When the Vulnerable offend – whose fault is it?

At one time they are vulnerable children in need of care and protection and then their offending behaviour, emerging out of the very same vulnerability, changes the game. Suddenly, it is all their fault. The long term protection of communities from offending behaviour, the reclaiming of young lives, requires ongoing recognition of what lies beneath the behaviour, and effectively addressing it. Youth Courts have a vital role in leading this response.

Address to Northern Territory Council of Social Services Conference

Darwin 27 September 2017

Judge John Walker, Principal Youth Court Judge for New Zealand

Te Kaiwhakawa Matua o te Koti Taiohi

I acknowledge the larrakia people, the traditional owners and custodians of the land on which we meet and I pay my respects to their elders, past and present and bring greetings from Aotearoa New Zealand.

E ngā mana, e ngā reo	*All authorities, all voices*
E ngā rangatira, e kui mā, e koro mā	*All nobles and elders*
Tēnā koutou katoa	*Greetings to you all*

I am very honoured to be asked to speak to you today.

I begin by paying tribute to all of you who work daily with our children who are in conflict with the law or who are at risk of being in that position. I am always conscious as a Judge that I touch these cases but briefly, I always hope in a meaningful way, but outside of the courts it is the social workers, counsellors and intervention agencies who work closely and intensely with these challenging cases often on a daily basis. I am sure that I can speak for all judges when I express my thanks and my admiration for what you all do.

What I have to say comes from my experience in New Zealand, what we are seeing, how we are endeavouring to address the increasing complexity of offending by children, and our Youth Justice processes. (I might refer to children and to young persons because in New Zealand we have this distinction - those under 14 are children, those 14 to 18 are young persons). But, they are all children.

I do not know enough about the issues which you all face in your work on a daily basis in the Northern Territory and I do not know whether you will find anything I say to be useful, but I hope so.

I want to talk about the complexity of offending behaviour by young people. It seems that the more we learn about it the harder it gets. Well that's how it seems to me.

When I talk about complexity I am referring to the conglomerate of long standing underlying issues which have contributed to the offending behaviour which brings a child into conflict with the law. I also want to explore with you the concept of fault. Whose fault is it when children offend?

The Youth Court in New Zealand is an example of a solution focused court. It has operated in that way before that term was invented. While I have been engaged in New Zealand in the development of solution focused judging in the District Court, developing therapeutic jurisprudence, I was perhaps unwittingly, bringing the practices of the Youth Court into the mainstream.

It may explain why, as a judge, I am most comfortable in a Youth Court.

The solution focussed approach requires the identification of what it is that is causing the offending , usually multi-faceted, and then using a multi disciplinary team to endeavour to address those underlying causes, and using the authority of the court to engender and maintain motivation to engage in interventions. Drug Courts, Family Violence Courts, are examples of this approach. It is an approach open to all judges whether in a specialist court or not.

One thing is certain: unless the underlying causes of offending are effectively addressed offending will continue.

And, the longer we wait to intervene the harder it will become.

What are we seeing in the Youth Court in New Zealand?

In summary: increasing violent offending, particularly in area of high population density and high levels of deprivation, increase in young girls offending violently, increased identification of neuro disability, mental illness, dislocation from school, disconnection with culture, the effects of traumatic brain injury, the effects of the trauma of sexual abuse and being

brought up in a climate of family violence, alcohol and other drug dependency. Often a young person will be affected by more than one of these serious issues.

A very high percentage of those who appear in the Youth Court have a background of Care and Protection proceedings. The issues I refer to will have been around for a very long time, and, I suggest, identifiable at a very early stage.

What are we trying to do in New Zealand to address these issues?

You will probably know of our Family Group Conference process.

I, as a Judge, can make very few decisions without the input from a Family Group Conference. That conference will generally have been held before any charge is laid in court, to explore alternatives to a matter even coming to court. Police, Social workers, young person, family and support persons and victims can be all part of such a conference.

Even when a case comes to court a FGC must be ordered before any disposition can be decided. Identifying underlying causes of offending is a requirement of a FGC. The FGC will often be informed by specialist reports and assessments.

The FGC has a restorative justice function as part of its process and very powerful outcomes can emerge when victims are part of the process.

We have an emphasis on diversion from court. 70% of all police apprehensions of young offenders result in diversion from court through alternative action. The challenge is to ensure that those who are diverted receive effective interventions where these are required to address underlying causes. If we do not do that we miss an important opportunity before offending escalates.

I want to deal with some of the common underlying causes that will confront a FGC and will confront us in the Youth Court . They may be just as familiar to you as they are to me.

Neurodisability

We now know that the prevalence of those disorders grouped as neurodisabilities (FASD, intellectual disability, dyslexia, communication disorder) is significantly higher in those who come to court than in the general population. A UK study found that while 2-4% of the general population has a general learning disability, 23-32% of young people in custody have

a generalised learning disability. While around 10% of the general population has a specific learning disability such as dyslexia, 43 to 57% of young people in custody have a specific learning disability. While 1-7% of the general population has some form of communication disorder has some form of communication disorder, this jumps to 60-90% of young people in custody. I could go on – traumatic brain injury, FASD, ADHD – these are all hugely overrepresented in youth custodial populations. There is increasing mental illness presenting in our courts and issues of fitness to stand trial are becoming common place rather than a rarity. We have become more alert to the possibility of neurodisability and mental illness. In New Zealand we have forensic screening available in almost all our Youth Courts and full assessments and reports can be ordered. Forensic nurses are observing presentation and interactions and hearing what is happening and will see concerning things (or red flags) that nobody else will see.

