

# INVISIBLE FEMALE INDIGENOUS OFFENDERS IN THE YOUTH JUSTICE SYSTEM: WHAT'S THE PROBLEM? AN ILLUSTRATION FROM THE NORTHERN TERRITORY PERSPECTIVE

Clement Ng\*

## I Introduction

Aboriginal girls have been regarded as victims in recent years, with many studies examining the systemic abuses and widespread disadvantages in Indigenous communities. However, little is known about their tendency to become perpetrators of crime and their actual involvement in the criminal justice system as offenders.<sup>1</sup> One obvious explanation is that most offences are committed by male youths. In the Northern Territory context, juvenile offenders are mostly Indigenous males. Because of the dominance of Indigenous male delinquents in the youth justice jurisdiction, the experiences of Indigenous female offenders are arguably marginalised and rendered 'invisible'.

There are problematic implications for this phenomenon. On a theoretical level, the omission of Aboriginal female involvement in the juvenile justice system helps to assert the existing patriarchal and white social hegemony. Another potential consequence of this male-focused juvenile system is that it fails to adequately deal with the complex needs of Indigenous female offenders, hence blurring the boundaries between welfare and criminal justice intervention. More significantly perhaps, this gender-driven marginalisation will also lead to real consequences of unequal treatment across various stages of criminal processes, and further victimisation.

This article will begin with an analysis of the existing research and crime statistics in relation to youth offending in the Northern Territory. In doing so, this paper will attempt to illustrate why young Indigenous women are hardly visible in the Northern Territory youth justice system. This article will focus on elaborating the major theoretical and practical problems that flow from this peripheral positioning of Indigenous female youths in the juvenile justice system.

Drawing on specific examples from court decisions and sentencing remarks, it will be argued that the 'neglect' of Aboriginal female offenders in the Northern Territory is a profound problem which demands an urgent change of social policies and government priorities.

## II Why Are Young Indigenous Females Invisible?

### A Youth Offending in the Northern Territory

The Northern Territory accounts for only about one percent of the population in Australia.<sup>2</sup> Unlike other states and territories, almost one-third of its residents are Indigenous.<sup>3</sup> The population in the Northern Territory is also relatively younger with a median age of 32.<sup>4</sup> Residents aged between 10 and 19 constitute a comparatively higher proportion of the overall population in the Northern Territory, namely 14.4%, whereas the same age group accounts for 12.27% of the aggregate population on a national level.<sup>5</sup> Notably, the Northern Territory also records the highest youth offender rate, at 7,241 per 100,000 persons, compared to the national rate of 3,083.<sup>6</sup> In terms of outcomes in the juvenile justice system, the Northern Territory continues to detain young people at a rate of 183.7 per 100,000 younger people, whereas the second highest rate is 64.1 in Western Australia.<sup>7</sup> Compared to the rate of 103.6 in 2008-2009, the youth incarceration rate is certainly on the rise in the Northern Territory.<sup>8</sup> While the national detention figures have been in decline since 1981,<sup>9</sup> that situation is undoubtedly not mirrored in the Northern Territory.

### B Over-representation of Aboriginal Male Youths

Not only is the Northern Territory incarcerating more youths at a higher rate than other parts of Australia, in the last two

decades most of the young people in custody have been Indigenous.<sup>10</sup> For example, only three of the 65 juveniles held in detention on 31 January 2013 were non-Indigenous.<sup>11</sup> While there are considerable differences in statistics measuring the extent of Indigenous overrepresentation across all the states and territories,<sup>12</sup> the problem is apparently more significant in the Northern Territory than its counterparts. More importantly, the many young defendants who come before the Youth Justice Court are predominately male and Indigenous.<sup>13</sup> This is consistent with the national trend regarding Indigenous contacts with the criminal system where Aboriginal males are 2.5 times more likely to be charged with an offence and four times more likely to be imprisoned than Aboriginal females.<sup>14</sup>

Not surprisingly, given its uniqueness in terms of demographics, the Northern Territory has the highest male youth offender rate at 10,659 offenders per 100,000 males.<sup>15</sup> As far as actual numbers are concerned, in 2013-14, a total of 1,349 recorded offenders aged 10-19 were Indigenous males whereas only 304 were non-Indigenous males.<sup>16</sup> Research findings have suggested that this overrepresentation is linked to the tendency of male Indigenous youths to commit more serious offences and to offend on a more frequent basis.<sup>17</sup> In particular, criminologists have contended that the public nature of Indigenous male offending is attributable to the need to re-construct their masculinity by engaging in car culture and reckless driving activities, hence exposing them to increased surveillance by police.<sup>18</sup> As boys are by and large considered by the court and the public to be recidivists,<sup>19</sup> it is no wonder that Aboriginal males occupy the central space in the juvenile justice system in the Northern Territory.

