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 by

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³ See below, I A, nn 40–2.
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 reintegretion 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

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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).
legislation he had introduced passed, authorising the seizure of ‘unexplained wealth’ and abrogating the presumption of innocence to require an explanation. On 31 July 2013, he announced a plan to abolish court-ordered parole and suspended sentences. 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. On 21 September 2013, the Queensland government moved to establish a website to announce the identity of certain offenders to the public. 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 incriminating information. 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. He has noted that there are roughly 6000 prisoners in Queensland, and room for about 500 more. 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. Tough-on-crime movements have failed many times before. 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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17 G20 (Safety and Security) Act 2013 (Qld) (‘G20 Act’).
19 Vicious Lawless Association Disestablishment Act 2013 (Qld); see also Tattoo Parlours Act 2013 (Qld); Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld). 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).
‘victims’ rights above and beyond the offender’s rights’ 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. 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’. 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. 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. 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’.

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. 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. 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

25 Criminal Law Amendment Act 2012 (Qld) s 17.
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).
rehabilitation or treatment.\textsuperscript{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.\textsuperscript{33} The Attorney-General has also foreshadowed extending that offence to children, punishable by up to one year of imprisonment.\textsuperscript{34} Another example is the extended offence of trafficking in precursor substances used to manufacture dangerous drugs,\textsuperscript{35} which comes with the difficulties associated with the criminalisation of preparatory acts.\textsuperscript{36} The reintroduced offence of ‘knowingly giving a false answer in Parliament’\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{40} and perhaps before.\textsuperscript{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’.\textsuperscript{42} This ratio became, metaphorically at

\textsuperscript{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.


\textsuperscript{35} Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013 (Qld) s 42.


\textsuperscript{37} Criminal Law (False Evidence before Parliament) Amendment Act 2012 (Qld) s 3.

\textsuperscript{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.

\textsuperscript{39} Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld) s 42.

\textsuperscript{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.


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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44 Andrew Horn, *The Mirror of Justices* (1646) 240.
47 *R v Phillips* (1868) 8 SCR (NSW) 54, 57 (Hargrave J).
50 Stephen, above n 48, 194–5.
51 Langbein, above n 45, 26–33.
52 In the Elizabthan 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.
intricate ‘web of the English criminal law’.\textsuperscript{57} It now finds expression in many regional and international conventions\textsuperscript{58} and the constitutions of at least 67 states.\textsuperscript{59}

Although the presumption of innocence is not to be considered ‘unduly fragile’,\textsuperscript{60} its protections can be, and increasingly are, abrogated by statute.\textsuperscript{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’.\textsuperscript{62} Western Australia was the first Australian jurisdiction to introduce such a law,\textsuperscript{63} which, the High Court observed, was ‘draconian in its operation’.\textsuperscript{64} Undeterred, the Northern Territory, South Australia, New South Wales and the Commonwealth followed suit.\textsuperscript{65} Bleijie introduced legislation along the same lines in November 2012, and it came into force on 6 September 2013.\textsuperscript{66}

The Attorney-General declared that the amendment gives ‘Queensland the toughest laws in the nation for dealing with organised crime’.\textsuperscript{67} While previous legislation allowed the seizure of assets of persons who had at least been charged

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


\textsuperscript{60} Mocilovic v The Queen (2011) 245 CLR 1, 47 [45] (French CJ).

\textsuperscript{61} Regarding the constitutionality of such provisions, see Mocilovic 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.

\textsuperscript{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].

\textsuperscript{63} Criminal Property Confiscation Act 2000 (WA).


\textsuperscript{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).

\textsuperscript{66} Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013 (Qld).

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.’

If satisfied there is a ‘reasonable suspicion’ 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.

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’.

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. 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. 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. 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 depose[d] in Court, is absolutely false’.

That included knowledge of the character of the defendant, including any prior evidence.

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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.
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. 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’. 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’.

