

Disabling criminology: conceptualising the intersections of critical disability studies and critical criminology for people with mental health and cognitive disabilities in the criminal justice system

Leanne Dowse, Eileen Baldry and Phillip Snoyman*

Increasing numbers of people with mental health disorders and cognitive disabilities (MHD&CD) are becoming caught in a cycle of social exclusion and criminalisation, resulting in their incarceration and re-incarceration in the criminal justice system. Our capacity to conceptualise and protect the human rights of such people, although recognised in a range of instruments, is questionable. Their over-representation in the criminal justice system constitutes a complex human, social and economic problem and suggests the need to move beyond traditional theoretical approaches which examine social support systems, processes of criminal justice and the presence of impairment as separate issues. This article reflects on issues raised in a study investigating the pathways people with MHD&CD take through the criminal justice system and is aimed at describing and analysing the interactions among the criminal justice subsystems and associated human services using detailed records of a cohort (around 2800) of those already diagnosed in the criminal justice system. The outcomes will assist in the development of new interventions to address preventive health, duty of care and human rights. Early analysis of the data in the MHD&CD in the criminal justice system study indicates that individual experiences of impairment and social disadvantage are powerfully amplified when they intersect with exclusionary practices within social, systemic, community and institutional spaces. These findings suggest the need to develop a hybrid interdisciplinary theoretical perspective merging critical disability studies and critical criminology to open up new spaces from which to reconsider the complex matrix of concerns impacting upon this group's enjoyment of their rights.

* Leanne Dowse, Lecturer, School of Social Sciences and International Studies, University of New South Wales. Email: <L.Dowse@unsw.edu.au>.

Eileen Baldry, Associate Dean, Faculty of Arts and Social Sciences, University of New South Wales. Email: <E.Baldry@unsw.edu.au>.

Phillip Snoyman, PhD Candidate, School of Social Sciences and International Studies, University of New South Wales. Email: <pcsnoyman@optusnet.com.au>.

Introduction

Increasing numbers of people with mental health disorders and cognitive disabilities (MHD&CD) are becoming caught in a cycle of social exclusion and criminalisation, resulting in their incarceration and re-incarceration in the criminal justice system (Belcher 1988; Aderibigbe 1996; Harrington 1999; Reed and Lyne 2000). In a health survey in prisons in New South Wales, Australia, for example, almost half of the reception inmates and one-third of sentenced inmates had suffered a mental disorder in the previous 12 months — three to four times the rate in the general population (Butler and Allnut 2003). Persons with cognitive disability are estimated to be equally over-represented in the criminal justice system (New South Wales Law Reform Commission 1993). This over-representation constitutes a complex human, social and economic problem. Persons with disability who are in prison not only have the same human rights afforded to all, but also have particular rights as recognised in an array of human rights instruments, including the United Nations Convention on the Rights of Persons with Disabilities (CRPD) (Arts 12, 13, 14 and 15), and as prisoners the right to be treated with humanity, dignity and respect while in detention as set out in the International Covenant on Civil and Political Rights (ICCPR) (Arts 7 and 10), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (Arts 10 and 11) and the Convention on the Rights of the Child (CRC) (Art 37). These umbrella protections, however, appear to have had limited impact on the increasing over-representation of people with MHD&CD in the criminal justice system.

This article reflects on issues raised in a study currently investigating the pathways people with MHD&CD take through the criminal justice system and is aimed at describing and analysing the interactions among the CJ subsystems and associated human services using detailed records of a cohort (around 2800) of those already diagnosed in the criminal justice system. Although still in the analysis phase, the study suggests a hybrid interdisciplinary theoretical perspective merging critical disability studies and critical criminology. This opens up new spaces from which to reconsider the complex matrix of concerns impacting this group of highly marginalised people.

Patterns emerging from the preliminary analysis of pathways for a range of subgroups within the MHD&CD study cohort suggest that identities of impairment, gender, class, ethnicity, age and criminality interact with one another in unique and largely uncharted ways. It also appears that individual experiences of impairment and social disadvantage are powerfully amplified when they intersect with exclusionary practices within social, systemic, community and institutional spaces. This is evidenced in the study findings, for example, where individuals with an IQ of less than 70, although eligible for disability support services, have low incidence of service

usage. While significant work has been undertaken to explore and understand issues for people with cognitive disability (for example, see Simpson and Hogg 2001; Hayes 2004; 2007) and people with mental health disorders (for example, see Lamb and Weinberger 1998; Butler and Allnut 2003) in the criminal justice system, their over-representation persists.

