



TRAUMA AND THE LAW:

APPLYING TRAUMA-INFORMED PRACTICE TO LEGAL AND JUDICIAL CONTEXTS

ABSTRACT

The applicability of 'trauma-informed practice' to the practice of law is increasingly recognised. While originating from within the field of mental health, mounting evidence supports the contention that 'more effective, fair, intelligent, and just legal responses must work from a perspective which is trauma-informed' (Randall & Haskell, 2013). By contrast, implementation of trauma informed principles to the contexts of law remains in its infancy. This paper introduces the core principles of trauma-informed practice with reference to the many areas of legal practice to which they relate. The evidence base for widespread application of trauma-informed practice within and across the legal system and judiciary is presented, and the many benefits of implementation of trauma informed principles to legal practice are discussed.

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BACKGROUND PAPER

*Most if not all, situations of conflict and harm
involve questions of justice and injustice, and
situations of injustice frequently involve trauma.*

(Zehr, 2009)

Trauma and law...are interconnected.

(Randall & Haskell, 2013:503)

Originating from within the field of mental health - and now well established within that sector - the paradigm of 'trauma-informed practice' is applicable not only to mental health, but to all forms of human service delivery and interaction. Necessarily, this includes the domain of law - *'As a powerful institution in society, law regularly encounters and deals with people, both as victims and offenders, whose lives have been shaped and harmed by traumatic events'.¹*

¹ Melanie Randall & Lori Haskell, 'Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping', *The Dalhousie Law Journal* (Fall 2013), p.523.

The recommendation that both the legal and justice systems (and the criminal justice system in particular) should be trauma-informed is recent. Yet mounting evidence supports the contention that 'more effective, fair, intelligent, and just legal responses must work from a perspective which is trauma informed'.² As in the mental health sector, broad-based implementation of this approach would benefit not only clients and practitioners, but whole systems and organisations.

By presenting key themes of the relevant research base, this background paper makes the case for legal and judicial practice to become 'trauma-informed'. It defines the core principles of trauma informed practice, the multiple benefits of their implementation, and some of the many areas and aspects of law to which trauma-informed practice is pertinent.

Although the challenge of the paradigm shift, within and across the legal and justice systems, both in scope and nature is substantial, this paper illustrates multiple grounds for the introduction and embedding of trauma-informed practice. While the nature and brevity of the paper preclude a comprehensive account of these, a large and growing evidence base substantiates the case for trauma-informed practice *per se*. The pivotal role of law in the regulation of human behaviour and the adjudication of disputes further suggests why the domain of law cannot remain immune to its implementation.

Defining trauma and trauma-informed practice

Trauma stems from the overwhelming of coping mechanisms in response to perception or experience of extreme threat. Unlike 'normal life stress' (which is constant and experienced by everybody) the perception of extreme threat activates innate 'fight', 'flight' and/or 'freeze' responses which are protective at the time of the precipitating event/s but which corrode health over time if the underlying trauma is not resolved. For those who live with the effects of unresolved trauma, 'normal life stress' can be profoundly destabilising, trapping them in a cycle of physical and psychological reactivity which is devastating to well-being and to a wide spectrum of functioning.

² *ibid*: 501.

Trauma stems from extreme stress but is highly prevalent. For most people, the word 'trauma' connotes single incidents and events (i.e. post-traumatic stress disorder; PTSD). But 'there is more to trauma than PTSD'.³ It is important to distinguish between 'single incident' trauma (PTSD) and what is increasingly called 'complex' trauma (i.e. *cumulative, underlying, and often interpersonally generated*). In fact, 'complex' interpersonally generated trauma is not only more extensive in its impacts across a range of functioning,⁴ but is also more common.⁵ This includes within legal and judicial contexts.

Increasingly within the health sector a range of otherwise diverse problems, conditions and disorders are being recognised as trauma-related.⁶ Yet vast numbers of people who experience the effects of complex interpersonally-generated trauma also access human services both within and outside the health sector. Often their trauma relates to childhood experiences at the hands of care-givers. Unresolved early life trauma is correlated unequivocally not only with a raft of adverse physical and psychological health problems in adulthood,⁷ but with a range of psychosocial issues as well.

Because complex trauma-related problems present in many guises (including risky and/or challenging behaviours) service-providers may not readily identify the trauma operative in the lives of their clients. Similarly, the unresolved trauma in the lives of many people who engage in various capacities with the legal system is not necessarily apparent to practitioners of law.

³ Robin Shapiro, *The Trauma Treatment Handbook* (New York: Norton, 2010), p.11.

