

WHEN THE VULNERABLE OFFEND

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INTRODUCTION

The title of this paper, “When the Vulnerable Offend” might be confusing to some. Surely, it is the victims of crime who are vulnerable not offenders. In common usage we tend to think of someone who is vulnerable as someone susceptible to harm. Vulnerable is from the Latin *vulnus* which means wound. To say then that someone is vulnerable can describe someone who is open to being physically or emotionally wounded. Children are easily recognised as being vulnerable. To start with, they are reliant on others for the very basics of life, food, shelter and clothing. They have limited ability because of their physique to protect themselves from physical harm. Young children who are not attending day care or school are particularly vulnerable as this often means there is no independent adult authority to act on concerns of neglect and abuse. This paper discusses some of the causative factors for youth offending and proposes some alternative approaches for dealing with offenders.

SAD KIDS AND BAD KIDS

Those of us who frequently sit in both the Youth Justice Court and Local Court Child Protection matters sometimes colloquially refer to the “sad kids” and the “bad kids”. The kids who have had sad things happen to them and the kids who have done some bad things. It is true that not all sad kids do bad things but the bad kids, particularly the ones we see often, are almost always sad kids.

This can be borne out, for example, by the very high proportion of young offenders held in detention who are children who have been previously found to be in need of protection by a court and who have been placed under the care of the Department of Children and Families. Although no formal records appear to be maintained, having monitored the daily detention lists now for well over a year, I can safely assert that the number of children in the care of the Department of Children and Families who are in detention runs around 25 to 30% of the detention population at any given time.

Additionally, some young offenders who are not under care orders at the time they appear before the court will subsequently have applications for protection orders made as a result of the Court ordering an assessment as to their well-being by the CEO of Children and Families.¹ For others, sentencing and other reports ordered by the court will reveal a high level of family dysfunction and lack of care.

¹ Section 51 Youth Justice Act permits the court if it believes that a child may be a child in need of protection; or there is a risk to the wellbeing of the youth to require the CEO to investigate the circumstances of the youth; and to take appropriate action to promote the wellbeing of the youth. The CEO must provide a report to the Court as to the circumstances of the child and any action taken regarding those circumstances.

Unfortunately, I have also seen many cases over the years where section 51 reports were ordered and although the Youth Justice Court was of the opinion that protection intervention was warranted, the needed intervention did not occur with the result that the young person then continued offending and then reached an age that made a protection application by the relevant authority impracticable or unlikely to bring about the change in circumstances required. In some cases, an intervention for that child might have prevented a younger sibling from also becoming an offender. We have many sibling groups before the Youth Justice Court.

Example:

Z was 16 years old and moving about with his parents either long grassing or from community to community. His school attendance was unsurprisingly very limited. The section 51 report revealed that amongst other things his father would give him petrol to sniff. The conclusion of the report was that he should be encouraged to be "an independent young man". Not only was Z let down by the failure to intervene but his younger siblings some years later were taken into care. His younger brother C is now a youth offender and a chronic volatile substance abuser.

However, it should also be obvious from the detention figures mentioned that simply taking an abused young person into care does not provide an automatic panacea for the behavioural issues that arise from their past abuse and neglect. It is these issues that need attendance and simply placing a child in a new "home" will not cure those problems. I recognise that some young people are resistant to engaging in therapeutic programs however I am amazed at the number of times in Court when I have asked what interventions are in place that I have been told that they are awaiting approval or have not been arranged. Generally this appears to be a resource issue not a lack of will on the part of the caseworkers who often seem frustrated by their inability to access assistance.

When the high proportion of child offenders who have been abused or neglected is raised a not uncommon reaction is to ask, what about the others who have likewise experienced abuse and neglect? They have not got into trouble so why should we be considering those factors in dealing with the ones who do? The answer to the question as to why some abused or neglected children offend and why others do not is quite complex. For example, although all violent behaviour impacts on children (including witnessing violence) the impact will differ depending on matters such as the type of violence, the pattern of violence, the presence (or absence) of supportive adult caretakers and other support systems, and, of key importance, the age of the child².

