

‘Children First, Offenders Second’:

Why NT Police must act now to implement Royal Commission recommendations

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Children are fundamentally different from adults, particularly in the way they think and act. Their brains are not fully developed. They are more likely to act impulsively and with less regard for the consequences. Yet they have greater capacity for rehabilitation.

The Royal Commission found that an effective justice response for children must reflect these differences and be informed by child and adolescent development, trauma, adolescent mental health, cognitive and communication deficits, and Aboriginal cultural competence.

Unfortunately the NT has a long way to go. In many ways NT Police and the court system still treat children as ‘mini adults’ with little accommodation or change in approach to their unique circumstances, needs and issues.

By contrast, New Zealand has led efforts by Australasian Courts to learn from brain science when dealing with children and to transform the courts approach and judicial responses.¹ It is now clearly established that the frontal lobes of young people (which regulate reasoning and impulse control) only mature in their mid-twenties. It is also clear that when a young person’s emotions are heightened, or when they are subject to peer influence, their ability to regulate risky behaviours is diminished.²

Child appropriate therapeutic interventions

Judge Sue Oliver, former Managing Judge, NT Youth Justice Court argues that we need to move away from the ‘view that child offenders are simply bad kids who need to be punished without any appreciation that punishment will

do nothing to alter that young person's behaviour’. And that ‘generally what is required will be intense therapeutic intervention.’

Judge Oliver has written extensively on the impact of trauma to children and the role of the courts to understand their experiences in order to respond appropriately:

“The effects of the trauma of abuse and neglect cannot be understated. There is a tendency within the Court and correctional systems to look only at what has happened to the young person at the current point in time ... We need to ask what has been happening to that child from the moment of his or her birth. Within the first 1000 days of the child's life, exposure to traumatic events including serious physical and emotional neglect will change the organic structure of the child's brain. By the time we see this child as a teenager their reactions, their impulses, their empathy or rather their lack of empathy as a direct result of this trauma will result in well-established behaviours.”³

This approach is echoed by Judge Peter Johnstone, President of the NSW Children’s Court, who also notes the very different approach needed when dealing with children.⁴ Judge Johnstone points to “intensive and often expensive interventions”⁵ as opposed to incarceration.

Yet the NT, where almost all young people dealt with by police and the courts are Aboriginal, has a chronic lack of therapeutic interventions, let alone culturally appropriate programs or services. Judge Greg Smith, Managing

Judge, NT Youth Justice Court recently noted that there are no “approved programs” under the *Youth Justice Act*, substantially limiting his sentencing options.⁶

Post-Royal Commission, this is an utter disgrace. It means young people are not supported in their efforts to turn their lives around or achieve their goals and dreams, they frequently have to do this in spite of the system.

We not only need therapeutic interventions, but ones that are culturally safe, and culturally strengthening. Interventions need to enliven a young person’s sense of self and community. Former New Zealand Principal Youth Court Judge Andrew Becroft highlights, “Māori young people who are disconnected from their culture and cultural roots make up the vast proportion of Māori youth offenders.”⁷ In recognition of this, New Zealand courts have significantly adapted processes and procedures and justice responses through a cultural lens.

Former NAAJA youth lawyer, Franky Bain recently proposed a trauma-informed NT youth justice model with increased cultural match. This approach has much to commend it.⁸

Recasting the role of police

Police are effectively the gate keepers to the youth justice system and play a vital role in terms of how young people are dealt with. Their contact with young people can be encouraging and guiding; or harmful, alienating and stigmatising.

There are some exemplary members of NT Police that are highly skilled in working with children. The NT Police Youth Diversion Unit has been evaluated as highly effective⁹, and in years past, was the envy of police diversion units around Australia. But in recent years, the government stripped it of resources and withdrew its youth-expertise in guiding and informing the approach of NT Police to children and young people.

In 2012, NT Police established Strike Force Trident. Trident’s focus is ‘identifying, targeting, prosecuting and managing all recidivist property offenders.’

Trident emerged as NT Police’s primary means of policing ‘recidivist’ young people.¹⁰ It takes a zero tolerance

approach to policing. In its Concept of Operations (2017) produced to the Royal Commission, Trident proclaimed:

‘These offenders will be targeted relentlessly and prosecuted for any and all offences committed. Arrest is the preferred option for recidivist offenders rather than other avenues (i.e. Summons, Notice to Appear, Diversion).

When warranted, bail should be vigorously opposed. If this is not possible or Local/Youth Court bail is granted, ... (bail) conditions must be stringently enforced to reduce the opportunity of reoffending.’¹¹

Their approach to arrest and ‘relentless targeting’ of young people goes against the objects and principles of the *Youth Justice Act*, and is abhorrent to the findings and recommendations of the Royal Commission.