### **C The 'Neglect' of Female Delinquency**

Although there is no dispute that gender is the most consistent predictor of youth delinquency, this method of theorising crime has the unintended consequence of minimising the importance of studying the unlawful behaviours of the opposite sex.<sup>20</sup> This is especially so given recent statistics have demonstrated that the gender gap in youth offending is narrowing in many developed countries including Australia.<sup>21</sup> A very similar trend was observed by Northern Territory Youth Justice Review Committee in 2011.<sup>22</sup> Just as the North Australian Aboriginal Justice Agency submitted there was an increase in the amount of their female youth clients,<sup>23</sup> the daily number of female

detainees in the Northern Territory was seen to be surging from 0.3 in 2005-6 to 5.4 in 2010-11.<sup>24</sup> As of June 2014, for example, four of the total 47 detainees were females and they were all Indigenous.<sup>25</sup>

Far from simply representing a negligible portion of youth offending in Northern Territory, the latest annual report from the Northern Territory Police indicates that there were 566 female offenders below the age of 18, compared to 1940 male offenders in the year 2013-14.<sup>26</sup> In fact, the number of Aboriginal female juvenile defendants exceeds that of non-Aboriginal male juvenile defendants in the Northern Territory.<sup>27</sup> Similarly, nationwide research also confirms that the likelihood of any contact with the juvenile justice system is more than double when comparing young Indigenous women with young non-Indigenous men.<sup>28</sup> In this regard, gender analysis serves only to disguise the truth about Indigenous female offending. In other words, gender analysis omits the racial dimension and does not differentiate between women of different ethnicities.<sup>29</sup> This is the reason why critics label this as a major failure of feminist studies.<sup>30</sup> In theorising delinquency by way of gender, the influence of race or class becomes secondary to the analysis.<sup>31</sup> As a result, the experiences of female youths from a minority ethnic background are often overlooked, leading to very limited research which examines issues specific to them. In the Northern Territory context, Indigenous young women are thus no different than any other 'vulnerable groups' such as young people who are affected by alcoholism, mental health or culturally diverse youths because only very limited statistics are available to enhance further understanding of their behaviours and circumstances.<sup>32</sup> Given their criminality is ignored, it follows that the needs and treatments of Aboriginal female youths are also neglected.<sup>33</sup>

### **III Theoretical Problems**

#### **A Inability to Challenge the Existing Social Order**

Essentially, the problem of this invisibility of Aboriginal female delinquents is ontological: the patriarchal hegemony defines femininity and condemns female conduct which does not conform to feminine norms. Because girls are asserted to be not prone to rule-breaking, crime becomes a way of reinforcing the patriarchal notion of femininity.<sup>34</sup> Likewise, the paternalistic criminal justice system also

relies on the concept of family to control female offenders.<sup>35</sup> This can be reflected in the all-too-common belief that a disrupted family is the explanation for female wrongdoing in the youth justice jurisdiction, despite little being known about female delinquency in reality.<sup>36</sup> While family breakdown is certainly a common risk factor for juvenile offending in general, to exclusively rely on family disruption as the all-encompassing cause of female delinquency is to overlook the impact of other gender-specific causes of female misconduct which are influenced by broader social practices.<sup>37</sup> For example, research informs us that girls are much more likely to be relocated from their family homes because of the abuses they suffer from, and are more prone to running away than boys.<sup>38</sup> Likewise, parent criminality and history of sexual abuses have also been found to affect girls more severely than boys.<sup>39</sup> At present, however, there is very limited political will to fund different policies that respond specifically to female criminal behaviours or to at least explore other driving forces of female delinquency in a comprehensive way.<sup>40</sup>

(i) *Mosel v DT*<sup>41</sup>

Perhaps this idea of patriarchal control and the impact it has on female offenders can be best illustrated in the decision of *Mosel v DT*. By way of background, DT was a 15 year old girl subject to the care of the state who was charged with assaulting a police officer in the course of trying to free herself from the officer's arrest.<sup>42</sup> The magistrate ultimately found DT not guilty on the basis that she was not satisfied the officer had a reasonable belief that DT's well-being was at risk, and that accordingly there was no power to lawfully execute the subsequent apprehension.<sup>43</sup> The officer's sole reason for removing DT was that he thought 'she should be home at the carer's house at that time' and that he '[didn't] feel comfortable with having [DT] out here.'<sup>44</sup> Nevertheless, there were three other young people (all male) who were in the company of DT and yet they were not subject to the same treatment, despite being in very similar circumstances.<sup>45</sup>

Clearly, the case of *Mosel* is an example of how paternalistic assumptions could potentially replace the legal requirement on enforcement officers to conduct an assessment of actual evidence of risks in carrying out their duties.<sup>46</sup> More importantly, it demonstrates how patriarchal values still continue to permeate various criminal processes, which in turn shape the experiences of female offenders. This is why scholars contend that the existing male dominant

youth justice system inflicts a 'double penalty' on girls because they are not merely punished for their offending but also for their contravention of the prescribed code of appropriate female conduct.<sup>47</sup> Their criminalisation is not based on the commission of any distinct crime, but their contravention of the customary regulation of public space policed by social agents such as teachers or social workers who are preoccupied with the government of young people and their gender-appropriate conducts.<sup>48</sup> In DT's case, the paternalistic opinion of the arresting officer about DT's behaviours led to her entry into the criminal justice system, even though the actual circumstances do not suggest that she was in any riskier a situation than that of her male friends, who were not subject to any deprivation of liberty on the night in question.