² Perry, BD Incubated in Terror: Neurodevelopmental Factors in the 'Cycle of Violence' In: Children, Youth and Violence: The Search for Solutions (J Osofsky, Ed.). Guilford Press, New York, pp 124-148, 1997

Resilient or Malleable?

I have many times heard it said that children are resilient. It is often said in the context of abuse and neglect. There is an impression that children are good at “getting over” the things that they have experienced.

Resilience is a human quality and one that people appear to possess in varying amounts. Some people demonstrate greater resilience to life’s ups and downs than others. We can no doubt reflect on family and friends and see the different ways in which they have reacted and recovered from the same or similar traumatic events.

But is this true? Do children recover from trauma simply because they are removed from those circumstances or seem to be able to function with the family dysfunction around them?

In the opening to his chapter “*Incubated in Terror: The neurodevelopmental factors in the ‘Cycle of Violence’*”³ Dr Bruce Perry states

"Children are not resilient, children are malleable."

He draws on the definitions of these terms

Resilient

1. *Marked by the ability to recover readily, as from misfortune.*
2. *Capable of returning to an original shape or position, as after having been compressed.*

Malleable

1. *Capable of being shaped or formed, as by hammering or pressure: a malleable metal.*
2. *Easily controlled or influenced; tractable.*
3. *Able to adjust to changing circumstances; adaptable.*

In his chapter, Dr Perry explains what he means by the assertion that children are malleable, by explaining the way in which they are shaped and formed into a child with an altered brain. In more technical terms, there are neurobiological effects of violence on the developing brain. It is critically important to understand those effects if we are to understand “the pathways from a terrorised child to a terrorizing adolescent”⁴.

³ Ibid

⁴ Ibid

COMPLEX TRAUMA AND ITS EFFECTS

What is meant by “trauma”? Trauma can be described as the emotional, psychological and physiological residue left over from heightened stress⁵. Not all forms of trauma bring about the changes to the brain that can be associated with behavioural change. Complex trauma involves amongst other events, interpersonal threat, violence and violation. It generally involves multiple incidents.⁶

It is well outside the scope of this paper, and particularly the expertise of the author, to explain the physiology of those changes other than to note that the changes are **physical** within the brain affecting development of key areas that control memory and responses. Perhaps an easy way to understand this is to think about brains being wired in a particular way; different regions of the brain being connected with neural pathways dependent on life experiences. In the brains of children who have been the subject of complex trauma, this wiring goes astray affecting such things as memory and the ability to self-regulate so that the child may be in a high state of arousal “flight or fight” or dissociative state (freeze).⁷ Repeated experiences of terror and fear can become so engrained within the circuits of the brain and so easily retrieved that they become characteristic traits of the individual⁸. Relationships can also be affected, for example in terms of empathy for others and their view of themselves and their world can become distorted.

These changes in the brain can amongst other effects predispose a person to violence⁹.

A recent study¹⁰ conducted through Monash University has been able to identify the increased likelihood of subsequent offending by persons who had been the subject

⁵ Understanding the Neurobiology of Complex Trauma. Australian Childhood Foundation, childhood.org.au/training

⁶ Ibid

⁷ A child experiencing trauma or abuse develops strategies, which become coping mechanisms to enable day-to-day functioning. They help the child detach from the emotional and physical pain of events, especially if it continues over a long period of time (Henderson, 2006). Researchers have observed the ways people respond to dangerous or abusive environments. These neurophysiological physical and mental responses to threat are of two main types:

- hyper-arousal continuum ('fight or flight'), i.e., vigilance, resistance (freeze), defiance, aggression
- dissociative continuum, i.e. avoidance, compliance (appease), dissociation, fainting (Perry, Pollard, Blakely, Baker, & Vigilante, 1995).

