

Northern Territory Bar Association 2016 Conference
Common Issues Common Solutions
14-16 July 2016
Dili, Timor Leste

Youth Offenders – Healing the Damage

Judge Sue Oliver
Managing Judge
Northern Territory Youth Justice Court

Children brought up in dysfunctional families, without love, abused and beaten, ill-fed and ill clothed, how were they to turn into model citizens?

An overall cause is the replacement of a sense of community by that “every man for himself, and the devil take the hindmost” culture...

To reduce crime it is necessary to identify what makes criminals and deal with the causes...

This is the only long-term, effective way to help victims, to reduce their numbers. Punishment does not work.¹

The issues which are commonly associated with youth offending are universal. You can move across Continents and through the islands of Asia and the South Pacific and the same or similar issues will be raised in each and every Court that deals with youthful offenders.

This paper will consider those common issues and why a youth justice system should not simply mimic the adult criminal system either within the Court or in the custodial and non-custodial services that exist to address youth offending.

WHAT ARE THE COMMON ISSUES IN YOUTH OFFENDING?

Most youth offending is youth limited

First, it should be acknowledged that the majority of youthful offenders do not go on to be adult offenders². That does not mean that we do not have to deal with the immediacy of the problem because it is important to take measures at an early stage to limit the duration and impact on the community of the offending.

An effective early intervention measure is pre court diversion.

¹ A Letter to the editor from Shirley Smith “Crime and jail” *The Dominion* (2 February 1999, ed 2, p10) referred to by The Rt Hon dame Sian Elias, Chief Justice of New Zealand in her 2009 Annual Shirley Smith Address

² Bureau of Statistics Trends & Issues in Crime and Criminal Justice no. 409 <http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi409.html>

In the Northern Territory the police operate a diversion program for youthful offenders. If a police officer believes on reasonable grounds that a youth has committed an offence or was a youth when the offence was committed, then instead of charging the youth with the offence, the officer must do one of 4 things:

- (a) give the youth a verbal warning;
- (b) give the youth a written warning;
- (c) cause a Youth Justice Conference involving the youth to be convened;
- (d) refer the youth to a diversion program.

There are some exceptions to this rule.

1. There are charges that are outside the diversion regime. Certain offences are prescribed to be outside diversion, for example, terrorism, possession of child abuse material, certain sexual offences including rape, homicide offences, robbery, home invasion, arson. Traffic offences are also outside the regime and this can potentially complicate the way in which matters that would otherwise go to diversion can proceed. For example, a youth may have committed offences of unlawful use of a motor vehicle but being the driver of the vehicle faces a charge of driving unlicensed. Whilst the more serious offending can be dealt with by diversion, the unlicensed driving charge cannot be referred to diversion.
2. The youth has been dealt with by diversion twice before or has a history (of diversion or convictions) that makes diversion an unsuitable option.
3. The youth commenced diversion but did not complete diversion.

In each of these cases the youth will be charged with offences and will then appear before the Youth Justice Court.

However, where a young person has not engaged with diversion or has failed to complete diversion the court may order, with the consent of the prosecutor, that the youth be re-assessed for diversion or for a youth justice conference. Examples of when this might occur are that the youth has previously been in an unstable care situation, or has been transient but is now in a situation where diversion is more likely to succeed.

Sometimes it may simply be that a change of attitude is required for a successful engagement with diversion and that this has been brought about once the youth and his or her responsible adult have been alerted to the consequences of proceeding through the court on criminal charges.

Where there has been a reassessment and re-direction to diversion successfully completed the criminal charges that are before the court will be withdrawn by the prosecution.

The mandatory requirement for diversion is in itself an alert that in criminal matters, there is an entirely different approach to the way in which youth offending is to be dealt with and this difference should also be reflected in the processes of the court. It should not be the case that youthful offenders are simply dealt with as small adults in a process that simply mimics the processes and procedures of the adult criminal jurisdiction.

Diversion produces strong results in addressing youth offending. It is a restorative justice approach that focuses on a young person taking responsibility for their actions and being directed into pro-social activities, performance of community work and in some cases victim offender conferences.

I suggest that a similar approach should generally be required in a Youth Justice Court. That is, that the focus should be on a youth accepting responsibility for his or her conduct, on identifying the factors that have influenced the offending and then putting in place measures to address those issues so that the youth is encouraged to engage in prosocial rather than antisocial behaviour that frequently leads to offending.

