

JUVENILE JUSTICE

PETER O'BRIEN

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The Northern Territory is not alone when it comes to flagrant human rights abuses against some of the most vulnerable children in our community. Cases like Udin Sarfin's and Saiful Baco's illustrate the Commonwealth's preparedness to put political expediency and populism before its concerns for basic civil liberties, including commitments under the United Nations Convention on the Rights of the Child, even in dealing with some of the most impoverished, desperate and exploited children in our region.

SU V THE COMMONWEALTH

My firm represented Udin Sarfin and Saiful Baco since 2011 when they were crew members of a suspected illegal entry - 'vessel 231' - that was intercepted by the Ocean Protector Customs ship and taken to a detention facility on Christmas Island for immigration processing, and for further investigation in relation to their role in the alleged people smuggling of dozens of people crowded aboard a vessel which had set sail from Indonesia.

When interviewed by immigration officials, both said that they were under the age of 18 and gave dates of birth accordingly. Immigration officials also verified their ages with their families and people in the village.

In April of 2011, members of the Australian Federal Police travelled to Christmas Island and interviewed them both and again they declared that they were under 18 years of age.

A short time after this both boys were transferred by the Department of Immigration (DIAC) to an immigration detention facility for unaccompanied minors.

The Australian Federal Police subsequently arranged for both to be transferred to Surry Hills police station where they were again interviewed - again they gave same dates of birth indicating that each of them was under 18 years of age at the time of the offence (14 and 16 years of age), and after participating in recorded interviews both were arrested, charged and put before a Magistrate in the Central Local Court who subsequently bail refused them. They were remanded into an adult custodial facility.

The evidence upon which the Australian Federal Police relied upon was the – even then - notoriously unreliable wrist x-ray technology and the evidence of a Doctor Low, radiologist. Evidence was gathered by the firm - from school records and from the family and villages where the boys came from - demonstrating their assertions as to their age were correct.

At the end of 2011, the charges against both were discontinued and they were released back into immigration detention and then removed back to Indonesia.

An action was subsequently taken against the Commonwealth of Australia pleading that the boys had been unlawfully imprisoned and that the Australian Federal Police had been negligent in the manner in which they had conducted their investigation in relation to the two plaintiffs.

The negligence action was maintained on the basis that ever since section 3ZQ and the regulations accompanying wrist x-ray technology were introduced into the *Crimes Act* in

2001, there had been real concerns as to its reliability when relied on in the absence of other evidence to determine the age of a person.

The recent case of *Jazmin v The Queen* confirmed the position in Australia at this time.

Jazmin v The Queen [2017] WASCA 122 has an interesting history. Ali Jazmin was a young person convicted in the District Court of Western Australia on 22nd December 2010 having pleaded to a charge of facilitating the bringing to Australia of a group of five or more people under section 232A of the *Migration Act*. Having pleaded guilty, he was sentenced to a mandatory minimum penalty for an adult of five years' imprisonment with a non-parole period of three years.

In November 2015, his lawyers petitioned to the Commonwealth Attorney-General for a royal prerogative of mercy. George Brandis, Attorney-General for the Commonwealth, having duly considered the petition, exercised his discretion in favour of referring the whole of the case to the Court of Appeal in Western Australia, as if it were an appeal by Mr Jazmin against his conviction prior to pleading guilty.

The primary evidence in relation to the District Court Judge's determination that Jazmin was over 18 years of age when the offence was allegedly committed was the evidence of radiologist, Dr Low. At the time, the assessment of skeletal age as a method of determining chronological age was approved under sections 3ZQA to 3ZQK of the *Commonwealth Crimes Act* and regulation 6C of the *Crimes Act* (since repealed by the *Crimes Amendment (X-ray) Regulation 2013* (Cth)). Having done an x-ray of Jazmin's left hand, Dr Low relied on an interpretation of the Greulich and Pyle Atlas in determining the chronological age of which the skeletal maturity is reached and then compared his analysis of the x-ray of the appellant's wrist to that axis.

Dr Low gave the opinion at trial that at the time of the x-ray there was close to 22 per cent chance that the appellant was aged 18 years or younger. At the time of the alleged offence there was a 24 per cent chance that the appellant was aged 18 years or younger. His opinion was that the x-rays showed a person of age 19 and was of the view that if he led a life of deprivation or was undernourished it would have pushed his age beyond the age of 19.

The Western Australian Court of Appeal considered the evidence of DR James Christie who revealed that Dr Low's evidence lacked the proper foundation. This is based on the following:

- The Atlas data had never been evaluated against the Indonesian population.
- The effect of illness and nutrition upon the skeletal development were not within Low's area of expertise.
- That his conclusion that average skeletal maturity in a male occurs at 18 years or age was unsupported by evidence.

His calculation as to the standard deviation of skeletal maturity in a male from the age of 19 years assumed a standard deviation of skeletal maturity in males of the age of 17 years and did not have any factual basis. Moreover, there was primary evidence, particularly in the schooling reports of Jazmin which had been provided at trial and supported the asserted age of Jazmin.

