

PERPETRATORS AND PARIAHs: DEFINITIONAL AND PUNISHMENT ISSUES FOR CHILD SEX OFFENDERS, AND THERAPEUTIC ALTERNATIVES FOR THE CRIMINAL JUSTICE SYSTEM

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A punitive approach to criminal sentencing is profoundly counterintuitive in circumstances where incarceration and criminal labelling expedites, rather than prevents, recidivism. In a bid to avoid physical contact offences some paedophiles self-manage with low-level offending, such as viewing child exploitation material. These individuals are child sex offenders who may be receptive to rehabilitation with therapeutic assistance, yet are punished in a system deficient of genuine rehabilitation methodology. Therapeutic jurisprudence approaches for paedophiles have seen great success in international jurisdictions. This article contends that it is not without merit as an alternative for Australian sentencing practices.

I INTRODUCTION

In Western society today, the most reprehensible of wrongs are those of a sexual nature, and more particularly, sexual offences against children. The proliferation of information about crime, punishment, and perpetration means that those who commit these crimes become pariahs: universally reviled and notorious within a system that is structured to punish offenders rather than strategise to prevent perpetration. While there are those offenders who are opportunistic or remorseless—some individuals who may display sociopathic traits, without empathy, and for whom treatment is ineffective—there are those who experience significant distress at their actions. These individuals identify as paedophiles.

This cohort is often unable to access effective preventative assistance due to stigma in the wider community.¹ Consequently, self-management of these urges can involve low-level offences such as viewing exploitative material as a substitute for, and protection against, physically engaging in sexual acts with a child. Those who experience paedophilic urges, but do not physically perpetrate acts of harm upon children can therefore still be found guilty of an offence, and receive a criminal

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¹ Luke Malone, Interview with 'Adam' (This American Life Podcast: Tarded and Feathered, 11 April 2014); Margo Kaplan, 'Pedophilia: A Disorder, Not a Crime', *The New York Times* (New York), 6 October 2014, 23; Nick Wigham, 'Experts Are Calling For Prevention Strategies For Paedophilia, So Why Is No One Listening?', *news.com.au* (online) 18 July 2015 <<http://www.news.com.au/lifestyle/real-life/experts-are-calling-for-prevention-strategies-for-paedophilia-so-why-is-no-one-listening/news-story/0de393948df51ace92e6add639b13ef>>.



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sanction as a result. This leads to a confusion of what it means to be a ‘paedophile’ and what it means to be a ‘child sex offender.’²

This article examines the definitional and practical distinctions between the two cohorts. In order to understand the internal battle fought, the article delves into the experiences of some individuals who live with this paraphilia. Following this, the sentencing structure of the Queensland justice system is assessed as a tool of punishment and crime prevention (recidivism), contrasted with the rehabilitative ideals of therapy-based sentencing. Therapeutic jurisprudence has been workable in a number of jurisdictions, and those programs are assessed here with regard to recidivism rates and holistic community benefits. It is concluded that the viability of such programs necessitates an initial distinction between these demographics. That distinction enables a more rehabilitative and therapeutic approach to justice; imperative in improving preventative assistance, sentencing methodology, and reintegration.

II WHAT IS PAEDOPHILIA?

A *Distinguishing Between Paedophilia and Sexual Offending*

Although the term ‘paedophilia’ is intended to define a recognisable clinical entity or subgroup that suffer a particular combination of urges, the term has become a demonising pejorative.³ The worst is often assume of these individuals, however contrary to popular belief, having paedophilic urges and acting upon them are not mutually inclusive. Paedophilia is literally a love, or attraction (‘philia’) to children (‘paedo’), and perpetration of sexual offences is not a foregone conclusion. Thus ‘we must counter the emotionality surrounding the topic of paedophilia in the popular media,’⁴ and society more generally, in order to wholly address a problem that perplexes courts and policy-makers alike.

The aetiology of paedophilia is uncertain, however it is commonly understood to be multifactorial, comprising psychosocial and biological factors. ‘Neglect, abandonment, sexual, physical, and emotional abuse can all have a strong negative impact on a child’s overall development including his or her sexual development,’⁵ and thus no single ‘molester profile’ exists: child sex offenders are unique in terms of personal characteristics, life experiences, and criminal histories⁶—just like any other individual. Significantly, little evidence exists supporting the notion that victims of paedophilia-related offences become paedophiles themselves.⁷ That is to say, they will not necessarily develop the symptomology which is consistent with paedophilic disorder *because* of a

² Pursuing syntactical clarity, this article is referring to adults who engage in sexual acts with children, not those under 18 who commit sexual offences.

³ Fred S Berlin, ‘Pedophilia and DSM-5: The Importance of Clearly Defining the Nature of a Pedophilic Disorder’ (2014) 42 *Journal of American Academic Psychiatry Law* 404, 404.

⁴ Sarah D Goode, *Understanding and Addressing Adult Sexual Attraction to Children: A Study of Paedophiles in Contemporary Society* (Routledge, 2010) 1.

⁵ TC Johnson, ‘Development of Sexual Behavior Problems In Childhood’ in Jon A Shaw (ed), *Sexual Aggression* (American Psychiatric Association, 1999) 41; Dennis Stevens, ‘Influences of Early Childhood Experiences on Subsequent Criminology Violent Behaviour’ (1997) 6(1) *Studies on Crime and Crime Prevention* 34.

⁶ Dennis Stevens, ‘Pedophiles: A Case Study’ (2002) 17(1) *Journal of Police and Criminal Psychology* 36, 37.

⁷ Cathy Spatz-Widom, ‘Child Abuse, Neglect, and Violent Criminal Behaviour’ (1989) 27 *Criminology* 251, 252.

prior incident of abuse. Paedophilia is a lifelong individual condition;⁸ it is not ‘passed on.’

Child sexual development is a vast and complex progression; one that has not been researched thoroughly enough for the psychological community to identify certain sexual preferences formed during these years. For sexual predilections considered ‘normal’ this is less of a concern, but for those preferences or paraphilias that are abnormal, deviant, or potentially dangerous, knowledge of their aetiology is necessary to navigate treatment and prevention approaches. Counterintuitively, while the neuronal mechanisms underlying ‘normal’ sexual function *have* been widely examined, those which trigger deviant sexual behaviours – such as paedophilia – remain relatively unknown.⁹ Some suggest that the character of any violent offender is a consequence of environment, culture or experience,¹⁰ and that paedophilia can be explained as such. Others suggest that biological factors can be implicated, such as alterations in brain structure and function.¹¹ What is indisputable is that human sexual arousal is a ‘multidimensional experience comprising physiological and psychological processes.’¹² In the interests of criminal sentencing and justice itself, one cannot assume that all paedophiles are pathological or criminal; or that all child sex offenders are paedophiles.

B Clinical Definitions

The technical diagnostic term ‘paedophilia erotica’ was first suggested in *Psychopathia Sexualis*,¹³ a definitional tome that included the concepts of sadism, masochism, fetishism, necrophilia, homosexuality, heterosexuality, and paedophilia. The expansive research therein indicated that some sexual deviation was a medical, rather than merely judicial, problem.¹⁴

Today, western society predominantly relies on the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V) for classification of mental disorders.¹⁵ The DSM-V refers to paedophilia as ‘pedophilic disorder,’¹⁶ and distinguishes between exclusive and non-exclusive paedophilia.¹⁷ pedophilic disorder is designated as a subset of paraphilic disorder; one that creates ‘a significant psychiatric burden and, in some cases, can make it very difficult to maintain full and consistent self-control.’¹⁸

The current DSM-V definition is summarised as:

1. Over a period of at least 6 months, an individual has recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger); *and*

⁸ Michael Seto, ‘Is Pedophilia a Sexual Orientation?’ (2012) 41 *Archives of Sexual Behaviour* 231, 232.

⁹ Boris Schiffer et al, ‘Functional Brain Correlates of Heterosexual Paedophilia’ (2008) 41 *NeuroImage* 80, 80.

¹⁰ Stevens, above n 6, 37.

¹¹ Sebastian Mohnke et al, ‘Brain Alterations In Paedophilia: A Critical Review’ (2014) 122 *Progress in Neurobiology* 1, 4.

¹² Schiffer et al, above n 9, 80.

¹³ Richard Krafft-Ebing, *Psychopathia Sexualis: eine Klinisch-Forensische Studie* (1886).

¹⁴ Goode, above n 4, 10.

¹⁵ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed, 2013).

¹⁶ *Ibid* at 302.2 (F65.4)

¹⁷ Where a person can be sexually aroused *only* by children, or also by elder persons, respectively.

¹⁸ Berlin, above n 3, 406.

