

Crime *by default*

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Legislating for parental restitution in Queensland.

In the wake of the recent State and federal election campaigns, the forces of political conservatism appear to dominate almost every aspect of social policy discourse. The 'mandate' given to the Coalition by the electorate has been rapidly translated by governments into a formidable array of radical-conservative measures. The issues that were previously closeted in a seemingly 'progressive' liberal state have now risen to public prominence. The 'crackdown' on the alleged 'mismanagement' of funds by Aboriginal organisations, the cuts to ATSIIC, higher education and employment training programs, the increased policing of social security fraud and the 'toughening up' of law-and-order are all symptomatic of a rapidly changing ideological climate.

Crime and moral order

In Queensland one of the most contentious areas of reform is taking place in relation to juvenile justice.¹ The Coalition, already bruised by its flirtation with the Police Union in the Memorandum of Understanding, is eagerly attempting to portray itself as the government of law-and-order. Coincidentally, as if on cue, there has emerged a number of moral panics over the supposed 'rising tide' of juvenile crime. For example, following a spate of robberies by teenagers in the outer suburbs of Townsville, as well as the bashing of a respected and widely known veteran of the second world war, the headline of a local newspaper called for 'Tougher Penalties for Juveniles' (*Townsville Bulletin*, 24 April 1996). In addition to reporting calls for longer sentences, and the public naming of offenders and their parents, the paper quoted the Attorney-General, Denver Beanland, as saying that '... the whole thrust of the *Juvenile Justice Act* will be to ensure that young offenders accept responsibility for their actions' and that 'the business of them shrugging their shoulders ... is going to cease'.

Among measures being proposed are longer sentences, family conferencing and increased parental restitution. In relation to the latter, it has been suggested that parents should be held directly accountable to victims for any damage or injury caused by their children. In cases of property damage, for example, parents may be required by the court to pay up to \$5000 in restitution.²

The repercussions of such measures for families, and especially for mothers who often end up holding households together, may, as suggested below, prove calamitous. The measures also legitimate the popular misconception that the origins of juvenile crime lie in particular family structures and relational dynamics. Single mothers or 'fatherless families' are represented in public discourse as the main harbingers of anti-social behaviours among their children.³ The supposed failure of parents (and especially of sole parents) to manage the behaviours of their children is seen by politicians and others as symptomatic of the demise of stable and 'traditional family life'.⁴ It is a failure of 'manners and morals' in which the causes of crime are seen

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to be connected to the erosion of 'traditional values' and individual responsibility.⁵ The task facing the State, therefore, is to engage institutional processes so as to ensure a return to a moral order based on the 'proper' roles and responsibilities of parents and their children.

Making them pay in Queensland

While the notion of parental restitution is hardly new, it has recently re-surfaced as a form of judicial penalty in a number of jurisdictions around Australia, including Queensland. Restitution exists both as an option for courts in respect of juvenile offenders and in the context of family conferencing. (Interestingly, it does not exist in relation to failure by the State in respect of those offenders who are under its care and protection. 'Exemptions' often apply in such cases.) Generally speaking, restitution is premised on the view that parents are culpable in the instigation, if not the commission, of their children's offending. It follows, therefore, that if juvenile offending occurs then parents should be held liable to pay restitution to the victim(s). In short, restitution may be defined as 'an order for payment for damage or loss resulting from the offence. A child or the child's parent or guardian may be ordered to repay the amount'.⁶

In Queensland, as elsewhere, legislative provision for parental restitution has existed for some time. Thus, s.2 of the *Children Services Act 1965* allowed for courts to:

... order such a child or a parent or guardian ... of a such a child [offender] or any two or more of such persons to pay compensation or make restitution in respect of the damage or loss occasioned by the offence to a charge of which such a child has pleaded guilty or of which he has been found guilty.

The *Children Services Act* thus provides for penalties to be imposed on parents or guardians where a failure to exercise 'proper' care, supervision and guardianship can be demonstrated by the court. More recently, the *Juvenile Justice Act 1992* includes similar provisions, although it is concerned explicitly with the 'wilful neglect' of parents in relation to the occurrence of juvenile crime. Like the previous legislation, the *Juvenile Justice Act* articulates a clear causal link between the alleged negligent actions of parents and guardians and the offending behaviour of their children:

... if it appears to the court that finds a child guilty of an offence relating to property or against the person of another, or evidence submitted or submissions made in the case against the child: (a) that wilful failure on the part of a parent of the child to exercise proper care of, or supervision over, the child was likely to have substantially contributed to the commission of the offence ... compensation [by the parent or guardian] should be paid to [the victim]. [s.197]

In enabling the court to widen its understanding of culpability in cases of juvenile crime to include the offender and her/his parents and guardians, the Act infers that such action occurs mainly because of the dereliction of parental responsibilities. However, there is no clear definition of what might constitute 'wilful neglect' on the part of parents or guardians in such instances, or how a 'substantial contribution' to the criminal act might be assessed. By allowing for such a broad framework of interpretation s.197 opens up the possibility for considerable variation in discretionary decision making by the court. Nonetheless, the Act proceeds to outline the conditions under which parental restitution should occur, namely that compensation (by the parent or guardian) should be paid to any person for:

1. loss caused to the person's property whether the loss was an element of the offence charged or happened in the course of the commission of the offence; or
2. injury suffered by the person, whether as the victim of the offence or otherwise, because of the commission of the offence ...