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’. In a murder trial in 1692, Holt CJ refused to admit evidence of previous felonies, asking, ‘Are you going to arraign his whole life?’ 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. 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.

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’. In reality, however, such was the pressure on defendants to bolster their good character that the exception swallowed the rule. 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. 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

77 Bennett v Hundred of Hartford (1650) Sty 233.
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.\textsuperscript{87} The purpose was not to undermine any version of events presented by the accused, who was incompetent as a witness until the late 19\textsuperscript{th} century. Rather, it was evidence of bad character that ‘was freely admitted to prove his guilt’,\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{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.\textsuperscript{92} That state of affairs was preserved by legislation in 1851.\textsuperscript{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,\textsuperscript{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 \textit{Treason Act 1695}\textsuperscript{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 \textit{United States Constitution}.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{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

\textsuperscript{87} Criminal Law Act 1827, 7 & 8 Geo IV, c 28, s 11.
\textsuperscript{88} Glanville Williams, \textit{The Proof of Guilt: A Study of the English Criminal Trial} (Stevens & Sons, 3\textsuperscript{rd} ed, 1963) 6.
\textsuperscript{89} \textit{R v Stannard} (1837) 7 C & P 673, 674–5; 173 ER 295, 295–6.
\textsuperscript{90} Previous Conviction Act 1836, 6 & 7 Will IV, c 111.
\textsuperscript{91} Extracted in \textit{R v Shrimpton} (1851) 2 Den 319, 324–5 (Lord Campbell CJ).
\textsuperscript{92} \textit{R v Gadbury} (1838) 8 Car & P 676, 677–8; 173 ER 669, 670.
\textsuperscript{93} Prevention of Offences Act 1851, 14 & 15 Vict, c 19, s 9(a); \textit{R v Shrimpton} (1851) 2 Den 319, 324–5 (Lord Campbell CJ).
\textsuperscript{94} County Courts Act 1867, 30 & 31 Vict, c 142, s 28.
\textsuperscript{95} 7 & 8 Will III, c 3.
\textsuperscript{96} Art III, s 3.
\textsuperscript{97} \textit{Rookwood’s Case} (1696) 13 How St Tr 220.
\textsuperscript{98} John George Phillimore, \textit{The History and Principles of the Law of Evidence as Illustrating our Social Progress} (1850) 245.
witness, prosecutor or co-accused. 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. 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’. 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’. 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’. 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. It is true that criminal histories have been left to juries in England and Wales for the last decade. 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. 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).
104 Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013 (Qld) cl 123.
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 20\(^{th}\) 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 21\(^{st}\) century.\(^{119}\)

In England, mandatory minimum transportation sentences were in place for various offences in the 18\(^{th}\) and 19\(^{th}\) 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).
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’. 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’. Only one year later, judges were permitted to disregard them if they considered a lesser term ‘ought to be awarded’. 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. By this time, there was no distinction between the two. The absurdity was ‘quietly abandoned’ in 1924.

Mandatory life sentences and death penalties for murder aside, 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. They were heavily criticised for their arbitrary effect, particularly on the indigenous population. 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. Such injustices led to their repeal in the Northern Territory on 18 October 2001.

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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.
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. 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, Wynbye v Marshall (High Court of Australia, No D174 of 1997, Gaudron and Hayne JJ, 21 May 1998) (special leave refused).
130 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.\(^\text{132}\) 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.\(^\text{133}\) Such injustices led to criticism of the regime by judges. This included that it was ‘completely out of kilter’\(^\text{134}\) and ‘savage’,\(^\text{135}\) and drew an ‘exceptional’ submission from the Judicial Conference of Australia (‘JCA’) supporting the proposed repeal of the relevant provision.\(^\text{136}\) 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.\(^\text{137}\)

The difficulties with mandatory sentencing transcend the injustices associated with any one particular regime. Mandatory sentences are ineffective deterrent mechanisms.\(^\text{138}\) 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:

\[\text{[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.}\(^\text{139}\)

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 unanticipated case with sufficient mitigating factors was well known. The Parliament added the proviso, ‘unless there are exceptional circumstances’.\(^\text{140}\) In support of that proviso, the then Attorney-General made the astute observation that:

\(^{132}\) 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.