Addressing current obstructions to the achievement of human rights protections for this group is, to a significant degree, associated with the ways social structures and people in relevant agencies have positioned them in theory and in practice. There is a pressing need, recognised among researchers, criminal justice agencies, practitioners and advocacy groups, to move beyond traditional theoretical approaches which examine social support systems, processes of criminal justice and the presence of impairment as separate issues and towards an integrated conceptualisation of the over-representation of people with MHD&CD in the criminal justice system as a complex human, social and political phenomenon.

Troubles with terminology, classification and lived experience

The first challenge in building a new conceptualisation of this group of people and their experiences is to determine exactly who people with mental health and cognitive disabilities are, or at least how they are defined. Delineating diagnostic categories and identifying those who fall into them is a complex process characterised by ambiguous relationships to the theoretical paradigms that shape our thinking about such people. It is important at the outset to identify the bifurcation of 'mental' from 'cognitive' disability in theory, policy and practice. Conceptualisations of, and responses to, mental illness predominantly fall within the terrain of health and illness. Nomenclature in the field of mental health encompasses terms such as 'psychiatric illness/disability', 'mental disorder' and 'mental illness'. Individuals who fall into this broad category are most often identified with one or more of a number of medical diagnoses which form part of the psychiatric classification system set out in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) (American Psychiatric Association 2000). For the purposes of the MHD&CD study, those with such a label include people with a psychotic condition such as schizophrenia, an affective disorder such as bipolar disorder or depression, or an anxiety disorder such as obsessive-compulsive disorder.

The category of cognitive disability adopted for the purposes of the MHD&CD study encompasses the diagnostic groupings of intellectual disability and acquired brain injury. Labels of intellectual disability are attributed to individuals through a process largely defined by the work of the American Association on Mental Retardation (now the American Association of Intellectual and Developmental Disabilities) and also

found in the DSM-IV. There are three components within the definition, all of which are required for a person to be considered to have an intellectual disability. These components are significantly sub-average intellectual functioning (that is, reasoning, memory and other cognitive skills), existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics (basic literacy and numeracy), leisure and work. The condition arises prior to the age of 18 (American Association on Mental Retardation 2002).

Acquired brain injury (ABI) is the term used to describe all types of brain injury that occur after birth. It is distinct from intellectual disability in that people with ABI do not necessarily experience a decline in their overall level of general intellectual functioning; rather, they are more likely to experience specific cognitive changes that lead to difficulty in areas such as memory, concentration and communication (Brain Injury Australia). ABI is often conflated with intellectual disability, but in reality it is a much less well-defined category around which there is a dearth of theory, policy and practice literature. It does, though, represent a significant group in the criminal justice system, hence its importance to the study discussed here.

The diagnostic categories associated with these labels and the dynamics of their attribution are themselves subject to significant debate, the details of which are beyond the scope of the discussion here. In essence, the relationships between the theoretical underpinnings of diagnostic frameworks, their associated institutional structures and systemic processes, and the lived experiences of people with mental health and cognitive disabilities who find themselves in the criminal justice system remain under-researched. This lack of coherence highlights the ways in which current explanatory frameworks which focus on offending, social location, gender, impairment, or race and ethnicity as separate issues fail to offer an accurate representation of the relationship between theory and experience. They also ultimately fall short of enabling a comprehensive explanation of the complex, multi-level, clustered and negatively synergistic interactions of impairment, disability and criminal justice.