⁴ 'It is clear from many studies that interpersonal violence is more likely to have long-term consequences than natural disasters or accidents' (Sandra Bloom & Brian Farragher, *Destroying Sanctuary*, Oxford University Press, New York, 2011), p.67. For elaboration of the debilitating effects of complex trauma, and the multiple health impacts for which treatment is necessary, see Christine A. Courtois & Julian D. Ford, *Treating Complex Traumatic Stress Disorders: An Evidence-Based Guide* (The Guilford Press, New York, 2009).

⁵ 'The majority of people who seek treatment for trauma-related problems have histories of multiple traumas' (Bessel A. van der Kolk, 'Posttraumatic Stress Disorder and the Nature of Trauma', in Marion F. Solomon & Daniel J. Siegel, ed. *Healing Trauma*, Norton, New York, 2003), p.172.

⁶ '[M]ore and more problems in living are being understood as being trauma generated' (Elizabeth Howell, *The Dissociative Mind* (Routledge, New York, 2005), p.ix; 'PTSD, borderline personality disorder, and self-harm can all reflect complex adaptation to early trauma' (Louis Cozolino, *The Neuroscience of Psychotherapy* (Norton, New York, 2002), pp.267-268.

⁷ Vincent J. Felitti, Robert F. Anda, et. al (1998) 'Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study', *American Journal of Preventive Medicine*. 14 (4), 1998, pp.245-258; J. P. Shonkoff, A. S. Garner, et al. (2012). "The Lifelong Effects of Early Childhood Adversity and Toxic Stress." *American Academy of Pediatrics* (129, 1, 2012), pp. e232-e246.

Trauma-informed practice is relevant to all contexts, services and institutions with which people experiencing the effects of unresolved trauma come into contact.

Becoming trauma-informed is accessible to everyone, with no need for clinical knowledge or qualifications. What is required is *basic knowledge of the impacts of stress on the brain and body and strategies to avoid exacerbating possible trauma-related problems* (which research substantiates to be highly prevalent in the general population).⁸

Disturbingly, research also shows that many people who experience complex trauma-related problems have been re-traumatised by the very services they have accessed for assistance.⁹ Such re-traumatisation occurs across the full spectrum of sectors, practices and services, including within and across the legal and justice sectors.

Core principles of trauma-informed practice

With the appropriate training, the following principles of trauma-informed practice are readily accessible to all personnel. This is irrespective of the nature of their work, the qualifications they hold, the types of interaction they have with clients, and the services they provide.

- (1) Basic knowledge of the impacts of stress on the brain and body
- (2) Consistent emphasis on *safety, trustworthiness, choice, collaboration* and *empowerment* (emphasis on doing *with* rather than *for* or *to*)
- (3) Consistent emphasis on *the way in which* a service is provided (i.e. the 'how' as much as the 'what'; the context in which services are delivered, not just what the service is)

⁸ van der Kolk, *ibid*, Felitti, Anda et al, *ibid*.

⁹ 'Trauma has often occurred in the service context itself' Ann Jennings, 'Models for Developing Trauma-Informed Behavioral Health Systems and Trauma-Specific Services'. Report produced by the National Association of State Mental Health Program Directors (NASMHPD) and the National Technical Assistance Center for State Mental Health Planning (NTAC) United States, 2004, p.6.

(4) Consistent emphasis on what may *have happened to a client*, rather than what is 'wrong' with client/s

(5) Recognition that 'difficult' behaviour and/or 'symptoms' may be the product of *coping mechanisms* and attempted self-protection in light of prior adverse experiences. If not seen through the lens of trauma, client behaviour is *often and inappropriately labelled as pathological, when [it] should instead be viewed as adaptations a person has had to make in order to cope with life's circumstances'*¹⁰

(6) A 'strengths-based' approach which acknowledges people's skills, notwithstanding the enormity and effects of overwhelming experiences with which they may be struggling (*'Recognizing and promoting resilience is also a fundamental component of effective trauma-informed work'*).¹¹

Trauma-informed practice is also attuned to the myriad ways in which stress can further traumatise people whose physiology and psychology are disrupted and dysregulated due to prior and unresolved adverse experiences.

Becoming trauma-informed means being attuned to *all aspects* of a service and how it is delivered (i.e. formal and informal; from policy and procedure, to first contact interactions and the manner in which clients are engaged.)¹² Trauma-informed practice also applies to *all levels* of service delivery; to senior management no less than to front line workers (i.e. to all staff, paid and unpaid; 'top down and bottom up').¹³

¹⁰ Randall & Haskell, 'Trauma-Informed Approaches to Law...', p 508.

¹¹ *ibid*: 509.

¹² For comprehensive accounts of trauma-informed practice and the changes it requires to human service-delivery, see Jennings (*ibid*) and Roger FalLOT & Maxine Harris, 'Creating Cultures of Trauma-Informed Care (CCTIC): A Self-Assessment and Planning Protocol'. Washington, DC: Community Connections (2009).