(ii) Intersectional Discrimination

This social order also operates to further discriminate against Aboriginal female delinquents. Academics identify this repeated form of injustice generated by race and gender as 'intersectional discrimination.'<sup>49</sup> On one level, the 'bi-polar' nature of masculinity and femininity functions to exclude females whose behaviours do not conform to either side of the spectrum.<sup>50</sup> In addition, Indigenous female offending youths are also exposed to additional risk factors in the form of systemic racist treatments carried out by state agents, such as over-policing and forced removals.<sup>51</sup> Therefore, it is not enough to simply understand and remedy the sexist barriers in the youth justice system with which female offenders are often confronted. An effective problem-solving strategy needs to be derived from a perspective which recognises the cultural, ideological and economic pressures that are relevant to the daily experiences of the Indigenous female juvenile population.<sup>52</sup> Until this strategy is developed and supported by committed political initiatives, the system will still be dictated by the 'imaginary constructs of male young offenders' and the underlying ideologies that marginalise Indigenous young women will continue to operate without scrutiny.<sup>53</sup>

**B Confusion with Welfare Issues**

Traditionally, the one feature that characterises children's courts as distinct from their adult equivalents is their welfare jurisdiction. However, the Youth Justice Court in the Northern Territory does not have jurisdiction over the care and protection of children.<sup>54</sup> Instead, the Local Court

is conferred with powers to deal with welfare issues in respect of neglected and abused children.<sup>55</sup> In practice, this results in a lack of coordinated information and responses to juvenile offenders who present with significant welfare needs.<sup>56</sup> If the Court fails to distinguish the welfare concerns from the criminogenic ones, the consequence is that already traumatised children will be treated punitively.

(i) Criminal Involvement of Girls in State Care

Quite often, the division between welfare and justice matters can be very unclear, particularly in relation to young girls in state care.<sup>57</sup> In order to fully appreciate the potential scope of the problem, it is necessary to look at child protection practices in the Northern Territory.

According to the *Little Children Are Sacred* report,<sup>58</sup> sexual abuse of children is widespread and severely under-reported in Aboriginal communities in the Northern Territory. Following this report, significant efforts were made by the Federal Government to tackle this systemic crisis. Although there is no concrete evidence to demonstrate the effects on child protection as a result of the Northern Territory Emergency Response, the Northern Territory has certainly recorded the highest increase in rate of substantiations for child protection across all age groups in all states and territories in the last five years.<sup>59</sup> According to the latest annual report from the Northern Territory Department of Children and Families, there was a 29 per cent increase in child protection investigations in 2013-14 compared to the previous year.<sup>60</sup> While the rate of non-Indigenous children on care and protection orders has been steady in the last few years, the rising trend is arguably contributed to by the considerable increase in the number of Indigenous children being taken into care by the government.<sup>61</sup> Interestingly, the Northern Territory is the only part of Australia which has more girls than boys subject to protection orders.<sup>62</sup> In the absence of any available conclusive research, it remains speculative whether increased welfare intervention might have a positive correlation with the increased involvement of female Aboriginal youths in the NT criminal justice system. Studies elsewhere have confirmed the links between welfare intervention in relation to young women and their entry into and the obstacles to exiting the justice system.<sup>63</sup> At the least, research in NSW has so far established that Indigenous young females in state care are twice as likely to appear in the Children's Court when compared to Indigenous young females who are not in state care.<sup>64</sup>

(ii) *Steven Bott v CP*<sup>65</sup>

Despite the paucity of research, it is reasonable to hypothesise that there are risks associated with the use of the criminal justice system to discipline the behaviours of children in the care of the state.<sup>66</sup> Given Indigenous girls are disproportionately represented in the child protection regime in the Northern Territory, they are thus arguably more vulnerable to criminal sanctions for their misconduct whilst in care.

This problem is illustrated by the decision in *CP*,<sup>67</sup> a 14 year old girl in out-of-home care. It was alleged that she had assaulted her carer by 'tackl[ing] her to the ground' in an attempt to retrieve her iPod which had been taken away from her as a form of discipline.<sup>68</sup> Following a contested hearing, Magistrate Oliver found CP not guilty and ruled that the physical interaction between a parent and child over possession of an item of personal property did not meet the criminal definition of assault, and that CP did not deliberately push her carer to the ground.<sup>69</sup> In obiter, her Honour made the following comment:

Finally I should say that calling the police over such an incident was an overreaction on the part of [the carer]. She was there to essentially parent CP in the home provided for her. That was her job. In my view the normal and responsible parental reaction to an incident of this nature would be to allow time for emotions to cool and then to discuss with the child the incident in an appropriate way and determine a proper consequence. I am not suggesting that there cannot be instances where conduct in a care placement amounts to an assault. It is a question of degree as to whether it is an ordinary incident concomitant of a parent/child relationship or exceeds that. This was not an incident that did so.<sup>70</sup>

Rather than using appropriate behaviour management techniques, protection workers have been criticised for too readily resorting to seeking assistance from enforcement authorities to contain the troubled behaviours of children in their care.<sup>71</sup> In turn, this usually marks the transition into the justice system for many Aboriginal youths. If there are no longer any suitable placements with carers able to deal with their challenging behaviours, then they may be kept in detention 'for their own good.'<sup>72</sup> The fact that more Aboriginal girls than boys are now in the NT child protection system poses a significant danger of increasing criminalisation of their welfare needs.