In the Court of Appeal, the Crown accepted that Dr Low's evidence has been entirely discredited and the Court accepted the views of Dr Christie, a diagnostic radiologist, over that put by Dr Low at trial. It was said in the appeal that "skeletal maturity has an inconsistent relationship with criminological age and is only to be used as part of an assessment of a child". There is no data confirming that it is valid to use an assessment of skeletal maturity to determine chronological age.

There had always been a strong surge of opinion in the medical world that it is inappropriate to make determinations on age based on this sort of assessment alone.

The Court was thus satisfied that Ali Jazmin was under the age of 18 at the relevant time and therefore that the Court did not have jurisdiction. The Court determined that in all the circumstances it would be oppressive and unjust to require a retrial when the appellant had already served his sentence – as a child in an adult prison - but particularly when a mandatory minimum prison term was wrongly applied to him. A verdict of acquittal was entered.

Children being imprisoned in adult jails breaches – by my count - not less than 15 of the Articles of Convention on the Rights of the Child. But very likely many more Indonesian children who protested their age and therefore the applicability of the mandatory minimum terms imposed for human trafficking offences – were imprisoned in adult prisons over the years 2009 through to 2012. In a great number of those matters, the wholly unreliable and discredited opinion of Dr Low had been used and accepted to determine age and was commonly accepted over the assertions of the child as to their age, even where that evidence was known to be tarnished by those adducing it.

These children were some of the poorest kids in our region. There can be no doubt that their involvement in the boat trip was enabled by others who took advantage of their naivety and their vulnerability; that they were subject to a mandatory imprisonment regime was not short of appalling. Thirty-one of them are presently litigating a class action for compensation against the Commonwealth in the Jakarta District Court. The Australian Government has refused to concede jurisdiction. The Indonesian Commissioner for the Protection of Children has called for Australia to compensate those litigants.

Action in negligence

Udin and Baco's case began as an action in negligence against the Australian Federal Police as well as unlawful imprisonment action. The negligence case asserted that the wrist x-ray technology was - at the time they were apprehended - already subject to significant disquiet and had been discredited by other agencies and experts who had made their concerns known to the Australian Federal Police and to other Commonwealth agencies including the office of the CDPP. DIAC had stopped using this method for age determination by March 2010. In September 2010 there were meetings between DIAC, AFP, CDPP wherein DIAC provided the prosecuting agencies with material demonstrating their serious concerns as to the reliability of the technology. By late 2011 courts were beginning to reject the evidence of Dr Low.

Australia has adopted a conservative approach when deciding whether police owe a duty of care to suspects during the course of an investigation. This includes circumstances where suspects have sustained physical or psychiatric injuries while being apprehended or self-harmed whilst in police custody. A duty of care will only be owed in “exceptionally egregious situations” when:

1. A sufficient relationship exists between the parties;
2. Vulnerability of the plaintiff is high;
3. Control of the defendant is high;
4. The law is coherent and does not interfere with existing laws; and
5. Guidelines exist but are not followed by the defendant.

Judicial reasoning focuses on two broad fields of inquiry when deciding to recognise a duty of care: proximity and policy. However, as sufficient proximity exists between investigating police officers and suspects, judicial inquiry has focused on policy considerations that ought to negate or the duty of care.

Udin and Baco's argument was that the Australian Federal Police owed a duty of care to them as suspects and that they could have properly discharged their statutory and common law duties to investigate the crime without placing the plaintiffs at risk of harm. In circumstances where Udin and Baco were, as suspects, already detained in a children's detention centre, to find a duty of care would not bring about conflict or give rise to inconsistent duties or obligations.

It was pleaded that the investigation had reached a point where the Australian Federal Police's duty to the public had been discharged, that the suspects had been apprehended and that they were about to be charged with a criminal offence. The way in which the Australian Federal Police chose to prosecute an accused person where there was a dispute as to their age – namely whether they did so in an adult court or in a children's court – could not be said to bring about inconsistent or conflicting obligations for the police. Proceeding with the prosecution in the Children's Court, and having the remaining immigration detention centre within a children's facility until the age determination hearing was conducted, would not have imposed upon the Australian Federal Police conflicting obligations.

The pleadings in negligence were struck out.

Unlawful imprisonment action

The unlawful imprisonment action had more success. In *SU v Commonwealth of Australia & Anor* [2016] NSWSC 8 it was pleaded narrowly that the arrest of the boys was unlawful. Section 3W of the *Crimes Act 1914 (Cth)* provides for the power of arrest without warrant by constables, and essentially justifies the use of the arrest power as opposed to securing an accused's attendance by summons – only in certain circumstances. It had to be believed by the constable on reasonable grounds that acceding by summons would not achieve the purposes of – ensuring the appearance of a person before a court – preventing the repetition or continuation of the offence – preventing the concealment, loss or destruction of evidence – preventing harassment or interference with a witness or preventing the fabrication of evidence in relation to the offence.