In the face of persisting threat, a child will either move along the hyper-arousal continuum (the child's version of 'fight or flight') or into the dissociative continuum (Perry et al., 1995). The individual response will depend upon the age of the child and the nature of the threat. **The younger the individual, the more likely he/she is to use dissociative adaptations rather than hyper-arousal responses (Perry et al., 1995)**. ASCA (Adults Surviving Child Abuse <http://www.asca.org.au/Health-Professionals/Information/Childhood-Responses-to-Threat-Coping-Strategies.aspx>)

⁸ Understanding the Neurobiology of Complex Trauma. Australian Childhood Foundation, childhood.org.au/training

⁹ Perry, BD Incubated in Terror: Neurodevelopmental Factors in the 'Cycle of Violence' In: Children, Youth and Violence: The Search for Solutions (J Osofsky, Ed.). Guilford Press, New York, pp 124-148, 1997

of childhood sexual abuse (CSA). Generally when the issue of offending by those who have been the victims of sexual abuse is raised the tendency is to consider whether those children go on to be sexual offenders. This study produced very strong evidence that persons who have been the victims of childhood sexual abuse are more likely to commit crimes of various nature and also to be more likely to be victims of crime again, particularly crimes of a sexual or violent nature.

The study found that childhood sexual abuse victims were almost 5 times more likely than the general population to be charged with any offence than their non-abused counterparts, with the strongest associations found for sexual and violent offences. The study was done by obtaining records collected between 1964 and 1995 by the Victorian Institute of Forensic Medicine for all cases of suspected childhood sexual abuse but confined to cases of contact offending. That database comprised 2759 cases of childhood sexual abuse over a 31 year period and is the largest population of CSA victims ever studied. The researchers then took a comparison group of 2677 people that they matched against the CSA victims for gender and age range drawing that sample group from Victorians on the Australian electoral commission rolls.

They then took offence and victim data with respect to both groups from the Victoria police database. The study found that CSA victims were 4.97 times more likely than their peers from the general population to have been charged with an offence and this difference remained significant for both male and female victims. The average number of charges was also significantly higher for CSA victim cases than the comparison group and more CSA victims than controls received a custodial sentence. They also had a greater number of charges, a higher proportion of charges resulting in a guilty verdict, more custodial sentences and offending continued to an older age.

The researchers conclude that the findings have a number of implications for clinical, policing and judicial practices.

“One clear implication is the need for therapeutic interventions targeted at adolescent male CSA victims with a focus on positive sexuality in an attempt to reduce their heightened risk of committing a sexual offence. The benefits of psychological treatment for trauma, addressing victims mental health problems and preventing or addressing criminogenic risk factors such as low education and employment attainment, substance abuse and negative supports, in the aftermath of sexual abuse to both male and female victims is also likely to reduce the risks of offending in general and violent offences in particular.”

¹⁰ James RP Ogloff, Margaret C Cutajar, Emily Mann and Paul Mullen, Child sexual abuse and subsequent offending and victimisation: A 45 year follow-up study. Australian Institute of Criminology: Trends & issues in crime and criminal justice No 440 June 2012

The study provides particularly strong evidence of the link between complex trauma and offending and the need for therapeutic intervention for those who have suffered trauma.

Unless the changes that are brought about to the brain from complex trauma are understood, it is almost certain that the behaviour of the young person will not be understood and will sometimes be misinterpreted. The following example is one that illustrates the flight, fight or freeze mechanism in children.

Example:

Police are called to a house where occupants have become concerned that the mother of three young children has been hitting them. The children are known to have experienced long term family violence between the parents. The father is in prison for an assault on the mother. The mother has got a new partner and is drinking heavily. When they arrive two of the children appear deeply asleep and cannot be roused them. They have a low pulse rate and respiration. The other child is hypervigilant with raised vital signs. They fear they have been drugged. However what they were seeing were the children's reactions to the trauma they have experienced. Freezing (disassociation) in two and fight (hypervigilance) in the other.

How often do we hear it said in Court that the children in the house were not exposed to the domestic violence incident that occurred because they were in another room asleep? Or that they were too young to understand what was happening?

Children asleep or unaware? Or like these children?

