

# *Politics-led Policy and Policy-led Evidence: The Noetic Review of Juvenile Justice in New South Wales*

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## **Introduction**

On 4 June 2010, the New South Wales (NSW) Minister for Juvenile Justice the Hon Graham West announced his resignation from his ministerial post and indicated that he would leave Parliament at the next election. It was reported that his resignation was prompted not only by a desire to spend more time with his family, but also so that he could work 'more collaboratively in the welfare field' (Robins 2010) and 'speak a bit more freely' (Hall, Nichols and Robins 2010). *The Sydney Morning Herald* reported that there were two decisions in particular that had prompted his resignation: the first was a failure to notify him of the reversal of a decision, which he had previously publicly announced, to establish a program of 'bail houses' for young people (see Department of Juvenile Justice 2010); and the second was the failure of the Government to respond more positively to a major review of juvenile justice in NSW, undertaken by independent consultancy firm Noetic Solutions and released in May 2010 (the Noetic Report: Noetic Solutions 2010).

The Noetic Report, which was commissioned by the NSW Government in 2009, is a thorough and comprehensive review of juvenile justice in NSW set against national and international best practice. The Report includes: a history of juvenile justice in NSW; current statistics and trends; roles and descriptions of each of the main stakeholders involved in the juvenile justice system; the political context; legislative frameworks of relevance; references to whole-of-government initiatives; and specific chapters on indigenous young people in contact with the criminal justice system, and young women and culturally diverse groups. The Noetic Report makes 77 recommendations and concludes with the presentation of three costed strategic options for juvenile justice in NSW (Noetic Solutions 2010:170–91).

This comment was prompted by disappointment at the muted Government response to the Noetic Report, something shared with Graham West. It is the authors' opinion (and one that is probably widely held) that the NSW juvenile justice system is currently in a mess and that there is little political will to engage in a revitalised juvenile justice project. This comment looks at the details of the Noetic Report and the Government's response. It will raise questions about the role of the independent review and of evidence in policy development, and will question how a State that seemed to be at the forefront of progressive reforms embodied in the *Young Offenders Act 1997* (NSW) seems to have lost its way and has now embarked on a program of politics-led policy that is out of step with evidence, experience and international best practice and standards.

## **Before the Noetic Report – Assessing juvenile justice in NSW<sup>1</sup>**

Over the last 20 years there has been considerable development in juvenile justice policy in NSW. A spate of new legislation in the late 1980s was significant for the changes it heralded — separating child welfare from criminal matters, and providing the foundations for the current juvenile justice system (*Children's Court Act 1987* (NSW), *Children (Community Service Orders) Act 1987* (NSW), *Children (Detention Centres) Act 1987* (NSW), *Children*

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<sup>1</sup> See this Journal's special edition on youth justice, *Current Issues in Criminal Justice* vol 20 no 1 (July 2008), as well as the details contained in the Noetic Report (Noetic Solutions 2010).

(*Care and Protection*) Act 1987 (NSW)). During this time, a number of United Nations (UN) policies concerning children's rights were tabled, including: the *UN Standard Minimum Rules for the Administration of Juvenile Justice* ('The Beijing Rules'); the *UN Guidelines for the Prevention of Juvenile Delinquency* ('The Riyadh Guidelines'); and the *UN Rules for the Protection of Juveniles Deprived of their Liberty*. In 1989, Australia became a signatory to the *UN Convention on the Rights of the Child* (CROC), which set out 11 principles to guide the sentencing of young offenders.

The early 1990s were marked by a series of review papers that framed policy reform in the NSW juvenile justice system over the following decades. In 1990, the NSW Youth Justice Coalition produced its report, 'Kids in Justice: A Blueprint for the 90s' (Youth Justice Coalition 1990), which led to a Green Paper written by the Juvenile Justice Advisory Council (1993) and subsequently a White Paper: *Breaking the Crime Cycle: New Direction in Juvenile Justice in NSW* (NSW Government 1994). Perhaps the clearest theme running through these papers was, in keeping with the CROC and the Beijing Rules, a real recognition of the rights of children and young people, and of the need for children and young people to be dealt with differently to adults, as well as a commitment to divert, where possible, young people from formal intervention and to use detention as a last resort. The culmination of this period of reform came with the introduction of the *Young Offenders Act*; a piece of legislation widely well regarded as a groundbreaking reform for creating a four-tiered system, with the first three tiers (warnings, cautions, youth justice conferences) purposely diverting young people from court.