¹³ Sandra L. Bloom, 'Organizational Stress as a Barrier to Trauma-Sensitive Change and System Transformation', Alexandria, VA: National Technical Assistance Center (2006), p.2.

Everyone involved will experience a profound and comprehensive shift in existing ways of operating.¹⁴ Implementing the requisite changes will take time. Introducing trauma-informed practice approaches may also be challenging. Yet there are also immediate ways in which the principles of trauma-informed practice can be applied. They can also be applied progressively over time, prior to embedding them within and across service structures. As there are many significant benefits of doing so, this process does not need to be delayed.

A wide evidence base

It is now known that trauma negatively impacts neural integration (i.e. the capacity of different pathways and brain/mind functions to work together). Research has unequivocally established that positive relational experiences assist the neural integration which trauma catastrophically disrupts.¹⁵ It also shows that positive relational experiences not only assist the resolution of trauma but *enhance general well-being*. Everybody benefits from being trauma-informed – i.e. staff as well as clients; those of us with ‘normal life stress’ as well as the chronically traumatised. This, in turn, provides the rationale and the ‘buy in’ for comprehensive embedding of trauma-informed practice at all levels and throughout all practices, services, organisations and institutions, including within and across the legal and justice sectors.

The research base in neuroscience, trauma and psychology is expanding rapidly. It can now be considered in the context of enhanced understanding of the role of relational (‘attachment’) experience in shaping the people we are and may yet become. Diverse fields of knowledge are converging in a common understanding of the brain and of the conditions conducive to its optimal functioning.¹⁶

We now have considerable research on the effects of stress – particularly early life stress – on the brain, as well as of the potential for positive interception and remediation of even severe and longstanding stress. This includes recognition of *neuroplasticity* (i.e. the capacity

¹⁴ Jennings, *ibid*: 15.

¹⁵ Cozolino, *ibid*; Daniel J. Siegel, *Mindsight* (New York: Random House, 2009); Norman Doidge, *The Brain that Changes Itself* (New York: Viking, 2007).

¹⁶ See Daniel J. Siegel, Prefatory Note, in Siegel & Solomon, ed. *Healing Trauma*, *ibid*.

of the brain to regenerate and change both in structure and function across the life cycle) and the enormous possibilities it opens up for both resolution of trauma and for general well-being.¹⁷

Put simply, *positive relational experiences assist integration of neural pathways disrupted by stress, while negative relational experiences impede integration and compound the effects of stress.*¹⁸ Understanding of the negative effects of stress – and particularly overwhelming stress – on the brain and body mandates a trauma-informed approach both *interpersonally* and *systemically*. The former applies to everyday interactions no less than to formal ‘treatment’ and service engagement. The latter relates to policies, procedures and modes of engagement operative within and across the full spectrum of practices, services, organisations, institutions and human service settings.

Trauma-informed practice and the practice of law

While pertinent and pioneering in the field of mental health, the need for implementation of these insights to all disciplines, fields, and professions is clear. This includes, and in some ways especially, the practice of law (*‘the law too should strive to become trauma-informed’*).

¹⁹

The law plays a pivotal role in regulation of, and responses to, human behaviour. Yet the insights of psychology do not currently inform either the professional training of legal personnel or their practice. This paradox is in urgent need of redress. Thus it is not only the ‘new’ research insights of neuroscience which await incorporation within the training curricula of law - *‘Most areas of law are organized around simplistic assumptions about humans as rational maximizers of their own self-interest, undertaking cost-benefit assessments of their actions and the possible reactions to them’*.²⁰ This underpinning conception has some unfortunate effects.

¹⁷ Some contend that such understanding is as critical today as was recognition of the role of microbes in infectious diseases two centuries ago (Bloom & Farragher, *ibid*: 90).

¹⁸ Siegel, *ibid*; Cozolino, *ibid*; Doidge, *ibid*. Also see David Pilgrim, A. Rogers, & R. Bentall, ‘The Centrality of Personal Relationships in the Creation and Amelioration of Mental Health Problems: the Current Interdisciplinary Case’, *Health* (13, 2, 2009), pp.235-54.

¹⁹ Randall & Haskell, ‘Trauma-Informed Approaches to Law...’, p 505.

²⁰ *ibid*: 516.

Self-interest is a primary motivator of human behaviour. But it is far from the only one. It is also the case that the multiple neurobiological effects of unresolved traumatic experience impair people's capacity to select and implement courses of action which progress and enhance their overall well-being. Thus the trauma-informed principle of the need for basic knowledge of the effects of stress on human functioning can be seen to be highly pertinent.