By enabling the court to grant orders of parental restitution in respect of harm caused by their children to victims, the Act links the criminal act *explicitly* to the ability and willingness of parents to exercise effective care and supervision. Section 197 further involves parents and guardians in the court process by allowing them to contest the imposition of restitution orders:

... of its own initiative or on application by the prosecution, [the court] may decide to call on the parent to show cause, as directed by the court, why the parent should not pay compensation.

This provision is a matter for the court's discretion. However, mindful of the fact that some parents and guardians may find it extremely difficult to meet restitution payments s.198 of the Act provides for consideration of financial circumstances:

In determining the amount to be paid by a parent by way of compensation, the court must have regard to the parent's capacity to pay the amount, which must include an assessment of the effect any order would have on the parent's capacity to provide for dependents.

In the event that parents are required by the court to pay compensation, the Act also outlines the conditions under which payment should be made. Section 198 states that the order must refer to:

- (a) the amount must be paid by a time specified in the order by instalments specified in the order; and
- (b) the amount must be paid in the first instance to the proper officer of the court.

The Act provides no clear indication of how the 'ability' to pay restitution is to be assessed and is equally unclear how penalties for default of payment are to be imposed. This allows for the possibility that parents and guardians may have to face criminal proceedings in the event of a failure to meet restitution requirements in the agreed time frame. Given that fine defaulters make up a significant proportion of the Australian prison population, such an outcome raises serious concerns over some of the unintended consequences of parental restitution.

Criminalising 'wilful default'

The proposal of the Queensland Government to place more emphasis on parental restitution as a means of crime management reflects a growing trend throughout Australia to penalise not only juvenile offenders but families as a whole. Recent legislation in New South Wales (*Children (Parental Responsibility) Act 1994*), Western Australia (*Young Offenders Act 1994*) and Tasmania (*Statute Law Revision (Penalties) Act 1994*, in association with the *Child Welfare Act 1960*) all include provisions allowing penalties to be imposed on parents where 'wilful' neglect or failure can be demonstrated to have contributed to the young person's offending. In the case of s.9 of the NSW legislation 'wilful default' on the part of parents is deemed to be an offence. Thus:

A person who by wilful default or by neglecting to exercise proper care and guardianship of the child, has contributed to the commission of the offence of which the child has been found guilty, is guilty of an offence.



This provision formally extends the boundaries of responsibility from the child to include his or her parents or guardians. Moreover, like the existing Queensland legislation, the *Children (Parental Responsibility) Act* (NSW) allows for the possibility of parents having to face further criminal proceedings should they breach the conditions of the court order. In short, the NSW legislation marks a significant shift in juvenile crime control insofar as the court may now *criminalise* parents for apparent dereliction of 'proper' care and supervision. Parents are thereby brought directly into formal criminal proceedings to face charges in their own right.

The emerging critique

While current reforms in Queensland are not intended explicitly to criminalise parents in the event of their children's offending, the proposed ceiling figure of \$5000 restitution raises a number of serious concerns. At a general level, critics point to the tendency of punitive and individualistic approaches, such as parental restitution, to abstract criminal action, and alleged parental culpability, from broader social, economic and political considerations.⁷ The result is an abstract articulation of justice that reduces criminal action to essentially moral and behavioural concerns. This form of reductionism ignores the complexities of criminal action and takes little or no account of the ways in which particular social groups are disproportionately policed and criminalised in the liberal state.⁸

The extension of punitive approaches in juvenile justice to include the parents and guardians of offenders rests on a number of crucial assumptions about crime causation. In particular, the notion of 'wilful failure' supports the idea that juvenile offending is the result of what are essentially the 'dysfunctional' features of family life. The inference is that 'low parental supervision' contributes directly to anti-social behaviours among children. According to the legislation, therefore, parents should be held liable for costs incurred through the actions of their children.

This assumption has attracted the most vehement criticism over recent months, particularly in relation to the NSW *Childrens (Parental Responsibility) Act*. The strength of opposition to this Act has emerged partly as a result of the explicit focus given to 'parental responsibility'. Foremost among the critics has been the New South Wales Council of Social Service (NCOSS). In a recent position paper the Council sets out a number of welfare and human rights concerns relating to the Act. NCOSS also asserts that the legislation runs counter to community-based initiatives out-

lined in a number of Green and White papers that preceded the ascent of the Act. Moreover, it is noted that:

... the likely impact [success?] of the legislation is severely curtailed by the exclusion from its ambit of wards of the state, a group which forms a large component of the number of homeless young people in the state.⁹

The Council is further mindful of the hardship that may be imposed on already hard-pressed families in the event of parents having to meet the demands of restitution orders. Thus:

... the impact on families already under stress is imaginable in practical (financial) terms but also likely to be considerable in terms of already fragile intra-family relationships.¹⁰

A similar view has been expressed by the Catholic Prison Ministry and the Church Network for Youth Justice. They argue that:

Most families where children are faced with court suffer from issues such as poverty, fractured relationships, domestic violence, unemployment, drug and alcohol abuse. Measures which shame and further alienate families who are the most in need of support and encouragement are to be deplored.¹¹

The Ministry also describes proposals by the President of the NSW Children's Court, Judge Fred Maguire, to fine those parents who fail to accompany their children to court, as 'anti-family, anti-community and pro-punishment. Solutions that are not grounded in a total social support approach are totally inadequate'.¹²

Criticism has also been expressed of the view that parents are indeed in a position to manage the behaviours of their children. Research shows that many of the breakdowns in relationships between children and their parents occur precisely because of disputes over household rules.¹³ This suggests that the simple association between 'low parental supervision' and juvenile crime implicit in the term 'wilful neglect' may in fact gloss over the intricate and often difficult processes of communication between family members. It also fails to recognise that parents may have made repeated efforts in the past to address their children's behaviours but without the necessary systems of social support have curbed their efforts. Moreover, it also assumes that it is indeed possible for parents to continually regulate their children's behaviours. As the Australian Association of Social Workers (AASW) points out:

The assumption that a parent can guarantee a child's behaviour at all times is simplistic, and is likely to affect disproportionate numbers of those on low incomes who are least able to pay fines. Convicting parents for not exercising proper care transforms failure as a parent into a crime, and punishes parents without offering help. The Act ignores the community's responsibility to create conditions conducive to effective parenting and focuses on the symptoms rather than the causes of the crime.¹⁴

The fact that parental restitution may in fact make the position of a family worse, and possibly reinforce the material conditions that contributed to offending in the first place, is an unintended consequence of such a measure. Indeed, the failure of the existing legislation to recognise the impact of poverty and disadvantage on growing numbers of families, and the results of this in terms of the ability of parents to provide effective care and supervision of their children, demonstrates an insensitivity to the realities of contemporary

family life. Furthermore, the penalisation of parents does little or nothing to improve the ways in which families themselves might address the problem of offending among their children. Indeed, the *de facto* criminalisation of parents constitutes yet another punitive attempt to formally control and regulate the actions of parents and young people. In addition, as Ian O'Connor points out in relation to Queensland's *Juvenile Justice Act*:¹⁵

The imposition of external solutions in fact destroys traditional modes of social control, and in consequence gives rise to many of the problems that result in children coming into contact with the child welfare and juvenile justice systems.

The ability of juvenile justice legislation to provide for positive and constructive responses to families in situations of difficulty requires an understanding of the social patterns of juvenile crime.¹⁶ This involves an appreciation of the ways in which structural and political forces shape processes of criminalisation as well as an awareness of the institutional means by which particular young people and their families are subject to differential patterns of policing.¹⁷

The fact that parental restitution is grounded in the individualistic principles of the justice model (with its emphasis on responsibility, accountability, proportionality, due process and so forth) means that such considerations are unlikely to receive attention in the sentencing process. To the contrary, the penalisation of parents for the actions of their children constitutes a punitive and retributive response on the part of the state to juvenile offending. It also supports the time-honoured view that the origins of juvenile crime are to be found in the homes of 'dysfunctional' or 'problem' families. Thus:

The principles of responsibility and restitution fit in neatly with recent populist assumptions about the general 'breakdown' in parental authority and the need for the restoration of greater discipline and control in the home.¹⁸

While such an essentialist understanding of juvenile crime may placate 'law-and-order' lobbyists, it does nothing to address the complex structural processes associated with offending. As noted by the NCOSS and the AASW, punitive measures such as parental restitution are likely to make the position of many families even worse and will further prevent parents and their children from engaging in empowering and self-directed approaches to crime management. By transforming crime into a moral issue (the failure to act 'responsibly') punitive approaches to justice merely disregard the role played by the state in generating the conditions that contributed to offending in the first place. Attention is thus drawn away from all the essential concerns of *social* justice and replaced by a narrow pre-occupation with individual moral failure. Put more bluntly, parental restitution (along with other punitive and retributive approaches) lays the *blame* for offending squarely on the shoulders of offenders and their children.

Conclusion

The Queensland Government's proposal to extend the legislative provision of parental restitution represents a shift to the more intense policing of young people and their parents. Specifically, the measures provide for increased penalties for parents where the court can demonstrate that 'wilful neglect' on the part of parents has contributed substantially to the offending of their children. In essence, the measures propose a highly individualistic and narrow view of crime causation: namely, that offending occurs primarily because of the failure of both the young person and his or her parents to act

'responsibly'. Crime is thus represented as a moral aberration, or a 'failure' on the part of parents to perform their 'proper' roles. Consequently, it only remains for the court to establish the degree of culpability on the part of parents and to punish them accordingly.

References

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