We are starting to confront the communication / cognition issues that may accompany neurodisability by the provision of skilled communication assistance in the court room where that is required.

Education

Many of those in the Youth Court are disengaged from education and often they have been out of school for years. Almost 50% of young people in New Zealand who offend are not enrolled, excluded, suspended or simply not attending school.

Getting them back into school or a meaningful alternative is essential, being in school is a major protective factor against offending, but often the underlying causes of offending are also what had resulted in their disengagement from school. One of the greatest advances for us in recent years has been the introduction of education officers into many of our Youth Courts. These officers are provided by the Ministry of Education and they provide the court with very valuable information on education history, and provide a link with schools and can smooth the pathway back to school.

The model provides for written reports ahead of a first appearance in court.

Cultural disconnection

There is overrepresentation of Māori in our Youth Courts, reflecting the overrepresentation in our adult prisons and in the negative statistics such as health and deprivation. In 2016, Māori were approximately 20% of the 14-16 year old population, but made up **64%** of young people appearing in the Youth Court. A sense of belonging, knowing ones place in the

world, pride in culture and history, is essential for the delivery of effective interventions, addressing underlying causes, for young Māori.

This need has given rise to the development of Te Kōti Rangatahi where the Youth Court sits on a marae, the place which is the centre of Māori community life and which will contain a wharenui or meeting house. The court sits in the wharenui alongside tribal leaders to monitor the completion of a family group conference plan. Alongside this the young person will learn where he or she comes from, their ancestors and their tribe. They will learn the marae protocol and become connected with their culture. And there will be the delivery of interventions.

There are now 14 such courts, and 2 Pasifika Courts for pacific peoples. A further Rangatahi Court will open in Whangarei early next year. A challenge for these courts is the development of accompanying interventions that will support the work being done by the Court – for the cultural intervention, and sense of community, cannot be provided by just a couple of court appearances. For the 15th Rangatahi Court, we are very strongly focussed on the establishment of resources to support the work of the Court – such as tikanga wananga – a meeting over several days, in which the young person is fully immersed in Māori culture at a marae.

In both Rangatahi Courts and our mainstream Youth Courts we have developed the role of the Lay Advocate. They are not lawyers. The Lay Advocate is a person of standing in the culture of the Young Person who can bring to the court the cultural background and advocate for the family, and bring in wider family to assist. This role is provided for in the Oranga Tamariki Act, which was passed in 1989, but lay dormant for many years before we started to realise its potential – and give effect to that potential.

Family Violence

In 2011 a study[76] on young people in NZ aged between 10-24 years who had committed a violent crime found that 66% of the young people who had committed a violent offence had had a police family violence notification, meaning they had been exposed to family violence as a victim, witness or offender at some stage of their offending history. A higher percentage of repeat offenders (72%) had also been exposed to family violence compared with non-repeat offenders (56%).

The Youth Offending Risk Assessment Tool, or YORST, is a world-leading tool designed and implemented by New Zealand Police Youth Aid, our specialist youth police, for use with young people, to determine the risk of reoffending of young people they apprehend. It has

shown that around 80% of children and young people who offend have experienced family violence (either directly or indirectly).

There is a very clear correlation between exposure to family violence and going on to commit serious violent offences.

In the last few years I have been heavily involved in District Court – led initiatives to improve the way we respond to family violence in the District Court and, of course, in Improving the way we respond to youth offending in our Youth Courts. I had seen these efforts as quite separate.

In one part of my work I was dealing with Family violence – often severe violent behaviour, sometimes life threatening, the controlling non fatal strangulation – I am not killing you but I could, towards a partner, or towards the partner's and or perpetrator's children – behaviour that takes place inside the home and often repeated over and over again; and in another part of my work I was dealing with Youth offending – seriously disturbing behaviour – ram raids, aggravated robberies, gratuitous serious violence – by children, and increasingly not just boys but girls as well, aged sometimes as young as twelve or thirteen.
It soon become clear that there is a real connection between exposure of children to family violence and violent offending by the young.

The areas where we are seeing serious violent offending by the young are the areas wher we see the most serious family violence.

And Family violence is a major issue in New Zealand.

In 2016 alone, there were 119000 family violence investigations by NZ Police. There is a call for Police services in relation to family violence every 6 minutes. 41% of Police front line time is spent on family violence. We are a small country (population 4.5 m).

In New Zealand, **children** are present at about half of all family violence callouts by police. And police report that in approximately 70% of family units where IPV exists, the **children are also direct victims** of some form of violence.