The 2000s continued with juvenile justice reform notably including: the introduction of the NSW Youth Drug and Alcohol Court in 2000; strategic plans aimed at addressing the specific needs of both Aboriginal young people in contact with the criminal justice system (*Aboriginal Over-representation Strategic Plan*) and young women (*Girls' and Young Women's Action Plan 2002-2004*); and the provision, for the first time ever, of comprehensive data concerning the physical and mental health characteristics of young people in contact with the NSW juvenile justice system both in custody (Department of Juvenile Justice 2003) and serving community orders (Kenny et al 2006).

Another distinct and positive feature of juvenile justice in NSW is Legal Aid's specialist Children's Legal Service and the free Legal Aid Youth Hotline for young people in contact with the law.

This is not to suggest that these were halcyon years — the disadvantage entrenched in the lives of young people in contact with the criminal justice system and the imperative for intergovernmental liaison, set a formidable context for progress. However, it does seem that during this period of NSW juvenile justice history there was an attempt to balance the need for justice and holding young people accountable, with innovative rehabilitation strategies and a respect for the rights of the child. We now know that the *Young Offenders Act* does work to divert young people from court (Chan 2005), we have some evidence that both cautions and youth conferencing reduce reoffending when compared to young people who go straight to court (see Vignaendra and Fitzgerald 2006; Luke and Lind 2002 respectively), and we know that the Youth Drug and Alcohol Court has met many of its stated aims (Eardley et al 2004).

In stark contrast to the innovations outlined above, in recent times it appears that the political pressure to introduce more 'law and order' style policies has resulted in a series of measures that seem philosophically opposed to the principles of diversion and court as last

resort and detention as an option of last resort, and that, in turn, have had a disproportionately severe impact on young people (Youth Justice Coalition 2009). The changes to public order and fines legislation, extension of police powers coupled with changes to bail legislation and the policing of compliance with bail conditions has resulted in closer supervision of young people in public places, and a rise in the arrest and detention of young people — increasingly for breaches of bail conditions — regardless of the nature of the breach and the circumstances (Youth Justice Coalition 2009). In addition, although a recent policy initiative on antisocial behaviour — the pilot ‘youth conduct order’ (*Children (Criminal Proceedings) Amendment (Youth Conduct Orders) Act 2008* (NSW)) — has not yet been evaluated, the cumbersome nature of the proceedings, the lack of community programs to provide young people with support, and the fact that it was based on the UK’s notorious ‘antisocial behaviour orders’ does not augur well for its future as a diversionary strategy.

It is of no surprise, then, that the cumulative result has been a significant rise in the number of children and young people in custody. The average daily number of young people held in custody has risen from 272 in 2003–04 to 427 in 2008–09 (Noetic Solutions 2010:21) leaving NSW with the third highest rate of incarceration of children in Australia behind the Northern Territory and Western Australia (Noetic Solutions 2010:8). The numbers of children and young people admitted to detention on control orders increased from 480 in 2003–04 to 711 in 2008–09 (Noetic Solutions 2010:20); there has similarly been a significant rise in the number of young people admitted on remand — from 3255 in 2003–04 to 4634 in 2008–09 (Noetic Solutions 2010:20). Of those held on remand in 2008–09, 78.3% did not go on to receive a detention order within 12 months (Taylor 2009; Noetic Solutions 2010:22). Of huge concern is the significant and well-documented over-representation of Aboriginal children and young people in the juvenile justice system and the fact that this has not been reduced in NSW over the last decade (Noetic Solutions 2010:138).

Another important influence on policy reform, and funding priorities in NSW has been the NSW State Plan. Introduced in 2006 and revised in 2010, the State Plan establishes key aims and objectives that are said to guide the direction of policy and practice in NSW, including juvenile justice (NSW Government 2010a). Government performance is evaluated against the indicators established in the State Plan and State Budget allocations are aligned with the measures established (see, eg, NSW Budget 2010–11: NSW Government (2010b)).