- a. The person has acted on these sexual urges (be it physical perpetration against a child, use of exploitative material, or intense fantasising during sexual arousal); *or*
 - b. These sexual urges or fantasies cause marked distress or interpersonal difficulty for the person; *and*
2. The person is at least age 16 years and at least 5 years older than the child or children in the first criterion.

Though there are isolated reports of paedophilia in women¹⁹ it is substantially more frequent in men.²⁰ Overall, and across a number of studies, the prevalence for paedophilia amongst men is estimated to be between 1–3.8 per cent.²¹ Very little is known about undiagnosed paedophiles who have *not* sexually abused a child, which is understandable given that most studies on paedophiles are conducted on those who have also perpetrated abuse – those who are already incarcerated.²² Attempting to learn about this sexual attraction by studying samples only of known offenders offers a distorted picture,²³ not only statistically, but within society as well.

C Identification as a ‘Paedophile’

In a society where tales of abuse, horror, and ‘evil’ perpetrators are easily accessible, stories from those who suffer with this paraphilia – equally as accessible – are not highly publicised. A pervasive bias continues to demonise these individuals without understanding their experience, or being willing (or able) to empathise with them as people afflicted with a sexual attraction that they did not solicit, and do not want.

Those paedophiles who are willing to be interviewed or participate in research seek to encourage discussion and eliminate stigma. One such individual, known as David²⁴ paints a ‘detailed and vivid picture of how it feels, as a lonely and frightened teenager, to slowly come to the horrific realisation that you yourself are a paedophile.’²⁵

This is not unique. Many of those who identify as possessing the key traits of paedophilia state they feel uncomfortable discussing their attraction with family²⁶ even though the role of family and friends is crucial to an individual’s self-acceptance.²⁷ For those whose family or friends continue to be a positive support network after such revelations, a law-abiding (non-offending)

¹⁹ Eva W C Chow and Alberto L Choy, ‘Clinical Characteristics and Treatment Response To SSRI In A Female Pedophile’ (2002) 31(2) *Archives of Sexual Behaviour* 211, 213.

²⁰ Myriam S Denov, ‘The Myth of Innocence: Sexual Scripts and the Recognition of Child Sexual Abuse By Female Perpetrators’ (2003) 40(3) *Journal of Sex Research* 303, 307.

²¹ See Paul Okami and Amy Goldberg, ‘Personality Correlates of Pedophilia: Are They Reliable Indicators?’ (1992) 29(3) *Journal of Sex Research* 297; Paul Okami, ‘Sociopolitical Biases in the Contemporary Scientific Literature on Adult Human Sexual Behavior with Children and Adolescents’ in Jay R Feierman (ed), *Pedophilia: Biosocial Dimensions* (Springer-Verlag, 1990).

²² See Jehan Safitri, Rahmi Fauzia, and Qomariyatus Sholihah, ‘Aetiology of Paedophile Sufferers’ (2013) 9(2) *The European Journal of Social & Behavioural Sciences* 1418.

²³ Goode, above n 4, 20; Annie Cossins, National Child Sexual Assault Reform Committee, *Alternative Models For Prosecuting Child Sex Offences In Australia* (2010).

²⁴ Nom de plume.

²⁵ Goode, above n 4, 5.

²⁶ *Ibid* 116.

²⁷ *Ibid*.

lifestyle is highly correlative.²⁸ When those whose attraction has become known to family or friends do not receive support – or encounter disapproval – a converse outcome is likely.²⁹

Professional help is also difficult for these individuals to access, for a number of reasons. In Australia, mandatory reporting laws³⁰ perpetuate a fearful attitude towards these people, and make it difficult for them to not only seek help, but have help given when they ask for it. Even some who research or work within this field appear incapable of empathising with those who are sexually attracted to children, and this is not surprising:

Common portrayals of paedophiles, which we see every day in popular culture, media, charity campaigns, educational materials and even crime and justice materials, are often simplistic, and psychologically naïve... they ask us to believe in what amounts to almost two-dimensional cardboard cut-outs, evil monsters utterly unrelated to everyday life.³¹

In one German survey of psychotherapists, more than 95 per cent of respondents acknowledged an unwillingness to work with patients diagnosed or identifying with paedophilia, for reasons including negative attitudes towards this subgroup.³² In a 2014 survey of clinical practitioners in Finland, 65 per cent rated their skills and knowledge insufficient, while 38 per cent rated their personal attitudes incompatible with treating paedophiles.³³ Meanwhile, in a US survey of people with sexual interest in children, a large number of respondents named ‘the expectation to be treated in a stigmatising way by the professional’³⁴ as a primary reason for their reluctance to seek help.³⁵

Conducting a series on pariahs and stigma, *This American Life* journalist Luke Malone interviewed a young paedophile known as “Adam.”³⁶ Adam’s story reveals the need for such support from family, friends, and the health community.³⁷ He is 19 years old and self-identified as a paedophile at the age of 16. After viewing child pornography compulsively from the age of 14, he realised he was addicted and sought help from online communities. However, the guilt he experienced – even after he ‘quit’ viewing – manifested itself in self-loathing and suicidal thoughts.

²⁸ Ibid.

²⁹ Ibid.

³⁰ As to mandatory reporting laws, see for example *Children and Young People Act 2008* (ACT) ss 356, 357; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 23, 27, 27A; *Care and Protection of Children Act* (NT) ss 15, 16, 26; *Child Protection Act 1999* (Qld) ss 22, 186; *Children’s Protection Act 1993* (SA) ss 6, 10, 11; *Children, Young Persons and Their Families Act 1997* (TAS) ss 3, 4, 14; *Children, Youth and Families Act 1997* (VIC) ss 162, 182, 184; *Children and Community Services Act 2004* (WA) ss 124A-H; *Family Law Act 1975* (Cth) ss 4, 67ZA.

³¹ Goode, above n 4, 1.

³² M Stiels-Glenn, ‘The Availability of Outpatient Psychotherapy For Paedophiles in Germany’ (2010) 28(2) *Recht & Psychiatrie* 74, 75.

³³ K Alanko et al, (2015) ‘Attitudes and Knowledge to Treat Potential Child Sexual Offenders Among Finnish Health Care Professionals.’ *Manuscript in preparation for publication*. Referenced in Sara Jahnke, Kathleen Philipp and Juergen Hoyer, ‘Stigmatizing Attitudes Towards People with Pedophilia and Their Malleability Among Psychotherapists in Training’ (2015) 40 *Child Abuse & Neglect* 93, 94.

³⁴ Sara Jahnke, Kathleen Philipp and Juergen Hoyer, ‘Stigmatizing Attitudes Towards People with Pedophilia and Their Malleability Among Psychotherapists in Training’ (2015) 40 *Child Abuse & Neglect* 93, 94.

³⁵ Richard Kramer, ‘The DSM and the Stigmatization of People Who Are Attracted to Minors’ (Paper presented at the Symposium meeting of the B4U-ACT Inc., Pedophilia, Minor-Attracted Persons, and the DSM: Issues and controversies, Westminster, MD, 17 August 17 2011).

³⁶ Malone, above n 1.

³⁷ Ibid.

I [went to] see a psychologist... I knew what I was going to say: I'm a paedophile and I'm addicted to child pornography. I saw a look of horror on her face... Immediately she went from being a nice, gentle person, to being very critical... I was being judged... I was terrified the whole time.³⁸

This psychologist informed Adam and his mother that she was unwilling to treat him. Adam now runs his own online support group for those who identify as 'virtuous' paedophiles.³⁹

People who identify as paedophiles work against a current of stigma, desertion, and most significantly, the common presumption that perpetration is a foregone conclusion. It is imperative that our criminal justice system, psychological community, and wider society distinguishes between involuntary desires, and voluntary actions – between 'being sexually attracted to children and acting on that attraction... a distinction often lost,'⁴⁰ and a relatively unexamined dynamic. In doing so, approaches to prevention and punishment may be more successful than current methodologies.

D *Child Sex Offenders*

Not all child sex offenders identify as having paedophilia, and not all paedophiles necessarily perpetrate against children. For those who identify as having the symptomology consistent with paedophilic disorder, perpetration is not a foregone conclusion. Effectively, 'an individual with pedophilia is not necessarily an abuser, and an individual who sexually abused a child does not necessarily have a pedophilic sexual preference.'⁴¹ Persistent conflation of these concepts has led to confusion on this point, which has serious consequences for research, management, and sentencing methods.

The criminal justice system must begin to distinguish between the subgroups related to child sex offences in order to enable distinct jurisprudential approaches. Current methodology for perpetration prevention, sentencing, and reintegration is not as effective as it could (or should) be, which is of little benefit to potential victims or perpetrators.