The Commonwealth were unable to establish any evidence that the power to arrest provisions in section 3W had been considered. There was no evidence that anybody had even turned their mind to section 3W. The practical effect of the arrest was that the children – as they have now proven to have been – were unlawfully arrested – taken from a children's detention centre where facilities were more appropriate for children and young people, and placed into an adult remand centre and then before an adult magistrate in a local court and bail refused in the adult prison.

The Commonwealth's primary defence asserted that because Udin and Baco were unlawful non-citizens and were therefore required to be kept in immigration detention, that there was an "umbrella of legality" as to their imprisonment and that - although the arrest may have been unlawful due to the failure to comply with the arrest provisions of section 3W – it did not follow that the plaintiff's unlawful arrest caused a false imprisonment. It was submitted that the unlawfulness of their arrest was of no legal consequence. Put another way, a person cannot sue for unlawful imprisonment if they are otherwise lawfully imprisoned or detained. That indeed has been to many the accepted wisdom, at least until these boys' case.

In *SU v The Commonwealth* Justice Hamill upheld the principal of what has been described as 'residual liberty'. The concept holds that even though a person is otherwise lawfully detained; they still enjoy those civil liberties that were not taken away by expressly or by necessary implication. The principal derives from US and Canadian authorities holding that an infringement of a prisoner's residual liberty may well support a

writ of habeas corpus and supported the concept of residual freedoms within a prison for the analysis of the character of unlawful detention in the prison context; rejecting the alternative view that liberty is all or nothing.

It was determined that the boys were not detained after their arrests at the Sydney police centre as a result of being in immigration detention, they were there to be arrested, charged and dealt with as remanded prisoners. In this respect, the legal nature of their imprisonment was different. One of the residual liberties that they enjoyed was the right to be dealt with according to the law. This included the right not to be arrested contrary to the provisions of section 3W. Accordingly, it was determined they were wrongfully imprisoned and were awarded judgement in their favour.

THE NT ROYAL COMMISSION

The decision of *SU v The Commonwealth* was critical. It brought about a set of circumstances that gave rise to the Royal Commission into the Detention and Protection of Children in the Northern Territory.

Dylan Voller's suit against the NT was filed in the months after the determination of that judgement. The treatment of Dylan Voller and other juveniles in the now infamous Behavioural Management Unit – 'BMU' - at Don Dale Detention Centre, the movement and transfer of him from juvenile detention facilities into adult prisons, the use of restraint chairs, all form part of the claim made in the latter part of 2015 that Dylan Voller's right to be treated in accordance with law had deprived him of his residual liberty, although at the time he was a legally remanded or a sentenced detainee.

Other intentional torts were added into the pleadings including the assaults and batteries that had been investigated over and over again without successful outcome for Dylan.

Although most of these matters were within the realm of public knowledge in the Northern Territory – there had been some media scrutiny – particularly by the ABC – to this in authority in the Northern Territory – those who could change the course of events and prevent such things from reoccurring – to them it apparently barely rippled a concern. Conversely some pride was engendered in their response – that this was the way juvenile offenders were to be treated.

The NT Children's Commissioner had been conducting investigations in relation to the treatment of Dylan Voller and other detainees for almost two years prior to the Four Corners program. Those concerns had been brought to the attention of the government of the day. Pictures and reports were shown to government ministers and the heads of Correctional Services, calling for immediate and urgent changes to be implemented relating to the training of staff, the use of different types of restraints and the use of force and the immediate welfare of children in detention. Those notifications barely seemed to matter.

Some prosecutions had been commenced by police – although there are question marks as to the efficacy and expediency of those prosecutions (in each instance the prosecution either failed because of time limitations, or by virtue of decisions that, to my mind, involve some impressive mental gymnastics). In instances where staff were charged, they were usually publicly supported by the Commissioner. There was evidence to suggest – at least so far as the Children's Commissioner was concerned – that evidence had been fabricated, and police and Children's Commissioner's investigators had been misled in relation to the availability and existence of CCTV footage. Additionally, extremely poor record keeping – particularly of complaints and use of force – a repeated feature of evidence at the NTRC, and did not assist prosecutors.

Four Corners, having done extensive research and having been alerted to some of the footage of the incidents in the Centre, were hot on the trail when the proceedings were

filed in the NT Supreme Court. Discussions began as to the firm's participation in the television program.

The terms of reference were drafted reasonably quickly after the airing of the programme in July 2016. And the Royal Commission was taking evidence by September.

The Federal Government initially allowed for a three-month turnaround before a report was due to be presented to the Commonwealth Attorney-General. The Terms of Reference were published and included the very significant – but extremely complex – issue of the protection of children and the care and protection mechanisms within the Northern Territory.

