

Disabling justice

Our prisons are packed with people with mental and cognitive impairments. Professor Eileen Baldry offers alarming insights into how they are failed before and after they become enmeshed in the criminal justice system.

It has long been obvious to many who struggle with mental and/or cognitive impairment (and their supporters) and whose lives are enmeshed with the criminal justice system that they are not well served by our public institutions. Evidence from all 'Western' countries, particularly the United Kingdom and United States, over the past 30 years shows that people with mental impairments are imprisoned at higher rates than their peers without mental impairment.¹

In New South Wales there has been mounting and strong evidence via the Inmate Health and the Young People in Custody Surveys that 40–50 per cent of adult prisoners and 60 per cent of juvenile detainees have mental impairment (excluding drug or alcohol disorder) and the rate appears to be increasing.² Although the level of over-representation is not as high in Victoria, rates of mental illness amongst prisoners are also of great concern.³

Lesser recognised is that people with a cognitive impairment are also over-represented in police events, at courts, in the prison population and, most alarmingly, in the juvenile justice population.⁴ For example, a recent survey of juvenile offenders in custody in NSW demonstrated that a remarkable 77 per cent scored below the average range of intellectual functioning, compared to 25 per cent expected in the general population. Of these:

- 14 per cent had an IQ of less than 70 (intellectual disability [ID] range) compared with 2 per cent expected in the general population, and
- a further 32 per cent had an IQ between 70 and 79 (borderline intellectual disability [BID] range) compared with less than 7 per cent expected in the general population.

Young Aboriginal people in custody had an even higher incidence of cognitive impairment, with 20 per cent in the ID range and 39 per cent in the BID range.⁵

But there is very little information on or understanding of those in criminal justice systems with complex needs;⁶ that is, persons who have more than one and, most often, multiple impairments, and who also experience serious social disadvantages. They are more likely than people with only one impairment or none to have earlier contact with police, be victims as well as offenders, be a client of juvenile justice, have more police contacts, and more police and prison custody episodes and to experience these criminal justice events over much of their lives.⁷

Differentiating the manifestations of mental or psychiatric disabilities from those associated with cognitive impairment is a challenge for many working outside specialist medical and/or disability fields.⁸ But when it comes to recognising and working with people with both mental and cognitive impairment who have lived with social disadvantage, abuse and exclusion (complex needs), most people working in criminal justice systems, including police, legal officers and corrections staff, have virtually no idea of what this means or what to do to best assist.⁹

LIFELONG DATA RESEARCH

Much research on and work in this area focuses on the individual and their impairment, and on a single diagnosis, for example mental disorder, intellectual disability or alcohol or drug use, and how to treat these particular disorders or impairments or how to divert this group from court and prison. There are, by the way, very few places to which to divert people in this group and, even if diverted, long-term support in the community is extremely rare in most jurisdictions. There has though been very little examination anywhere on this group of people's life-course institutional pathways into, around and out of the criminal justice system: in other words, why they have ended up enmeshed in the criminal justice system at all.

Despite being found unfit to plead or not guilty by reason of mental illness they are imprisoned as there is nowhere else to accommodate them.

However these matters have been the subject of two Australian Research Council (ARC) projects since 2007 that have gathered life-long institutional data on 2,731 persons who have been in prison in NSW and whose mental and cognitive diagnoses are known.¹⁰ Mental impairment amongst this cohort refers to psychosis, anxiety disorder, affective disorder, personality disorder or neurasthenia.¹¹ People with cognitive impairment include individuals with intellectual disability (ID) (IQ <70), borderline intellectual disability (BID) (IQ >70 and <80) and those with acquired brain injury (ABI) who, as well as possibly experiencing physical, sensory, psychological and communication difficulties, also experience disability related to cognitive function (as defined in the NSW Corrective Services Statewide Disability Dataset).

Participants' histories from a range of human services (NSW Departments of Housing, Ageing Disability and Home Care, Health and Community Services) and all criminal justice sector departments (NSW Police, NSW Attorney Generals Department [Court data], NSW Department of Corrective Services, Legal Aid and NSW Department of Juvenile Justice) were assembled and linked to allow the research team to explore institutional pathways from early childhood to today, through human and criminal justice agencies. Of the cohort studied, 11 per cent are female, 25 per cent are Aboriginal Australian and 40 per cent have been a client of juvenile justice as a young person.