As aforementioned, child sexual abuse is a legal term, while pedophilia is a medical term.⁴² They cannot be used synonymously: 'when speaking of child sexual abuse and paedophilia, it is important to remember that these terms describe two potentially related, but distinct phenomena.'⁴³ Therefore, child sex offenders can be grouped into two categories:

³⁸ Nom de plume in Malone, above n 1.

³⁹ In Adam's group, any member must believe that engaging inappropriately with children is wrong. In other contexts, such support groups or individuals are labelled as 'virtuous paedophiles'. The concept involves individuals with this sexual urge learning to control it, because although they accept they have sexual attraction to children, they do not seek to offend against them.

⁴⁰ Goode, above n 4, 2.

⁴¹ Klaus M Beier et al, 'Can Pedophiles Be Reached For Primary Prevention of Child Sexual Abuse? First Results of the Berlin Prevention Project Dunkelfeld (PPD)' (2009) 20(6) *The Journal of Forensic Psychiatry & Psychology* 851, 852.

⁴² Ryan CW Hall and Richard CW Hall, 'A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues' (2007) 82(4) *Mayo Clinic Proceedings* 457, 460.

⁴³ Beier et al, above n 41, 852.

- 1) Those *without* an erotic preference for children as identified by the DSM-V, who commit sexual crimes against children.
- 2) Those *with* a sexual preference for children which can be designated as paedophilic disorder, who commit sexual crimes against children.

The proportion of paedophiles who perpetrate and thus dually classify is approximated at 40–50 per cent,⁴⁴ which means that at least 50 per cent of child sex offenders do not meet the criterion for paedophilic disorder. But the conflation of the two concepts results in the criminal justice system, media, and wider community referring to child sex offenders as paedophiles – which in half of the cases is not accurate. This creates difficulties for the individuals with paedophilic disorder who do not offend, and unchecked, some of these individuals go on to commit low-level offences in a bid to manage their urges. This is not to denounce an individual's sense of agency in the choices they make: the decision to commit a sexual offence (low-level or not) is a conscious one. However, if feasible mechanisms exist to aide in the prevention of initial perpetration and subsequently, recidivism, they ought to be taken advantage of. The discovery and implementation of these judicial devices necessitates a careful distinction between paedophiles, child sex offenders, and this unique third category.

III PAEDOPHILIA, CHILD SEX OFFENDERS, AND CRIMINAL SENTENCING

Within a climate of populist punitiveness, legislators have modified statutes to incorporate harsher terms of punishment.⁴⁵ In the United States, punitive measures have increased considerably, with the number of arrests for internet child sex crimes⁴⁶ tripling between the years 2000 and 2009.⁴⁷ Average sentences are lengthier for child pornography offences, meaning offenders occupy custodial spaces longer, and require longer-term supervision for probation and parole.⁴⁸ Australia has promulgated mandatory sentencing, one-strike policies,⁴⁹ and the withdrawal of alternative sentencing strategies for sex offenders.⁵⁰ Any modification of sentencing (to more community-

⁴⁴ Barry M Maletzky and Cynthia Steinhauer, 'A 25-Year Follow-Up of Cognitive/Behavioral Therapy with 7275 Sexual Offenders' (2002) 26 *Behaviour Modification* 123, 128; Michael C Seto, R. Karl Hanson and Kelly M Babchishin, 'Contact Sexual Offending By Men Arrested for Child Pornography Offenses' (2011) 23 *Sexual Abuse: A Journal of Research and Treatment*, 124.

⁴⁵ E Lotke, *Sex Offenders: Does Treatment Work?* (National Center on Institutions and Alternatives, 1996); JM Brown, PA Langan and DJ Levin, *DJ Felony Sentences In State Courts* (US Department of Justice, 1999).

⁴⁶ Generally possession or distribution of child exploitation material.

⁴⁷ J Wolak, D Finkelhor and KJ Mitchell, 'Child Pornography Possessors: Trends in Offender and Case Characteristics' (2011) 23 *Sexual Abuse: A Journal of Research and Treatment* 22, 26.

⁴⁸ J Wolak, D Finkelhor and KJ Mitchell, *Law Enforcement Responses to Online Child Sexual Exploitation Crimes: The National Online Juvenile Victimization Study, 2000 & 2006* (Crimes Against Children Research Center, 2009).

⁴⁹ *Penalties and Sentences Act 1992* (Qld) s 161E(2): An offender who is convicted of a repeat serious child sex offence is liable to, despite any other penalty imposed by the Criminal Code, imprisonment for life, which cannot be mitigated or varied under any law.

⁵⁰ Ralph Henham, 'Sentencing Sex Offenders: Some Implications of Recent Criminal Justice Policy' (1998) 37(1) *The Howard Journal* 70, 72. See also Barbara E Smith, Susan W Hillenbrand and Sharon R Goretsky, *The Probation Response To Child Sexual Abuse Offenders: How Is It Working?* (American Bar Association, 1990); Jonathan Simon, 'Managing the Monstrous: Sex Offenders and the New Penology' (1998) 4(1/2) *Psychology, Public Policy & Law* 452.

based approaches) has been unavailable to child sex offenders, and the criminalisation of ‘low-level’ offences⁵¹ is resolute.

In Queensland, under section 228D of the *Criminal Code Act 1899* (Qld),⁵² it is an offence to possess child exploitation material.⁵³ This offence incurs a sentence of up to 14 years imprisonment. Under section 41(3) of the *Classification of Films Act 1991* (Qld),⁵⁴ it is an offence to knowingly have possession of a child abuse film,⁵⁵ incurring a sentence of up to 12 months imprisonment. Under section 14 of the *Classification of Publications Act 1991* (Qld),⁵⁶ it is an offence to knowingly possess a child abuse photograph or child abuse publication.⁵⁷ The sentence for this offence is imprisonment for 1 year.

In *R v Mara*⁵⁸ it was explained that ‘denunciation and deterrence (both general and personal) are particularly powerful considerations in sentencing for child pornography offences.’⁵⁹ Case law generally demonstrates that a sentence for possession of exploitative material will generally range from 1 to 3 years.⁶⁰ These are cases that do not include counts of more serious offences,⁶¹ such as *distribution* of child exploitation material,⁶² *production* of exploitation material,⁶³ or grooming a child for procurement.⁶⁴

For cases including more serious offences along with counts of possession of exploitative material, the sentence is more severe. *R v Tahiraj*⁶⁵ involved multiple counts of serious offences with different victims. The appellant displayed no contrition, had a complete lack of remorse, and little insight into his own conduct. Initially sentenced to 12 years’ imprisonment, this was appealed on the basis of relative closeness in age to the victims, ‘youthful immaturity,’ his family support and prospects of rehabilitation and previously clear criminal record. The appeal was allowed and his sentence reduced to 8 years’ imprisonment.

⁵¹ These offences involve conduct other than the direct physical perpetration of a sexual act upon a child, such as possession of child exploitation material. The creation or distribution of child exploitation material is intentional and mercenary conduct, and is not considered a mechanism of urge-control. See, eg, *Criminal Code Act 1899* (Qld) s 228D (14 years maximum penalty); *Crimes Act 1900* (NSW) s 91H (10 years maximum penalty); *Crimes Act 1958* (ACT) s 70 (10 years maximum penalty). For the purposes of this paper, the legislation will be limited to the Queensland jurisdiction, focusing on specific low-level offences.

⁵² *Criminal Code Act 1899* (Qld).

⁵³ Maximum penalty 14 years imprisonment.

⁵⁴ *Classification of Films Act 1991* (Qld).

⁵⁵ Maximum penalty 12 months imprisonment.

⁵⁶ *Classification of Publications Act 1991* (Qld).

⁵⁷ Maximum penalty 1 year imprisonment.

⁵⁸ [2009] 209 QCA.

⁵⁹ *Ibid* [20]. See also: *R v Carson* [2008] QCA 268 [32]; *R v Plunkett* [2006] QCA 182 [6]; *R v Wharley* [2007] QCA 295 [17].

⁶⁰ *R v Grehan* [2010] QCA 042 (3 year sentence); *R v Lloyd* [2011] QCA 012 (3 year sentence; appealed and granted to suspended 3 year and 2 years probation); *R v Gargett-Bennett* [2010] QCA 231 (3.5 year sentence appealed and down to 3 years).

See also: *R v Waszkiewicz* [2012] QCA 22 (2 year sentence); *R v Lovi* [2012] QCA 24 (sentence of 12 months imprisonment allowed on appeal); *R v Plunkett* [2006] QCA 182 (sentence of 18 months imprisonment).

⁶¹ ‘More serious’ for the purposes of this article, is any offence which involves physical perpetration, or non-personal

⁶² *Criminal Code Act 1899* (Qld) s 228C.