This remains one of the key difficulties and challenges for the Royal Commission. With a report due at the end of this month, it will be very interesting to note how far the protection Terms of Reference are addressed, and the extent to which those matters overshadow the initial public concerns that were raised in the Four Corners program in relation to the treatment of children in detention. Care and protection and the juvenile justice system are intricately connected (A study from 2016 revealed that 45% of young people incarcerated across Australia received interventions under the child protection systems) – but even with the extended time frame for the Commission to report, the ability for the Commission to deal with both the detention and protection aspects, was in my view heavily compromised.

A Royal Commission doing its work quickly and reporting as soon as possible is obviously laudable. But where the task is so important, the issues so apparently intractable and the terms of reference involving such complex areas – such as the care and protection jurisdiction – about which there has been decades of debate and consternation – the still severe time limits on the Commission to turnaround a robust and implementable report is a real challenge.

A lot of short-cuts have been taken, I think by necessity, given this very tight deadline: parties with leave were extremely limited in their ability to test the evidence – very harsh time constraints on cross-examination, following strict applications for leave to appear and examine witnesses setting out written abstracts as to areas, topics, demonstration of an area of conflict and putative questions. Requests for submissions did not follow in the usual manner for inquiries of its type – there have been no submissions prepared by counsel assisting for consideration by the parties. Parties do not apparently get to see and respond to those whose submissions are adverse to their witness. There were other significant matters that – to my mind – draw a concern that those whose interests are subject to adverse finding might yet argue a failure in the application of procedural fairness.

From commencement the task appeared overwhelming. The proceedings were, I think it is fair to say – as Commissioner White did – 'shambolic', in the early stages. While the Commission quickly came to understand the issues – hearing first from numerous experts who had for years reported upon the endemic problems within the detention system, it took months for the Commission to get traction on an approach to dealing with the complainants, to build the expertise and set up the foundation to support those who would bring to bear their own experiences in the system. As I'll speak about further shortly, the approach taken by the NT Government did not assist the investigative role of the Commission. In December of 2016, the entire solicitor base of the Royal Commission was removed and replaced in favour of an assignment to Gilbert and Tobin who remain solicitors assisting the Royal Commission.

Notwithstanding that there were some grating aspects of the Inquiry for a lawyer in my position and that the process did not run as smoothly as we'd imagined it might, my

clients and I remain very hopeful, and indeed confident that the Commission will meet the very significant challenge set for it. All of the firm's clients committed themselves to assisting the Commissioners undertaking a very important task.

Dylan Voller was the first witness to be called in relation to first hand complaints of what are generally accepted to be systematic abuses within the department and within NT detention centres. He was fully identified and he gave evidence on camera that was broadcast live. No other detainee witnesses followed him until 4 months later.

He was very widely vilified by certain members of the media in relation to the stand that he took. Defamation actions are now pending in relation to some of that vilification.

After Dylan Voller, not a single vulnerable witness of the dozens who gave evidence before the Royal Commission gave evidence using their real name and/or were broadcast live to camera in the same way that Dylan Voller did so. My belief is that although each of them was committed to change to assisting the Royal Commission, they learnt from the experience that he had with the Royal Commission - particularly the manner in which he was dealt with and examined by the Northern Territory Government – and were not going to put themselves in the same position.

This gave rise to an incongruity from a public perspective side of the Royal Commission. Some of the most appalling evidence of abuse was given in camera, leaving for news publication only the desperate denials of guards and the claims of an absence of knowledge by those above them.

To my mind, Dylan Voller remains a person of incredible resilience and strength of character to have conducted himself so publicly in relation to his evidence. But that was really the nature of him. From 10 years of age, Dylan Voller had a very keen sense of unlawful and unfair treatment by those who were meant to care for him. Whilst others from his background might have simply endured it or thought it part of what was 'normal', from that age, Dylan was – with good reason - complaining about extended periods of isolation, physical assaults and the use of force, and instances of broader abuse of children in detention – to anyone in authority who would listen. He complained to his lawyers, to Magistrates, to Judges, to Child Protection workers, to the chains of command in the youth detention centre, to the Commissioner, to the Ombudsman, to the Children's Commissioner and to all and others along the way. But for the determination he had to ensure that what was happening to him and others was exposed and understood, the Royal Commission would not have come into existence.

The real horror show for this Royal Commission has been the manner and approach of the Northern Territory Government. They have put themselves in an invidious and precarious position. It is evident that the Government – although of a different political persuasion – have instructed their lawyers to refute and refuse the assertions that what has happened to Dylan Voller and other children was unlawful – or even - unreasonable. It was out expectation that the government would be co-operative and eager to learn how to address the failings of the system and improve it. Instead they have been adversarial and obstructive.

Only Dylan Voller was actually cross- examined. In each other instance the NT Government tendered a "responsive tender bundle" designed apparently to discredit or contradict the witness as to their accounts. This material pulled together reports produced by workers Department of Juvenile Justice documenting their account of the alleged incidents and other material that sought to discredit the child. The value of that material against a backdrop where the reporting and records of the workers and the department were accepted to be very substandard is yet to be seen.

