

Most children involved with the Australian criminal justice system are Aboriginal and Torres Strait Islander (hereafter, respectfully referred to as Aboriginal) and have a myriad of complex problems relating to unrecognised neurodevelopmental impairments from conditions such as Fetal Alcohol Spectrum Disorder (FASD) and trauma. They are commonly from our most disadvantaged communities, and many are in the 'care' of child protection services and follow an increasingly intractable pipeline to prison from the out-of-home care system.

While we recognise the right to community safety is a priority, in our experience many children are locked up for committing multiple petty crimes and are on remand for long periods of time. They languish in detention centres without neurodevelopmentally or age-appropriate education services, health checks and health needs, psychological support, rehabilitation and planning for their futures, co-ordinated planning for release back to the community. These views are largely supported by half a century of inquiries and reports on child protection and youth justice systems across Australia, that list a litany of contraventions to children's rights and that report methods of containment which harm the child's dignity and ignore the child's worth. The findings regarding the atrocious treatment of children in detention at Don Dale in 2017 are a prime example: the centre was not fit accommodation or conducive to rehabilitation, children were subject to a range of serious abuses, corrupt conduct by staff, and punitive, excessive control measures which caused suffering to detainees and for many, lasting psychological damage.¹

The authors were researchers on the Western Australian (WA) Banksia Hill FASD prevalence study. This found that 36% of children had FASD and a whopping 89% had at least one severe neurodevelopmental impairment that was previously unrecognised and undiagnosed.² We found that the children in Banksia have an elevated frequency of health problems³, shared experiences of early life and sustained adversity, intergenerational trauma and cross-sector disadvantages and disengagements.⁴ There was a lack of knowledge across detention centre staff about neurodevelopmental disabilities and the individual challenges experienced by the children were often unrecognised and undiagnosed. These children face enormous challenges as a result of FASD yet are being managed by multiple systems blind to their disability.

¹ Royal Commission into the Protection and Detention of Children in the Northern Territory. website: www.childdetentionnt.royalcommission.gov.au

² Bower et al. (2018). Fetal alcohol spectrum disorder and youth justice: A prevalence study among young people sentenced to detention in Western Australia. *BMJ Open*, 8: e019605. <https://doi.org/10.1136/bmjopen-2017-019605>

³ Mutch et al. (2022). Comprehensive Clinical Paediatric Assessment of Children and Adolescents Sentenced to Detention in Western Australia. *Journal of Fetal Alcohol Spectrum Disorder*, 4(1), e16-e31.

⁴ Hamilton et al. (2020). Disability 'in-justice': The benefits and challenges of 'yarning' with young people undergoing diagnostic assessment for Fetal Alcohol Spectrum Disorder in a youth detention centre. *Qualitative Health Research*, 30(2), 314–327. <https://doi.org/10.1177/10497323198882910>

Hamilton, et al. (2020). 'That thing in his head': Aboriginal and non-Aboriginal caregiver responses to Fetal Alcohol Spectrum Disorder diagnosis. *Sociology of Health and Illness*, 42(7), 1581-1596. <https://doi.org/10.1111/1467-9566.13146>

Hamilton et al. (2020). Putting 'justice' in recovery capital: Yarning about hopes and futures with young people in detention. *International Journal for Crime, Justice and Social Democracy*, 9(2): 20-36. <https://doi.org/10.5204/ijcjsd.v9i2.1256>

Hamilton et al. (2019). 'He has problems; he is not the problem ...' A qualitative study of noncustodial staff providing services for young offenders assessed for Foetal Alcohol Spectrum Disorder in an Australian youth detention centre. *Youth Justice*, 19(2), 137–157. <https://doi.org/10.1177/1473225419869839>

Research over decades has shown that children in detention commonly experience a variety of detrimental social and economic determinants of health including, but not limited to: impaired development, early school failure/disengagement, early engagement in high risk behaviours, decreased social, economic and occupational opportunities, and in general poor physical, mental, cultural, social and material health. The confluence of each determinant provides a nexus for intractable social disadvantage and exclusion, and all increase the likelihood for anti-social or offending behaviours. A child with any neurodevelopmental condition is at high-risk of severe and persistent mental illness, homelessness, unemployability, years of productive life loss and early and repeated incarceration.