⁶³ *Ibid* s 228B.

⁶⁴ *Ibid* s 218B.

⁶⁵ [2014] QCA 353.

Often, the courts dismiss appeals against excessive sentences where the appeal is made on the basis of mental health⁶⁶ or clinical diagnosis. In *R v Mara*⁶⁷ the appellant had been diagnosed with paedophilia, but was sentenced to 6 years imprisonment alongside his two fellow perpetrators, for trading and possessing child exploitation material. The assessment made by a forensic psychologist was as follows:

He has no real insight or understanding as to why he found such abhorrent sexual images stimulating or as to why child exploitative material appeared to be his preference or why it led him to act in an illegal manner on a large number of occasions for a very long period of time. He is nevertheless “a man overwhelmed with his predicament, contrite, highly remorseful and ... genuine in his stated position that he desired to and had to change.”⁶⁸

However, in that case, the sentencing judge emphasised that the internet and child pornography exploits defenseless children to ‘feed the craving for personal sexual gratification of a paedophilic nature ... of your cruel, unnatural and disgusting perversion.’⁶⁹ Most cases concerning s 228D⁷⁰ include reference to Justice Kennedy’s judgement in *R v Jones*,⁷¹ where his Honour stated that ‘the offence of possessing child pornography cannot be characterised as a victimless crime. The children, in the end, are the victims.’⁷²

Similarly, the consideration of deterrence is at the forefront of judgements for these offences. Consequently, some offenders who are cooperative, remorseful, and able to seek rehabilitative treatment are nonetheless made an example of, as in *R v Riley*:⁷³

The evil and exploitive industry of child pornography is fed by those ... who download it from the internet. Others who might be similarly tempted should know they are likely to be detected, charged with a criminal offence, have a conviction recorded with all that ensues from it, be publicly shamed and risk being sentenced to a period of actual imprisonment, even if first offenders.⁷⁴

In *R v Cook; Ex parte Director of Public Prosecutions (Cth)*⁷⁵ the Crown successfully appealed a monetary penalty, which was then substituted for both a fine and 12-month prison sentence. Overall, it appears that the courts prefer custodial sentences over non-custodial ones for offences of this nature.⁷⁶

⁶⁶ *R v Craig Daniel Vantoosten* [2009] QCA 54.

⁶⁷ [2009] 209 QCA: Sentenced under s 474.19(1) of the *Criminal Code Act 1995* (Cth) – analogous to s 228D *Criminal Code Act 1899* (Qld).

⁶⁸ *Ibid* [16].

⁶⁹ *Ibid* [19].

⁷⁰ *Criminal Code Act 1899* (Qld) s 228D.

⁷¹ (1999) 108 A Crim R 50 (Kennedy J).

⁷² *Ibid* [9].

⁷³ [2007] QCA 391.

⁷⁴ *Ibid* [18] (McMurdo P, Jerrard JA and Dutney J). The sentence was set aside in this appeal, with the Court giving regard to s9(2)(a) of the *Penalties and Sentences Act 1992* (Qld).

⁷⁵ *R v Cook; Ex parte Director of Public Prosecutions (Cth)* [2004] QCA 469.

⁷⁶ See: *R v Salsone; ex parte A-G (Qld)* [2008] QCA 220, where the Attorney General appealed against sentences involving probation and community service. The appeal was allowed and offender sentenced to 15 months imprisonment.

This may be considered a deviation from rehabilitation as a sentencing objective, and contrary to section 9(2) of the *Penalties and Sentences Act 1992* (Qld) which states:

Courts [must] have regard to the principles that (a) a sentence of imprisonment should only be imposed as the last resort and (b) that a sentence which allows the offender to stay in the community is preferable.⁷⁷

Pursuant to this departure, the court in *R v Carlton*⁷⁸ held that the principle of imprisonment as a last resort should *not* apply to certain offences.⁷⁹ These offences include those of s 14 of the *Classification of Publications Act 1991*,⁸⁰ s 41(3) of the *Classification of Films Act 1991*,⁸¹ and s 228D of the *Criminal Code Act 1899*.⁸² This is consistent with s 9(4) of the *Penalties and Sentences Act 1992* (Qld),⁸³ which states that an individual convicted of any offence of a sexual nature committed in relation to a child under 16 years must serve an actual term of imprisonment. Enshrining the exceptions to rehabilitative sentencing is a reflection of a more punitive attitude, and an unwillingness to offer community-based approaches to child sex offenders.

Successful appeal cases concerning these offences contain considerable extenuating circumstances, such as judicial misdirection,⁸⁴ youth of perpetrator,⁸⁵ or other exceptional factors.⁸⁶ Remorse or guilty pleas do not seem to be mitigating factors in these cases. In *R v Sykes*⁸⁷ a sentence of 1 year and 3 months was upheld although the appellant had no prior convictions, sought counselling, and pled guilty. In *R v Davis*⁸⁸ acceptance of responsibility, remorse, cooperation with authorities, and family support were not enough to reduce a 4-year prison sentence.⁸⁹

Despite the rhetoric that seeks to justify it, it appears the real intent of sentencing is not to be rehabilitative, but to be disciplinary, and affirm the rule that has been broken by the offender. That is not to say that such intention is without merit; the very fabric of our judicial system relies on rule abidance, and the modern accessibility of child pornography is a reasonable concern for the judiciary. Viewing child pornography is often a high frequency behaviour, and at the end of the day, those children who are exploited in order to create it, are the victims. However, we must be careful not to limit ourselves to traditional disciplinary methods when we seek to protect our most

⁷⁷ *R v Cameron James Reid* [2000] QCA218 [5].

⁷⁸ *R v Carlton* [2010] 2 Qd R 340 [20].

⁷⁹ *Ibid* s 9(13).

⁸⁰ *Classification of Publications Act 1991* (Qld) s 14.

⁸¹ *Classification of Films Act 1991* (Qld) s 41(3).

⁸² *Criminal Code Act 1899* (Qld) s 228D.

⁸³ *Penalties and Sentences Act 1992* (Qld).

⁸⁴ *R v Campbell* (2009) 195 A Crim R 374; [2009] QCA 128.

⁸⁵ *R v Lovi* [2012] QCA 24. A male of 16 years old. Sentenced to 1 year's imprisonment, appealed to 1 year on immediate release with 2 year good behaviour bond.

⁸⁶ *R v Verburgt* [2009] QCA 33. Here the applicant successfully had sentence reduced from 12 months to 6 months, with his Honours giving regard to his mental capacity, employment, cooperation, counseling, family support, and the singular nature of the offence, with no additional distribution made by the offender.

⁸⁷ [2009] QCA 267.

⁸⁸ [2012] QCA 324.

⁸⁹ Further example: *R v Engeln* [2014] QCA 313 (no previous convictions; good employment history; family support; limited social interaction with females; low risk of reoffending; no genuine remorse; general deterrence approach. Appeal against 3 year sentence dismissed).

vulnerable demographics in a modern age. Traditional, punitive methods are no longer proving successful in that protective endeavor, and rehabilitative alternatives might do more.

IV CHILD SEX OFFENDING AND ‘PUNISHMENT’

A *The Experience of Punishment*

According to many sociologists, sentencing is no longer aimed at preventing crime.⁹⁰ By punishing the offender, the superiority of an ‘us’ and ‘them’ mentality is affirmed;⁹¹ comparing, excluding, and homogenising.⁹² Indeed, s 9(1) of the *Penalties and Sentences Act 1992* explicitly states the purposes for which a sentence may be imposed,⁹³ which encompass these values, including ‘to make it clear that the community... denounces the sort of conduct in which the offender was involved.’⁹⁴

Any period of incarceration can have a grave impact on the individual, both whilst in prison and for their reintegration into society. During incarceration, those labelled child sex offenders can suffer at the hands of their fellow inmates⁹⁵ and experience all the general symptoms of isolation and exclusion.⁹⁶ Post-incarceration, offenders are faced with a dearth of support to reintegrate: some variation of being jobless, friendless, homeless, without family support or psychological assistance is the experience of each individual who carries this label.⁹⁷ And the label itself may be the most damaging aspect of conviction and registration.

Society now treats child sex offending as an act by a particular species of individual, rather than as a particular type of conduct that is given a legal description. The accompanying stigma and collective antipathy turns mere judicial designation into ‘negative symbol capital that cannot be

⁹⁰ Emile Durkheim fathered this notion.

⁹¹ Chrysanthi Leon, *Sex Fiends, Perverts, and Paedophiles: Understanding Sex Crime Policy in America* (NYU Press, 2011) 180.

⁹² *Ibid* 181.