\(^{137}\) 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.


\(^{139}\) 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.\textsuperscript{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\textsuperscript{142} and a 25-year non-parole period for the murder of a police officer.\textsuperscript{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.\textsuperscript{144} In subsequent months, various pieces of mandatory legislation followed, to: require all drug traffickers to serve 80 per cent of their sentences;\textsuperscript{145} impose mandatory Graffiti Removal Orders for prescribed graffiti offences on children aged 12 years or over unless disabled;\textsuperscript{146} create various mandatory terms of imprisonment for possession and supply of firearms;\textsuperscript{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’.\textsuperscript{148} In addition, members, or aspiring members, of certain motorcycle clubs specified by statute are exposed to a minimum of six months imprisonment \textsuperscript{149} and 12 months for grievous bodily harm\textsuperscript{150} or serious assault,\textsuperscript{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.\textsuperscript{152}

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{141}
\item Queensland, \textit{Parliamentary Debates}, Legislative Assembly, 3 August 2010, 2309 (Cameron Dick on the Penalties and Sentences (Sentencing Advisory Council) Amendment Bill).
\item \textit{Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012 (Qld)} s 7.
\item \textit{Criminal Law Amendment Act 2012 (Qld)} ss 3, 7.
\item \textit{Criminal Law and Other Legislation Amendment Act 2013 (Qld)} s 7.
\item Ibid s 47, and, in relation to juveniles with the same effect, s 83.
\item \textit{Weapons and Other Legislation Amendment Act 2012 (Qld)} s 15.
\item Explanatory Notes, Police Powers and Responsibilities (Motor Vehicle Impoundment) and Other Legislation Amendment Bill 2012 (Qld) 1–2.
\item \textit{Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld)} s 43.
\item Ibid s 45.
\item Ibid s 46.
\end{enumerate}
\end{footnotesize}
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. 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. Torture was thought to be so effective in Ancient Rome that a slave’s testimony was inadmissible unless torture was used in its extraction. 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. Roman law was rediscovered in 12th-century Europe and trial by ordeal prohibited by the Fourth Lateran Council in 1215. 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 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 \textit{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 16\textsuperscript{th} and 17\textsuperscript{th} 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

\(^{159}\) Ibid 40–1.


\(^{161}\) Hajjar, above n 154, 17.

\(^{162}\) Ibid.


\(^{164}\) Sir William Blackstone, \textit{Blackstone’s Commentaries} (1803) vol 4, 325.

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

\(^{166}\) David Farmer, \textit{The Oxford Dictionary of Saints} (Oxford University Press, 5\textsuperscript{th} rev ed, 2011) 95.


\(^{169}\) See, eg, \textit{Standing Mute Act 1275}, 3 Edw I, c 12.

\(^{170}\) \textit{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.\footnote{Peters, above n 155.} 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.\footnote{Napoleon Bonaparte, Letters and Documents of Napoleon, Volume I: The Rise to Power (John Eldred Howard trans, Cresset Press, 1961) 274.}

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’.\footnote{Alice Bullard, Human Rights in Crisis (Ashgate, 2008) 13.} 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’.\footnote{Central Intelligence Agency, KUBARK Counterintelligence Interrogation (July 1963) [Declassified and approved for release January 1997] 90.} 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’.\footnote{Report by International Committee of the Red Cross on Guantánamo, 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>.} 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’.\footnote{Report by International Committee of the Red Cross on Guantánamo, 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>.} Then Vice-President Dick Cheney justified the use of waterboarding on the basis that it ‘produced a lot of valuable information’.\footnote{Associated Press, ‘Cheney: Nothing illegal in CIA interrogations’, NBC News (online), 1 August 2009 <http://www.nbcnews.com/id/28565549/>.