The inquiries, reports and revelations since the Don Dale debacle in 2017 about children in places of detention confirms little has changed. Worse, is the repeated failure to implement recommendations, repeatedly and comprehensively outlined by iterative reports into youth justice facilities nationwide. Indeed, the impunity and failure to implement recommendations resulting in ongoing mistreatment of children by and within justice systems can appear as intentional disregard of clear and detailed instructions to do differently; the harmful practices are malignant to the children involved with justice services for their lifetime. Ultimately, it demonstrates an ongoing lack of political will and courage to do things differently.

We question the level of understanding by state actors (ie, child protection [social] workers, teachers, police, courts) about the Convention of the Rights of the Child [hereafter the Convention], and the application of the principle of the 'best interest' of the child. Much of our work, but particularly our work at Banksia, highlights the ineffectiveness applying the Convention and its principles in practice. The obligations for state actors to the Convention are not well understood and there has been little attention given to understanding and educating state actors about the Convention, and ways for effectively enacting the principles of the Convention in federal and state government systems. This is a critical gap in the education of those responsible for administering child protection, criminal justice, health, education, and social services.

It is hard not to see the 'best interest' of the child as a meaningless catchphrase used to avoid debating decisions that have been challenged and yet, do not seem to be in the 'best interests' of children. Addressing this is key to transparency and accountability. The National Framework for Protecting Australia's children referred to the 'best interest' principle numerous times, however nowhere in the document defines what it is or discusses how to enact the principles.

We argue that the 'best interest' principle, is seemingly nothing more than a plausible folk theory. A theory that has surface validity, is easily comprehensible, and yet is a superficial way to implement somewhat excessive monitoring and surveillance of the private lives of families, particularly Aboriginal families. Despite our obligations to adhere to the Aboriginal Child Placement Principle, and place children with kin, half of the Aboriginal children in care are with non-

Aboriginal carers. In our research and work in the child protection sphere,⁵ we know that all kinds of excuses are made; most commonly, no 'suitable' family could be found. We know that family has not been looked for. We have heard experiences of Aboriginal families prepared to take in children who meet hurdles and obstacles too difficult to navigate. And we have heard this regularly. We see and hear very little that truly pays attention to the 'best interests' of children.

There is extensive debate about raising the age of criminality from 10 to 14 years. Currently the minimum age of criminal responsibility in Australia is 10 years. Although we broadly support this campaign, we argue, that current justice services expect pernicious consequences to change a child's behaviour. Consequential reasoning is outside the developmental capacities for the children involved in justice services in Australia given the plethora of unmet and unrecognised developmental impairments. Essentially, a 16-year-old living with FASD is most likely around five years younger developmentally than their chronological age. There is a persistent dissonance in systems of youth justice as they are premised on ideas of criminality, a model where offending behaviour results in intervention, consequences and/or punishment. John Pilger's 1994 book "Distant Voices" challenged consensual silence and paid tribute to dissenting voices illuminating human rights violations and the lived experience of those being silenced. Pilger demonstrated how governments and malicious actors, each needing silence, employ language and novel terms to obfuscate violations.

So, we need to stop talking about "youth justice". Talking about youth justice obfuscates violations and silences the lived reality. Youth justice is not about youth nor is it about justice. The term youth justice obfuscates that it is children who are incarcerated. Children as young as 10 years. There is no justice for incarcerated children; their lived realities have been iterative injustices across their life-course and across nearly every domain of their lives. Incarcerating children does not address the embodied harm of their lived injustices nor remediate the behavioural consequences of those lived-harms. Incarceration and detention of any child or adolescent is a significant adverse determinant and traumatic to the individual and their family. These adverse childhood experiences and intergenerational trauma correlate with worse health and social outcomes across their life course.