Charting the conceptual landscape

One of the primary challenges in taking a theoretically informed stance towards any inquiry into the presence of people with mental health and cognitive disabilities in the criminal justice system is to take account of the proliferation of perspectives that attend the broader conceptualisation of the complex human experiences of disability and criminality. In broad terms, perspectives identified with the natural sciences and biomedical understanding of bodies and behaviours have traditionally centred

on the identification and operation of diagnostic categories and psychiatric and therapeutic regimes of treatment. These are now increasingly focusing on genetics and on neuroscientific and pharmacological interventions (Busfield 2000, 543). These methodologies intersect with sociological and social scientific contributions which seek to understand these biomedical claims in light of the array of social forces and relations that contribute to the production and shaping of these 'disorders', the formation and reformation of the boundaries of their diagnostic categories, and the ways remedial responses are driven in policy and practice. Social perspectives, such as those which focus on recovery (Pilgrim 2008), have been extended to encompass socially conditioned conceptualisations of pathology and normalcy. Social perspectives are being coupled with other positions which variously focus on, for example, broader concerns in promoting social cohesion and inclusion; a rising critique of the neoliberal impetus for a rational, competent and productive citizenry; and postmodern conceptualisations of the cultural and identity dimensions of difference. This arena is complex theoretical terrain indeed.

In this context, the relatively recent emergence of a critical turn both in disability studies and in criminology offers a platform for critique of the siloed approaches contained within biomedical, psychosocial or social constructionist realms. In identifying a theoretical framework to account for the complex, multiple and fluid experiences of people with MHD&CD in the criminal justice system identified through the MHD&CD study, we argue that it is necessary to bring together an analysis of the synergistic interactions of impairment and its disabling consequences, the systemic and institutional contexts of crime and criminalisation, and the overarching impacts of dimensions of social stratification including gender, socioeconomic location, class, ethnicity and age (Baldry et al 2008a). This has the potential to create a hybrid framework for conceptualising the individual, institutional, systemic, social and political factors that appear to propel increasing numbers of people with mental health disorders and cognitive disabilities into, through and back to the criminal justice system. The following sections of the article consider the relative contributions of this range of perspectives as they apply to understanding mental health disorders and intellectual disability.

Biomedical frameworks

Understandings of mental health disorders and cognitive disabilities have been framed in terms of biological processes. The predominant influence of medical personnel whose orientation is towards the natural sciences means that causal accounts of mental illness have been largely couched in biomedical terms, such as the faulty gene (Conrad 1999), leading to a focus on what is going on in the body rather than the mind or social relations (Busfield 2000, 543). In the contemporary

era, this has opened up opportunities for ameliorating mental illness through the application of 'modern pharmacological technologies with magic bullets for the complexities of madness ("anti-psychotics") and misery ("anti-depressants") or through the application of technical fixes such as cognitive behaviour therapy' (Pilgrim 2008, 296).

The separation of mental illness from intellectual disability is a key milestone in the construction of intellectual disability. In Britain from the 13th century, a legal dichotomy was established whereby 'idiots' were considered to possess a condition of permanent absence and declared the responsibility of family, while 'lunatics' were seen as having a condition arising from a temporary illness (Wright and Digby 1996, 2). Although in practice these distinctions were far from clear, the separation sat comfortably with professional confidence in the potential curability of lunacy, whereas 'the idiot' was seen as incurable (Williams 1996, 256). In Australia, this distinction was drawn for the first time legislatively in the Tasmanian *Mental Deficiency Act* of 1920, which established a separate administrative system for the treatment of intellectual disability (Garton 1994, 168).

The drawing of a distinction between mental illness and intellectual disability also set the template for the development of the field of scholarly attention to the 'problematic of mental deficiency' (Radford 1994, 9) in the fields of, for example, special education and para-medical therapies, rather than a focus on the lived experience of having an impairment. In the developing academic gaze, the field was legitimated through the authority of science and the rise of professionalism. Intellectual impairment has, however, tended to receive less scholarly attention than mental illness (Dowse 2007), since the prospect of a cure for mental illness made the incorporation of its study into the medical sciences logical.

Researchers in bio-medicine tended to distance themselves from intellectual disability as a field of study in the early years of such disciplines. While studies on the definitions, causes, prevention, measurement and treatment of intellectual impairment have emerged from behavioural and educational psychology and the allied health professions in more recent times, these topics have tended to be pursued on the margins of established disciplines such as medicine (Radford 1994, 12). Where it has been present, research has tended to focus on the technical or functional, with an emphasis on treatment and management — for example, multivitamins, cell therapy, movement training (Parmenter 2001, 270), and emerging pharmacological and gene therapies — and until relatively recently has avoided the social, cultural and political dimensions. This perhaps accounts for the scant consideration of intellectual disability until the 1990s in the developing terrain of disability studies.