## IV Practical Problems

### A Biased Treatment

In addition to the above two implications, evidence from various sources has revealed certain practical difficulties that follow from the ideological exclusion of Indigenous female young offenders. The obvious result of the process of marginalisation means that young women's needs are rarely addressed by existing youth justice programs.<sup>73</sup> Owing to the unequal status between Aboriginal female and male offenders, the report from the Standing Committee on Aboriginal and Torres Strait Islander Affairs recommends that specific community-based programs be funded to address the complex needs of Indigenous female youths.<sup>74</sup> Notwithstanding this recommendation, the needs of female offenders are still constantly ignored in practice. In the Northern Territory context, the most unfair treatment occurs in detention settings.

#### (i) Detention

While male youths account for 90% of the total detention population in the Northern Territory over the last three years,<sup>75</sup> it is not surprising that the needs of the several female detainees are not being prioritised. Due to the lack of understanding of the complex needs of female children in juvenile justice facilities, the standardised programs are unavailable or not suitable for female offenders.<sup>76</sup> Because the Alice Springs Juvenile Detention Centre was only designed to house males, female offenders from Central Australia were often transferred to the Don Dale Juvenile Detention Centre in Darwin,<sup>77</sup> where they usually had no ties and it was impossible for their families to visit. Despite the recommendation by the Youth Justice Review Committee that young women be accommodated in the local detention centre,<sup>78</sup> there has not been any evidence to suggest any changes to the relocation policy.<sup>79</sup> Whilst in custody, it is also evident that female children's therapeutic needs are neglected.<sup>80</sup> In contrast, certain efforts were made by the Minister for Correctional Services to implement programs which are conducive to preventing male delinquency such as partnering with a local cycling club.<sup>81</sup> Not only are female detainees not being cared for in a therapeutic manner, there have been reports that they are subject to sexual harassment or inappropriate comments made by adult male prisoners because there is not enough protection and separation in remand facilities.<sup>82</sup>

#### (ii) Custodial Remand

Another example of how Indigenous female offenders are likely to suffer more than their male counterparts is the use of custodial remand. Recent research demonstrates that the chance of Indigenous youths being remanded before sentencing is over 20 times that of non-Indigenous youths.<sup>83</sup> The Northern Territory maintains the highest rate of remand population in juvenile detention, and detainees are remanded for longer on average.<sup>84</sup> For instance, in the year 2007-2008, an average Indigenous detainee spent about 79 days on remand in the Northern Territory whereas the lowest average length of time for any Indigenous detainee was 26 days, in South Australia.<sup>85</sup> In terms of the Aboriginal status of the juvenile remandees, researchers have found that the rate for non-Aboriginal detainees is so low in the Northern Territory that none has been reported.<sup>86</sup> Although no recent published data was made available, the latest Review of the Northern Territory Youth Detention System certainly found that the remand population has been expanding.<sup>87</sup> One of the many reasons is that Indigenous children from rural or remote regions are likely to have more difficulties meeting stringent bail conditions due to their transient lifestyle and shortage of services.<sup>88</sup> Unlike other major cities or states, there is lack of bail support and residential options and rehabilitation facilities in the Northern Territory with the exception of Darwin.<sup>89</sup>

Again, given the scant data available, it is difficult to evaluate whether Indigenous female offenders in the Northern Territory are indeed more negatively affected in relation to the use of custodial remand. But there can be little doubt that the situation is any better than the national picture, which shows that the proportion of females detained on remand is consistently higher than for males.<sup>90</sup> It should be understood that child detainees are often those children 'for whom the fabric of life invariably stretches across poverty, family discord, state welfare, inadequate housing, circumscribed educational and employment opportunities'.<sup>91</sup> Compared to non-Indigenous females, it is often common to Indigenous young women that they are exposed to racism, neglect, interpersonal violence, extreme poverty, substance misuse and social marginalisation.<sup>92</sup> On the other hand, while Indigenous girls may share similar disadvantages with Indigenous boys, scholars maintain that social and economic conditions affect Indigenous girls in a different manner than the opposite sex.<sup>93</sup> For instance, Indigenous girls are reported to have suffered more due

to issues associated with homelessness and are unlikely to be successfully granted bail because previous experiences of physical and sexual abuses often mean that they are less likely to have a safe residence to live in.<sup>94</sup>