Youth detention centres have been heavily criticised around the country for their ineffectiveness in applying responsive, restorative or rehabilitative care to children. In our research at Banksia Hill, non-custodial staff were working with many young people who had complex trauma and unrecognised and undiagnosed neurodevelopmental impairments. They had minimal knowledge of the effects of neurodevelopmental impairments, little to no previous professional development opportunities and no access to clinical or support information. They were understaffed and working with minimal resources, including a lack of teaching aids that

⁵ Hamilton et al. (2021). "We don't want you to come in and make a decision for us": Traversing cultural authority and responsive regulation in Australian child protection systems. *Australian Journal of Social Issues*. Online <https://doi.org/10.1002/ajs4.160>

Hamilton, S. & Maslen, S. (2021). Redressing "unwinnable battles": Towards institutional justice capital in Australian child protection. *Journal of Sociology*. Online <https://doi.org/10.1177/1440783211010220>

are usually available for teaching children and young people with learning difficulties. The nature of the environment meant that there were high numbers of youth in classrooms and more of a focus on security than on rehabilitation and teaching. As a result, the education staff spoke of the difficulty in justifying resources specifically related to managing neurodevelopmental disability. They described children who were unable to access hearing and eye testing or be provided with glasses, and they overwhelmingly raised concerns about their ability to provide any quality education for the young people in their care. They described poor information sharing and a lack of access to comprehensive information about social, educational and medical histories. In addition, despite 75% of the population of Banksia being Aboriginal, there were few Aboriginal staff and no Aboriginal staff in senior leadership roles at the time the research was undertaken.

The WA Office of the Inspector of Custodial Services has repeatedly released Inspection Reports that highlight these issues at Banksia Hill. Most recently, in May the report of their Inspection of Banksia Hill and Unit 18 Casuarina Adult Prison, the Inspector stated: “the experience of young people in custody has deteriorated since our last full inspection of BHDC in 2020”, citing lockdowns and decreased time out of cells as negatively impacting on the children’s mental health with increasing self-harm and attempted suicides.⁶

So, when we are asked about the factors that contribute to the current state of youth justice and child protection systems in Australia, we cannot look past the way the State has operated, and thereby created and perpetuated the situation we have. Reflecting on the Banksia Hill study. It was the only study of its kind to be undertaken in Australia, and moreover, the only known research project where researchers were present in the facility as researchers, clinicians, observers, advocates, supports and mediators. 36% FASD 89% > one severe neurodevelopmental impairment. The research findings have been ignored and the state of Banksia Hill is now at crisis point; again. We must do better. We cannot continue to spend millions of dollars on research, only to shelve evidence that could well improve the way these systems operate. Not to mention the potential improvement in long term outcomes for children and their families and communities.

Our research provided significant evidence that diagnostic services should be implemented as a routine aspect of youth justice service provision. Assessing for neurodevelopmental impairments both on entry to, and throughout involvement with the justice system provides an efficient mechanism for gathering information, identifying risks and needs, and promoting consistency in practice. This then supports appropriate referrals to external services to ensure successful transition between detention and life in the community.

Currently there are few affordable pathways to multidisciplinary diagnostic services for detecting neurodevelopmental impairments in children involved with the justice system. WA has seen the emergence of justice-contracted FASD assessment teams; however, these assessments are costly and do not offer a long-term

⁶ Office of the Inspector of Custodial Services. Department: Office of the Inspector of Custodial Services 2023 Perth: ISSN 1445-3134 (print), ISSN 2204-4140 (Electronic)

economically viable option for children, siblings and their families involved in justice services. Assessments are at magistrate discretion suggesting they are child selective; that is more likely to be assessed because they are causing problems than because they have a right to these treatments. Any child involved in justice services, by the very fact they are present, warrants routine health and wellbeing screening as well as culturally safe and trauma informed multidisciplinary assessments of the child's neurodevelopmental strengths and challenges. Any neurodevelopmental impairment detected requires individualised and appropriate provision of therapeutic services when managed in a detention centre, ensuring continuity in transitioning from detention to their communities.