As the Youth Justice Coalition point out in its ‘Bail Me Out’ Report, there are now a number of contradictions and points of conflict in current juvenile justice policies (Youth Justice Coalition 2009:1). For example, on the one hand the State Plan has an ‘objective to keep the community safe through tightened monitoring of those at high risk of offending’ — prompting the decision to closely police young people on bail and consequently placing young people into custody. Yet, on the other hand, diversionary strategies that aim to keep young people away from the formal system and from re-offending are fundamental to the principles of the *Young Offenders Act*. Reduction in recidivism, ironically, is another key target of the State Plan (Youth Justice Coalition 2009), yet it is widely recognised that putting young people into custody will not reduce recidivism, no matter how it is measured.

All this indicates a system that is in a mess — a system that has lost overall direction and could use a systematic review. To its credit, the NSW Government acted on this and in 2009 the Minister for Juvenile Justice (the Hon Graham West) established the terms of reference for a review (see Noetic Solutions 2010:1–2), a reference that was subsequently sent out for tender and won by Noetic Solutions.

## The Noetic Report

The independent review offered the first systematic government-commissioned review of all aspects of the juvenile system in NSW since the early 1990s.<sup>2</sup> It brought together material from extensive consultation with government and non-government youth justice agencies, academics, members of the public and young people involved in the juvenile justice system. It also drew on research from Australia and overseas. Yet, despite it being a significant, visionary document, the release of the Noetic Report received very little media coverage, as well as a less-than-enthusiastic response from the NSW Government (Horin 2010). By contrast, the Report was welcomed in the youth sector — many of the recommendations echoed findings of previous inquiries and research, validated the direct experience of those people working with young people and reflected the view that there needed to be a significant overhaul of juvenile justice to move positively into the future.

The options and costing in the Report centre around how best to address the increasing numbers of incarcerated young people given that the majority are being held on remand.

The first option — to ‘continue on the same path’ — would cost about A\$348.14 million over the next six years, with much of that going to building new centres to accommodate the projected numbers of young people on remand and custody orders. Maintaining the status quo is, of course, relatively risk free, however the Noetic Report suggests it is ‘highly unlikely to address the underlying causes of crime or reduce re-offending’.

The second option — ‘less costs and some better outcomes’ — would cost about \$34.4 million over the next three years. In targeting the Report’s recommendations to reduce the remand population it would decrease the need for more custodial space and reduce associated building costs. However, because few of the Report’s other recommendations would be taken up in this option — for example, the strategies designed to reduce indigenous offending — Noetic suggests that, on the whole, this second option would be unlikely to bring about any general reduction in re-offending, or work to address the various causes of crime.

The Noetic Report supports the third option, which requires ‘a change in thinking’ and ‘[j]ustice [r]einvestment’. This strategy involves acting on all the review recommendations and diverting the funds that would be used to build juvenile justice centres into evidence-based prevention and early intervention programs and services for local communities. Thus, the cost would be A\$348.14 million. While there is some risk attached to the certainty of outcomes, it is only this option that the Noetic Report believes might bring ‘significant long term benefits for the community’ (Noetic Solutions 2010:169).

## The NSW Government’s response

The 46-page *Government Response to Juvenile Justice Review* has been made available on the Department of Juvenile Justice website (NSW Government 2010c). The response carefully speaks to each of Noetic’s 77 recommendations, but does not explicitly ‘choose’ a particular strategic option for moving forward. In so doing, it makes clear that a ‘justice reinvestment’ is not in the pipeline.

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<sup>2</sup> Excluding the NSW Juvenile Justice Advisory Council’s smaller scope ‘snapshot’ of juvenile justice in NSW: Juvenile Justice Advisory Council (2007).

On the surface there is much that the Government supports in the Noetic Report. There is agreement that children and young people are sufficiently different to adults to warrant different treatment in a criminal justice system; that all young people need to be held accountable for their actions; that the evidence suggests incarceration does not work to reduce offending; that the number of young people in detention is rising; and that the significant overrepresentation of Aboriginal young people in custody has not been addressed. There is also agreement on the need for whole-of-government and whole-of-community engagement with juvenile justice due to the complexity of disadvantage facing many young people in contact with the law.

However, a close reading of the Government's response makes clear that very few of the recommendations will actually be implemented. In the majority of instances, the Government's response argues that existing policy is sufficient it thus evades any commitment to action.

Of particular disappointment, given the increasing numbers of young people on remand, was the complete lack of support for recommendations concerning bail (see Recommendations 6, 17, 18, 19, 20, 21, 22, 23, 24, 53: Noetic Solutions 2010). The Government's response that no legislative changes would be supported, that no extra bail accommodation assistance was needed and that existing policy (the approved Bail Assistance Hotline) would be sufficient, suggests it is burying its head in the sand on this issue (NSW Government 2010c:9).