The NT Government lawyers represented a great range of witnesses – from ministers, and former ministers of the Crown, governmental agencies and departments, and heads

of them, workers, guards and supervisors - down to many of those against whom abuses had been alleged. They were generally therefore pitted in an adversarial position against almost every child who gave evidence.

It troubled me throughout the Commission that despite the fact that there were two sets of people in the detention centre who were the responsibility of government – children and workers – the government of the NT took up the cause for the workers alone. But the children were their charges, and to many the Territory was *in loco parentis*.

It is the Northern Territory Government who must implement the recommendations of the Royal Commission in the Northern Territory. How they intend to do so where they have taken such a belligerent and adversarial approach within the proceedings is troubling.

The manner in which the NT Government has approached this Royal Commission is very different to the manner approached by almost every institution who was party to the Royal Commission into the Institutional Responses to Child Sexual Abuse – in almost every instance – first, accepted a level of responsibility by way of *mea culpa* – and secondly, insisted that they were approaching things differently now and were in train to change their operations, policies, practices and procedures so that things that were complained about would not happen again. They generally didn't represent the individuals connected with the abuse and never those alleged to have committed the abuse – all of whom were independently represented. Conversely, the Northern Territory Government's approach is to refute that such things have happened, or that if they did, that they were reasonable. How they will implement recommendations based on findings that they submit against so rigorously is yet to be seen. But the NT Government has placed itself in an awkward - if not conflicted - position. It does not bode well for their response.

THE EVIDENCE OF ABUSE

There were numerous very disturbing accounts of abuse and mistreatment given by former detainees in the Northern Territory Royal Commission. I'd like to relay the experience of one of the clients of my firm.

- Sophie, not her real name, is an Aboriginal girl who suffered severe neglect as a child. She first came into juvenile detention aged 12. She was in and out of detention for the next 6 years to the extent she spent a total of two years in detention.
- An examination of her time in detention by an independent expert found that there had been an abject failure to investigate the sources of her acting out behaviour and to design any kind of meaningful management and support plan. There had also been a distinct lack of empathy and compassion shown by staff towards her. There had been a complete failure to recognise and address a significant hearing impairment that she suffered from.
- Throughout her time in detention Sophie was regularly placed in isolation. The independent expert noted that this likely exacerbated her distress and could have resulted in long-term effects.
- When she was 16 Sophie had an acute Mental Health episode. A pattern developed whereby she would self harm, the guards would take her to hospital, they would return and place her in isolation where she would self harm again. Over a 75 hour period she was only out of a cell for 3 hours and 40 minutes. She was screaming to be let out. A CCTV video shows on one occasion after being placed back in the cell that she stands near the door pleading for it to be left open. The guard can be seen shoving her forcefully in the chest and slamming the door.

- Despite 6 self harm attempts in 3 days, Sophie was not seen by a Mental Health professional until 4 days after the first self harm. The professional said she should be in a youth mental health institution. Instead she was transferred to the adult prison where she was placed in the infamous restraint chair and medicated in a manner described by an independent expert as “chemical restraint”.
- On the very day she was returned to detention she had all her clothing forcibly removed by 6 guards, including 4 males.
- She spent the remainder of her time in detention in isolation and under chemical restraint. No significant plan was formulated for her release.
- While she was subjected to numerous assessments, none of them focused in on why she was acting the way she was and what could best be done to address it. And significantly, no meaningful therapeutic approach was ever attempted with Sophie.
- She left detention traumatised and worse than when she came in.

This snapshot of Sophie’s experience in that month paints an appalling picture of abject neglect, incompetence and abuse. It also highlights the punitive manner of dealing with highly traumatised young people within the juvenile detention centre in the Northern Territory.

The Children’s Commissioner investigated this matter and found that Sophie’s treatment during the acute Mental Health episode highlighted serious systemic and departmental failings in dealing with young people at risk. They said, and I quote, “the approach is reactive, confronting and, at times, frantic. It is not cognisant of the complex, extremely vulnerable nature of these young persons and fails to apply a therapeutic or preventative approach.”

It has been submitted by my firm to the Royal Commission that the Northern Territory government were guilty of gross negligence in that they:

- Failed to develop a timely and therapeutic case management plan aimed at Sophie’s welfare;
- Failed to detect her significant hearing impairment;
- Failed to provide the psychological and therapeutic treatment she needed;
- Inappropriately used chemical means to restrain her;
- Were responsible for an environment where she could be sworn at, belittled and on occasion racially abused;
- Were responsible for an environment where she could be effectively sexually assaulted (by virtue of her clothes being forcibly removed));
- Were responsible for re-traumatising Sophie by repeatedly placing her in isolation;
- Failed to adequately manage an acute mental health episode.

The juvenile justice system, in treating her in a manner where she was making serious attempts at taking her own life in an isolation cell, then taken to hospital, returned from the hospital and put straight back into the same isolation cell was, as Commissioner Gooda observed, doing the same thing and expecting a different result - the very definition of insanity.

Most former detainees gave evidence that they came out of detention more angry and acting tougher than they were when they went in, that it "didn't make them a better person".

