

People with intellectual disabilities in the criminal justice system – when is disability a crime?

By

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Introduction

There are a few simple points that I wish to emphasise today.

The plight of people with intellectual disabilities (ID) in the criminal justice system can only be improved if the following long-overdue strategies are implemented:

- Comprehensive and compulsory education about people with ID and the issues in this area is essential for every professional involved in the criminal justice system.
- Early identification of the condition of ID has to take place, and this is contingent upon training for professionals.
- There must be a diversionary system established, to divert people with ID out of the criminal justice system into more appropriate community based or secure services.
- Realistic and accessible exit strategies must be in place for those who are released from the criminal justice system.

Over-representation in the criminal justice system

The statistics demonstrate that there is an over-representation of people with ID in the criminal justice system – the only area of debate is the extent of over-representation. We have to accept that this is an issue where there is unlikely to be agreement, and this is not only because of a lack of well-planned and executed research. Even with the most sophisticated research, there will be differences in over-representation.

This can arise because of differences between jurisdictions in the provision of services for people with ID, which can support diversion from the criminal justice system at any stage.

There may be differences in over-representation within one jurisdiction, for example, a remand prison may have more prisoners with ID than a prison for sentenced prisoners, because in remand the diagnosis of ID may not yet have been made. Once the diagnosis is made, the accused may be diverted out of the CJS or may receive a non-custodial bail or sentence. In rural areas there may be high levels of ID in the prisoner population because of a dearth of community services for people with ID. All these factors will affect the measurement of prevalence.

Hence we will never arrive at an absolute figure for over-representation.

But what if there is no over-representation and the prevalence is the same as in the community, that is, 1-2%?

In a prison system with 6,000 inmates, 120 would have ID.

In Magistrates Courts in Queensland with a turnover of 320,000 charges each year, some 6,000 charges will involve people with ID.

Therefore, even if there is no over-representation, it is important to take care of and meet the needs of people with ID who are in the CJS and offer the best chance for rehabilitation, health care and other services.

The prevalence issue can be a red-herring.

The important issues are

- provision of adequate services for people with an ID
- prevention of offending behaviour
- services to meet their needs once they have come into contact with the CJS.

The criminalisation of people with ID

Let me give you an example of how people with ID can become offenders as a result of their ID and concurrent diagnoses. There is a young man named Brent (not his real name obviously), who was diagnosed with ID, anxiety disorder, obsessive-compulsive disorder, and acquired brain injury. He underwent a number of assessments by government agencies as well as other service providers and expert witnesses.

Three years ago, it was recommended:

“That he receive **intensive** assistance from a specialist behavioural intervention unit, and that any recommendations that are made in relation to managing his aggressive behaviour, and also for intervention with his condition of panic anxiety, be implemented fully. He should not be exposed to the conditions that trigger a panic attack.”

It was advised that he be provided with alternative out-of-home accommodation because his family were not coping and indeed were in benign ways, playing into his multiple diagnoses. For example, if they went to church and Brent had a panic attack, the family would leave church and go home.

He was provided with support for two days a week and then this was reduced to one day a week. His multiple phobias meant that even a trip to the park was difficult because he had a fear of insects and dogs. He hated crowds, queuing and shopping centre.

Two service providers took him and three other clients with ID to a crowded supermarket.

Brent felt that the elderly woman behind him was too close, so he pushed her away. She fell to the floor and started screaming for people around her to call the police. Brent has a criminal history for other acts related to his multiple diagnoses and so he panicked. He ran out of the shopping complex, pushing another three elderly people over on the way. Some sustained some serious injuries. Brent is now facing a number of charges of assault occasioning grievous bodily harm and he is in prison.

In my opinion there are significant ethical issues involved in this case history. In no other medical or health care situation would a client be exposed to a situation that would make their condition worse. If a client has a bee allergy, they are not taken to an apiary and encouraged to participate in collecting the honey from the hives. This case history demonstrates the lack of importance that is attached to care plans for people with ID especially those in the CJS. There is an attitude of “here is the care plan – but we cannot do that so this is what we will actually provide”.