Canon law, in particular, as Randall and Haskell point out, assumes deterrence and the threat of penalty to be effective disincentive to the commission of crime.²¹ The flaw in this assumption becomes starkly apparent when viewed through the lens of trauma: privileging of a narrow conception of self-interest can neither account for the complexity of other motivations and needs or the neurobiological impairments with which unresolved trauma is correlated.

The trauma-informed principle of need for attunement to *what has happened* to a person (rather than what is 'wrong' with a person) allows sense to be made of behaviour and responses which may otherwise seem perplexing and/or flagrantly counter-productive.

The need to protect against potentially overwhelming experience will always trump cognitive assessment of the maximisation of interests.

Self-protective strategies - even when injurious to one's ostensible 'interests' - are themselves rational when viewed through the lens of trauma. This is because they are attempts to defend against repetition of painful and potentially unbearable experience. Thus behaviour which may appear to (and may actually) jeopardise promotion of self-interest 'makes sense' in the context of prior traumatic experience. The 'rational actor' assumptions of legal discourse cannot easily accommodate this reality.

The foundational assumptions of much legal discourse often preclude recognition that many responses and behaviours serve *adaptive and protective purposes*. Failure to recognise this not only limits understanding of the impacts of trauma. The effects of this myopia are re-

²¹ *ibid.*

traumatising to victims and offenders²² alike (which is not to equate these groupings in other respects).²³ They are also subversive of the very attempt to facilitate justice, which is the core business of diverse legal personnel and of the law *per se*.

What, then, are the areas of law to which trauma-informed practice applies?

Most obviously, they include:

- Criminal law (*including sexual assault; domestic violence*)
- Child protection (*includes assault and abuse*)
- Family law
- Engagement with Aboriginal Australians
- Immigration; refugee/asylum seeker advocacy
- The work of community legal centres (*where funding is restricted and much work is pro bono*)
- Legal aid
- Personal injury

The potential for - and actuality of - severe stress for all parties and stake-holders (including legal personnel; see below) is a given in each of the above domains.

The reality, however, is that there are few areas of legal practice to which trauma-informed principles do not apply. As the quotation which prefaces this paper underlines - *'[m]ost if not all, situations of conflict and harm involve questions of justice and injustice, and situations of injustice frequently involve trauma'*.²⁴ The core business and very nature of law – i.e. in all its aspects and contexts – means that the role of trauma cannot be discounted at any level.

This also correlates with the comprehensiveness of the changes required (i.e. at cultural and systemic levels as well as interpersonally; both 'bottom up' and 'top down' within organisations and institutions).

²² It is significant that Randall & Haskell make this point quite unequivocally - 'Given the criminal justice system's dismal record regarding its treatment of victim-witnesses and offenders, this trauma-informed approach applied to prosecuting crime can only be a step forward which offers at least the opening for more creative, and hopefully more transformative, interventions into the lives of people affected by crime' (ibid: 518).

²³ As Randall & Haskell also care to point out (ibid).

²⁴ Zehr, 2009; cited in Randall & Haskell, ibid, p.522.

Consequently, the intersection of trauma with attempts to implement justice is fundamental. The very terms 'settlement', 'redress' and 'restitution' (i.e. in addition to the criminal law language of 'sanction', 'punishment' and 'deterrence') indicate this nexus. Trauma can also be operative even in the ostensibly 'quiet' domain of general legal practice.

Thus in addition to the areas of law already noted as clear candidates for introduction of trauma-informed practice, the following also warrant inclusion:

- Property law
- Wills, probate and estates
- Taxation and finance

In short, trauma-informed practice applies and, in most cases is urgently necessary, to all areas of legal practice

Relevance to the judiciary

Trauma-informed practice is also highly pertinent to the judiciary. This includes all stakeholders including judges and magistrates (i.e. as well as court staff and all who appear before the courts).

Powerful illustration of the benefits of trauma-informed practice for judges comes from the recent comments and current advocacy of Victorian Federal Court judge, Shane Marshall. Justice Marshall, who has disclosed his own experience of depression, has become a vocal advocate for mental health issues to be addressed by the legal profession as 'a necessity, not an option'.²⁵

As an ambassador of the Wellbeing and the Law (WALT) Foundation (established in 2013 by the Victorian Bar Association and the Law Institute of Victoria) Justice Marshall is shining a light on the range of ways in which the practice of law and operation of the judiciary can incubate depression, anxiety, and other devastating health impacts. As a journalist who has

²⁵ Cited in Nikola Berkovic, 'Mental Wellbeing 'a legal must', *Weekend Australian*, 7-8 February 2015, p.4.

interviewed him on this topic points out, '[i]t's difficult for anyone to make themselves this vulnerable, let alone a 20-year veteran of the Federal Court bench'.²⁶