⁹³ *Penalties and Sentences Act 1992* (Qld): s 9(1)(a) to punish the offender to an extent or in a way that is just in all the circumstances; or

(b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or

(c) to deter the offender or other persons from committing the same or a similar offence; or

(d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or

(e) to protect the Queensland community from the offender.

⁹⁴ *Ibid* s 9(1)(d).

⁹⁵ See AN Groth, ‘Treatment of the Sexual Offender in a Correctional Institution’ in J Greer and I Stuart (eds), *The Sexual Aggressors: Current Perspectives on Treatment* (Von Nostrand Reinhold, 1983) 160.

See also Don Thompson, ‘Sex Offenders Are Being Killed Off in California Prisons,’ *Business Insider* (online), 17 February 2015 <<http://www.businessinsider.com/sex-offenders-are-being-killed-off-in-california-prisons-2015-2?IR=T>>; Associated Press, ‘Teacher Left Alone With Sex Offender In Prison Is Raped,’ *New York Times* (Online) 19 June 2014 <<http://nypost.com/2014/06/19/teacher-stabbed-assaulted-after-left-with-sex-offender-at-prison>> ; Michael James ‘Prison is Living Hell for Pedophiles,’ *ABC News* (online), 26 August 2003 <<http://abcnews.go.com/US/prison-living-hell-pedophiles/story?id=90004>>.

⁹⁶ Although prison is not designed to be a genuinely relaxed experience for offenders, it ought not be a sentence to endure psychological or physical torture.

⁹⁷ RK Hanson and K Morton-Bourgon, *Predictors of Sexual Recidivism: An Updated Meta-Analysis*. (Public Safety and Community Preparedness Canada, 2004).

shed and will, therefore, weigh on the bearer for life.’⁹⁸

Interviews with convicted sex offenders have found that this capital—framing them as monsters—dehumanises them, robbing them of choice or normality, and undermining treatment.⁹⁹ This may contribute to the high rates of recidivism amongst child sex offenders, and to the reluctance amongst non-offending paedophiles to seek preventative help.

B Recidivism

Precise statistics on recidivism rates are relatively scarce¹⁰⁰ due to the range of assessment methods and self-reporting variables.¹⁰¹ Available figures vary from 0 per cent to over 80 per cent, which indicates the difficulty in finding accurate information,¹⁰² and Australian studies on sex offender specific recidivism are next to non-existent.¹⁰³

However, two international studies note recidivism rates of 22–43 per cent¹⁰⁴ for those child sex offenders who are left untreated and unaided after incarceration. These statistics are specifically related to secondary offences of a sexual nature; secondary offences of a non-sexual nature are much more common.¹⁰⁵

Those who identify as paedophiles, or who are labelled as such, are often considered to be at greater risk for sexual recidivism compared to those who do not. However a number of studies have debunked this myth,¹⁰⁶ and for all the fear mongering about paedophilia and crime, sexual

⁹⁸ Leon, above n 91, 181.

⁹⁹ Pamela Schultz, *Not Monsters: Analyzing the Stories of Child Molesters* (Rowman & Littlefield, 2005).

¹⁰⁰ Daniel Turner and Peer Briken, ‘Child Sexual Abusers Working with Children - Characteristics and Risk Factors’ (2015) 10(1) *Sexual Offender Treatment* (online).

¹⁰¹ Office of the Inspector of Custodial Services, Western Australia, *Recidivism Rates and the Impact of Treatment Programs* (2014) 1. See also David Greenberg et al, ‘Recidivism of Child Molesters: A Study of Victim Relationship with the Perpetrator’ (2000) 24(11) *Child Abuse & Neglect* 1485.

¹⁰² Lita Furbey, Mark R Weinrott and Lyn Blackshaw, ‘Sex Offender Recidivism: A review’ (1989) 105(1) *Psychological Bulletin* 3; Robin J Wilson et al, ‘Community-Based Sex Offender Management: Combining Parole Supervision And Treatment To Reduce Recidivism’ (2000) 42(2) *Canadian Journal of Criminology* 177; Hanson and Morton-Bourgon, above n 97; Friedrich, Lösel and Martin Schmucker, ‘The Effectiveness of Treatment For Sexual Offenders: A Comprehensive Meta-Analysis’ (2005) 1(1) *Journal of Experimental Criminology* 117.

¹⁰³ Patrick Parkinson et al, ‘Nonsex Offences Committed By Child Molesters: Findings From A Longitudinal Study’ (2004) 48(1) *International Journal of Sex Offender Therapy and Comparative Criminology* 28; Steven W Smallbone and Richard K Wortley, ‘Criminal Diversity and Paraphilic Interests Among Adult Males Convicted of Sexual Offences Against Children’ (2004) 48(2) *International Journal of Offender Therapy and Comparative Criminology* 175.

¹⁰⁴ Heather M. Moulden et al, ‘Recidivism In Pedophiles: An Investigation Using Different Diagnostic Methods’ (2009) 20(5) *The Journal of Forensic Psychiatry & Psychology* 680. It has been found that anywhere between 22% to 45% of child sex offenders (identifying as paedophiles or not) reoffend after incarceration.

See also Dawn Fisher, ‘Adult Sex Offenders’ in Tony Morrison, Marcus Erooga and Richard Beckett (eds), *Sexual Offending Against Children: Assessment and Treatment of Male Abusers* (Routledge, 1994) 1, 14.

¹⁰⁵ Jason Payne, ‘Recidivism In Australia: Findings and Future Research’ (Research and Public Policy Series, Paper No 80, Australian Institute of Criminology, 2007) 130: Recidivism among male juvenile sexual offenders in Western Australia found that 67% recorded a new conviction after the index offence; the majority were for offences other than sex offences. See also Alfred Allan et al, ‘Recidivism Among Male Juvenile Sexual Offenders in Western Australia’ (2003) 10(2) *Psychiatry, Psychology and Law* 359.

¹⁰⁶ Moulden et al, above n 104, 697.

recidivism is lower than assumed.¹⁰⁷

What is evident from the studies available, is that offenders who are not offered treatment or assistance have higher reoffending rates than those who are.¹⁰⁸ Careful study of paedophilia across the medical, psychological, and sociological fields suggests that treatment of the individual offender—rather than incarceration—is a ‘legitimate social and correctional response.’¹⁰⁹

The child sex offender does indeed deserve special treatment. But if that treatment is to be correctional in any meaningful sense, programs of treatment must be fashioned to respond appropriately to the particular needs of this unique class of offenders. Simple incarceration is ineffectual and regressive.¹¹⁰

Research shows that across a wide range of offences, a generally punitive approach does little to prevent recidivism.¹¹¹ Remarkably, there is little to no evidence to suggest that viewing exploitative material such as child pornography has a correlation with subsequent hands-on offending. One prospective study has found that less than one per cent of 231 men who had viewed child pornography (but with no evidence of a prior physical sexual offending) had gone on to commit such a sexual offence.¹¹² Another study found that only one in eight non-contact offenders also perpetrated physically,¹¹³ falling short of the idea that conventional child sex offenders and those who access imagery are synonymous groups. From a statistical standpoint, individuals with no history of physical offences against a child, but who have accessed child pornography, are part of a low-risk group:¹¹⁴ the assumption that one leads to another is a misguided one. However, exposure in custodial settings to more serious sex offenders can heighten the risk of reoffending in lower-risk offenders.¹¹⁵

This, coupled with the hardships that befall those who have been convicted, generates problems for recidivism of both the sexual and non-sexual kind after incarceration. Punitive laws are

¹⁰⁷ RK Hanson and MT Bussiere, ‘Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies’ (1998) 66 *Journal of Consulting and Clinical Psychology* 348; A Harris and R Hanson, (2004) *Sex Offender Recidivism: A Simple Question* (Ottawa Ministry of Public Safety and Emergency Preparedness Canada, 2004).

¹⁰⁸ Hanson and Morton-Bourgon, above n 97; Lösel and Schmucker, above n 102.

¹⁰⁹ Roger Wolfe and Dominic Marino, ‘A Program of Behaviour Treatment for Incarcerated Pedophiles’ (1975-1976) 13 *American Criminal Law Review* 69, 69.

¹¹⁰ *Ibid* 70.

¹¹¹ Office of the Inspector of Custodial Services, above n 101, 1: over the past decade, between 40 and 45 per cent of offenders have returned to prison within two years.

See also Jane Goodman-Delahunty and Kate O’Brien, ‘Parental Sexual Offending: Managing Risk Through Diversion’ (Trends and Issues in Crime and Criminal Justice Series, Paper No. 482, Australian Institute of Criminology, 2014).

¹¹² Berlin, above n 3, 405.

¹¹³ M Seto, RK Hanson and KM Babchishin, ‘Contact Sexual Offending By Men Arrested For Child Pornography Offenses’ (2011) 23 *Sexual Abuse: A Journal of Research and Treatment* 124, 127.