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.\footnote{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. 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’. The 1975 Declaration of Tokyo specifically includes the infliction of suffering ‘to force another person to yield information’. There is an ongoing debate about whether solitary confinement constitutes torture in and of itself. 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. 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. 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. 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. Such schemes have been criticised by those who suggest that those in custody have less

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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).


187 *Penalties and Sentences Act 1992* (Qld) s 13A.
incentive to be truthful than they do to see someone convicted of a crime.\textsuperscript{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.\textsuperscript{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.\textsuperscript{190} While this is ‘designed to destroy’ bikie\textsuperscript{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’.\textsuperscript{192} It is for the individual to prove their group is not formed for the purpose of committing offences.\textsuperscript{193} ‘Participant’ includes a person who has or seeks membership or meets more than twice with other participants.\textsuperscript{194} The ‘declared offences’ range from very serious violent and sexual offences to bomb hoaxes,\textsuperscript{195} money laundering,\textsuperscript{196} drugs offences\textsuperscript{197} and even unlawful sodomy.\textsuperscript{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,\textsuperscript{199} or 25 years if a person ‘exercises or purports to exercise authority’ in the group.\textsuperscript{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.\textsuperscript{201} In particular, if the prisoner is a ‘participant’\textsuperscript{202} in one of the motorcycle clubs deemed to be a criminal


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

\textsuperscript{190} \textit{Vicious Lawless Association Disestablishment Act 2013} (Qld) s 5(1)(a)–(c).

\textsuperscript{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’, \textit{Courier Mail}, 15 October 2013.

\textsuperscript{192} \textit{Vicious Lawless Association Disestablishment Act 2013} (Qld) s 3(d).

\textsuperscript{193} Ibid s 5(2).

\textsuperscript{194} Ibid s 4(a)–(d).

\textsuperscript{195} Ibid sch 1; \textit{Criminal Code 1899} (Qld) s 321A.

\textsuperscript{196} \textit{Vicious Lawless Association Disestablishment Act 2013} (Qld) sch 1; \textit{Criminal Proceeds Confiscation Act 2002} (Qld) s 250.

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

\textsuperscript{198} \textit{Vicious Lawless Association Disestablishment Act 2013} (Qld) sch 1; \textit{Criminal Code 1899} (Qld) s 208.

\textsuperscript{199} \textit{Vicious Lawless Association Disestablishment Act 2013} (Qld) s 7(1)(a)–(b).

\textsuperscript{200} Ibid s 6(c), 7(1)(c).


\textsuperscript{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’: \textit{Criminal Law (Criminal Organisations Disruption) Amendment Act 2013} (Qld) s 42, inserting ss60A–60C into the \textit{Criminal Code} (Qld).
organisation, that person must be kept in high or maximum security, medically examined at least once a month, and they can be moved from prison to prison without any right of review or reconsideration. Such prisoners’ food and personal property are ‘strictly limited’, their personal calls and mail monitored, and phone calls limited to 42 minutes per week. They are required to wear fluorescent pink jumpsuits. They will spend 22 hours a day in solitary confinement. 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.

Even once on parole, a ‘vicious lawless associate’ can be required to give urine or blood samples at any time, confined to a certain place and required to wear a tracking device. 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. So ‘extremely harsh’ 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, and six months to six weeks.

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) cls 11–12 inserting in particular Corrective Services Act 2006 (Qld) sss 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].
209 Callanan v Attendee X [2013] QSC 340 (12 December 2013) [33].
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.
enforcement agencies’. 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’.

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. 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.

Similar Victorian legislation enacted shortly after Federation created a system of remission determined according to behaviour in gaol. With the development of ‘reformatory prisons’ for the detention of habitual criminals 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. The clear purpose was to facilitate rehabilitation. 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. 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.

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 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 is ongoing.

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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).
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.
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. In Queensland, they were contained in sentencing legislation passed in 1992 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.

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. 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. 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’.