So, we must ensure equitable access to assessments that are affordable and that have long-term viability as part of youth justice service delivery and that are culturally safe, and trauma informed.⁷ More importantly we need to find ways to make it safe for the child's family of origin to access these same multidisciplinary health services where they have concerns about their children or family members. The Banksia Study found almost 50% of sentenced children had a sibling, currently or previously incarcerated before their own sentencing. Many caregivers identified other children and family members, for which diagnosis explained various problems.

We must also ensure that assessments are beneficial and provide effective and meaningful support for the young people and their families on the child's return to community. For Aboriginal communities, this will be most effective when the narrative becomes about healing and recovery, and where solutions and interventions are led, designed and driven by Aboriginal peoples and communities.

Every state and territory has reported experiencing significant problems managing the behaviours of detained children. By almost every measure, the punitive approaches used in Australia's justice and child protection systems are failing to serve the purpose of protecting and rehabilitating children in their care. As such, we believe there are benefits in taking a national recovery approach to change in the criminal justice and child protection systems, and to child wellbeing reform in Australia.

Communities need to be able to define their own needs and to design and control the required responses to problems or concerns. If the Australian government is committed to addressing the over-representation of Aboriginal people in prisons and reducing the ever-widening gaps in social and health disparities, it must first and foremost demonstrate that it is willing to begin addressing problems of systemic and institutional racism and discrimination and commit to reforming institutions and embracing culturally designed and led recovery-focused strategies which shift the focus to healing the extreme harms which have been incurred across generations of Aboriginal families and communities.

⁷ Hewlett et al. (2023) Development of an Australian FASD Indigenous Framework: Aboriginal Healing-Informed and Strengths-Based Ways of Knowing, Being and Doing. *Int. J. Environ. Res. Public Health* 2023, 20, 5215. <https://doi.org/10.3390/ijerph20065215>

The cost of incarcerating one child for one year in WA is almost half a million dollars. This money would be far better spent on meeting the individual health, developmental, cultural and trauma needs of each child, on country, in communities and with their families. Securing a commitment from the youth justice, child protection, education and health sectors to meeting the neurodevelopmental assessment and diagnostic needs of children, particularly those involved with, or at risk of involvement state care systems must be prioritised.

The most critical aspect of developing routine assessments for neurodevelopmental disability is consideration of the diverse nature of Aboriginal and Torres Strait Islander Australia. There cannot be a 'one-size-fits-all' approach to assessments, communities, organisations and programs. In some regions, infrastructure is significantly lacking, particularly in rural and remote areas where communities have suffered extreme social harms and cultural loss as a result of dispossession and colonisation. To assist recovery, assessments need to be holistic and capture the professional relationships, family networks and broader social relationships that can be used to assist young people. (Figure 1). Developing an assessment model that employs community connectors or social workers to conduct yarning or conversational interviews with young people during assessments will provide an opportunity to share and gain knowledge about diagnostic results and needs, and to gather information about a young person's life circumstances. This is important for enhancing the knowledge gained from the results of assessments and predicting the need for future interventions. A wholistic assessment model also provides a significant amount of information about the strengths, hopes and pathways available to the young people to live meaningful and productive lives into the future. When asked about their futures, almost all of the young people at Banksia identified what they wanted to do in their lives. Most were realistic and achievable. Indigenous Rangers, tradies, station hands. Pathways and opportunities were almost non-existent. They were caught up in the complex world of living with neurodevelopmental disability without support.

There is a need for Australia as a nation to confront its colonial history, decolonise justice, address systemic racism, and recognise the potential benefit of embracing Indigenous knowledge systems for developing strategies or policies around the care and control of their children. We need to explore the development of a clinical assessment models based which focus on recovery, wellbeing, and positive futures for Indigenous children. Systems that redress and unravel the harms of colonialism, bringing equitable and multidisciplinary health and social care. We need greater understanding of what it means to work in the 'best interest' of the child, and ensure we are adhering to our human rights obligations.

Figure 1: Recovery Capital Framework