Like diversion, to achieve these aims the Court must seek to engage the young person and his or her parents in the process. They should not just sit idly by while the lawyers discuss the matter and the court determines the outcome. You cannot engage a young person without directly speaking with them, demonstrating an interest in their life and future and encouraging them when they demonstrate improved behaviour.

COMMON ISSUES

What then are the common issues that might pre-dispose a youth to offending?

Lack of Parental Interest, Support and Supervision

The *Youth Justice Act* requires a young person to be accompanied to court by their “responsible adult”. Very few of the young people who appear before the court are accompanied by a parent who would fulfil that description in a general sense. In many cases this will be not because the parent does not want to do what is best for their child, but they are simply ill-equipped to parent in an effective manner. Often, this is due to intergenerational trauma and/or alcohol and/or drug abuse.

In some cases, the parent or parents are themselves an offender which not only affects their ability to parent their child but influences the decisions that the child is making.

A common feature for these children as a result of the lack of supervision or parental guidance is a lack of school attendance. The parents either do not see the benefit of an education, or lack the interest and ability to ensure that their child is enrolled in and attending school on a daily basis. It should go without saying, that when a child lacks even a basic education, and we see children who at the age of 15 or 16 are performing at a grade 2 or grade 3 level, they are set up a life that will not include meaningful employment, if any, and will entrench them in an ongoing cycle of social disadvantage with an increased chance of continued involvement in criminal behaviour.

Abuse and Neglect including the Trauma of Family Violence

There is a high prevalence amongst the young people who appear before the court of a history of abuse and neglect. At any one time in the Northern Territory between 25 to 30% of the detainee population are children for whom a protection order has already been made. They have been removed from the parental responsibility of their natural parents and parental responsibility granted to the Northern Territory by way of an order to the CEO of the Department of Children Families. These are children who have been found by a court to have suffered physical and emotional abuse or neglect by a parent.

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 and in the immediate lead up to that. We need to go back further. 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.

When the general community thinks about the abuse of children their minds are more commonly turned to physical abuse, perhaps because media reporting of child abuse is generally of those cases where there has been horrific physical abuse or neglect resulting in the death of a child. These are the cases that are out in the open. This is not a criticism of media reporting because the child protections systems are structured on confidentiality and non- publication of proceedings and the media either simply do not know of the details of the cases each week before the courts or are not able to publish those details.

While it is understandable that there must be protection of a young person from any further harm that might be generated by media reports, it does mean that there is no real appreciation or understanding of the prevalence of emotional abuse and neglect amongst the general community, which are in fact the majority of the child protections cases seen by the Courts. Consequently, it is somewhat understandable that some members of the community categorise these young offenders as “bad kids” without understanding that these are the same children for whom they would feel enormous pity if they knew of the circumstances of their upbringing.

It is particularly troublesome when leaders in government either do not understand the connection between the traumatised and damaged child and the child as an offender. Public comments that “We’re out there working our backsides off and we've got young mongrels out there breaking into houses, it is outrageous”³ perpetrate the view that

³ Northern Territory Chief Minister Adam Giles, Adjournment debate, NT Legislative Assembly as reported at <http://www.news.com.au/national/breaking-news/nt-govt-makes-crime-top-election-issue/news-story/1b21d45ff2fd8ccb83dcda49f1228d5f>

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. If this connection is not understood then what chance is there that the services necessary to provide that intervention, whether within a detention facility or under community supervision will be obtained and fully resourced.

Family Violence

Until fairly recently in Australia it seems to me that there has been little understanding in the community at large of the impact on a child or of the effects of witnessing family violence. Indeed this lack of insight into the impact of family violence is often reflected when the Court deals with adult criminal matters. I hear practitioners say that the child was in another room, or asleep or “only” heard the assault on the mother.

Are these children deaf? Do they sleep soundly through an assault so violent that neighbours call the police? Does just hearing the screams and cries of their mother as she is brutally beaten not have any impact upon them?

Associated with the high level of abuse of alcohol in the Northern Territory is the high rate of violence within families. More than 60% of assault offences in the Northern Territory are associated with domestic violence. Eighty two per cent of domestic violence victims in the Northern Territory are women. More than 70% of sentenced prisoners in the Northern Territory have one or more convictions of domestic violence-related offences.

Indigenous females in the Northern Territory are almost 22 times more likely to be victims of domestic violence than non-Indigenous females. Indigenous females represent 73% of domestic violence victims in the Northern Territory.⁴

With this high level of violence within the indigenous community, is it any wonder that this translates into a high rate of both indigenous youth offending and incarceration?