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.

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’. 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.
231 Viellaris and Ironside, above n 21.
232 Ibid.
234 Kirk v Industrial Court of New South Wales (2010) 239 CLR 531.
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.  

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. In 18th-century France, the guillotine was reserved for those who could afford the luxury. 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.

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. Convicts were a major source of productive labour in colonial Australia, although by the time hard labour was abolished in Queensland in 1988 it was “designed primarily as punishment”, and “characterised by hard, repetitive labour and was often deliberately purposeless”. 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. 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’. It must be paid whether or not a conviction is recorded, and is not subject to fee waiver provisions. It also operates retrospectively. 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.
241 Corrective Services Act 1988 (Qld).
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’, and that it would be likely to impact the most vulnerable members of society hardest.

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. 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. However, Bleijje has clarified that the offender levy is ‘not a fee’. 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. 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. 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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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.
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).
further punishment. 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’. 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. 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. Vlad the Impaler was beheaded in 1476, after his death. Richard III was hanged by Henry VII after his death in 1485. Oliver Cromwell was dug up on the restoration of Charles II in 1660 to be hung, drawn and quartered.

The practice of gibbeting, although apparently designed under Roman law ‘as a comfortable sight to the friends and relations of the deceased’, 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’. 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. Various other methods of corpse mutilation remained common until the 1830s. Particular felons would be ‘insulted in extraordinary ceremonies’ or subjected to ‘burking’ — the ‘final indignity’ of dissection by surgeons. Even the popular enthusiasm for punishment turned on post-mortem humiliation — such events were often accompanied by riots. Post-punishment practices were out of

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255 The Bible, Nahum 1:9; see George Thomas, Double Jeopardy: The History, the Law (New York University Press, 1998) 72.
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.
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.
264 Ibid 180–1.
265 Ibid.
fashion by the time the House of Lords sought to revive them for Ireland in 1837. 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’.

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. 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’.

The indeterminate sentence was said to be for the benefit of the prisoner — it ‘cannot increase the sentence’ — and would allow the authorities to ensure the prisoner’s release as soon as he or she was ready. 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.

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. 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.

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

269 Ibid 566–7 (Robert Robinson).

270 Yates v The Queen (2013) 247 CLR 328.


attention: Garry David and Gregory Kable. The law imprisoning the latter was found to be invalid by the High Court; 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

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.
277 Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) s 5, read with the schedule (‘DPSOA’).
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.
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).
be detained until detention is ‘no longer in the public interest’. The courts can only be involved in the case of jurisdictional error — the minimum constitutionally necessary. 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’. 

Plainly enough, he meant Robert John Fardon, whose release from preventive custody had been ordered three weeks earlier. 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 to his release on a supervision order with some 32 conditions in December 2006. 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. He was taken back into custody until his conditions of release were varied a supervision order, to use his car at 9.30 pm in contravention of his curfew.

In those five and a half years, his release under supervision was ordered three times, but on each occasion that order was stayed. He then remained at controlled liberty until April 2008, when he allegedly raped an intellectually impaired woman. Although an acquittal was entered on appeal, he remained in custody until December 2013. In those five and a half years, his release under supervision was ordered three times, but on each occasion that order was stayed and, until the recent decision, reversed on appeal. 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

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).
295 A-G (Qld) v Fardon [2007] QSC 299 (19 October 2007) [8]–[9].
Executive. It was immediately condemned as offensive to the separation of powers. 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. In a related judgment on the same day, the Court dismissed Bleijie’s appeal against Fardon’s release. Bleijie immediately foreshadowed a High Court appeal, and, warned that if that was not fruitful, he would ‘look at other options’. 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’.

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. By the 4th century, under Constantine I, such facial disfigurement was outlawed and branding was confined to the less prominent hand, arm or leg. 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, and prisoners condemned to travaux forcés with ‘TF’, until 1832. At times in the 19th century, both the British and United States armies branded deserters.