OTHER FACTORS AND CONDITIONS THAT MAY CONTRIBUTE TO OFFENDING

Foetal Alcohol Spectrum Disorders

Foetal alcohol spectrum disorder (FASD) is still a condition that is not fully understood and for which there is a lack of information which affects the ability both to diagnose the condition and provide treatment for it.¹¹

Although in lay terms FASD is often thought of as a single disorder it is a way of describing 4 different conditions¹². These are

¹¹ AIHW: Bonello MR, Hilder L & Sullivan EA 2014, Fetal Alcohol Spectrum Disorders: strategies to address information gaps. Cat. No. PER 67 Canberra AIHW

¹² Ibid at p2

Foetal Alcohol Syndrome (FAS)

Children with FAS have distinct facial characteristics together with evidence of growth retardation and neuro-developmental abnormality of the brain.

Partial FAS (pFAS)

These children have one or more of the FAS facial features, along with growth retardation and/or developmental abnormality of the brain.

Alcohol Related Neuro-developmental Disorders (ARND)

These children show characteristic behavioural and cognitive impairments but without any obvious FAS facial features.

Alcohol Related Birth Defects (ARBD)

A specific group of congenital anomalies but without any obvious FAS facial features.

The estimate for the prevalence of FAS in the Northern Territory is 0.68 per 1000 children though 2-3 times higher for indigenous children. There is no dedicated national data collection for FASD that provides information about this group of disorders so the actual prevalence is not clear.¹³

The Liliwan Study into communities around Fitzroy Crossing documented the highest prevalence rate yet found in Australia with a rate of 120 per 1,000 children aged seven to nine years. It is not difficult to identify within the Northern Territory particular communities where the drinking culture would be at a similar level to that around Fitzroy Crossing before the women of that community embarked on a project to turn things around.

The likelihood is that many of the young offenders that we see in our courts have one of the FASD conditions and that their behaviour and their ability to comply with court orders is affected by their condition. As there is no screening, diagnostic or treatment services for FASD and no national guidelines for screening and diagnosing FASD¹⁴ it may be difficult to ascertain whether a young offender has this condition. When we know however that there is a family background of maternal alcohol abuse this should serve as a red flag for further inquiry. For some young people though this family history may not be known or be part of the readily available information to the court, for example when the young person has been taken into the care of other family or the Department of Children and Families at a young age.

¹³ Ibid

¹⁴ Ibid p8 but note that the paper provides information of funding being put in place in mid 2014 to support the finalisation of a diagnostic tool

If we add to this picture the knowledge that the young person has been exposed to violence in their home (or community) and/or subject to abuse or neglect, it should be apparent that we may be dealing with someone with very complex neurobiological issues, some potentially as a result of FASD and some as a result of exposure to complex trauma.

Contributing Factors for Indigenous Children in Remote Communities

At the outset the definition of “vulnerable” was mentioned. It included the concept for a child as being vulnerable because they are reliant on others for the necessities of life. Essential to a child is the provision of food, not just in quantity but by way of proper nutrition, shelter and clothing. None of these things which all of us would regard as being the absolute basics for a child are capable of being independently provided by the child. In terms of child development, I would also include as a necessity the provision of an education sufficient to equip the child with numeracy and literacy skills that can provide an opportunity for employment and independent living.

Poor Nutrition

The lack of food or proper nutrition may cause developmental issues for a child from an early age. Malnutrition is not an uncommon ground for which protection orders are sought.

It is a relatively well understood concept that poor early nutrition affects physical growth. What is less generally well understood is the effect that poor nutrition has on brain development and intellectual ability.

“Poor early child feeding practices contribute to growth faltering and developmental delays that have long-term consequences, such as increased risk of cardiovascular disease, diabetes and obesity. Paradoxically, childhood obesity is also associated with increased cardiovascular disease risk in adolescence. In the Northern Territory, stunting and anaemia remain the most significant recognised nutritional issues for remote indigenous children under 5. The prevalence of stunting is declining slowly but still remains at 13%, compared to wasting prevalence of 5%. Stunting is related to both inadequate food and frequent infections and is largely irreversible after age 2. Stunting results in shorter adult height and poorer outcomes in educational and employment status. Anaemia affects up to 21% of remote children under 5, but is more prevalent in children under 2, with up to 40% of children anaemic in some communities. Anaemia due to iron deficiency adversely affects brain development resulting in delays in a child reaching motor and mental milestones, and learning ability impairment which persists into adolescence. These serious short and long term consequences of poor feeding practices underline the need for interventions to prevent both undernutrition and

overnutrition, not just to improve infant health, but to help prevent chronic disease in the long term.”¹⁵

An only too common offence in communities is young people breaking into stores or the school and stealing food. When we see these cases they should act as a red flag, not just around the current care of the young person but also as to whether they have suffered some brain and other developmental impairments as a result of poor feeding from an early age.