¹¹⁴ Cecilia D’Anastasio, ‘Can Virtual Sex Prevent Pedophiles from Harming Children in Real Life?’ *Broadly Online*, 14 January 2016.

¹¹⁵ HC Wakeling, RE Mann and AJ Carter, ‘Do Low-Risk Sexual Offenders Need Treatment?’ (2003) 51(3) *The Howard Journal of Criminal Justice* 286.

confrontational, and provide no incentive for sex offenders to engage in a pro-social lifestyle after incarceration.¹¹⁶

V THERAPEUTIC JURISPRUDENCE AND CHILD SEX OFFENDING

A *Reducing Recidivism through Therapeutic Approaches to Sentencing*

Paedophiles, opportunistic child sex offenders, and child sex offenders who also suffer from paedophilic urges must be distinguished from one another if intervention is to be effective. If individuals experiencing paedophilic urges are sentenced to prison without treatment, they reoffend sooner and at a greater rate than those who have access to therapy.¹¹⁷ Therapeutic interventions may provide a more effective alternative in terms of community safety and treatment for individuals.

Therapeutic jurisprudence (‘TJ’) is a widely researched field, with supporters asserting that the law can successfully function as a therapeutic – rather than punitive – agent.¹¹⁸ It is a framework developed to study the law and its impact upon the physical and psychological wellbeing of individuals who come into contact with the justice system.¹¹⁹ This includes defendants, victims or survivors, and witnesses. The theory emphasises the need for a balanced approach in sentencing for low-level sex offences, placing particular importance on the ethical treatment of individuals, which can encourage more positive outcomes post-incarceration.¹²⁰

The justice system, as a social force affecting every member of society, has the capacity to be ‘therapeutic or anti-therapeutic,’¹²¹ and thus the prescriptive heart of TJ theory suggests that the law should be restructured if need be, to abide by inherent principles of justice.¹²² In turn, this has a holistic benefit for the community and those whom the law touches.

Without knowing the complex aetiology of paedophilia, and acknowledging that offending *can* be a consequence of this condition, there is less room for an empathetic approach to sentencing¹²³ or

¹¹⁶ Bruce Winick, ‘A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws’ in Winick, and La Fond (eds), *Protecting Society From Sexually Dangerous Offenders: Law, Justice, and Therapy* (American Psychological Association, 2003) 213. See also Astrid Birgden, ‘Serious Sex Offenders Monitoring Act 2005 (Vic): A Therapeutic Jurisprudence Analysis’ (2007) 14(1) *Psychiatry, Psychology and Law* 78, 78.

¹¹⁷ Jason Peebles, ‘Therapeutic Jurisprudence and the Sentencing of Sexual Offenders in Canada’ (1999) 43(3) *International Journal of Offender Therapy and Comparative Criminology* 275, 280.

¹¹⁸ Jeffrey Klotz et al, ‘Cognitive Restructuring Through Law: A Therapeutic Jurisprudence Approach to Sex Offenders and the Plea Process’ (1992) 15 *University of Puget Sound Law Review* 579, 581.

¹¹⁹ Astrid Birgden, ‘Serious Sex Offenders Monitoring Act 2005 (Vic): A Therapeutic Jurisprudence Analysis’ (2007) 14(1) *Psychiatry, Psychology and Law* 78, 80.

¹²⁰ Astrid Birgden, ‘Therapeutic Jurisprudence and Sex Offenders: A Psycho-Legal Approach to Protection’ (2004) 16(4) *Sexual Abuse: A Journal of Research and Treatment* 351.

¹²¹ David B. Wexler, ‘Therapeutic jurisprudence and changing conceptions of legal scholarship’ (1993) 11 *Behavioral Sciences and the Law* 17, 19.

¹²² Peebles, above n 117, 283. See also David B Wexler, ‘Therapeutic Jurisprudence and the Criminal Courts’ (1993) 35 *William and Mary Law Review* 279.

¹²³ Kate Warner et al, ‘Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study’ (Trends and Issues in Crime and Criminal Justice Series, Paper No. 407, Australian Institute of Criminology, 2011) 3. See also: Julia Davis, Kate Warner and Rebecca Bradfield, ‘Interviewing the Jury: Three Case Studies from the

prevention research.¹²⁴ However, there is now considerable evidence that psychological assistance can be delivered to those who suffer from paedophilia, helping them deal more effectively with their urges, and assisting them in redirecting their preferences to more appropriate partners.¹²⁵ Consequently, there is newfound support for therapeutic jurisprudence; sentencing that incorporates psychological assistance offered to those offenders who have paedophilia, and who want to make a change.

Researchers claim that sexual offenders who attend and cooperate with psychological treatment while incarcerated are less likely to reoffend than those who do not.¹²⁶ This is not an assertion that 'paedophilia' is curable; it is a hypothesis that with guidance and management assistance, an individual can control their urges. A paraphilia such as this is acknowledged as an unchanging manifestation,¹²⁷ one which causes distress to many individuals. Those who advocate TJ highlight that because of the distress and complex problems paedophiles experience, it is reasonable to assume that those who offend are more likely to be remorseful, open to rehabilitation, and willing to work hard at it than opportunistic child sex offenders.¹²⁸

A plethora of studies demonstrate that adult sex offenders who receive treatment are less likely to reoffend when compared to those who do not.¹²⁹ One meta-analysis conducted with 11 000 sex offenders revealed that only 7.2 per cent of those who went through prevention therapy were arrested for new crimes (sexual or otherwise), contrasted with 17.5 per cent of those who went without such therapy.¹³⁰

There are a number of studies assessing child sex offence recidivism rates after therapeutic approaches,¹³¹ with approximated recidivism rates ranging between 4–18 per cent¹³² for those

Tasmanian Jury Sentencing Study' in Bartels L & Richards K (eds), *Qualitative Criminology: Stories from the Field* (The Hawkins Press, 2011); Karen Gelb, 'Myths and Misconceptions: Public Opinion Versus Public Judgment About Sentencing' (2009) 21(4) *Federal Sentencing Reporter* 288.

¹²⁴ Malone, above n 1, interview with Elizabeth Letourneau. See also: Elizabeth Letourneau et al, 'Effects of Sex Offender Registration and Notification on Judicial Decisions' (2010) 35(3) *Criminal Justice Review* 295; Elizabeth Letourneau, 'A Prevention-First Approach To Child Sexual Abuse', *The Baltimore Sun* (online), 6 August 2013 <<http://www.baltimoresun.com/news/opinion/oped/bs-ed-child-sexual-abuse-20130806-story.html>>.

¹²⁵ LF Lowenstein, *Paedophilia: The Sexual Abuse of Children, Its Occurrence, Diagnosis and Treatment* (Able, 1998) 19. Some researchers emphasise that many paedophiles are also attracted to those their own age, however it is not the dominant sexual preference they have.

¹²⁶ RK Hanson and MT Bussiere, above n 107, 360. See also WL Marshall et al, 'Working Positively with Sexual Offenders. Maximizing the Effectiveness of Treatment' (2005) 20 *Journal of Interpersonal Violence* 1096.

¹²⁷ KM Beier, HG Bosinski and K Loewit, *Sexualmedizin* (Elsevier Urban & Fischer, 2005).

¹²⁸ Beier et al, above n 41, 853.

¹²⁹ Furbey et al, above n 102; B Gallager, 'Ritual Abuse: A Response to Coleman' (2001) 10(2) *Child Abuse Review* 83; Hanson and Morton-Bourgon, above n 97; Lösel and Schmucker, above n 102.

¹³⁰ MA Alexander, 'Sexual Offender Treatment Efficacy Revisited' (1999) 11 *Sex Abuse* 101, 112.

See, in addition: the most recent research has consolidated this, finding substantial decreases in the recidivism rates of 'treated' offenders versus untreated: Janice Marques et al, 'Effects of Cognitive-Behavioral Treatment on Sex Offender Recidivism— Preliminary Results of a Longitudinal Study' (1994) 21(1) *Criminal Justice and Behavior* 28.

¹³¹ R Hanson et al, 'First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sex Offenders' (2002) 14(2) *Sexual Abuse: A Journal of Research and Treatment*, 169; Heather Wood, 'Internet Pornography and Paedophilia' (2013) 27(4) *Psychoanalytic Psychotherapy* 319.