Some suggestions — such as giving the Children's Court its own status separate from local courts and having specialist Children's Court magistrates hear all children's matters through a circuit rotation system — were rejected outright as not 'cost effective or efficient' (NSW Government 2010c:31). Other recommendations will be kept under review, such as Recommendation 2 to have a children and young person's impact statement introduced to legislative and policy process (NSW Government 2010c:3).

It is, of course, ironic that in this 'evidence-led' environment, among the recommendations rejected as unnecessary were Recommendations 3 and 4 concerning evaluation: that '[n]o juvenile justice pilot program be approved without an evaluation framework and associated funding'; and that 'a common evaluation framework for all programs and pilots related to juvenile justice [be] developed' (NSW Government 2010c:5).

## **Reflecting on the policy process**

The commissioning of the Noetic Report, its findings and the Government's response to the Report provide us with important, detailed information about the state of juvenile justice in NSW, as well as potential, immediate and future policy directions. In relation to policy process, it also raises interesting questions about the role of independent reviews and inquiries in formulating policy agendas and options, and influencing decision making.

Over the years, auditing, research and policy evaluation have become increasingly privatised and profitable sources of business, as governments outsource many policy-related activities. This has been partly a result of cost saving by government, but also the result of the impact of new managerialist business models across State-funded agencies that require the devolution and separation of research, governance and service delivery set against performance indicators.

In NSW, the Youth Justice Advisory Committee and the Juvenile Justice Advisory Council (both since disbanded) provided the Government with independent, expert advice on the operation of the *Young Offenders Act* and related issues and policy. A particular strength of the Juvenile Justice Advisory Council came from its independence from the Department of Juvenile Justice and its broad membership, including many youth experts drawn from the community sector (for details of their work, see <<http://www.djj.nsw.gov.au/jjac1.htm>>). Since 2008, the Young Offenders Advisory Council has provided expert advice to the NSW Attorney-General and the Department of Juvenile Justice (for the Terms of Reference see <[http://www.djj.nsw.gov.au/pdf\\_html/YOAC%20TOR%20Final%20Dec%2009.pdf](http://www.djj.nsw.gov.au/pdf_html/YOAC%20TOR%20Final%20Dec%2009.pdf)>).

Other sources of independent review and inquiry include: standing and ad hoc parliamentary committees; the NSW Ombudsman's scheduled and delegated reports on legislation relating to children and young people; and commissioned reports, such as the NSW Law Reform Commission's Report on young offenders and semi-independent reports of the Audit Office of NSW. Unfortunately, it appears that the evidence gathered and the research accumulated has often resulted in little or no related policy reform —leading to a situation where, as John Lea eloquently argues in his work on UK inquiries into ethnic and racial disturbances, these findings become repositories, 'museums of official discourse' (Lea 2004:184).

So why does it appear that nothing, or so little, happens as a consequence of review and inquiry processes? Perhaps the more cynical amongst us might say that governments only use these evidence-gathering processes as strategies — to avoid criticism, to be seen to be doing something, to delay action or to divert attention. In essence, there seems to be no political will or imagination to act. Yet, it could also be argued that it is the very process of review that is valuable —where governments provide meaningful opportunities for the broader community of interest and/or non-government policy experts to engage in policy analysis and the formulation of options.

George Gilligan (2004:15), in his work on official discourse, provides a critical overview of the role of independent inquiries and reviews — placing them into two broad categories:

- a pragmatic and/ or legal function to investigate an issue for a government, collect information, submit a report and make recommendations; and
- a broader political or ideological function as a technique of governance, in particular a capability for crisis management of an issue or a range of issues.

Gilligan (2004:15, citing Prasser) goes on to suggest that the purpose of inquiries and reviews can be broken down into a number of other categories, including:

- to provide a perceived independent response to a crisis situation;
- to investigate allegations of impropriety;
- to obtain information;
- to define policy problems;
- to provide government with policy options;
- to help governments manage policy agendas;

- to justify government decisions; and
- to help governments determine what to do about previous promises.