(iii) *Police v SP*<sup>95</sup>

The unreported decision of *SP* can be used as a relevant example to elaborate the above argument. The court proceeding was concerned with a bail application made on behalf of *SP*, a 12 year old Indigenous girl raised in the community of Yuendumu who was alleged to have committed a series of offences including arson and breaching her bail undertaking.<sup>96</sup> After hearing submissions from her counsel, the presiding Magistrate declined the application for her to return to Yuendumu to live with extended family on the basis that she was 'wandering the streets at night engaging in sexual activity', was 'diagnosed with sexual[ly] transmitted diseases' and was 'a danger not only to the community but also to herself'.<sup>97</sup> Despite the fact that *SP* had already spent a week in custody and there was a considerable chance of her not being ultimately sentenced to detention for the offences she had committed, she was remanded because there was no safe option.<sup>98</sup> Anecdotally, his Honour also commented that he was 'not having that on [his] conscience' by 'sending her back to the very community she's offending in and the very community [where] she is being infected'.<sup>99</sup> It should also be noted that *SP*'s mother did not have the capacity to care for her and *SP* was due to give evidence against her father for physically abusing her.<sup>100</sup>

While it is arguable that the Magistrate assumed a paternalistic approach in dealing with the matter and seemed overly pre-occupied with the potential exposure of *SP* to moral danger, there is no doubt that custodial remand was endorsed as a means to resolve *SP*'s clear welfare needs due to the lack of available placements and services.<sup>101</sup> For Aboriginal female children offenders who usually come to court with very complicated issues as a result of intergenerational conflict, abuse and trauma, it is foreseeable that they are more likely to be remanded because the existing mechanisms fail to appropriately remedy their challenging behaviours.<sup>102</sup> In this respect, to not give priority to their already 'silenced' concerns means that young Indigenous female offenders are more easily trapped in the vicious cycle of the justice system.

## B Further Victimization

In the same way that the line between welfare and justice concerns can be very blurred when it comes to Indigenous young women, so is the line between perpetrators and victims.<sup>103</sup> To a certain extent, the above example of *SP* illustrates this quite clearly. Although *SP* was clearly a victim of serious physical and sexual abuse, she was punished because she was unable to be cared for appropriately.

In addition, the above example also reminds us not to simply assume that Aboriginal female offenders are self-determining individuals.<sup>104</sup> One needs to look beyond the circumstances of offending and appreciate how their behaviours may be shaped by their experiences as victims.<sup>105</sup> Otherwise, any further contacts they have with the criminal justice system will only expose them to the risk of further victimisation.

### (i) Family Violence and Offending

To elaborate further, it is necessary to first understand the primary difficulties that Indigenous young women face in the Northern Territory on a broader scale. One of the major difficulties is unquestionably family violence. According to the 2014 Productivity Commission Report on Overcoming Indigenous Disadvantage, the rate of Indigenous females escaping family violence in the Northern Territory is 5,550 per 100,000 population in 2012-13.<sup>106</sup> This figure is almost five times that of the second highest rate in Western Australia, at 1,148, and over 15 times the national average.<sup>107</sup> By way of comparison, the NT rate for non-Indigenous females is 13 per 100,000.<sup>108</sup> Given that 73 per cent of Aboriginal women victims in the Northern Territory are assaulted by a family member, compared to 32 per cent for non-Aboriginal women,<sup>109</sup> it can readily be inferred that Aboriginal children are highly likely to be exposed to violence and be affected directly or indirectly in the form of displacement and trauma. In fact, research has highlighted that girls' susceptibility to criminal conduct can be more consistently attributed to child maltreatment than is the case for boys.<sup>110</sup> Moreover, it has been found that females are likely to engage in criminal survival strategies, such as running away, as a result of domestic violence or abuse.<sup>111</sup> Therefore, criminalising their behaviours will mean that Indigenous female child victims are further punished.

(ii) *Police v Ms Jones*<sup>112</sup>

To further emphasise the relationship between child abuse, criminal offending and the effects of further victimisation, it is worth considering the decision in *Ms Jones*. Ms Jones was an Aboriginal girl who turned 18 when she was sentenced for two serious assaults she had committed as a juvenile a year previously.<sup>113</sup> As part of the materials before the court, it was revealed that she was raised by her maternal grandmother in a remote community and first came to the attention of the authorities when she was 12 years old because she was treated for sexually transmitted infections.<sup>114</sup> Ms Jones was a victim of serious physical violence by her previous partner and, at the time of sentencing, she was in a relationship with another man who was remanded in custody for assaulting her.<sup>115</sup> In addition, her assessing psychiatrist reported that she suffered from alcohol abuse disorder, borderline personality disorder and was at risk of developing post-traumatic stress disorder.<sup>116</sup> In her sentencing remarks, the former Chief Magistrate commented:

There is no doubt that Ms Jones' traumatic childhood experiences has shaped her subsequent behaviour and development and that the high degree of violence shown in the two significant matters (and in all likelihood is the case with her prior violent offending) is linked to her borderline personality disorder developed as a result of these childhood experiences. Similarly, her alcohol abuse disorder is both related to those childhood experiences and connected to her offending...It is most unfortunate both for Ms Jones and for the community that although extremely alarming matters relating to her care and protection were known to relevant agencies such as the Department of Children & Families, nothing effective was done to protect her from harm, especially as that harm is directly related to matters such as the development of a personality disorder and substance misuse, which in turn is related to her offending, particularly in a context where a high degree of violence appears to have been normalised in Ms Jones' life.<sup>117</sup>

Although it is beyond the scope of this article to assess the impact of other social disadvantages on Indigenous female offending, it is of critical importance to recognise the significant correlation between social deprivation and the criminal behaviour of Indigenous girls. To rely on the current youth justice responses to address their problems

has the effect of further victimisation because these responses are the products of a system which is ill-equipped and traditionally marginalises the needs of Indigenous girls.