It is rare for judges to speak out, much less to disclose, experience of mental health issues. Thus the advocacy work undertaken by Justice Marshall in relation to the mental health risks of the practice of law is authoritative and compelling (*'I'm really concerned about where the legal profession is heading'*²⁷) Indeed, he has facetiously remarked that 'one is almost tempted to go to a law school and put up a sign 'Beware: Toxic Profession''.²⁸

Justice Marshall's comments underline the *systemic rather than purely 'personal'* mental health risks of the practice of law. His standing within the profession, and the psychological costs he highlights in attaining it, provide particular strength and resonance to his account and recommendations; i.e. they cannot easily be minimised. His advocacy work aims to facilitate a healthier induction to and experience of law for students and young legal practitioners. For example, he suggests that they would benefit 'by the curriculum including a mental wellbeing subject within it'.²⁹

His observations regarding the judiciary, operation of the courtroom, and the role of judges are no less salutary. Here he has remarked on the competitive and hierarchical nature of the legal profession and its impacts on the courtroom. Not only is this intimidating to members of the public, but the courtroom is a highly stressful workplace for lawyers who defend and prosecute within it. One of Justice Marshall's interviewers describes how he has not only 'reprimanded barristers in his court for bullying junior staff', but also 'talked to former Federal Court judges about their bullying from the bench'.³⁰ The stratification of hierarchy – in which the induction of stress occurs both 'top down' and 'bottom up' – reinforces the

²⁶ Di Martin interviewing Justice Shane Marshall, 'Federal Court judge says pressures of legal profession are 'toxic'', ABC AM with Michael Brissenden, 20 February 2015.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Cited in Nicola Berkovic, 'Mental wellbeing should be taught to law students, says judge', *The Australian*, 7 February 2015.

³⁰ 'I have made a comment to them that I didn't think that was the appropriate way to go, that it wasn't fair on them, and we had immense power over them, and we could shatter someone by our reaction to them, especially a junior practitioner' (comments made in interview with Di Martin, 'Federal Court judge says pressures of legal profession are 'toxic'', *ibid.*

intense pressures on legal practitioners. These can reach their corrosive zenith in the court room.

In this scenario, one can identify how the pressures conducive to anxiety and depression (described as 'toxic' by Justice Marshall) could escalate to full-blown trauma. This applies not only to legal personnel intimidated by the behaviour of (some) judges but also potentially to judges themselves, who 'pass down' what they have themselves experienced and may continue to experience.³¹ It is therefore apparent that trauma-informed practice is both relevant and urgently necessary to a number of intersecting judicial areas.

Questioning 'credibility'

A trauma-informed approach to law has numerous benefits in all domains. It is revealing, as well as helpful, to consider a single illustration which likewise relates to diverse areas.

The issue of 'credibility' is a key concept in relation to engagement with witnesses, victims and offenders alike (which once again is not to elide the important differences between them). Because interpersonally generated trauma stems from relational harm, traumatic responses 'are deeply organized around disruption and disconnection'.³²

This has a number of adverse consequences, not only for the management of stress but for conceptions of self and other/s. The effects of overwhelming stress also *impede the imparting of coherent narratives*, such that the testimony and accounts of traumatised people can appear discursive, episodic, unreliable and even mendacious.

Trauma-informed principles recognise this reality and enable provision of policies and modes of interaction conducive to stabilisation and safety. Thus testimony can be imparted in a context in which additional stress is minimised. This not only reduces the risk of re-traumatisation. It also facilitates the eliciting of accounts which are potentially more

³¹ Justice Marshall describes the judiciary as a 'bear pit' in which rumours of the abilities of respective judges abound (see Jane Lee, 'Judge tells of depression struggle in bid to help many in legal circles', *The Age*, 14 September 2013).

³² Randall & Haskell, 'Trauma-Informed Approaches to Law...', p.532

consistent and thus regarded as more reliable, so better able to 'stand up' in court). Current research into the neurobiology of memory also has major implications for the issue of 'credibility', and urgently needs to be made available to legal and judicial contexts. Understanding that memory does not relate solely to conscious recall, but stems from complex neural networks associated with different types of memory,³³ is likewise critical to the pursuit and achievement of just outcomes.³⁴

'Cooperation with authorities' is less likely to occur in stressful situational contexts. Adherence to trauma-informed practice reduces stress not only for defendants, victims and witnesses but for the legal personnel who engage with them (as well as potentially leading to better outcomes as above).

Engagement with the law and justice system *in any capacity* is stressful for many members of the public. This is irrespective of the presence or absence of underlying trauma. How much higher are the stakes then (once again for all parties) when high stress levels are intrinsic to the nature of the encounter? The potential for heightened negative repercussions is thereby greatly increased.