Sociological contributions

In an attempt to account theoretically for this increasing presence of people with mental health disorders and cognitive disabilities in the criminal justice system, several areas of sociology and social scientific endeavour present themselves as relevant. Current conceptualisations of mental health and illness have their roots in sociological work on deviance and labelling theory (Schur 1971; Strauss et al 1964; Link and Phelan 2001) and on explorations of changing modes of treatment (Prior 1993; Scull 1979), while in more recent times sociologists have drawn on the work of Foucault to explore changing ideological and discursive practices of psychiatry in a postmodern context (Rose 1996; De Swann 1990; Pilgrim and Rogers 1994). This work has effectively demonstrated that social factors must be brought to the understanding of the causation of mental health disorders and responses to it. It has, though, fallen short of providing either a much-needed analysis and critique of the major changes taking place in mental health policy or of fostering any recent social policy directed towards improving the quality of life of those so diagnosed (Mulvaney 2000, 583). Specific conceptualisations of cognitive disability (including intellectual disability and acquired brain injury) have received much less sociological attention, remaining more firmly in the realms of psychology, special education and rehabilitation, although increasing attention to the historical, social and cultural study of people with cognitive impairments (Dowse 2007; Goodley 2000; Chappell 1998; Walmsley 1997) contains some promise of a refiguring of social enquiry to take account of the lived experience of cognitive disability.

In terms of conceptualising disability more broadly, individual models based in a functionalist view of the social system have dominated societal responses to disability since the beginning of the 20th century. Functionalism, identified with the work of Emile Durkheim and Talcott Parsons (1951), refers to a sociological perspective that conceptualises society as a totalising system that is an aggregate of its parts. It assumes that these parts or phenomena must operate in required or particular ways for the system to survive. A focus on bodily normality and abnormality is central to this approach. In relation to the conceptualisation of disability, this approach foregrounds the ways in which disorder and deficiency cause a functional limitation or incapacity on the part of the individual. In the case of intellectual disability, the functionalist view has been shaped by centuries of moral, social and scientific thinking (Parmenter 2001), which constructed a discourse of subhumanity, demonisation, mystification, racialisation, medicalisation and deviancy.

Several consequences flow from the functionalist position. First, individual incapacity becomes the defining characteristic and results in a summary categorisation of the individual as the victim of disability. This personal tragedy model necessitates the care and protection of the dependent individual. It legitimates an approach to

social welfare designed to help people cope with or adjust to their disability (Oliver 1983; 1990; Finkelstein 1993). The solution to the individual's 'plight' rests with intervention by medical, rehabilitation, psychology and educational professionals who are sanctioned to diagnose, define and devise regimes of treatment with the aim of curing or at the very least ameliorating the effects of an individual's impairments. This medicalising of disability has been termed 'the medical model of disability' (Oliver 1990). While support and treatment are necessary and important elements of responses to disability, it is a focus on the bio-medical to the exclusion of social, material and cultural dimensions that forms the central plank of critiques of this conceptualisation.

The widespread adherence to individual models of disability has historically resulted in segregation, institutionalisation, surveillance, and questionable therapeutic and medical interventions. Approaches to social management also retain individualised in/competence as the primary focus for amelioration. Through sustained political action by those in the disability rights movement, a critical approach has emerged which explores disability as a major and neglected area of human social experience (Shakespeare 1998, 1). Importantly, the study of mental illness and of cognitive impairment has remained on the margins of developing approaches to disability and to the emerging discipline of critical criminology. For example, scholarly articles and texts in critical criminology and critical disability studies have consistently excluded the intersection of disability and criminology as an area of serious concern or investigation. This leaves a significantly uncharted theoretical space within which to understand the increasing presence of people with mental health and cognitive disabilities in the criminal justice system.