Community Violence

This issue is not one that is common across youth offending generally but is one that is not uncommon to some remote communities in the Northern Territory. There are communities in the Northern Territory where children are exposed, not once but on a regular basis to rioting. They see people (including relatives) running amok with weapons such as machetes and axes and spears and using those to either attack other people or damage property.

Imagine such an incident in Melbourne or Sydney? What media coverage would it get? What concern would be raised for the children exposed to this? Would counsellors be called in to help these children address the trauma? In many communities children see

⁴ Domestic and Family Violence Reduction Strategy 22 April 2016 at <https://justice.nt.gov.au/statistics-and-strategy/domestic-and-family-violence-reduction-strategy>

this behaviour repeated over and over again not only giving rise to a risk of trauma inflicted neurological damage but also giving rise to a risk that it becomes seen by them as normal adult behaviour.

Aren't there just some kids who are bad?

When trauma from abuse and neglect and exposure to violence is put forward as being a prime factor in youth offending, some sections of the community will respond that there are children who have been abused and neglected and these children do not get into trouble, so the offenders must be "bad kids". The observation that not all traumatised children commit offences is undoubtedly true but it does not establish that these children are somehow inherently bad.

Why some children are traumatised, including by witnessing violent behaviour, personal abuse and neglect and this leads onto offending whilst others do not is complex and involves consideration of the type of violence and the pattern and duration of violence, the presence or absence of trusted adults and, importantly the age of the child at the time of exposure.⁵

Do we penalise a child for being less resilient to the abuse and violence they have experienced?

What other issues exist?

Foetal alcohol spectrum disorders

It is now relatively well understood that when a foetus is exposed to alcohol in utero it may be affected neurologically and born with irreversible abnormalities of the brain. What level of alcohol intake brings about these changes and whether there is a particularly critical point of gestation at which this occurs is not entirely clear.

Foetal alcohol spectrum disorders (FASD) are commonly thought of as being a single condition, the term however describes four different conditions. First there is the more commonly known foetal alcohol syndrome in which the affected child displays distinct facial characteristics, growth retardation and neurodevelopmental brain disorders. There is a partial syndrome where the child does not show all the facial features but has growth retardation and/or neurodevelopmental abnormality. Thirdly, there may be the characteristic behavioural and cognitive impairments but without the characteristic facial impairments. The fourth disorder is a group of congenital abnormalities but without the FAS facial features.

⁵ 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

There is an extraordinary high level of consumption of alcohol in the Northern Territory. In the child protection jurisdiction, the Court sees many cases where the child, still an infant, is displaying the signs of FASD. The Youth Justice Court is increasingly identifying young people with these conditions.

As the condition affects brain function a young person afflicted with a FAS disorder will have difficulty with memory and with problem solving. They will have difficulty learning from previous actions and have difficulty understanding and recognising boundaries. They will have a developmental level well below their chronological age. The damage in FASD is to the frontal lobe of the brain and this affects the ability to plan, make decisions and importantly in the context of offending, controlling an impulse to act. The young person will often be easily led by others so they will most often present in the criminal justice system as a follower rather than a leader⁶.

A punitive approach to a young offender with FASD is highly unlikely to achieve results.

Consider also the likelihood that the young offender presenting with FASD may still be in a household where alcohol abuse is rampant, so that the propensity for offending is compounded and increased by the presence of both factors of neglect and abuse and brain abnormality and cognitive functioning.

Poor Nutrition

The lack of proper nutrition particularly in the early developmental stages of childhood can greatly affect children's growth and can be another cause of poor brain development and affect intellectual ability.

Substance Misuse

Care needs to be taken when dealing with young people who have substance abuse issues not to assume that this is the issue that is causative of the offending because often the substance abuse will be reflective of the type of trauma issues that have already been identified in this paper.

How do we address this issue?

The idea that simply removing a child from his or her family and placing them in foster care or a group home will alleviate the behaviours should be put aside. Experience is that these young people do not stay in these placements but abscond, sometimes to return to the abusive home that they have been removed from, often in a complex reaction in which the child will be seeking to protect the abusive or neglectful parent or they roam from place to place. Both circumstances place them at risk: at risk of personal harm and at risk of involvement in offending.