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].
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.\footnote{311} This practice continued through to 1780 in colonial America, where the scope of such advertisements included ‘A’ for adultery or ‘I’ for incest.\footnote{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.\footnote{313} The Attorney-General could then inform anyone with ‘a legitimate and sufficient interest’,\footnote{314} which might include neighbours and employers.\footnote{315} A proposal made for more stringent requirements in 1997 was never passed,\footnote{316} but the provisions were expanded to cover more information and a longer period of time in 1999.\footnote{317} Yet only 12 orders were made in the 10 years following their introduction,\footnote{318} and no application for the release of such information to the public has ever been made.\footnote{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’,\footnote{320} including ‘giv[ing] police the power to name missing sex offenders’.\footnote{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.\footnote{322}

Then, on 12 September 2013, the Queensland government introduced a Bill to establish such a website.\footnote{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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\item[313] \textit{Criminal Code, Evidence Act and Other Acts Amendment Act 1989} (Qld) s 70.
\item[314] \textit{Criminal Law Amendment Act 1945} (Qld) s 20.
\item[316] Criminal Law (Sex Offenders Reporting) Bill 1997 (Qld).
\item[317] \textit{Criminal Law Amendment Act 1999} (Qld) ss 4–7.
\item[323] Child Protection (Offender Reporting — Publication of Information) Amendment Bill 2013 (Qld) cl 6, inserting in particular \textit{Child Protection (Offender Reporting) Act 2004} (Qld) s 74AE.
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they do not comply with reporting conditions. 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. 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.

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. 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’.

That did not turn out to be the case — by 2009, there were 840 offenders in custody and 600 on community supervision. 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. 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 — the decision was overturned and the injustice avoided on appeal. 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

\[\text{324 Ibid inserting in particular Child Protection (Offender Reporting) Act 2004 (Qld) s 74AF.}\]
\[\text{325 Ibid inserting in particular Child Protection (Offender Reporting) Act 2004 (Qld) s 74AG(1)(a).}\]
\[\text{326 Ibid inserting in particular Child Protection (Offender Reporting) Act 2004 (Qld) s 74AG(1)(b)–(c).}\]
\[\text{327 Criminal Code (Qld) ss 228(2)(a), 316A(1), s 321A(2), s 328A(2).}\]
\[\text{328 Queensland, Parliamentary Debates, Legislative Assembly, 26 November 2003, 5127 (R J Welford).}\]
\[\text{329 Queensland, Corrective Services, DPSOA Fact Sheet, January 2009, 2 <http://www.corrrectionservices.qld.gov.au/About_Us/The_Department/Probation_and_Parole/Managing_sex_offenders_in_the_com munity/DPSOA_FactSheet_QA.pdf>.}\]
\[\text{330 A-G (Qld) v Tilbrook [2012] QSC 128 (11 May 2012); Tilbrook v A-G (Qld) [2012] QCA 279 (19 October 2012) [22]–[23].}\]
\[\text{331 See generally Lacey v A-G (Qld) (2011) 242 CLR 573, 582–3 [18] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).}\]
\[\text{332 Tilbrook v A-G (Qld) [2012] QCA 279 (19 October 2012). Another decision was overturned on the same day, the Court of Appeal finding that preventative detention could not apply to offenders entrapped by officers posing as children on the internet, such offences not being ‘against children’: Dodge v A-G (Qld) [2012] QCA 280 (19 October 2012). Bleijie’s application for special leave to appeal to the High Court was dismissed: A-G (Qld) v Dodge [2013] HCATrans 132 (6 June 2013).}\]
notification system. Certain discrete registration regimes came into existence in the United States in the 1930s and 1940s. 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’. 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. 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. 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. 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.

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. 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’. The first recipe for baked beans was published in 1829

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335 State v Bateman, 94 Or App 449 (1987).
336 King, above n 333, 120.
339 Blancher, above n 273, 918–19.
and designed to help poor families through the depression of the 1820s. By 1841 they were no longer a food for the poor, but for the industrious who were ‘growing rich’. 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’. 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. In 2013, a woman was jailed for 20 months after ransacking a friend’s home with baked beans. 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. However, 2.3 million people in Britain continue to eat them every day.

