop&utm_medium=email>.

390 See, eg, Explanatory Notes, Police Powers and Responsibilities and Other Legislation Amendment Bill 2013, 1.

391 *Woolmington v DPP* [1935] AC 462, 481 (Viscount Sankey LC); *Maiden v R* (1991) 173 CLR 95, 128–9 (Gaudron J).

for their own penalties in the 16th and 17th centuries. The threat of 15 or 25 years extra imprisonment unless the prisoner produces information is not much more subtle than the extraction of such information by torture in England before 1640. Allowing juries access to the criminal histories of defendants undoes a refined framework that has stood in place since 1836. The largely unreviewable and unconstrained power to detain sex offenders after they have served their sentence is reminiscent of post-punishment penalties that were abandoned by 1837. The abolition of court-ordered parole and suspended sentences would derogate from the graded system of deterrent mechanisms that has gradually developed since 1840. The introduction of a series of mandatory sentences fails to learn from an error made and swiftly undone in 1884. The emergency G20 laws and the coercive police powers that support them repeat the Canadian mistake of 2010.

If this historical context is not enough to illustrate the thorough undesirability of the criminal reforms legislated and foreshadowed by the Attorney-General, there is no shortage of practical and policy objections to supplement it. Some of these have been mentioned in the case of each reform, but they only graze the surface of the criticisms that have been more fully aired in the various submissions on each Bill, the academic discussion and the public objections of civil libertarians.

The role of the institution of criminal punishment is 'a very old and painful question'.[392] The tension between the 'passionate, morally toned desire to punish' and the 'administrative, rationalistic normalising concern to manage'[393] can be traced back to the famous disagreement between Plato and Aristotle on whether the function of the criminal law was to punish past wrongs or moderate future conduct.[394] It is clear that there is an 'obligation of the government to protect', which has been characterised by the United States Supreme Court as 'lying at the very foundation of the social compact'.[395] However, it is clear also that human rights must 'tame the excesses of political pursuits of security and public protection'.[396] There is a delicate balance to be struck. Bleijie's approach to reform, and his reforms themselves, have failed to strike this balance. The roll-back of human rights in Queensland, primarily instigated by the Attorney-General, must be noted in detail. In due course, steps must be taken to redress his great leap backward.

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392 Ernest van den Haag, *Punishing Criminals: Concerning a Very Old and Painful Question* (Basic Books, 1975).

393 David Garland, *Punishment and Modern Society: A Study in Social Theory* (University of Chicago Press, 1990) 180.

394 See further John Rawls, *Two Concepts of Rules* (1955) 64 *Philosophical Review* 3, 23–4.

395 *Chicago v Sturges*, 222 US 313, 322 (1911).

396 Liora Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce?' in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press, 2012) 135–6.