The very poor school attendance rates in the Northern Territory are well-known. In addition to the other factors such poor parental supervision and assistance on school perhaps we should also be considering whether the reluctance to attend is related to impaired cognitive ability and the consequent struggle to keep up in class.

Peer Pressure

Peer pressure is of course a common feature for all youth offending. However in indigenous communities there is often an overlay of cultural obligation to join with a relative in offending behaviour.

Substance Misuse

Substance misuse is in some communities a prevalent issue with young people taking up the use of cannabis from a very early age. In other communities petrol sniffing continues often going through cycles of prevalence and is a substance well known to cause brain damage.

We should however not only be concerned with substance misuse by the youth offender but given the high levels of use of cannabis in particular we should be asking the question about the level of use by the young person’s carer/s which may be a strongly contributing factor to the lack of supervision and school attendance.

A 5-year study of adolescents and young adults in three remote communities in Arnhem Land in the Northern Territory found that not only was cannabis use common in remote Indigenous settings, but it had a profound effect on health and social adjustment. The communities in the study were close to each other but isolated, being over 550 kilometres from the nearest city. Tobacco use was found to be the norm in these communities, with over 90% of adolescents and young adults smoking but because of restricted access to alcohol, problem drinking was uncommon. In contrast, cannabis use was endemic, with over 70% of males and 20% of females being current users. It was typically consumed mixed with tobacco and smoked using a locally fashioned “bucket bong” that gives the user a rapid and

¹⁵ The First Thousand Days – A Critical Window of Opportunity for Health Heather Ferguson, Child Health Nutritionist, Health Development Branch, NT Department of Health The Chronicle VOLUME 24, ISSUE 4, DECEMBER 2012 PUBLICATION OF THE CHRONIC DISEASES NETWORK

intense dose with little smoke lost. Regular heavy use (≥ 6 “cones” daily) was found in almost 90% of users with this being around twice the consumption of regular cannabis users elsewhere in Australia. About 90% of the Indigenous users reported symptoms of cannabis dependence compared with about 20% of users aged 18 or over in the general Australian population. Of even greater concern was that, for most Indigenous users, cannabis was not a passing adolescent phase. After 5 years of follow-up, the great majority reported continuing heavy use¹⁶

Case example

L who was from one of the communities mentioned in the above study was 15 years old when he first appeared before the court on property offences with others. He had never had anything much to do with his father and his mother had moved into Darwin. Sometimes he would go from the remote community in which he lived to Darwin with his mother or sometimes he would be taken there by his grandparents. When he was in town he would be exposed to alcohol abuse by his family. When left in his community he seemed to simply pass around to whoever had a space for him in the house at any given time. At 16 he had never had his own bed to sleep in nor did he have his own clothes. He shared some clothes with two other boys. He was missing a considerable amount of his teeth as a result of a diet largely based on soft drinks. Cannabis use was an issue. Despite the court referring his case to the child welfare authorities no protection application was taken by them on the basis that he had family members that he could stay with.

Did we expect in his personal circumstances, no income, no positive family support, no proper nutrition and with no education and no prospect of providing for himself once he became an adult that he would cease to offend in the way that he had done? He has not unsurprisingly gone on to serve time in prison as an adult.

Community Violence

There is the exposure in some communities to very high levels of violence not within the family home but in the broader community. Often children will see large numbers of community members rioting usually with weapons or individuals running amok with weapons such as machetes and axes and using those to either attack other people or damage property. I think I can safely assert that if one of our children were exposed to an incident where they saw a person attacking another with a machete that we would be seeking immediate counselling to assist them in recovering from that trauma. But in many communities children see this behaviour repeated over and over again giving rise to a risk that it becomes seen by them as normal adult behaviour.