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. The Explanatory Notes to the Bill admit to ‘a number of provisions of the Bill that are not consistent with fundamental legislative principles’. An examination of those offending provisions occupies the next 12 pages of the Explanatory Notes.

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

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343 Ibid 165.
344 Ibid 166.
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. 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. 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’. 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’.

It is prohibited, without lawful excuse, to possess, attempt to take into, or use a prohibited items in a ‘security area’. This includes vast areas of both central Cairns and Brisbane, extending from South Brisbane across Spring Hill to Breakfast Creek, encompassing ‘tens of thousands of homes and businesses’. 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. 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’, who may be anyone who the Commissioner is reasonably satisfied ‘has the necessary expertise or experience to be an appointed person’. 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. 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. An appointed person could search such a person’s bag in certain security areas for the prohibited haricots. 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.
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.\textsuperscript{366} If the person refuses, the police officer can arrest that person without a warrant.\textsuperscript{367} If the person is then charged with ‘attempting to disrupt any part of the G20 meeting’,\textsuperscript{368} the presumption in favour of bail is reversed.\textsuperscript{369} In any event, the Queensland courts will be closed for the week of the conference.\textsuperscript{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.\textsuperscript{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.\textsuperscript{372} If the person enters or is in a prohibited area, he or she is liable to be removed by police or appointed persons.\textsuperscript{373} If the person lives in the security area, the cost of their alternative accommodation will fall to the Queensland government.\textsuperscript{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,\textsuperscript{375} which had originally been enacted to protect Ontario’s hydroelectric facilities against Nazi saboteurs,\textsuperscript{376} to pass a regulation giving police broad arrest powers during the summit.\textsuperscript{377} This was done despite the Federal Deputy Minister of Public Safety’s advice to his Provincial counterpart that existing police powers were ‘sufficient’.\textsuperscript{378} The Ontario Provincial Police also considered that additional powers were unnecessary.\textsuperscript{379} The same could be said of the Queensland laws.\textsuperscript{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.\textsuperscript{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

\begin{footnotes}
\item[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).
\item[367] Ibid s 79.
\item[368] Ibid s 82(1)(d).
\item[369] Ibid s 82(2).
\item[371] \textit{G20 Act} s 50(1), (2)(c).
\item[372] Ibid s 51(1), (4).
\item[373] Ibid s 54.
\item[374] Ibid s 84.
\item[375] \textit{Public Works Protection Act} RSO 1990, c P55 (as amended). The law has now been repealed.
\item[377] Ontario Regulation 233/10 made under the \textit{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 \textit{The Criminal Law Quarterly} 1.
\item[378] Ibid, above n 376, app 7.
\item[379] Ibid 10–11.
\item[380] See \textit{Police Powers and Responsibilities Act} 2000 (Qld) ch 19, pt 2.
\end{footnotes}
unrepentant, explaining that he ‘was trying to keep the criminals out’. 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.

The history of emergency legislation is characterised by legislative excess in times of panic and emergency. Fear has never been a good legislator. In his powerful dissent in Korematsu v United States, 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’. It is positive that the G20 legislation will expire on 17 November 2014, but the potential for excesses of the Canadian variety is concerning.

VI Conclusion

Bleijie and his government are cutting red tape, green tape, and blue tape. To this we would add the ‘golden thread’ of the presumption of innocence 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.
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.
390 See, eg, Explanatory Notes, Police Powers and Responsibilities and Other Legislation Amendment Bill 2013, 1.
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’. The tension between the ‘passionate, morally toned desire to punish’ and the ‘administrative, rationalistic normalising concern to manage’ 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. 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’. However, it is clear also that human rights must ‘tame the excesses of political pursuits of security and public protection’. 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.

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