When we consider the evidence that only about 20% of family violence is ever reported, these numbers become even more gravely concerning. Tens of thousands of children in New Zealand are growing up in a climate of violence. And the effects of being subject to violence within the home, or of witnessing or hearing such violence, are severe: physically, emotionally and developmentally.

These effects include, but are not limited to anxiety, fear, depression, toxic stress, aggression, PTSD, emotional and behavioural problems, and impaired social skills.

There are also more subtle consequences of experiencing or witnessing violence in the home. A child may learn that violence is normal, is an effective way of getting what you want, and is a marker of power and prestige. A child may learn to disrespect women with violent actions and words, or that violent behaviour is part and parcel of an intimate relationship.

A research project conduced in 2011 in the Tasman district (The Girls Project) examined the origins of violent behaviour by school age girls. It noted that familiarity with family violence meant these girls were more apt to form relationships with like-minded partners, to be more accepting of their behaviour and to end up in violent intimate relationships.

The family is key to socialisation. It is where children learn strategies for dealing with conflict and challenges. We cannot address youth violence – including that which escalates to the adult criminal justice system – if we do not address family violence.

There is another way by which children are exposed to family violence, and that is through its effects being filtered to the child through the mother. In utero, the constant release of a mother's stress hormone – cortisol – is unhealthy for the growing fetus. While in utero, the developmental health of that fetus depends on the health of the mother.
It used to be thought that a child was safe in the womb – not so. We know about the effects of alcohol consumption in pregnancy - FASD. Now we know about the effects of the mother being subject to violence or the fear of violence.

The bottom line is if you bring a child up in a war zone you end up with a warrior.

So, bring any one of those complexities into a young life, the neurodisability, FASD, the traumatic brain injury, the alcohol and other drugs, out of school, exposure to family violence, the mental illness, and often there will be more than one, and we begin to understand why a young person has offended as they have.

Often I finish reading a psychological report detailing the background of a young offender and the question I ask is "so why is anyone surprised about what has happened?"

The children who, at age 10, or 11 we think of as "vulnerable" and in need of care and protection – are very often the same children who, at age 14, we see before the Youth Court. They have the same underlying issues but they move from being seen vulnerable to being seen as criminal.

I believe that the children before the Youth Court are those who we, as a society, have profoundly failed in their early years. Our failure to provide a safe and nourishing environment for children to grow up in sets these same children on a path to prison.

The sad fact of the matter is that often by the time we get to pay attention, when an offence has been committed, when victims have suffered, it is very late in the piece. Their behaviours and coping mechanisms, their delayed development and disengagement from school – are well entrenched. But not only that, legally – it starts to be "their fault". They are the same children with the same underlying disabilities and life course. Society stops wanting to take responsibility. They are no longer "children" in the eyes of many. Instead, they are dangerous teens – on their way to becoming dangerous adults.

If we allow that view to go unchallenged, then we allow our communities to abrogate responsibility for what has gone wrong. We need our communities to see youth offending as everyone's responsibility, that the offending is a symptom of societal failure. Communities need to know what we see.

That is our challenge. To ensure that the public understand what we are seeing, to counter the popular narrative with knowledge of the underlying causes of offending.

Communities have enormous untapped resource to help with the solutions. Often they just need to be engaged, given information about what we are seeing, and shown a pathway to join with those agencies and families who need their help.

Youth Courts and the Judges who sit in them can have a powerful role in this. Engagement between courts and the communities they serve very often enables community resources to come to the court. I am thinking of mentoring, literacy, employment training and opportunities.

Māori concepts of justice in pre-colonial New Zealand regarded socially harmful behaviours to have been caused by an imbalance in social equilibrium, and responsibility for offences was collective rather than individual.[1] So, there is nothing new in what I am saying . The victim, too, was seen as a collective – as criminal actions affect not only the individual or individuals directly victimised by the offending, but also the whānau, hapū and iwi of the offender and the victim. Māori principles and processes of dispute resolution focus on acknowledgement of harm, hearing from the affected parties and attempting to forge an

[1] Lynch at [1.2.2].

outcome that restores all parties' mana.[2] This is the basis of our Family Group Conference system.

It is easy for communities to view youth offending as evidence of teenagers "gone bad", of a morally bankrupt generation of children emerging – children who are hopeless, dangerous and need to be put behind bars.

I argue that the view of collective responsibility for offending better reflects what is truly behind a child or young person's offending. The behaviours we are seeing, the disabilities are all well established by the time a young person comes in to the Youth Court. These children do need to be helped to take resopnsibility for their offending. But wider society needs to take responsibility too. In the Youth Court We are playing "catch up", trying to turn young lives around by dealing with issues which have been there for many years, maybe even from birth. In my view, taking collective responsibility for the plight of those who fall onto paths of crime – and taking collective responsibility for the effects of their behaviour – is a crucial step to take in fashioning effective, lasting responses. Recognising that behaviour does not come from nowhere, but is generally the product of an imbalance in social equilibrium, leads to asking what we can do – community by community – to address the causes of offending and to provide environments in which our young people can thrive, enabling us to reclaim young lives for the benefit of all.

[2] Cleland and Quince at [2.7.2].