¹⁶ Lee KSK, Clough AR, Conigrave KM, et al. Five year longitudinal study of cannabis users in three remote Aboriginal communities in Arnhem Land, Northern Territory, Australia. *Drug Alcohol Rev* 2008.

The Extended Family

Many times it is said that the extended family is one of the great strengths of Aboriginal communities. In theory this sounds like one of the things which would be of enormous benefit to a child – the idea of extended family who will look after a child in the absence of a parent; the idea of the community as a global village in which all members have an interest in the upbringing of that child. In reality many times this may be the very thing that creates vulnerability in a child and exposes them to a risk of offending. I do not wish to be disrespectful to the many people who are raising relatives' children. There are many of them and the majority are devoted and constant carers for these children even in the face of the difficulties created by crowded homes and limited finances. However not all children are so lucky.

In remote areas it is not uncommon to have young people before the court who are not in the care of their biological parents. The common reasons for this are:

- the parent or parents have let the community to go into town to drink, sometimes permanently and sometimes in and out.
- the parent or remaining supporting parent is currently in prison
- the child may simply have been passed, often at an early age, to a family member. The reason this happened is often unable to be explained.

The young person therefore appears in court supported by an aunt or uncle or a grandparent, sometimes a cousin. There may be different people on each appearance. It becomes apparent that there is no single person taking responsibility for the young person.

Consequently, in the course of proceedings a family member will be put forward as being the person who is now going to care for him or her but a few weeks or months later when that young person is back in court again it will be discovered that they only lasted a short time with that relative. There are a number of reasons why these arrangements fall apart. First, the proposition that they might care for the young person may have been put to that relative by someone in authority, for example, the child's lawyer or Community Corrections or a Children and Family caseworker. The family member does not want to disappoint that person by refusing to take the child or is too embarrassed to say no. Secondly, there may be family pressure placed on that relative to take the child which pressure the person does not feel able to resist by reason of cultural obligation. Sometimes a person may even agree to take a child because they perceive some financial benefit in doing so by way of increased benefits.

Finally, of course, we are not dealing with young persons who have perfect behaviour and the relatives may shortly come to realise that they do not have the skills and ability to manage that difficult behaviour, particularly if no support services have been put in place to assist them.

I do not criticise any of the agencies in making those approaches and seeking out someone to properly support and care for the young person. That is entirely proper however it needs to be done with a caution as to why the person is agreeing and ensuring that supports are in place to assist the proposed care arrangement.

OBJECTS AND PRINCIPLES OF THE YOUTH JUSTICE ACT

How then does the law or the current youth justice system as a whole equip the Courts to deal with youth offenders?

The *Youth Justice Act*, as with similar legislation in other jurisdictions, contains objects that are to guide the operation of the Act and principles that are to be taken into account in the administration of the Act. The principles therefore apply not only to the Court in determining proper sentences but also to other agencies involved with youth offenders, including Police and Correctional Services that exercise power and perform duties under the Act. As the Act provides for the establishment of detention centres and the operation of those centres the objects and principles of the Act are equally applicable to the operation of those centres.

Relevant principles are that a youth

- Must be held accountable and encouraged to accept responsibility for his or her behaviour.
- Must be dealt with in a manner consistent with his or her age and maturity.
- Should be dealt with in a way that allows him or her to be reintegrated into the community.
- Family relationships between the youth and his or her family should be preserved and strengthened.
- A balanced approach must be taken between the needs of the youth, the rights of any victim of a youth's offence and the interests of the community.

Two key principles of a youth justice system are that the youth should be kept in custody for an offence only as a last resort and for the shortest appropriate period. This is reflected in section 4(c) of the *Youth Justice Act* of the Northern Territory¹⁷.

One of the objects of the *Youth Justice Act* is to ensure that a youth who has committed an offence is given appropriate treatment, punishment and rehabilitation.¹⁸ The traditional idea of punishment for crime is modified in the case of youths by the principles of the *Youth Justice Act*, in particular by section 4(n) which provides that punishment of youth must be designed to give him or her an opportunity to develop a

¹⁷ The principles are reflective of the Convention on the Rights of the Child. Section 4(c) is a restatement of Article 37. Australia is a signatory to the Convention.