⁶ Dr Jessica Leonard, *The challenges of FASD & Implications for the legal system*, SA Law Society Bulletin Volume 38(1). Pages 38-39

Many children that our court has seen commence offending **after** they have been taken into care. Sometimes this is as a result of being placed in a group home with other young people who are already offenders. Peer pressure is a well- recognised factor for youth offending. Placing a young person who is already exhibiting problems such as poor school attendance and behavioural issues as a result of child protection issues with known young offenders can be a recipe for starting that young person down a path of offending.

Likewise, simple confinement and punishment of the behaviours are unlikely to achieve much if anything. Children who have been sent to detention are more likely than others to reoffend. Of course there is a complexity to this, part of which is answered by the fact that the young people who are ordered to serve a term of detention are already those committing more serious or more prevalent offending than others and are also likely to be children whose behaviour is more difficult to treat.

The *Youth Justice Act* contains principles that are to be applied to youth offending. Section 4(n) provides that the punishment of a youth must be designed to give him or her opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways.

This principle provides a very clear delineation between the principles that are applied in sentencing adult offenders to sentencing youth offenders. It addresses the need to recognize that many youth offenders are in fact damaged children who are damaging others and will continue to do so without intervention.

But principles of law are one thing. What the Northern Territory Youth Justice System lacks are sufficient services and programs to address the high degree of trauma that exists and a fully coordinated approach to these issues from relevant agencies, youth justice, child protection, education and health, particularly mental health. Coordination of services needs to occur both in the non-custodial and custodial environment.

Does the current Court structure work?

At present all youth offending that proceeds to court is dealt with by the Youth Justice Court. This includes children from the age of 10 years and children this age may be detained in the detention centres.

As previously noted some of these children are children already within the protection system or for whom applications for care may be made during the process of their criminal charges. These kids are often referred to as “crossover kids”. Their protection applications will not be before the Youth Justice Court but will be before the Local Court.

This current structure of courts - separating criminal proceedings for young people from child's protection proceedings does not advantage either group. It fails to recognise what all the evidence establishes, that is, that the more difficult group of offenders before the Youth Justice Court, those who frequently end up in detention or going on to be adult offenders are children who have experienced chronic trauma. It causes in many cases a lost opportunity for early intervention particularly for the younger group of children.

The Youth Justice Court's hands are tied in terms of taking all of the steps that may be necessary to address the dysfunction within the child's family that is harming that child's development and leading them to become involved in offending. Even where the court identifies child protection concerns, it lacks ability to ensure that protection proceedings are taken to protect that child. All the Court can do it is seek a report under section 51 of the *Youth Justice Act* from the CEO of the Department Of Children And Families. Along with my judicial colleagues, I have seen many cases where on the facts of the child's history I would have thought that a protection order was warranted. Yet the report received back from DCF is that there are no protection concerns or that they do not reach the threshold for investigation. There is in my view a significant impasse in the Court's ability to address both the child's offending and their protection in the current structure.

In New Zealand a different court model operates. Children under the age of 14 cannot be charged with criminal offences except for murder and manslaughter. Their cases are dealt with either by diversion, family group conference or by referral to the Family Court. In our system, on the other hand, we can be faced with placing 11 and 12 year olds in a correctional facility because there is no other place at that point in time that will either safeguard them from offending or provide a safe environment for them.

Not all youth offending is attributable to the identified factors in this paper but those that do not have at least one of the identified factors at operation in a young offenders life a few and far between.

Nevertheless there seems reluctance on the part of governments to abandon what is referred to as a justice model of offending, that it is a result of a juvenile's free will, or choice and therefore offenders are seen as responsible for their actions and deserving of punishment. The high level of incarceration of young people in the Northern Territory taken with the continuing high level of offending suggests that this approach is not working.

The alternative welfare approach considers the needs of the young offender and aims to rehabilitate the young person. This should not be confused with excusing the youth from responsibility for his or her conduct. Indeed there will always be cases where incarceration will be required either for particularly serious offences or where the continuation of offending is harming the community. Incarceration on its own will never resolve the issues that have been identified. It is crucial that youth incarceration provides the therapeutic interventions necessary to address the criminogenic factors of the individual youth.

Conclusion

Therapeutic intervention and other interventions that address the family and living circumstances of younger offenders in particular must be developed within the youth justice system to effectively limit youth offending. Whilst the "law and order" approach so popular across Australia at election times might resonate with some members of the

community, at the end of the day that approach and the failure to resource agencies to meet the needs of young offenders ultimately results in more community harm.

That helps no-one.