¹³² Dawn Fisher, 'Adult Sex Offenders' in Tony Morrison, Marcus Erooga and Richard Beckett (eds) *Sexual Offending Against Children: Assessment and Treatment of Male Abusers* (Routledge, 1994) 1, 14. Treatment programs such as Kingston Sexual Behaviour Clinic; Northwest Treatment Clinic; and Portland Sexual Abuse Clinic.

child sex offenders who are given assistance. There is limited concrete data due to the newness of modern treatment methods and therapy-based sentencing, but it is an assumption held by many researchers that therapy does reduce recidivism rates.¹³³

Those who evaluate the limited Australian programs stress the importance of post-incarceration support and reintegration assistance, and the high success therapeutic initiatives can have in lieu of punitive measures.¹³⁴ One Western Australian parliamentary study discovered that assistance and treatment programs (such as drug or sexual offender treatment) reduce the likelihood of reoffending¹³⁵ by offering management assistance and a level of personal support (rather than demonising an individual).

By treating offenders while they remain in the community – rather than separating them from society completely – these individuals can practice making responsible choices and managing their urges in the ‘real world’ immediately. They will be without the detrimental prison experience, and can work on their condition while surrounded by professionals and supportive personal network.

There have been a number of successful therapy-based initiatives over the decades, in Australia and internationally.

B *Best Practice Models of Therapeutic Jurisprudence for Child Sex Offenders*

In the early 1990s, Canada’s Hollow Water community created a Holistic Circle Healing Program,¹³⁶ which recognised that incarceration had more to do with ‘anger, revenge, guilt and shame... rather than the healthy resolution of the victimisation we were trying to address.’¹³⁷ In light of this, the Program was a therapy initiative for sexual offenders which embraced all willing participants who fully disclosed their offences and were eager to change.

Of the 48 cases dealt with by the Hollow Water CHCH only five have failed to enter into—and stay with—the program... these five went to gaol. Of the forty-three who completed the program only two repeated their crimes, one reoffending at an early stage, the second reoffending when the program was in its infancy. Since that reoffending he completed the formal healing program, and is now a valued member of the CHCH team.¹³⁸

Highlighting Canada’s more progressive approach to sentencing and offender assistance as it moves towards a more rehabilitation-focused criminal justice system, the Relapse Prevention

¹³³ Hanson and Morton-Bourgon, above n 97; Lösel and Schmucker, above n 102.

Comprehensive treatment efficacy literature is more difficult to come by, but for lively debate over the consensus of effective treatment see: Furbey et al., above n 102; L Berliner et al, ‘A Sentencing Alternative For Sex Offenders: A Study of Decision Making and Recidivism’ (1995) 10 *Journal of Interpersonal Violence* 487; K Heilbrun et al, ‘Sexual Offending: Linking Assessment, Intervention, and Decision-Making’ (1998) 4(1/2) *Psychology, Public Policy & Law* 138.

¹³⁴ Goodman-Delahunty and O’Brien, above n 111, 8.

¹³⁵ Office of the Inspector of Custodial Services, above n 101, 21. See also K Marsh, C Fox and R Sarmah, ‘Is Custody an Effective Sentencing Option For The UK? Evidence From a Meta-Analysis of Existing Studies’ (2009) 56 *Probation Journal* 129.

¹³⁶ R Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Penguin Books 1996).

¹³⁷ Ibid 38.

¹³⁸ Ibid 34.

Program at the Clarke Institute of Psychiatry in Toronto offers therapy for suspected child sex offenders, convicted child sex offenders, and individuals who seek preventative help before they offend.¹³⁹ Its basic assumption is that an individual can ‘learn to recognise risk situations and exert control over potentially harmful urges.’¹⁴⁰ The program works by empowering these paedophiles, rather than punishing them. It has seen considerable expansion over the years and the attendance rate for group therapy often extends far beyond parole requirements.¹⁴¹ Reflecting this trend, recent proposed changes to some provincial sentencing have advocated for community treatment and supervision, with probation periods instead of incarceration.¹⁴²

The ‘Stop It Now!’ campaign in Ireland and the United Kingdom, which works with adult abusers and those at risk of abusing, has also seen considerable success. It encourages individuals to ‘recognise their behaviour as abusive or potentially abusive and to seek help to change,’¹⁴³ without judgement or reprimand. In its first three years, over 1600 self-identified paedophiles (or child sex offenders) contacted the organisation’s helplines.¹⁴⁴ Two primary benefits to self-help programs such as this are that they can reach a wider demographic of at-risk individuals, and are extremely low-cost forms of intervention.¹⁴⁵

Charité’s Institute of Sexology and Sexual Medicine in Berlin has treated paedophilic men since the mid-1990s. Some have not committed offences, but are fearful of doing so. Others have committed some kind of offence and wish to avoid further perpetration. What is most notable in both kinds of cases is the distress their condition causes these individuals, their desperation to avoid being overwhelmed by it, and their subsequent eagerness to change.¹⁴⁶

The newest therapeutic initiative for such individuals has been functioning with great success in Germany.¹⁴⁷ The Berlin Prevention Project Dunkelfeld (‘PPD’)¹⁴⁸ was initiated as a preventative program to reach potential child abusers. Literally translating to ‘dark field,’ it consists of cases that have not been officially reported. PPD is based on cognitive-behavioural therapy, a method that has been proven successful with convicted child sex offenders.¹⁴⁹

Most importantly, the program works with the belief that a paedophile is not blamable ‘for the

¹³⁹ Laurie Gillies et al, ‘Relapse Prevention in Pedophiles: Clinical Issues and Program Development’ (1992) 33(2) *Canadian Psychology* 199, 200.

¹⁴⁰ Ibid.

¹⁴¹ Ibid 205.

¹⁴² Peebles, above n 117, 283.

¹⁴³ Lucy Faithful Foundation (2015) *Stop It Now UK – What We Do*.

¹⁴⁴ J Tabachnick and E Dawson (2000). *Stop It Now! Report #5—Four Year Evaluation: Findings Reveal Success of Stop It Now! Vermont*.

¹⁴⁵ Michael Seto, ‘Internet-Facilitated Sexual Offending’ in Office of Justice Programs, *Sex Offender Management Assessment and Planning Initiative* (US Department of Justice, 2013) 77, 83.

¹⁴⁶ Beier et al, above n 41, 853.

¹⁴⁷ Prevention Project Dunkelfeld, *Do You Like Children in Ways You Shouldn’t?* (2015) The Prevention Network <<https://www.dont-offend.org>>; KM Beier, ‘The German Dunkelfeld project: a Pilot Study to Prevent Child Sexual Abuse and the Use of Child Abusive Images.’ (2015) 12(2) *Journal of Sexual Medicine* 529.

¹⁴⁸ The project has full approval of the Charité Ethics Committee and is conducted in accordance with Germany’s Federal Data Protection Law and Privacy Acts.

¹⁴⁹ WL Marshall, ‘Appraising Treatment Outcome with Sexual Offenders’ in WL Marshall, YM Fernandez, LE Marshall, & GA Serran (eds) *Sexual Offender Treatment* (Wiley, 2006) 255.

existence of his sexual preference but rather for its behavioral consequences.¹⁵⁰ It is a given that life-long self-control is necessary, and different management options are offered to participants in order to find the right tools for each individual.¹⁵¹ Additionally emphasised is that this preventative therapy is proactive child protection rather than ‘perpetrator assistance,’ a common misunderstanding from the general public. By being proactive in the prevention of child sex crimes (rather than punitive after the fact), PPD is able to protect potential victims before they are harmed. The eligibility of participants varies from men who have not offended, but fear they might; men who have offended but are unknown to the justice system (embodying the concept of ‘dark field’); to men with a criminal record who do not want to reoffend. The willingness of these participants is motivated by personal moral concerns, rather than pressure from the justice system.¹⁵²

Remarkably, interest from potential participants came from not only Germany, but also Austria, Switzerland, and England. This indicates an apparent lack of facilities elsewhere, which is not surprising given that there is plenty of literature on prevention of abuse for children, parents, and the community, but very little for the potential offenders themselves.¹⁵³ More importantly, however, the international interest and willingness to travel also represent an impressive motivation to change, which is the inherent requirement for most TJ programs, and for the following reform recommendations. The primary benefits to self-help programs such as this is that they can reach a wider demographic of at-risk individuals, and are extreme forms of intervention.

One needn’t look far from home to find other examples of such programs. For example, under the *Pre-Trial Diversion of Offenders Regulation 2005*¹⁵⁴ New South Wales commenced a TJ program called Cedar Cottage, an initiative for intrafamilial offenders. Multiple evaluations of Cedar Cottage have found that programs like this are a workable alternative solution for low-level sex offenders.¹⁵⁵ It focused on diversionary measures in order to break the ‘costly and ineffective cycles of arrest, incarceration, release, and re-arrest that has often characterised the criminal justice system’s response.’¹⁵⁶ One evaluation established that the Cedar Cottage program effectively reduced sexual recidivism rates by 52 per cent.¹⁵⁷ More findings indicated that, compared with standard criminal prosecution and incarceration, treatment under the program reduced recidivism rates in low-risk offenders by 67 per cent, ‘whereas low-risk parental offenders who underwent standard criminal prosecution reoffended faster and at a higher rate.’¹⁵⁸ Although policy changes implemented in 2012 lead to the discontinuation of the program, Cedar Cottage offers a sample of the therapeutic sentencing that is possible for Australia.