Developments in disability theory

Developments in disability theory over the past 30 years have brought considerations of the social to an understanding of the lived experience of disability. The emergence of an influential and radical disability studies paradigm in the 1970s created the conditions for rethinking disability. What has become known as the social model of disability reads disability as an experience of oppressive social relations based on the exclusionary barriers inherent in societies that privilege normalcy. Associated with a number of British academics living with a disability — including Finkelstein (1980; 1981), Barnes (1991) and Oliver (1990; 1996) — this approach to conceptualising disability drew heavily on materialist theory and suggested that disability and dependence are the social creation of a particular type of social formation — namely, industrial capitalism (Abberley 1987) that was mainly concerned with material factors, social relations and political power. This social model of disability contrasted with traditional conceptualisations that located the problem of disability in the

impaired individual. It contains the following key claims: that people living with a disability are an oppressed social group, that there is a distinction between the impairments people have and the oppression they experience, and that disability is defined as the form of social oppression, not the form of impairment (Shakespeare and Watson 2002, 10). The body of knowledge and practice that constitutes the social model is primarily concerned with the political project of emancipation and, in some of its interpretations, with the development of an oppositional politics of identity (Corker and Shakespeare 2002, 3).

Social models of disability have advanced the premise that the disadvantage typically experienced by those who have a disability reflects primarily the way society defines and responds to certain types of 'difference'. There is a crucial distinction between impairment as a condition of the individual body or mind (such as experiencing schizophrenia, intellectual disability or brain injury) and disability, which is the social experience flowing from the presence of impairment, including the range of barriers to full participation that exist in a society (Oliver and Barnes 1998). While these approaches have enabled the de-medicalisation of disability (Lester and Tritter 2005), they have offered little in the way of conceptualisation and remedy for those who are criminalised.

Critical disability studies has sought to build on the social approach to understanding disability by bringing a closer examination of the dynamic interaction of social, political, cultural and economic factors to the analysis and by exploring the ways that they define disability and shape personal and collective responses to difference. In particular, critical disability studies problematises the relegation of 'impairment' to the domain of the medical, rehabilitative, private and personal and questions its dislocation from the social. Disability, in this contemporary frame, is seen as 'the quintessential post modern concept, because it is so complex, so variable, so contingent, so situated. It sits at the intersection of biology and society and of agency and structure' (Shakespeare and Watson 2002, 28). A critical perspective then allows a consideration of the disability experience that includes intrinsic limitation and disadvantage (Shakespeare 2006) and thereby offers the possibility of accounting for the complex interactions of individual, social and systemic factors that operate to deliver people with mental health disorders and cognitive disabilities into the criminal justice system.

Critical disability studies offers the scope to conceptualise differences in mental or cognitive functioning as both impairment and as disability, and is aided by drawing on the work of the sociology of the body. Human beings are not made up of two separate components of mind and body; rather, they are embodied — that is, the biological entity is bound together with the psychological and the cognitive, where

all are mutually constituted within social and cultural processes. The notion of embodiment brings the bodily experience of impairment back into the frame (Hughes and Patterson 1997) and, for those individuals of interest in the current research, gives rise to the concept of 'embodied irrationality' (Mulvaney 2000). This conceptual stance develops an understanding of the way people with mental health disorders and those with cognitive impairments make sense of their bodily experience while also providing a way to understand the complex relationship between biological and social factors (Mulvaney 2000, 590). This allows the recognition that there is a dynamic interaction between the experience of impairment, its treatments and their disabling consequences (particularly pharmacotherapy interventions), and the disability created by socially constructed systemic, social and cultural barriers (Lester and Tritter 2005). In the current analysis, it is argued that these in turn can contribute to creating, sustaining and exacerbating impairment.

For the study of people with mental health and cognitive disabilities in the criminal justice system, these forces and situations include societal and systemic reactions and the physical landscapes in which such people find themselves — particularly prisons. To harness the explanatory power of these insights, disability must be moved from its peripheral status in the criminal justice and human service experience to a central position (Baldry et al 2008a), re-theorising it as a key organising principle in the construction of an individual's identity (Erevelles 2000) and thereby playing a central role in structuring an individual's life experience.