Gilligan (2004) argues that independently-commissioned reports may allow governments to save money and also to provide investigations with the legitimacy of independence and rational consideration. At the same time, delegating research and evidence-gathering allows governments to distance themselves from any recommendations and findings. They are not bound to take on the recommendations — they can ‘cherry pick’ and ignore unwelcome findings. The findings can become areas for contestation and debate as parties negotiate, or take stances over the real ‘truths’ or better evidentiary accounts (Gilligan 2004).

The Noetic Report and the Government’s response offer a clear example of elements of the above. They offer different perspectives on the same problem encompassing different versions of appropriate policy strategies and ‘competing, complementary or contradictory truths about the same set of social facts’ (Gilligan 2004:21). Ultimately, the Government holds the power, authority and resources to accept or reject the findings — managing the release to the press of the Noetic Report is one way of exerting control over the release of the information and the Government’s response.

### **‘Evidence-led’ policy**

Although it is not a new concept, there has been a re-emergence in Australian policy debates — across political parties and at Federal and State level — for public policy to be ‘evidence-based’ or ‘evidence-led’ (see, eg, Banks 2009). This logically would lead to a new visionary juvenile justice agenda being driven by the compelling evidence for the reinvestment in juvenile justice presented by the Noetic Report.

There is a strong appeal in the idea that policy should be developed on the basis of thorough research, and that evidence should stand over and above any partisan interests in directing policy. Yet, despite the beguiling nature of the phrase ‘evidence-led policy’, there is a need to be wary about using it uncritically. There are a number of assumptions underpinning the phrase, which often remain unrecognised: first, there is a tendency to assume that we all know and agree on what we mean by evidence-led policy; second, it is assumed that evidence is and should be available to policymakers; and third, policies based on evidence are presumed to be better than ones not based on evidence (Maddisson and Denniss 2009:220). Those engaged in research and policy development understand that particular kinds of research — namely quantitative, ‘scientific’ research — is often privileged over other types of research. It is worth reminding ourselves that the use of evidence in agenda setting and decision making is relative and selective, there are many other factors that, at any one time, will shape the policy process. These include, but are not limited to: prevailing public opinion; political policy events such as elections; changes of ministers and governments; fiscal constraints and budgets; institutional constraints; policy actors; political power; policy discourse; organisational cultures; agenda setting; one-off events; political economy; and new managerialism (Colebatch 2005; Kingdon 2003; Howlett and Ramesh 2003; Maddisson and Denniss 2009). In relation to criminal and juvenile justice policy in NSW, it is important to add to this list: ‘penal populism’; the ‘politics of law and order’ (Weatherburn 2004; Hogg and Brown 1998); and the performance indicators of the State Plan.

This constellation of influences on policy development, decision making and implementation has led some commentators to talk about ‘evidence-informed policy’ and others to talk of ‘policy-led evidence’. In the latter case, it is the policy direction or the political strategy that dictates which evidence is selected, and not the other way round.

## Concluding remarks

Could the Noetic Report have been for the 2010s what the Youth Justice Coalition’s ‘Kids in Justice’ Report was for the 1990s? Perhaps. The Report provided the NSW Government with a timely and thorough review of the current juvenile justice system in NSW, a detailed review of innovation, and a series of recommendations for the future informed by substantial research and best practice evidence. Unfortunately, without the political will needed to navigate the complexities of a juvenile justice system, reform will be stymied.

In its refusal to appropriately engage with the Noetic Report, the Government positions itself as being driven by a set of policy priorities that are not evidence-based. Policies are being shaped by the State Plan — which, in itself, is internally contradictory and unclear in relation to juvenile justice, and clashes with principles and philosophy of the *NSW Young Offenders Act*. As the Government appears to be losing credibility through constant political scandals and disparaging critiques of its policies by the media and the Opposition, it appears yet again to be playing it safe with juvenile justice by surrendering vision and innovation to political expediency and the politics of ‘law and order’.

The idea of evidence-led policy is commendable, but we need strong leadership and courage to pursue innovation. Being distracted by the perceived politics of the day is never an adequate excuse for not engaging in topics concerning children, young people and justice.

Elaine Fishwick and Jane Bolitho, PhD

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## Legislation

*Children (Care and Protection) Act 1987* (NSW)

*Children (Community Service Orders) Act 1987* (NSW)

*Children (Criminal Proceedings) Amendment (Youth Conduct Orders) Act 2008* (NSW)

*Children (Detention Centres) Act 1987* (NSW)

*Children’s Court Act 1987* (NSW)

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