THE MEDICAL EVIDENCE – COGNITIVE FUNCTIONING

The overwhelming evidence from the expert medical and paediatric evidence at the Royal Commission was as follows:

- Psychological trauma early in life in the form of physical abuse and/or fear of abuse is a neurotoxin that damages brain growth by impacting on the neuroendocrine system (the chemical side of brain functioning) so that emotional regulation is compromised;
- Alcohol in-utero damages the actual wiring of the foetal brain, as well as the neuroendocrine system so that normal electrical signals are incapable of functioning;
- Children with ELPT and/or FASD will have a variable cognitive profile with areas of relative strength and areas of relative weakness;
- It is highly likely that there is a degree of prevalence of ELPT and/or FASD amongst Aboriginal youth in detention in the Northern Territory;
- ELPT and/or FASD are powerful drivers of engagement in the child justice and protection systems;
- The earlier ELPT and/or FASD are diagnosed and a treatment management plan implemented the greater the likelihood of positive future outcomes.

It is not clear how many children in the NT Juvenile Justice System suffer these types of conditions. But evidence emerging from Western Australia would suggest that as many as 40% of detainees have these disabilities.

The significance of these types of conditions in detention is:

- The children with these types of conditions will find it hard to follow rules and procedures;
- Children with these conditions will often respond poorly to discipline and aggression;
- Children with these conditions are more vulnerable to being further traumatised by aggression and isolation;
- Children with these conditions will find it difficult to participate in and benefit from mainstream programs.

Sensible governments should ensure that assessments for this type of conditions take place, and diagnostic and referral pathways linked to the Department of Health through police, courts, schools, the corrections system and child protection system. Cognitive impairment connected with ELPT and FASD should be included on a national disability scheme.

A UNIVERSAL PROBLEM

A 2017 report by Professor Eileen Baldry and others is entitled "Cruel and Unusual Punishment - An Inter-Jurisdictional Study of the Criminalisation of Young People with Complex Support". Baldry and her colleagues conducted an extensive summary of the international literature. It revealed that, unsurprisingly, for children and young people most heavily involved in youth justice systems:

"The fabric of life invariably stretches across poverty; family discord; public care; drug and alcohol misuse; mental distress; ill-health; emotional, physical and sexual abuse; self-harm; homelessness; isolation; loneliness; circumscribed educational and employment opportunities; and the most pressing sense of distress and alienation."

A New South Wales young people in custody health survey conducted in 2016 found that 83% of young people in penal custody have symptoms consistent with psychological disorder. The surveys from 2003 and 2009 found similarly high levels of psychological disorders amongst incarcerated young people at 88% and 87%, respectively.

Eighteen per cent of young people in custody in New South Wales, recent studies reveal, have cognitive functioning in the low range (that is an IQ under 70), indicating cognitive impairment with between 39 and 46 falling into the borderline range of cognitive functioning. These rates are very significantly higher than those rates of young people in the general population.

It appears that a number of magistrates were examined by Professor Baldry and her associates in relation to the compilation of this report and, of course, they revealed the evident number of young people struggling from cognitive impairment, severe social disabilities and intellectual disabilities that appear before them.

Baldry *et al* found that many young people appearing before the Courts have cognitive functioning and reading and writing levels at well below the age of criminal responsibility. They have a reduced capacity to understand and comprehend the implications of their offending and to follow and actively engage in the legal process. Most of those within the judicial system who were engaged in the study considered custody to be an inappropriate response for young people with disabilities and acknowledged that it often serves to exacerbate trauma. One Australian judicial officer responded, "There would be genuinely very few magistrates, or virtually none, who would actually say, 'If we can't do anything for them in the community, then we will lock them up,' but, inevitably, that is what ends up happening because if they don't get any services whatsoever ... their issues just continue."

The paper adds to a ever growing body of evidence; "that young people with mental health disorders, cognitive disabilities and complex needs are disproportionately and quite inappropriately processed, governed and regulated by systems of control, rather than care and are excessively criminalised in the absence of community-based education, health and welfare services. Moreover, repeated contact with youth justice systems can impose devastating, long-term impacts on individuals, families and communities by creating and compounding complex needs and embedding this vulnerable population within the apparatus of punishment. This is, of course, ultimately contingent on a social class and the material resources available to young people and their families. For the poor and dispossessed, and especially for indigenous people and the young people of Australia, too often imprisonment becomes the norm in lieu of community-based support services that are increasingly reserved for those who are able to purchase them. Such unnecessary cruel and unusual punishment is not justice. It is criminal."

ABOLITION OF THE PUNITIVE APPROACH TO YOUTH JUSTICE

There is abundant evidence before the Royal Commission that the present system of juvenile detention in the Northern Territory has failed. It has failed not only the youth that have had the misfortune to experience it, but it has also failed the community. The Northern Territory Royal Commission has had the very significant benefit of hearing from

esteemed experts who have written about, reported upon, studied, and have decades of experience in not only the Northern Territory juvenile justice system, but juvenile justice systems around the country and internationally, experts such as Pat Anderson OAM, Professor Muriel Bamblett, Dr Olga Havnen, Professor Keith Hamburger, Professor John Boulton, Professor Eileen Baldry, Aboriginal Elder Marius Puruntatameri and Dr James Fitzpatrick.