## V Conclusion

This paper has highlighted an alarming issue in the youth justice system in the Northern Territory. Aboriginal female young offenders are rising in numbers, as are their contacts with criminal justice agencies. But the male-centred juvenile justice system has controlled, marginalised and neglected their experiences and in turn becomes complicit in their further victimisation. The message behind the various case studies is consistent and clear: to adopt a universalising approach to juvenile delinquency has the consequence of silencing the needs of Aboriginal female offenders because the existing youth justice system is substantially based on the ideological model of male youth offenders.<sup>118</sup>

In the light of the rapidly expanding Indigenous female prison population in the Northern Territory and Australia in general, urgent reform in government policies and funding priorities is warranted to address the unique needs and disadvantages of Indigenous child female offenders. Otherwise, the current youth justice responses to female delinquency will only serve to contribute further to the seemingly unavoidable crisis of hyper-incarceration of Indigenous women,<sup>119</sup> in turn undermining the future wellbeing of Indigenous families and communities.<sup>120</sup>

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\* Clement Ng is a Lawyer at the Northern Territory Legal Aid Commission. This paper was originally submitted for assessment for the subject Indigenous Women and the Law, UNSW. The paper has since been reworked into its present format for publication.

1 Australian Institute of Criminology, *Indigenous Women's Offending Patterns: A Literature Review*, Research and Public Policy Series No 107 (2010). This report primarily summarises a range of research on indigenous women's offending. The chapter on 'juveniles' discusses various studies about offending among Indigenous girls, but tends to focus on statistics or policies in particular states such as Victoria or Western Australia.

2 Northern Territory Government, *Budget 2014-15: Northern Territory Economy* (2014) 37.

- 3 Ibid.
- 4 Ibid. The median age of the Australian population was 37.3 years as of June 2013.
- 5 Australian Bureau of Statistics, *Australian Demographics Statistics* (2014) 21.
- 6 Australian Bureau of Statistics, *Recorded Crime – Offenders, 2013-14* (2014) 1.
- 7 Australian Productivity Commission, *Report on Government Services* (2015) vol F, table 16A.4
- 8 Ibid.
- 9 Australian Institute of Criminology, *Trends in Juvenile Detention in Australia*, Trends & Issues No 416 (2011), 1-2.
- 10 Chris Cunneen, 'Changing the Neo-Colonial Impacts of Juvenile Justice' (2008) 20(1) *Current Issues in Criminal Justice* 43, 54.
- 11 Jared Sharp, *The Justice James Muirhead Churchill Fellowship Report: To Investigate Strategies for Increasing the Cultural Integrity of Court Processes for Aboriginal Young People and Their Families in the Northern Territory Youth Justice System* (2012) 7.
- 12 Kerry Carrington et al, 'Re-Imagining Youth Justice' (Paper presented at Crime, Justice and Social Democracy: Proceedings of the 2<sup>nd</sup> International Conference, Brisbane, 8 July 2013) 19.
- 13 Northern Territory Government, *Review of the Northern Territory Youth Justice System* (2011) 11; Teresa Cunningham, 'Restorative Justice and Pre-Court Diversion: Implications for the Development of Social Policy in the Northern Territory' (2009) 50 *Just Policy* 62, 65-6. The statistics from pre-court diversion are very similar with the majority of participants being Indigenous males.
- 14 Don Weatherburn, Lucy Snowball and Boyd Hunter, 'The Economic and Social Factors Underpinning Indigenous Contact with the Justice System: Results from the 2002 NATSISS Survey' (2006) 104 *Crime and Justice Bulletins* 1, 4.
- 15 Australian Bureau of Statistics, *Recorded Crime – Offenders, 2013-14* (2014) Table 8.
- 16 Ibid, Table 18.
- 17 Troy Allard, 'Indigenous Young People and the Justice System – Establishing an Evidence Base' in Anna Stewart, Troy Allard and Susan Dennison (eds), *Evidence Based Policy and Practice in Youth Justice* (The Federation Press, 2011) 32.
- 18 Chris Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 4<sup>th</sup> ed, 2011) 229.
- 19 Ibid, 203, 222. In *Police v Campbell* [2013] NTSC 79 (27 November 2013), the following passage from the Magistrate's remarks was cited at paragraph [15]: 'Unless you make a decision one day, you, your mates, your cousins, your brothers, all use cannabis, all steal to get items to sell to use cannabis, then you will come back. Until such time as you make a decision that you want to grow up, be responsible, then there is very little chance.'
- 20 Christine Alder, 'Theories of Female Delinquency' in Allan Borrowski and Ian O'Connor (eds), *Juvenile Crime Justice & Corrections* (Addison Wesley Longman, 1997) 48.
- 21 Carrington et al, above n 12, 22.
- 22 Jodeen Carney, 'Review of the Northern Territory Youth Justice System' (Report, Northern Territory Government, 2001) 38.
- 23 North Australian Aboriginal Justice Agency, Submission to Youth Justice Review Committee, Parliament of Northern Territory, *Review of the Northern Territory Youth Justice System*, July 2011, 14.
- 24 Carney, above n 22, 112.
- 25 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014* (2014), Tables 2 and 8.
- 26 NT Police, Fire and Emergency Services, *Annual Report 2013-2014* (2014)137.
- 27 Australian Bureau of Statistics, *Recorded Crime – Offenders, 2012-13* (2013) Table 19.
- 28 Australian Institute of Criminology, *What Makes Juvenile Offenders Different from Adult Offenders?*, Trends & Issues No 409 (2011), 3.
- 29 Kerry Carrington and Margaret Pereira, *Offending Youth: Sex, crime and justice* (The Federation Press, 2009) 66. The sexualisation theory has been criticised as excluding the 'historical, cultural and material diversity of young women's offending and victimisation'.
- 30 Cunneen and White, above n 18, 211.
- 31 Ibid.
- 32 Carney, above n 22, 23.
- 33 Rob White and Daphne Habibis, *Crime and Society* (Oxford University Press, 2005) 216.
- 34 Cunneen and White, above n 18, 225.
- 35 Annie Hudson, 'Troublesome Girls': Towards Alternative Definitions and Policies' in John Munice, Gordon Hughes and Eugene McLaughlin (eds), *Youth Justice: Critical Readings* (Sage, 2002) 298.
- 36 Alder, above n 20, 45; Linda Dahlberg and Thomas Simon, 'Predicting and Preventing Youth Violence: Developmental Pathways and Risk' in John Lutzker (ed), *Preventing Violence: Research and Evidence-based Intervention Strategies* (American Psychological Association, 2006) 115.
- 37 Cunneen and White, above n 18, 203.
- 38 Patricia Chamberlain, *Treating Chronic Juvenile Offenders: Advances Made Through the Oregon Multidimensional Treatment Foster Care Model* (American Psychological Association, 2003) 116.
- 39 Ibid 122.
- 40 Hudson, above n 35, 296-7.
- 41 [2012] NTMC 021 (15 June 2012) ('*Mose!*'). The selection of the