¹⁸ Section 3(e)

sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways.

It should be apparent that if the principles of the Act are being fully met, that the numbers of young persons held in custody should be relatively confined and that remand periods are able to be kept to a minimum. In other words the ability to uphold these principles will only be successful if the diversionary provisions of the Act are being met through the engagement of services that address criminogenic needs.

The detention figures for the Northern Territory however reveal that we have the highest rate of detention for youth in Australia. On an average night in the June quarter 2014, the rate of young people aged 10 – 17 in detention was lowest in Victoria (1.2 per 10,000 or about one in 8500 young people) and highest in the Northern Territory (18.2 per 10,000 or about one in 550 young people).¹⁹

Most of the young people in detention in the Northern Territory were Indigenous (between 89% and 100% in all quarters)²⁰

In a report released on 2 June 2015, Amnesty International reported that in Australia Indigenous youth were 24 times more likely to be in detention than non-Indigenous youth.

I suggest that what we can take from the detention figures in the Northern Territory is that the objects and principles in the *Youth Justice Act* and the provisions designed to uphold the objectives and principles are not being met. The services required and facilities needed for treating complex trauma effects are either not available or inadequate to address the level of need.

For example section 83(1)(e) allows the court in sentencing to order the youth to participate in a program approved by the Minister. On satisfactory completion of the program as specified in the order the Court may discharge the youth. This would seem to be an option particularly useful for addressing offending associated with the neurobiological effects of trauma by requiring the young person to engage in treatment that will assist the repair of their damaged brain. However no such programs have been developed and gazetted.

The high rate of detained youth, many of whom are repeat detainees, strongly suggests that detention which as required by the principles is intended to allow the youth “to develop in beneficial and socially acceptable ways” is not achieving that objective. Indeed events at the Darwin based detention centre over the last year strongly suggest that the behaviour of some of the detainees has deteriorated in custody rather than improving. The review of detention in the Northern

¹⁹ Australian Institute of Health and Welfare 2014. Youth detention population in Australia 2014. Juvenile Justice series no.16. Cat No. JUV 53. Canberra: AIHW

²⁰ Ibid at 54

Territory²¹ identified multiple problems with the system of youth detention. Of great concern and of particular relevance to the matters raised in this paper are some of the findings of the review:

- a lack of training and/or consistent use of an appropriate screening instrument or assessment tool that should drive the case management process by identifying risk factors that are criminogenic and significant in that particular young person's offending and reoffending history
- a case management process that is uncoordinated and driven by individual staff who, in some cases, are without training and who, without consultation with other government and non-government stakeholders, other than custodial staff, drive the case management process in a very basic fashion
- lack of understanding and coordination of how risk assessment, case management, classification, pro-social modelling and the incentive scheme should work together to provide an environment that is conducive to the stability, harmony, safety and security
- lack of meaningful offence focused programming
- lack of direction and consistency in the provision of a behaviour management strategy that lacks understanding of adolescent behaviour, behaviour initiated by history of trauma, symptoms of foetal alcohol syndrome and behaviour associated with ADHD and other mental health issues

Given the recent response by the relevant authorities to further breaches of security at the detention centre that these will be met by tougher measures, the following observation from the report is particularly relevant.

“Banksia Hill and other jurisdictional experiences show that where instability exists, improvement will not necessarily come from just toughening up centres physical security (e.g. installing bars, grills and fences), or toughening starts emergency responses.”

It should be obvious from those findings that the present detention system is not operating in a way that either recognises the causative issues for youth offending nor has an approach and mechanism for addressing them. I suggest that this is of particular concern in the case of very young detainees for whom there should be a very strong focus in identifying criminogenic factors and providing the treatment necessary to address those issues.

The report also notes that there is an increasing number of children under the age of 15 being detained. Over the past three years the quarterly daily average of youths detainees have increased by 22% from the September quarter 2011 to September quarter 2014 (34 to 42)²².