A further important aspect of this case history is that the incident was completely preventable. If the service providers had better training and more resources, they may have heeded the recommendations. Brent and the elderly people would not have been involved in this incident.

What services need to be put in place?

i. Prevention

Funding of early intervention is parlous. Only some young people with ID have access to these programs and usually the programs are of short duration and do not offer support to the individual and their family as they progress through various life phases and crises..

There is ample evidence that early intervention prevents crime (NSW Parliament Select Committee, 2001), and saves money (Rand Research Brief, 1997). The most effective forms of early intervention involve the individual in their environment – family, school, peer group, place of residence and later, their workplace. Such interventions need to incorporate:

- early, intensive and prolonged programs to identify and address behavioural difficulties that are apparent as early as pre-school age, and

- prevention of violence and abuse in families, which is then emulated by the children in the family

ii. Identification

Education and screening go hand in hand when identifying the person with ID in the CJS. Some criminal justice agencies want to use a screening test to assist in identifying the presence of ID, and this is laudable (see for example, Hayes, 2000). However, no screening instrument is 100% accurate in identifying the client who has ID. Furthermore, and very importantly, a screening instrument will be very inaccurate if it is administered poorly. The use of a screening instrument also begs the question of who is to be screened. Whilst some agencies, such as departments of corrective services, can screen all comers, it is more difficult in a police station or legal aid office, for example.

Therefore, all professionals involved in every aspect of the CJS must have education about the issues surrounding ID, and the characteristics of people with ID. This education and training must be ongoing, and be tied to important professional development and promotional aspects, so that these issues are perceived as important.

iii. Diversion from the CJS

Diversion can occur at many points in the criminal justice system, including

- Initial contact with the CJS
- Later diversion, e.g. non-custodial sentence, or post-release

Diversion at any stage, however, is only possible if there are community services which will meet the needs of the accused person or offender with ID. In every state in Australia, funding of community service for people with ID come a poor second to funding of criminal justice agencies such as police and corrections. As we have seen, preventative services are under-funded even though there is a clear body of evidence indicating that prevention is cost-effective. Similarly, community services are under-funded and disability services tend to concentrate their efforts on the people with severe and profound disabilities, rather than the offending group who are usually in the mild to moderate categories of ID.

Nevertheless, any society that is serious about addressing the needs of people with ID in the CJS must address the issue of provision of services.

Services must include:

- Accommodation – stable, long-term
- Specialist programs including substance abuse programs, and sex offending programs
- Therapeutic interventions, such as behaviour intervention, family therapy, individual therapy
- Work preparation programs and vocational training
- Secure units, both bail hostels and units for sentenced offenders
- Post-school educational opportunities
- Support and training in adaptive behaviour – communication, daily living skills and social skills
- Case management and a multi-agency approach

Women in the criminal justice system

Both men and women with ID are 2X as likely to be the victim of crime directed against them personally (Wilson and Brewer, 1992).

1 1/2 times more likely to suffer property crimes than non-disabled age-matched cohorts.

The majority of women with ID will have been sexually exploited by the time they reach adulthood (Keilty and Connelly, 2000).

Aboriginal women are especially over-represented as victims of crime (Kilroy 2004; Hayes 1996).

As with non-disabled women, being the victim of crime can in turn contribute to the criminalisation of the female victim (Preston and Gyde 2005). Police may make a cross-application Domestic Violence Protection Order (DVPO) which can result in the woman being charged, or removed from her home and detained by police.

Many people with ID in the CJS, especially women, have been the victim of crime. This may leave them with psychological or psychiatric disorders, including Post Traumatic Stress Disorder (PTSD).