Trauma-informed practice helps to defuse and de-escalate arousal. The attendant benefits flow in many directions. 'Do no harm' is an underlying principle of trauma-informed practice. Often people have already experienced harm from prior encounters with the law. Containing and minimising additional harm is respectful and soothing to the countless numbers of people involved in the legal and justice system (i.e. whether as administrators or

³³ Particularly important in this context is the distinction between *explicit* and *implicit* memory, where the former (also known as 'autobiographical' memory) relates to conscious recall and the latter (sometimes referred to as 'procedural' memory) is elicited by situational cues (e.g. a fragrance or sound) which is experienced somatically in the absence of conscious awareness of the prior experience it evokes (Siegel, 2009, Ogden et al 2006). While detailed discussion of the workings of memory takes us beyond the parameters of this paper, the previously described distinction has major implications for the practice of law and a more nuanced understanding of these different types of memory is both urgently needed within legal and judicial contexts and central to the achievement of justice.

³⁴ Obvious illustrations relate to rape and sexual assault trials, and to the whole area of child sexual abuse. We now know that shock can impede functioning of the hippocampus (necessary for the encoding of explicit memory). In the case of the abuse of young children, and particularly if it occurs pre-verbally, memory for the abuse will be implicit rather than explicit in any case (i.e. absence of conscious recall is not itself a sign of untruthfulness or of the absence of abuse but rather of how different types of memory operate). In the interests of just legal outcomes it is clearly imperative that current neuroscientific findings are available to all personnel of the legal and judicial systems.

recipients; at all levels and notwithstanding contrasting positions within it). We would suggest that it should also be a vital component of justice *per se*.

Ongoing reforms in many areas of law do not guarantee improved processes and outcomes. It also needs to be noted that *with respect to some areas of law, opportunities to access and secure justice may actually be decreasing rather than increasing*.³⁵ In implementing principles predicated on understanding of the stress response and reduction of triggers which can lead to overwhelm, trauma-informed practice enhances the likelihood that the processes and intended outcomes of legal reform/s will be achieved.

Trauma-informed practice as 'win-win': vicarious trauma, self-care and liability

Proximity to stressful situations and contexts can itself incubate trauma (as experience within the mental health arena has established). Exposure to traumatic material increases the risk of secondary, indirect or 'vicarious' trauma.³⁶ Vicarious trauma (VT), derived from the mental health field, is an increasingly familiar concept and reality which applies to many other contexts.

The context of law is inherently stressful; it furnishes multiple possibilities for erosion of the well-being of those within it. This applies even when the work is challenging and is experienced as rewarding. Indeed, as Justice Marshall's legacy and work attest, the profession of law is inherently and intensely stressful at a *systemic* (not just 'individual') level.

³⁵ See footnote 24 for previously cited reading of treatment of 'victim-witnesses and offenders' as 'dismal'. Also note the continued high incidence of Aboriginal deaths in custody and the acknowledged inadequacies of the law with respect to both protection of women from violent partners and protection of children from sexual abuse and maltreatment. With respect to the latter, and as recently as October 2014, Justice Peter McClellan said that '[i]n spite of the issues being well-known, and in spite of decades of reform, the preliminary results from some of our research suggest that the opportunity to secure justice for victims of sexual abuse through the criminal justice system may in fact be decreasing, rather than increasing' (Justice Peter McClellan, Chair of the Royal Commission into Institutional Responses to Child Sexual Abuse, Address to the 14th International Criminal Law Congress, 9 October, Melbourne).

³⁶ There is now a large literature which addresses the phenomenon of vicarious trauma (commonly referred to as 'VT'). See, for example, Sharon Rae Jenkins & Stephanie Baird, 'Secondary traumatic stress and vicarious trauma: A validation study', *Journal of Traumatic Stress* (15, 5, 2002), pp.423-432.

It is easy to overlook the subtle signs of erosion of well-being. This is especially so for goal-oriented people who work long hours in an occupation replete with arduous schedules and a frequently competitive culture. Self-care can readily be compromised as engrossing projects and successful outcomes are pursued. The need for rest and replenishment outside of work can mistakenly be regarded as time-wasting. The very notion of self-care can be misperceived as 'a luxury that can't be afforded', a sign of self-indulgence or even of weakness.

Vulnerability to vicarious trauma *cannot be overcome by will power and is not a sign of weakness*. In light of the culture of law, this point needs to be clearly understood and emphasised. Rather it is *situationally inherent* in exposure to traumatic material over time ('an occupational hazard, a cost of doing the work').³⁷

Hence the challenge is one of *recognition and management*. While the warning signs of vicarious trauma are clear 'when you are attuned to them',³⁸ recognising and managing them can be challenging. A tendency to 'overwrite' oneself and to 'power on' regardless can be particularly insidious.