The combined evidence of those eminent witnesses puts forward a blueprint with the following features of the juvenile justice systems in the Northern Territory - but should also be applied around the country:

1. The system must be therapeutic and restorative-based, focused on the physical and psychological welfare of children and modelled on the latest research as to what works;
2. We need to abolish the existing approach to youth crime and substitute a tiered approach with a preferred order of (i) diversion, (ii) youth specific services for impairments, disorders and substance abuse issues and (iii) small detention centres with therapeutic assistance;
3. The system must take into account childhood trauma and other cognitive impairments, including the increasingly troubling aspect of foetal alcohol spectrum disorder;
4. The system must have highly trained staff and ready access to skilled experts;
5. It must ensure Aboriginal people are significantly involved in the delivery of services;
6. There must be an overarching, long term strategic plan unaffected by political chest-beating in law and order campaigns;
7. There must be a strong and independent inspector and overseer.

There is an enormous body of international research and evidence – presented at the NTRC - that overwhelmingly supports a therapeutic, as opposed to punitive, approach to youth crime and detention. But there is no need to reinvent the wheel. There are therapeutic approaches working successfully all over the world, about which the Royal Commission heard evidence.

TOWARDS A THERAPEUTIC SYSTEM OF JUVENILE JUSTICE

The keys to a therapeutic, as opposed to punitive, system, are the following features:

- a) There must be an overarching philosophy that recognises that the majority of children coming into contact with the juvenile justice system are vulnerable and the system must be committed to causing no further psychological harm, but instead enhance the wellbeing and opportunities for the children and, of course, address the root causes of criminal behaviour;
- b) A legislative and regulative framework needs to be in place to support the philosophy. This includes having a police force and court system that work within the overarching philosophy above;
- c) There must be a focus on providing intensive assistance during early childhood to the child and the family of the child aimed at preventing future problems;
- d) A clear understanding is required that early childhood psychological trauma actually damages the brain and requires intensive treatment;
- e) An emphasis on local employees using national and international experts to increase the local skill set;
- f) Strong and meaningful consultation with Aboriginal people to incorporate skills and methods into a cultural context;
- g) Encouraging and supporting Aboriginal programs and modalities;
- h) Creating good physical spaces that achieve the aims of the philosophy;

- i) A commitment to heavily invest in creating this new model over a period of time beyond the election cycles and at the expense of traditional funding avenues.

Within these broad parameters, developments in youth justice and community youth services can take place. The features above are simply extensions of current juvenile justice philosophy – but based on the evidence that those philosophies are in the main not enough to assist our most vulnerable children and young people in the justice system. Concepts such as detention as an option of last resort, a focus of rehabilitation in sentencing. Those type of principles are meaningful and sound, but have failed overall to protect and assist our most vulnerable.

Ending bureaucratic lethargy

In undoing the current system, it will be necessary to overcome bureaucratic lethargy and incompetence. This is a significant hurdle. The Royal Commission in the Northern Territory heard a great deal of evidence about the tortuously slow and uninspiring manner in which the bureaucracy works, particularly in relation to matters concerning Aboriginal affairs. As Pat Anderson said, "When there is a change of government, or even where there is a change of minister or a head of department, everything concerning Aboriginal affairs goes way back to ground zero and, again, we have to start again."

Old thinking in relation to punitive approaches needs to be completely unsettled and extinguished. As a parallel to this, it is going to be necessary to sell a new youth justice model to the public. The 'tough on crime' rhetoric is obviously popular because people want to feel safe and want vengeance for wrongdoing. The only logical way to combat that is by broad encouraging a broader community understanding of other - enhancing community safety, protecting children and costing less money. This takes true leadership. But the evidence is well and truly in that therapeutic and restorative justice approaches do make the community safer and does cost significantly less than imprisoning children with a punitive approach. A public education campaign explaining the therapeutic and restorative justice approaches making communities safer must be employed.

Empirical evidence

There also must be baseline measurements as to the level of youth crime, the cost of youth crime and the cost of dealing with youth crime under the present system and the estimated cost of dealing with youth crime under the new system and then monitoring those measurements at regular intervals. It is essential that youth justice be dealt with in a manner which reflects empirical evidence and which is evidence-based, rather than anecdote-based or fear mongering-based.

End to isolation

It is imperative that the systems 'do no harm'. For this reason, the practice of isolating children in a room/cell because they are attempting or threatening self-harm must be abolished. As Professor Eileen Baldry said, placing children in isolation for punishment or because they have been marked as at-risk of self-harm is "an appalling practice and there is no evidence anywhere that putting young people or adults, particularly who have complex support needs, in an isolation cell does anything other than exacerbate their mental state and their understanding of what is going on."