The Anti-Discrimination Commission Queensland (ADCQ 2006) states that almost two-thirds of women in prison reported having received treatment or assessment by a psychiatrist or a doctor for an emotional or mental problem, compared with a population prevalence rate of 5.8%, and that women prisoners have a higher incidence of mental health problems, psychiatric admissions or counselling than male prisoners (p.92). ADCQ comments (p.79):

*“Given the relatively high incidence of intellectual disability among women prisoners, estimated to be as high as 30% compared to 2-3% in the general population, a systemic approach to provide for their needs must be put in place by prison authorities. **Neglecting the needs of these prisoners may be discrimination on the basis of impairment.**”*

The Department of Corrective Services maintains that if at all possible it strives to place women with mental illness or intellectual disability in low security facilities if this is appropriate (Department of Corrective Services 2006). Of the female prisoner population generally, 34.9% were placed in low or open classification, compared with 26.8% of men in 2004-2005 (Department of Corrective Services 2006).

When women leave prison they may have difficulty accessing pre- and post-release programs (Human Rights and Equal Opportunity Commission: HREOC 2004). The HREOC recommends that each State and Territory designate a coordinating agency to develop a “whole of government” approach to addressing the needs of women, especially indigenous women in corrections, in order to provide a continuity of support for indigenous women from the pre-release to the post-release phase. The HREOC report states that at the time of writing there was no coordinated government policy to address the needs of people exiting prison in Queensland, and community organisations were heavily relied on to provide support services.

In summary

Conflicting emotions –

- Pleased that these issues are being discussed in a thoughtful and considered manner.
- Frustrated at the glacier-like progress in this field.

The talking needs to stop and there must be some action.

If all else fails, surely the economic argument might work –

It costs about \$80,000 per year to imprison a person with ID in protection or a special unit.

That could buy a lot of community support.

References

- Anti-Discrimination Commission Queensland. (2006). *Women in prison*. Brisbane: Anti-Discrimination Commission Queensland.
- Department of Corrective Services. (2006). *Department of Corrective Services response to the Anti-Discrimination Commission Queensland Women in Prison Report*. Brisbane: Queensland Government Department of Corrective Services.
- Hayes, S. C. (1996). Minorities - as victims and offenders. In K. M. Hazlehurst (Ed.), *Crime and justice: Australian textbook in criminology* (pp. 317-348). Sydney: Law Book Information Services.
- Hayes, S. C. (2000). *Hayes Ability Screening Index (HASI) manual*. Sydney: Department of Behavioural Sciences in Medicine, University of Sydney.
- Human Rights and Equal Opportunity Commission. (2004). Chapter 2: Walking with the Women - addressing the needs of Indigenous women exiting prison. In Aboriginal and Torres Strait Islander Social Justice Commissioner (Ed.), *Social justice report*. Canberra, ACT: HREOC.
- Keilty, J., & Connelly, G. (2000). *Making a statement: an exploratory study of barriers facing women with intellectual disabilities when making a statement about sexual assault to the police*. Sydney: Intellectual Disability Rights Service.
- Kilroy, D. (2004). *Submission of Sisters Inside to the Anti Discrimination Commissioner for the Inquiry in the Discrimination on the basis of sex, race and disability experienced by women prisoners in Queensland*. Brisbane: Sisters Inside.
- New South Wales Parliament Select Committee. (2001). *Select Committee on the increase in prisoner population*. Sydney: NSW Parliament.
- Preston, P., & Gyde, S. (2005). *Mistreated and misunderstood: young women and domestic violence, negotiating the judicial system*. Paper presented at the State Youth Affairs Conference: Working Together for Young People, Brisbane.
- Rand Research Brief. (1997). *Criminal justice policies toward the mentally retarded are unjust and waste money* (No. RB-4011).
- Wilson, C., & Brewer, N. (1992). The incidence of criminal victimisation of individuals with an intellectual disability. *Australian Psychologist*, 27, 114-117.