Trident’s policing practices are aggressive and punitive towards children. In the years leading up to the Royal Commission, ‘zero tolerance policing’ meant more young people were arrested and charged for breaching bail conditions. Many young people were subjected to adult policing practices like conducting curfew checks in the middle of the night, arresting children at school, tasing children, arresting children for returning home minutes outside their curfew.

In the UK, the *Review of the Youth Justice System* in England and Wales (2016) recommended that police not be allowed to arrest a young person for the purpose of interviewing them other than in exceptional circumstances, something which happens all too frequently in the NT.¹²

NT Police are apprehending children more readily and more frequently for breach of bail than ever before.¹³ Policing practices in relation to monitoring bail conditions have contributed to the NT incarcerating four times as many young people as anywhere else in Australia.¹⁴ It remains the case that 71% of children in detention are on remand.¹⁵

Although the *Youth Justice Act* requires a police officer to divert a child¹⁶, this is not occurring consistently in practice. The Human Rights Law Centre notes ‘in 2015–16, just 36% of apprehensions by police resulted in a child

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being offered diversion.¹⁷ They also point out that 'despite offending rates decreasing, there has been a 125% increase in the number of children being prosecuted through the courts since 2006–07'.¹⁸ Subjective decision making and the broad nature of police discretion means many children who should have been considered for diversion, are instead formally charged. In my experience, many children are declined diversion on the basis of unfair and unjust reasons. Some young people are said to have 'previously had a chance' at diversion. Others are alleged to have criminal matters that are 'too serious.' But when you analyse an individual child's case, there are often contributing factors linked to their home or family environment including welfare and health issues to explain why diversion was not successful but might have well improved by now, or why the type of offence might be seen as serious, but the circumstances of which justify diversion.

A lack of access to diversion opportunities and supports has had a disproportionate impact on Aboriginal young people, and contributed to the NT's mass incarceration of Aboriginal young people.¹⁹ The youth offender rate—the rate by which police proceed with charges against children—shows the NT as the highest in the country.²⁰

Royal Commission recommendations with respect to NT Police

The Royal Commission made a number of recommendations aimed at increasing the circumstances and opportunity for diversion including restricting police discretion to refuse diversion (Recommendation 25.10) and more resources for the Police Youth Diversion Unit (Recommendation 25.8).

It also recommended substantive changes to reduce the frequency with which children are being remanded for breaching bail conditions (Recommendation 25.19) and a new police directive (Recommendation 25.20) around curfew checking and arrest for breach of bail conditions.

Perhaps the Royal Commission's most significant recommendation with respect to police was Recommendation 25.1, that "a specialist, highly trained Youth Division similar to New Zealand Police Youth Aid be established."

The New Zealand Police Youth Aid model would mean a fundamental shift from punitive to restorative. It would build on the foundational work of the NT Police Youth Diversion Unit. It would mean that *all* police officers would be trained in child and adolescent brain development, the impact of cognitive and intellectual disabilities including FASD and the effects of trauma, including intergenerational trauma. This would greatly improve the approach and quality of operational decisions made in relation to children.

Unfortunately, twelve months after the Royal Commission report, there is little indication NT Police is moving to implement the Royal Commission recommendations. Strike Force Trident continues its 'zero tolerance' approach. The numbers of children being formally charged continues to increase.²¹ The numbers of children in detention is comparable to the number twelve months ago (though with a greater percentage of children from Central Australia).²²

The NT Government recently announced the return of armed police at 10 schools across the NT. The Government claims this "is addressing issues raised in the Royal Commission,"²³ though it is unclear how.

Until and unless NT Police commit to implementing the New Zealand Youth Aid model, there are real concerns that police at schools will mean more children facing escalated sanctions (i.e. criminal charges), more children being arrested at school, and more children avoiding school because they don't feel safe there.

It is time to move away from criminalisation and punishment in our response to our young people. As was so clearly stated in the UK:

"The police should at all times see under-18s as children first and offenders second."²⁴

Children in trouble with the law are still children, filled with hope, with terrific aspirations and dreams. Some want to be rangers, musicians, fitness instructors or join the army. Others gardeners, teachers, social workers, lawyers.

These children have all the potential in the world and just need what most of us have had—an opportunity to thrive and to have someone in their corner to support them every step of the way.

But if we are to achieve this, we urgently need a new youth policing model embedded with culturally safe, therapeutic interventions at its core.