¹⁵⁰ Beier et al, above n 41, 856.

For discussion on self-responsibility see: Robert Langevin and Reuben Lang, ‘Psychological Treatment of Paedophiles’ (1985) 3(4) *Behavioral Sciences & The Law* 403, 415.

¹⁵¹ Sexological tools (the help of an adult sexual partner) and medicinal options such as anti-androgens are offered to participants. No method is compulsory.

¹⁵² Beier et al, above n 41, 852.

¹⁵³ Michelle Elliot, ‘Child Sexual Abuse Prevention: What Offenders Tell Us’ (1995) 19(5) *Child Abuse & Neglect*, 579, 588.

¹⁵⁴ *Pre-Trial Diversion of Offenders Regulation 2005* (NSW).

¹⁵⁵ Goodman-Delahunty and O’Brien, above n 111, 8.

¹⁵⁶ Patricia A Griffin et al, *The Sequential Intercept Model and Criminal Justice: Promoting Community Alternatives for Individuals with Serious Mental Illness* (Oxford University Press, 2015) 165.

¹⁵⁷ L Butler, J Goodman-Delahunty and R Lulham, ‘Effectiveness of Pre-Trial Community-Based Diversion In Reducing Reoffending By Adult Intrafamilial Child Sex Offenders’ (2010) 39 *Criminal Justice and Behaviour* 493.

¹⁵⁸ Goodman-Delahunty and O’Brien, above n 110, 6.

Researchers have found that relapse prevention does not end with short-term treatment:¹⁵⁹ individual therapy sessions are imperative for independent progress and self-control. Some individuals also find group therapy to be a non-judgemental, safe space to work through their progress. Many members of treatment programs feel a need to continue to meet with a support group even after initial treatment and the learning of basic control strategies.¹⁶⁰ Sex offender treatment that uses this model was developed from the Alcoholics Anonymous approach, which has a focus on accountability and comes from the perspective that sexual deviation can be a compulsion to be managed.¹⁶¹

The number one factor for the success of these programs is ‘responsivity’ of participants. Not all offenders are the same in terms of their level of motivation to change,¹⁶² and only those who are motivated are good candidates. Some argue that when those with paedophilia are offered therapy as an alternative to imprisonment, it is a kind of ‘quasi-coercion’¹⁶³ by the courts.¹⁶⁴ However, many offenders offered such alternatives remark that they are aware of their right to refuse treatment,¹⁶⁵ and it is ultimately their own decision, fuelled by a desire to change.

VI CONCLUSION

The holistic costs of child sexual abuse are significant. Congruently, the benefits derived from appropriate and effective treatment of child sex offenders are considerable.¹⁶⁶ It is undisputable that certain crimes necessitate removal from society, and that individuals who show no remorse for their actions, and no inclination to change, cannot be reached using a therapeutic approach. However, imprisonment is costly and ineffective, and does little to uphold the human rights of both perpetrators and victims alike. Better long-term risk minimisation can be achieved by a therapeutic approach to the sentencing of low-level child sex offenders.

Effective treatment and management of child sex offenders can reduce costs of initial incarceration, re-incarceration, and victim assistance. Recent studies of community-based sentencing demonstrated that offenders recidivated significantly less after performing community service, or participating in a designated therapeutic program, compared with imprisonment.¹⁶⁷ The

¹⁵⁹ W Pithers, J Marques, C Gibal, and G Marian, ‘Relapse Prevention with Sexual Aggressives: A Self-Control Model of Treatment and Maintenance of Change’ in Greer and Stuart (eds) *The Sexual Aggressor: Current Perspective On Treatment* (Van Nostrand Reinhold, 1983) 214, 223.

¹⁶⁰ Gillies et al, above n 139, 202.

Often, disclosing to a group of those who have experienced similar distress or perpetrated similar actions offers a sense of relief. See also: Pithers et al, above n 159.

¹⁶¹ Leon, above n 91, 91.

¹⁶² Office of the Inspector of Custodial Services, above n 101, 22.

¹⁶³ Quasi-coercion being that offenders will feel pressured into accepting treatment out of fear of serving a lengthy prison sentence, rather than due to any desire to rehabilitate.

¹⁶⁴ Frédéric Gilbert and Farah Focquaert, ‘Rethinking responsibility in offenders with acquired paedophilia: Punishment or treatment?’ (2015) 38 *International Journal of Law and Psychiatry* 51, 57.

¹⁶⁵ *Ibid.*

¹⁶⁶ Martin Shanahan and Ron Donato, ‘Counting the cost: Estimating the economic benefit of pedophile treatment programs’ (2001) 25(4) *Child Abuse & Neglect* 541, 541.

¹⁶⁷ Hilde Wermink et al, ‘Comparing the effects of community service and short-term imprisonment on recidivism: a matched samples approach’ (2010) 6 *Journal of Experimental Psychology* 325.

upfront cost of such community-based treatment is less than the cost of custodial sentencing,¹⁶⁸ meaning that the system maximises return on its initial outlay for treatment resources.

The viability of such approaches requires emphasis being placed on victim benefit rather than fairness to the offender, and rightly so: turning to child exploitation material is a crime, and a just punishment is necessary. But punishment without purpose is not beneficial; the principle advantage of implementing paedophile and sex offender treatment programs is the subsequent reduction in recidivism rates,¹⁶⁹ while benefit to any potential victim lies in the complete prevention of any offence, prior to its perpetration. Deterrence of initial engagement can only serve to reduce demand for exploitative material,¹⁷⁰ reduce the likelihood of contact offences, and directly mitigate some instances of child sex abuse.

However, the trend toward populist punitiveness¹⁷¹ undermines the capacity of the Australian criminal justice system to affect ‘thoughtful and customised adjudication strategies at the court level and beyond,’¹⁷² unlike its Nordic and Canadian counterparts. Queensland has seen a re-emergence of punitive sanctions,¹⁷³ overlooking the legislation¹⁷⁴ which places emphasis upon rehabilitation¹⁷⁵ and remorse.¹⁷⁶ Therapy-based programs have been limited or shut down entirely, which indicates their subordinate status: they are contrary to the long-standing, traditional objectives of punishment, retribution, and incapacitation.¹⁷⁷

Any assumption that we can have a completely risk-free society is naïve. However, outdated laws should not prevail in the face of alternatives, particularly where those intransigent policies are ineffective. Whether therapeutic jurisprudence in this context is the perfect answer remains to be seen, however, it is clear that current approaches are not sufficient. It is necessary to foster a more supportive mentality toward those who are desperate to manage these urges and implement mechanisms to assist those who are desperate not to reoffend. Such changes have the potential to bridge the gulf in understanding between those who have paedophilic tendencies and those who want to protect society’s most vulnerable people (sometimes one in the same). Without this, the conflation of terms will continue, perpetuating the current confusion and limiting prevention of paedophilia-related child sexual abuse.

¹⁶⁸ Ibid.

¹⁶⁹ Shanahan and Donato, above n 166, 543.

¹⁷⁰ JJ Prescott, ‘Child Pornography and Community Notification: How an Attempt to Reduce Crime Can Achieve the Opposite’ 2011) 24(2) *Federal Sentencing Reporter* 93, 96: The expected criminal sanction the only way to reduce demand for child pornography. If the law is able to isolate child pornography producers and distributors from consumers who no longer need it, the incentive is removed.

¹⁷¹ Birgden, above n 120, 351. For further discussion on populist punitiveness see Simon, above n 50, 452; William Edwards and Christopher Hensley, ‘Restructuring Sex Offender Sentencing: A Therapeutic Jurisprudence Approach to the Criminal Justice Process’ (2001) 45(6) *International Journal of Offender Therapy and Comparative Criminology* 646.

¹⁷² Edwards and Hensley, above n 171, 646.

¹⁷³ Birgden, above n 120, 78. See also D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001); JQ La Fond, *Preventing Sexual Violence: How Society Should Cope with Sex Offenders* (American Psychological Association, 2005).

¹⁷⁴ *Penalties and Sentences Act 1992* (Qld) s 9(7).

¹⁷⁵ Ibid s 9(7)(c) the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community.

¹⁷⁶ Ibid s 9(7)(e) any remorse or lack of remorse of the offender.

¹⁷⁷ Edwards and Hensley, above n 171, 646.