Experts were unified in the view that isolation is antithetical to ameliorating the suffering of a distressed child. The evidence at the Royal Commission was overwhelming in this regard. Children acting out and experiencing suicidal ideation are likely to be re-

traumatised and the impact of isolation will exacerbate their feelings of despair and increase the threat of self-harm.

The World Health Organisation's 2014 Prisons and Health report noted:

"The already mentally ill, as well as persons with borderline personality disorders, brain damage or mental retardation, impulse ridden personalities, or a history of poor psychiatric problems or chronic depression, for these inmates placing them in [isolation] is the mental equivalent of putting an asthmatic in a place with little air to breathe."

Chemical Restraint

There is growing and disturbing evidence also of the heightened use and misuse of forms of chemical restraint; doping up children for behavioural management. Such practices are truly frightening. The constant vigilance of lawyers is essential in this regard – it is only a matter of time before an action is taken by a child regarding this form of unlawful imprisonment, assault and battery.

Removal from community

Certainly children with substance abuse disorders or deep-seated trauma may need assistance away from the community. In places like Missouri and New Zealand the approach to youth justice is very much about having those young people who have been detained or sentenced for a period of time in smaller facilities, closer to family and closer to community. It is suggested that those small facilities be located in major urban centres and also in larger regional, and even remote communities.

If incorporated these features into our systems of youth justice and if governments invest in the right areas, it is predicted by experts that only a small handful will ever need to be detained; there will only be a need for very small detention facilities.

Effective Oversight

It is essential that there is a strong and independent inspector and overseer.

One of the key issues emerging from the Northern Territory Royal Commission - if the evidence is to be believed – is that ministers and, indeed, high level bureaucrats in charge of the juvenile justice system claimed that they did not know what was happening on the ground, despite the very horrendous things that were occurring.

If there was, in fact, a disconnect between what was happening and what upper management and government officials were aware of, the system is left practically unscrutinised.

It is essential that the justice system for the most vulnerable in our society must be scrutinised very rigorously and carefully. It is proposed that there should be an office of detention and a through care inspector that looks systematically at governance and carries out probative checks.

HOW WILL GOVERNMENT RESPOND?

History has taught us that there are three typical responses to Royal Commissions and Boards of Inquiry into entrenched problems within our governmental institutions:

1. Lip service is paid, but no action is taken due to it being too hard or there being no money and/or no political will and incentive to change. The cross-examination by the Northern Territory Government Solicitor of Professor Keith Hamburger is illuminating on this point.

The line of questioning is indicative to the historical attitude of the Northern Territory government towards empowerment of Aboriginal people and systematic change - it is too hard, it will cost too much, the area is too remote, the right people are not available, it requires too much work. If the Royal Commission is to be effective, this attitude needs to be overcome.

2. Recommendations and findings are often cherry picked with an emphasis on those recommendations that involve money staying within the structure of the existing system and changing or upgrading present infrastructure. This is exactly what the Northern Territory and Australian government did in relation to the Little Children Are Sacred report. It is exactly also what the Northern Territory government did in relation to reports that it has commissioned into juvenile justice in the past. Of the recommendations that required long-term systemic change, no actions were taken – the paradigm prevailed. There was no real systematic change implemented.

In relation to the Little Children Are Sacred report, there was absolutely no discussion with the community about how the intervention would be implemented and, indeed, the implementation of the intervention was completely counterintuitive to the logic and philosophy underpinning the Little Children Are Sacred report. The governmental approach taken to the Aboriginal Deaths in Custody Royal Commission was similar – the easily implemented recommendations were implemented, the ones that involved systemic change were and remain ignored. I remain convinced that had those recommendations been implemented in full, and the Little Children are Sacred Inquiry been given true heed, we would not be in the very serious predicament we are now in with juvenile justice across Australia.

There is genuine concern that the government's response to the Royal Commission will be like this - akin to "putting lipstick on a pig". The Northern Territory Government has a tragic and damaging history of doing the least possible, and maintaining a short-term politically expedient focus.

3. Governments across the country also have a history of implementing paternalistic responses that are aimed at exercising greater control over Aboriginal lives. The best example of this was the implementation of the "national emergency" and the intervention following the Little Children Are Sacred report. As Pat Anderson – the author of the report said at the Royal Commission, "The government's response was to have an intervention. This was a huge betrayal. And trust was lost. The last 10 years have just been appalling. So it is an extension of that abuse, the further abuse of Aboriginal people as a result. That is what the intervention was. There is no doubt in my mind about it."

My colleague, Stewart O'Connell, said it best: "while the Government cannot be held fully responsible for all of the trauma and dysfunction suffered by the children of Don Dale and the children that will follow them, the fact remains that the Government is the body with the resources that, if smartly invested and deployed, can potentially enhance the wellbeing and change the life path of these children. A smart and compassionate Government will do this; a smart and compassionate society will demand it."

PETER O'BRIEN

(Thanks to Olivia Tolley)