Safeguarding entails a number of dimensions, in addition to the obvious. The well-being of legal personnel is vital for many reasons. At the most basic level, the health of individual practitioners and staff is important in and of itself. It also affects the capacity to perform effectively in their role/s. When the work context is itself stressful – and involves ongoing contact with people who have unresolved trauma histories – the stakes become commensurably higher.

Under these circumstances, impaired functioning due to erosion of well-being is particularly problematic. Trauma survivors whose trust has been violated in the past (interpersonally and/or institutionally) are often acutely sensitive and attuned to the responses of others. In

³⁷ Laurie Ann Pearlman & James Caringi, 'Living and Working Self-Reflectively to Address Vicarious Trauma', in Courtois & Ford, *ibid*, p.205.

³⁸ Colin A. Ross & Naomi Halpern, *Trauma Model Therapy: A Treatment Approach for Trauma, Dissociation and Complex Comorbidity* (Richardson, TX: Manitou Communications, 2009) p.223.

the context of authority structures, this is especially so. Clearly law falls into the category of an institution of authority; indeed, it powerfully represents authority *per se*.

Stress experienced by legal personnel is not only likely to be *detected* by the already traumatised people with whom they come into contact. It is also likely to be *transmitted* to them. A major principle of trauma-informed practice in the sector of mental health is that *'[y]our own awareness, conduct and self-care has major implications for your interactions with clients'*.³⁹ This principle is at least as applicable to the context of law, where it is much less recognised.

The combination of stressed legal practitioners and traumatised clients is hazardous at all levels. Stress breeds and triggers further stress. In the hierarchical context of law this not only compounds the risks of re-traumatisation. It risks escalation of even seemingly minor irritants to potentially serious proportions and outcomes.

Attentiveness to self-care is thus as much about OHS, risk management and liability as about the more standard reading of it as purely pertaining to 'R and R'.

Legal personnel need to become aware of the risks of impaired functioning *on their own part* in light of the nature of the stress they face and the positions and work culture they occupy.

This involves awareness of the risks of vicarious trauma and active steps to minimise it. Work environments need to promote such awareness especially in contexts in which trauma is a feature. It is also important to initiate steps to embed support structures at all levels (*'a program cannot be safe for clients unless it is simultaneously safe for staff and administrators'*).⁴⁰

³⁹ Bloom, 'Organizational Stress as a Barrier to Trauma-Sensitive Change and System Transformation', p.2; emphasis added.

⁴⁰ *ibid* (emphasis added)

Self-care, awareness of the risks of vicarious trauma, and strategies to mitigate them are 'win-win' for all parties as well as a key dimension of risk management and OHS. Self-care also involves organisational as well as individual components.

Victorian Supreme Court Chief Justice, Marilyn Warren has said that she frequently hears of young lawyers who have 'suffered because of the demands and exploitation that is placed upon them...If we do not look after these individuals, the profession...the quality of the law and eventually the rule of law itself will suffer'.⁴¹ Stress generates stress; in the context/s of law the stakes are high at a range of levels. Introduction of trauma-informed practice is part of the antidote.

Trauma- informed practice = transformed legal practice: training of correctional officers, the culture of the courtroom, and the benefits of trauma audits in the context/s of law:

In diverse areas of law and legal practice to which trauma informed principles are beginning to be applied, the wide ranging positive effects are clearly attested to by the stake holders involved. The following sample endorsements from the North American context - in relation to the training of correctional officers, the culture of the court room, and the benefits of trauma audits respectively – are exemplary in this regard:

Implications for training of correctional officers

*'When correctional officers were trained in the Rhode Island system, administrators showed up to make it clear we were making these changes for them as well as for the women. Officers need to know that some inmate behavior is an adaptation that stems from trauma and that there are things they can do to help a woman "chill" when something sets off the alarms. They actually understand this better than the psychologists. They don't need clinical language to "get" it.'*⁴²

⁴¹ Cited in Jane Lee, 'Judge tells of depression struggle in bid to help many in legal circles', *ibid*.

⁴² Carol Dwyer, Warden, Rhode Island Department of Corrections quoted in Substance Abuse and Mental Health Services Administration. Why and how Creating a Trauma-informed Criminal Justice System for Women, p.5 [http://www.nasmhpd.org/sites/default/files/Women%20in%20Corrections%20TIC%20SR\(2\).pdf](http://www.nasmhpd.org/sites/default/files/Women%20in%20Corrections%20TIC%20SR(2).pdf)

The culture of the court room

*'In a drug treatment court, the culture of the courtroom has to be different. Judges talk directly to the women in the programs, and the women are allowed to approach the bench. We tell the officers to be supportive – not, for example, jingling the handcuffs to remind them who is in charge. We applaud the women when they are successful.'*⁴³

Introduction of trauma audits

'We participated in a Trauma Audit conducted by National Council of Juvenile and Family Court Judges researchers and we delivered a full-day training on trauma to attorneys, judges and court staff which featured the National Child Traumatic Stress Network (NCTSN) Bench Card for the Trauma-Informed Judge. As a result of the training, we are better equipped to identify trauma in children that appear before us.