²¹ Review of the Northern Territory Youth Detention System Report January 2015 – “The Vita Report”

²² Ibid

Many young people in the Youth Justice System are from homes where poverty, alcohol abuse, violence and dysfunctional relationships are the norm. These are young people in greatest need and the ones who are likely to require a high level of intervention and case management.²³

AN ALTERNATIVE APPROACH?

If we are serious about the need for early intervention for youth offenders then perhaps we should be looking at a system that reflects the offending very young children as being a matter which requires welfare intervention rather than immersing children as young as 10 or 11 in the criminal justice system as is the present case.

Although many very young offenders are dealt with successfully by Police Diversion there is still the potential for very young children to be charged and brought before the Youth Justice Court. These children tend to be ones who have multiple instances of offending and/or more serious charges. However, once before the Court it seems that often the dispositions applied by the Court have little effect on changing behaviour. On writing this paper I looked at the current remand list. I could identify at least 5 of the current detainees who have been appearing before the Youth Justice Court since they were 10 or 11 years old. They are now 15 and 16 years old with considerable histories.

Is there a more effective way of dealing with such young children i.e. those under 14 years old?

In New Zealand there are separate youth justice processes for those under 17. The child offending process for 10 to 13-year-olds and the youth justice process for 14 to 16-year-olds. Both processes focus on accountability and rehabilitation and are diversion focused. In New Zealand prosecution of children aged 10 to 11 is limited to murder and manslaughter. Serious or persistent offending by children aged 12 and 13 can be brought to the youth court. Otherwise a child of that age cannot be charged. Both in New Zealand and in the Northern Territory diversion is a very effective way of dealing with the majority of youth offenders. In the Northern Territory when a young child is not able to be adequately dealt with by way of diversion the only alternative is charging and bringing the child before the Youth Justice Court. In New Zealand however such cases are then referred to a Family Group Conference.

“The Family Group Conference involves the child or young person, his or her advocate (where one has been arranged), family/whānau or family group members, the victim(s) or their representative, the Police and the Youth Justice Coordinator (YJC). The role of the FGC is to hold young people accountable for their offending and encourage them to take responsibility for their behaviour. FGCs for child offenders will also focus on care or protection issues present and family/whānau issues contributing to the offending. To this end, the FGC formulates a plan for the child or young person making

²³ Ibid at 11

recommendations as it sees fit (which, for young persons, may include prosecution). Common elements of FGC plans include an apology, reparation, work for the victim or community, a donation to charity, curfews, counselling or training programmes. The FGC may also recommend that proceedings be discontinued or that a formal Police caution be issued ...Where a child is referred to an FGC, it may recommend that proceedings be discontinued, that a formal Police caution be issued, that the child make reparation to the victim(s), and/or agree to some form of assistance (e.g. request a psychological assessment, referral to a rehabilitative programme).”²⁴

A significant difference between our systems is that the Family Group Conference can also agree for an application to the Family Court for a declaration that a child is in need of care or protection where the number, nature or magnitude of the offending is such as to give serious concern for the well-being of the child. If the Family Court makes a declaration it can also make a variety of orders aimed at addressing support of the child and the issues associated with offending for example, counselling and other supports to prevent re-offending.

One wonders whether such an approach, that is, treating offending for those under the age of 14 as a welfare issue and dealing with the matter according to those needs might produce better outcomes?

CONCLUSION

Finally, let me be clear. This is not a call to excuse the behaviour of young offenders. It is however a call for all those within the youth justice system to understand what causes many young people to offend and to have within the system the measures that are necessary to prevent reoffending.

The causative factors that influence and drive offending behaviour must be addressed within the system, whether that be in the community or where necessary in detention otherwise we will continue to see increased offending and increased detention numbers. We should be very focused on young offenders and address their criminogenic needs because if we don't, we will find ourselves dealing with very difficult youth offenders, resistant to change and who are likely to go on to harm more and more people.

What better way to protect victims of crime than to put a stop to the progression of a child offender to an adult offender?

²⁴ Ministry of Justice New Zealand <http://www.justice.govt.nz/policy/crime-prevention/youth-justice/child-offending-and-youth-justice-processes/child-offending-and-youth-justice-processes>