- 1 See, for example Becroft, A (2013) "From Little Things Big Things Grow", *Emerging Youth Justice Themes in the South Pacific*. Australasian Youth Justice Conference: Changing Trajectories of Offending and Reoffending. See: <https://childdetentionnt.royalcommission.gov.au/NT-public-hearings/Documents/evidence-2017/evidence8may/Exh-337-027.pdf>
- 2 Ibid at 8.
- 3 Oliver, S (2016). *Young Offenders – Healing the Damage*. NT Bar Association Conference at 4. See: <http://ntba.asn.au/wp-content/uploads/Oliver-Youth-Offenders-%E2%80%93-Healing-the-Damage-English.pdf>
- 4 Johnstone, P (2014) *Emerging Developments in Juvenile Justice*. 5th Annual Juvenile Justice Summit, 25 March 2014, at 9.
- 5 Ibid.
- 6 Dunlop, C (2018) *Lawyer slams 'broken' justice system after detainee could not come to court due to Don Dale staff shortage* NT News (27 July 2018). See: <https://www.ntnews.com.au/news/crime-court/lawyer-slams-broken-justice-system-after-detainee-could-not-come-to-court-due-to-don-dale-staff-shortage/news-story/602351b5084afdd1fc98e5d714a2e215?login=1>
- 7 Becroft, A (2013) "From Little Things Big Things Grow", *Emerging Youth Justice Themes in the South Pacific*. Australasian Youth Justice Conference: Changing Trajectories of Offending and Reoffending at 10. See: <https://childdetentionnt.royalcommission.gov.au/NT-public-hearings/Documents/evidence-2017/evidence8may/Exh-337-027.pdf>
- 8 Bain, F (2017) *Improving Northern Territory Youth Justice: a proposed application of two beneficial approaches from North America: trauma-informed practice and cultural match*. LLM Thesis, University of Washington May, 2017.
- 9 See Cunningham, T (2007) Pre-court diversion in the Northern Territory: impact on juvenile reoffending. Australian Institute of Criminology 2007. Her research showed significant differences between young people who attended court and those who were diverted, both in terms of risk of reoffending and time to reoffending. Those who were diverted reoffended less than those who attended court and those who went to court reoffended more quickly. See: <https://aic.gov.au/publications/tandi/tandi339>
- 10 Note that the overwhelming majority of youth offending remains property-related or offences against the justice process, precisely the types of offending Strike Force Trident focuses on.
- 11 NT Police (2017) *Taskforce Trident 2017 Concept of Operations*. See: <https://childdetentionnt.royalcommission.gov.au/NT-public-hearings/Documents/evidence-2017/evidence10may/Exh-361-001.pdf>
- 12 Taylor, C (2016) *Review of the Youth Justice System in England and Wales* (December 2016), at 19.
- 13 In 2015-16, 697 children were apprehended for breaching bail, some 343 (49%) of whom were 10-14 years old. 662 (95%) of those apprehended were Aboriginal. See Yick, J (2016) *Statement to the Royal Commission into the Protection and Detention of Children in the Northern Territory*, 14 October 2016
- 14 The NT rate is 11–23 per 10,000 aged 10–17. See: Australian Institute of Health and Welfare (2018) *Youth detention population in Australia 2017* (Bulletin 143), at 13: <https://www.aihw.gov.au/getmedia/0a735742-42c0-49af-a910-4a56a8211007/aihw-aus-220.pdf.aspx?inline=true>.
- 15 Australian Institute of Health and Welfare, *Youth Justice in Australia 2015-16*. AIHW, Canberra (2018).
- 16 See section 39 (2), *Youth Justice Act*
- 17 Human Rights Law Centre, *Supplementary Submission to the Royal Commission* (2017) at 10, citing Northern Territory Police, Fire & Emergency Services, Annual Report 2015-16, 49.
- 18 Ibid, citing Joe Yick, *Statement to the Royal Commission into the Protection and Detention of Children in the Northern Territory*, 14 October 2016, table 1.
- 19 An Australian Institute of Criminology study found Aboriginal children were 'significantly more likely' to be referred to court than non-Aboriginal children. See House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time-Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) at 205.
- 20 Australian Bureau of Statistics (2018) 4519.0 - *Recorded Crime - Offenders, 2016-17* ABS. Canberra (2018). See: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4519.0~2016-17~Main%20Features~Northern%20Territory~14>
- 21 From 2008–09 to 2016–17, the number of police proceedings have increased by 62% (8,816 proceedings) from 14,251 to 23,067. Australian Bureau of Statistics (2018), 4519.0 - *Recorded Crime - Offenders, 2016-17*. ABS. Canberra (2018). See: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4519.0~2016-17~Main%20Features~Northern%20Territory~14>
- 22 Territory Families (2018), *Youth Detention Census* (last accessed 11 October 2018). See: <https://territoryfamilies.nt.gov.au/youth-justice/youth-detention-census>
- 23 NT Government, *Safer Communities: Territory Labor Government Brings Back School Based Policing*, Media Release (17 September 2018). See: <http://newsroom.nt.gov.au/mediaRelease/27122>
- 24 Taylor, C (2016) *Review of the Youth Justice System in England and Wales* (December 2016), at 19.