INSTITUTIONAL PATHWAYS INTO PRISON

Most persons in this cohort have a mental or cognitive disability, and the majority have more than one diagnosis and usually a drug and/or alcohol (AOD) disorder as well. Almost all come from and go back to highly disadvantaged social backgrounds and communities and have had disrupted and abusive childhoods. This group with compounding disability and disadvantage has significantly more interaction with agencies of control – that is child protection, the police, juvenile justice, courts, corrections agencies – rather than agencies of support, often from childhood, than those in the cohort without these complex diagnoses and needs. Indigenous Australians are significantly over-represented in this group.

It is evident from the pathway data that agencies tasked with assisting, caring for and supporting these children with disability and their families who live in poverty and with disadvantage and, in particular, those who are Aboriginal Australians, have failed to provide effective support. For example, most of the 330 individuals who had been in out-of-home care as children have cognitive impairment and 'complex needs'. They had significantly earlier police contact (both as victims and offenders) and juvenile justice and adult custody episodes than those not in out-of-home care.

Police case notes record officers often picking up people in this group as children, young people and young adults mostly for theft, traffic, minor assault and street offences but also as children and young people at risk. They record their frustration at trying to get them child protection, psychiatric or disability services, and of driving them around looking for safe housing, often in vain.

Persons with these disabilities are significantly more likely to end up in police custody, juvenile or adult remand as they have no safe place to live and have long histories with the police. There is no doubt that much of the behaviour of people in the group is very 'challenging', but working with challenging behaviour is one of the tasks of child protection, special education, psychiatric and disability services.

Incredibly, of those with cognitive impairment (N=1,400), only 15 per cent were clients of NSW disability services and of those only 20 per cent had been clients before going to prison.

It is abundantly clear from the pathway data and the detailed case studies developed that when these individuals were children and young people, they and their families required intensive support. But as they lived in marginalised and disadvantaged communities with poor access to services and very few people advocating for them, they were systematically excluded from care and support and from school education and funneled into management by agencies of control, in particular the police.

There is evidence that appropriate, integrated, structured support can effect positive change

There is growing evidence from cases reported in the media and in work done by the Aboriginal Disability Justice Campaign, that many young Aboriginal people, mainly males, with significant cognitive impairment and usually with mental health and AOD problems as well, are being held indefinitely in prisons following offences in particular in the Northern Territory and Western Australia.

Despite being found unfit to plead or not guilty by reason of mental illness they are imprisoned as there is nowhere else to accommodate them. Had they received ongoing and appropriate disability services and supports as children and young people the outcome is likely to have been far more positive for them, their families and communities.

Another aspect recently examined using the institutional pathways project data is the cost of managing people with disability and complex needs via the criminal justice system.¹² Cases were selected to span the range of people and their diagnoses and every event or intervention with each agency throughout life was costed and these costs added together. The life-course institutional costs for the 11 people (currently aged 23–55 years) whose cases were examined ranged from around \$900,000–\$5.5 million each. Of the total \$22 million, \$14 million was associated with criminal justice agencies. These staggering costs though do not begin to account for the personal and human relationship costs experienced by the individuals with disability, their families, victims and communities.

With the Australian prison population continuing to rise and in particular the rate of Aboriginal prisoners now a record 15 times the non-Aboriginal rate, the over-representation of persons with disability in justice settings across Australia is a national disgrace and a breach of Australia's human rights obligations.

There is evidence in the studies that appropriate, integrated, structured support can effect positive change. In almost all cases this involved a personal ongoing relationship with someone or a number of

people, such as an aunty, a disability support worker or a parole officer, who helped bring stability, structure, safe housing and human relationships into the person's life. But the current reality is that early intervention and disability support resources are available to those families who can afford it and can advocate on behalf of their child or family member – not to poor and disadvantaged Australians. Australia has the skill, capacity and resources to address these systemic problems. Does it have the political will?

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