The NCTSN Bench Cards have helped my judicial colleagues and I ground our decisions in the emerging scientific findings in the traumatic stress field. So, when I met [a young client] a year ago, I immediately knew she had been exposed to toxic stress as a child.

*Knowing about her history, I immediately asked for a trauma-informed mental health evaluation for [her] and asked other questions on the Bench Card to make sure I had all the information I needed to fully understand [this child's] trauma exposure. As a result, she is doing well in a residential treatment facility that specializes in trauma-informed care – not juvenile corrections'.*⁴⁴

⁴³ Honorable Jo Ann Ferdinand, Judge, Brooklyn Treatment Court quoted in Substance Abuse and Mental Health Services Administration. Why and how Creating a Trauma-informed Criminal Justice System for Women, p.3 [http://www.nasmhpd.org/sites/default/files/Women%20in%20Corrections%20TIC%20SR\(2\).pdf](http://www.nasmhpd.org/sites/default/files/Women%20in%20Corrections%20TIC%20SR(2).pdf)

⁴⁴ Judge Mary E. Triggiano, Milwaukee County Circuit Court, Wisconsin The Trauma-informed Judge: Asking all the right questions. Court Appointed Special Advocates for Children CASA ; National Council of Juvenile and Family Court Judges http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.9248319/k.92EA/JP04_Triggiano.htm

To date, the multiple benefits and `ripple effects' of introduction of trauma-informed practice to diverse applications of law (i.e. in international contexts where this process has begun to be implemented more systematically) are remarkable. For this reason, we recommend urgent introduction and implementation of trauma informed practice to and in Australian legal practice of all types. We also look forward to referencing the results of introduction and implementation of trauma-informed principles to diverse contexts of Australian legal practice as they become available.

In summary

Comprehensive introduction of trauma-informed practice within and across the contexts of law and the judiciary would have multiple benefits for the vast and diverse range of stakeholders who engage with them. The research base on the negative impacts of unresolved trauma and overwhelming stress on the brain and body is now solid. Its findings mandate a changed approach to service-delivery of all kinds. The provision of law and delivery of justice comprise critical terrain to which trauma informed principles should be applied.

As the 2015 National Wellness for Law Forum highlighted, `the conversation on psychological wellness and distress in the law has advanced substantially. There are now many voices bringing different experiences and perspectives from across the spectrum of legal education and practice, and crossing into many other disciplines'.⁴⁵ Systematic engagement with the paradigm of `trauma informed' is currently missing from this conversation.

The opportunity to address and comprehensively implement it is now great. As an intrinsically interdisciplinary concept and mode of operation, and in light of the conversations and initiatives already underway, now is a highly conducive time for doing so. By acknowledging and taking steps not to compound the unresolved trauma with which they are constantly confronted, legal and judicial systems will operate more effectively

⁴⁵ `Theme for 2015', National Wellness for Law Forum, 5-6 February 2015.

<http://www.tjmf.org.au/2014/12/event-2015-national-wellness-for-law-forum-5-6-february-2015/>

according to a range of criteria. Given the prevalence of interpersonal trauma throughout society, the benefits both to the practice of law and the community as a whole will be incalculable.

Bio

Dr. Cathy Kezelman AM is the President and Pam Stavropoulos PhD is Head of Research at Sydney-based NGO Blue Knot Foundation. Blue Knot Foundation is the leading national organisation working to improve the lives of the 5 million Australian adult survivors of childhood trauma. Blue Knot Foundation's nationally and internationally endorsed *Practice Guidelines for Treatment of Complex Trauma and Trauma Informed Care and Service Delivery* (www.blueknot.org.au/guidelines) set the standards in both complex trauma treatment and trauma informed practice.

Accordingly, Blue Knot Foundation is uniquely equipped to offer training, supervision and consultancy to legal, justice and ancillary staff in trauma-informed practice in the legal context. Some of Blue Knot Foundation's engagements include:

- Training of personnel (counselling, legal and administrative) associated with the Royal Commission into Institutional Responses to Child Sexual Abuse
- Ongoing and regular case consultation/debriefing of knowmore and Maurice Blackburn legal staff around Australia.
- 'Trauma-Informed Practice in Legal and Court Contexts' training delivered to Law Society of NSW, Victorian Law Reform Commission, Public Guardian, Legal Aid, Western Australian Family Pathways Network, NACLC and various community legal centres.

For more information on Blue Knot Foundation's services for legal practitioners, email inhousetraining@blueknot.org.au or call (02) 8920 3611.

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