- cases in this article is based on the experience of the author as a practitioner in the field. They are chosen because they are significant for the purpose of further discussion and elaboration of the relevant issues addressed in this paper.
- 42 Ibid [3].
- 43 Ibid [35].
- 44 Ibid [11], [14].
- 45 Ibid [29].
- 46 Hudson, above n 35, 302.
- 47 Ibid 300.
- 48 Carrington and Pereira, above n 29, 68.
- 49 Julie Stubbs, 'Indigenous Women in Australian Criminal Justice: Over-represented but Rarely Acknowledged' (2011) 15(1) *Australian Indigenous Law Journal* 47, 48.
- 50 Alder, above n 20, 48.
- 51 Allard, above n 17, 34.
- 52 Hudson, above n 35, 303.
- 53 Carrington et al, above n 12, 22.
- 54 *Youth Justice Act 2005* (NT) s 52.
- 55 *Care and Protection of Children Act 2007* (NT) s 88.
- 56 Allan Borowski, 'A Portrait of Australia's Children's Courts: Findings of a National Assessment' in Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts Today and Tomorrow* (Springer, 2013) 183.
- 57 White and Habibis, above n 33, 214.
- 58 Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Northern Territory Government, *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007).
- 59 Australian Institute of Health and Welfare, *Child Protection in Australia 2013-14* (2014), 29, 43.
- 60 Department of Children and Families, *Annual Report 2013-2014* (2014) 12.
- 61 Australian Institute of Health and Welfare, *Child Protection in Australia 2013-14* (2014) 43; The Northern Territory Children's Commissioner, *Annual Report 2012-2013* (2013) 47, 60; Australian Productivity Commission, *Overcoming Indigenous Disadvantage Report: Key Indicators 2014* (2014) Table 4A.10.5. The Children's Commissioner also reported that notifications involving Aboriginal children have increased by 59% since 2010-2011 and this has caused the number of Aboriginal children in state care to be increased as well. This is also confirmed by the latest report by the Productivity Commission. The report shows that the rate per 1000 children on state protection orders in 2012-13 is 25.6 for Indigenous children and 3.6 for non-Indigenous children in the NT.
- 62 Ibid 93; Table A23.
- 63 Sara Goodkind et al, 'From Child Welfare to Juvenile Justice: Race, Gender, and System Experiences' (2013) 11(3) *Youth Violence and Juvenile Justice* 249, 253; Cunneen and White, above n 18, 217; Caroline Spiranovic et al, 'Aboriginal Young People in the Children's Court of Western Australia: Findings from the National Assessment of Australian Children's Courts' (2015) 38 *University of Western Australia Law Review* 86, 106.
- 64 Katherine McFarlane, 'From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System' (2010) 22(2) *Current Issues in Criminal Justice* 345, 346-7.
- 65 [2014] NTMC 018 (11 August 2014) ('CP').
- 66 McFarlane, above n 64, 348.
- 67 CP [2014] NTMC 018 (11 August 2014) [3], [23].
- 68 Ibid [1], [7], [12].
- 69 Ibid [22], [28-9].
- 70 Ibid [28].
- 71 Australian Institute of Criminology, *Bail and Remand for Young People in Australia: A National Research Project*, Research and Public Policy Series No 125 (2013); McFarlane, above n 64, 348. McFarlane's research confirms that the practice of over-reliance on police and criminal justice responses to manage behaviours of children in care continues despite changes to the caring model; Spiranovic et al, above n 63, 105. Research findings from the experiences of young persons in Western Australia also support that the ineffective intervention into the children's circumstances can be attributed to 'the transience and inexperience of child protection workers.'
- 72 Cunneen and White, above n 18, 218.
- 73 Carrington et al, above n 12, 22.
- 74 Commonwealth, *House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs: Doing Time - Time For Doing: Indigenous Youth in the Criminal Justice System* (2011) xxix.
- 75 Northern Territory Government, *Review of the Northern Territory Youth Detention System* (2015) 10. It was reported that there was a daily average of 3 to 7 female detainees.
- 76 Lorana Bartels, 'Sentencing of Indigenous Women' (Brief No 14, Indigenous Justice Clearinghouse, November 2012) 4.
- 77 Northern Territory Government, above n 13, 109.
- 78 Ibid 100.
- 79 Carrington and Pereira, above n 29, 68. The authors contend that Aboriginal girls are constantly held in detention facilities which are very far away from their families and this amounts to additional punishment.
- 80 Roger Smith, *Youth Justice Ideas, Policy, Practice* (William Publishing, 2003) 125.
- 81 John Elferink, 'Setting the Pace for Youth in Detention' (Media Release, 11 August 2013) 1.
- 82 North Australian Aboriginal Justice Agency, Submission to Youth

- Justice Review Committee, Parliament of Northern Territory, *Review of the Northern Territory Youth Justice System*, July 2011, 62.
- 83 Australian Institute of Criminology, above n 71, 15.
- 84 Ibid 15, 23; Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2014* (2014) 19.
- 85 Ibid 29, Table 7.
- 86 Ibid 15.
- 87 Northern Territory Government, above n 75, 11.
- 88 Australian Institute of Criminology, above n 71, 75.
- 89 Deborah West and David Heath, 'Youth Justice, Child Protection and the Role of the Youth Courts in the Northern Territory' in Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts Today and Tomorrow* (Springer, 2013) 57.
- 90 Ibid 10.
- 91 Barry Goldson, 'Child Incarceration: Institutional Abuse, the Violent State and the Politics of Impunity' in Phil Scraton and Jude McCulloch (eds), *The Violence of Incarceration* (Routledge, 2008) 92.
- 92 Carrington and Pereira, above n 29, 100.
- 93 Cunneen and White, above n 18, 212.
- 94 Katrina Wong, Brenda Bailey and Diana Kenny, *Bail Me Out: NSW Young People and Bail* (Youth Justice Coalition, 2010).
- 95 (Unreported, Youth Justice Court Northern Territory, Magistrate Trigg, 19 September 2014) ('SP').
- 96 Ibid 7-8. The charge of arson relates to setting fire on the roof of a building which allegedly caused \$200,000 worth of damage, an estimate characterized as 'bizarre' by the magistrate.
- 97 Ibid 4, 9.
- 98 Ibid 5, 7.
- 99 Ibid 7.
- 100 Ibid 5.
- 101 Australian Institute of Criminology, above n 71, 100.
- 102 Cunneen and White, above n 18, 218. The writers contend that there has been a discrepancy in terms of support provided to female offenders which aim to divert from detention.
- 103 Australian Institute of Criminology, above n 28, 4.
- 104 White and Habibis, above n 33, 227.
- 105 Ibid.
- 106 Australian Productivity Commission, *Overcoming Indigenous Disadvantage Report: Key Indicators 2014* (2014) Table 4A.11.44.
- 107 Ibid.
- 108 Ibid.
- 109 Ibid Table 4A.11.6.
- 110 Goodkind et al, above n 63, 250.
- 111 White and Habibis, above n 33, 214.
- 112 [2013] NTMC 017 (22 July 2013) ('Ms Jones').
- 113 Ibid [2], [4].
- 114 Ibid [20].
- 115 Ibid [16].
- 116 Ibid [29-30], [32].
- 117 Ibid [34], [36].
- 118 Alder, above n 20, 51.
- 119 Chris Cunneen et al, *Penal Culture and Hyperincarceration: The Revival of the Prison* (Ashgate Publishing, 2013) 104.
- 120 Commonwealth, above n 74, 278.