Contributions of critical criminology

Critical criminology seeks to locate and understand the reasons for crime within wider structural and institutional contexts. These contexts may be conceived of in various forms, including socioeconomic, class-based, cultural, racialised and gendered (Anthony and Cunneen 2008, 1). It sees crime and social responses to it as deeply political and cultural, and as critically challengeable matters. Given its remit as a discipline, critical criminology has been slow to encompass the notions of impairment and disability. The recently edited Australian volume Anthony and Cunneen's *The Critical Criminology Companion* (2008) offers a broad range of criminological analyses emerging from the studies of gender, youth, class and ethnicity, yet disability is conspicuous by its absence. In the North American context, DeKeseredy and Perry's *Advancing Critical Criminology* (2006) includes a single disability-related chapter which offers a consideration of the issue of punishment of the mentally ill offender in relation to competency to stand trial and to be executed (Arrigo 2006). Given the significant numbers of offenders with mental health and cognitive disabilities in the criminal justice system documented the world over (Belcher 1988; Aderibigbe 1996; Harrington 1999; Reed and Lyne 2000; Hayes 2007), the absence of an engagement

with disability and impairment within critical criminology is at the very least surprising and perhaps both generative and indicative of the currently disconnected, siloed and boundaried conceptual, service system and practical approach to this group (Baldry et al 2008a). We speculate that this disengagement may be due to the social arrangements around disability that have evolved in Western nations over the past 30 years. These arrangements, focusing on deinstitutionalisation, community inclusion and rights, have excluded those who do not fit easily into these new social forms. These are persons with multiple, co-occurring mental and cognitive impairments — very often exacerbated by abuse of drugs and alcohol and resultant challenging behaviours — and are viewed as not being any agency's responsibility. The criminal justice system is the last institution left into which to funnel them (Baldry et al 2008b).

An emerging hybrid approach — disabling critical criminology

Critical theory

In an effort to move beyond the current impasse in conceptualising the experiences of people with mental health and cognitive disabilities in the criminal justice system and beyond, the current study has identified the need for a new conceptual territory which integrates a critical disability perspective with critical criminology, since it is clear that critical criminology has not substantively acknowledged the experience of disability, while critical disabilities studies has only begun to acknowledge the complex and dynamic interaction of criminal justice and impairment/disability. We have argued elsewhere that while nascent in its theoretical positioning and developmental in its makeup, this approach is currently best conceived of as a process of 'disabling critical criminology' (Baldry et al 2008b).

Bringing these two perspectives together brings disability to the centre of the analysis and suggests a new way to make visible material structures, ideological discourses and experiences of impairment that fundamentally and differentially structure an individual's pathway into, around and often back into the criminal justice system. In this analysis, the offending behaviours of persons with mental health or cognitive disabilities are not dismissed, ignored or excused. Instead, they are resituated in individual and social systemic contexts, opening up new ways to identify conceptualisations, structure and interventions that enable the support and development of new individual, systemic and political levels of engagement. This then highlights social support and enables thinking around ways that can make it possible for individuals to more frequently take non-offending pathways.

Critical method

In the past two decades, debates have arisen within disability studies concerning the nature, form and content of disability research as generally being exploitative and objectifying. It is argued that traditional forms of disability research have been implicated in mediating and intensifying the oppression of people with disabilities (Dowse 2009). With this perspective have come a rejection of the assumptions of the traditional individualistic approach to disability research and calls for the application of methods that emphasise the political project inherent in the research endeavour — foregrounding the role of research in promoting the interests of oppressed groups (Barnes, Mercer and Shakespeare 1999, 215).

This political interdisciplinary approach to research, which emphasises critical inquiry, is well suited to opening up a methodological framework within which to operationalise our emerging hybrid approach — that is, a way to ‘disable’ criminological research. The approach taken in this current study uses a life-course perspective that enables a longitudinal analysis of pathways through the range of human and social services into the criminal justice system. This is achieved by gathering extant administrative data from a range of criminal justice and human service agencies to trace the pathways of a cohort of people with mental health disorders and cognitive disabilities who have been in prison. It is primarily quantitative in nature and aims to identify the complex intersections between the risk and protective factors experienced by a person with impairment and system and policy driven problems. This work opens up new perspectives on what gives rise to extreme forms of social exclusion. It moves beyond individual blame and contributes to identifying, understanding and removing obstacles to the resources which are crucial to assisting these extremely marginalised and vulnerable people to stay out of the criminal justice system. The results of this method are providing a trans-institutional, integrated way of modelling pathways from earliest contacts with social agencies, through criminal justice and human service contacts, to build a picture of the life trajectories of this group of people with multiple and complex support needs. The method illuminates and helps to account for the compounding effects of social context, including community and corrections, with experiences of impairment and disability.

Implications for human rights

This new hybrid critical disability-criminology approach to conceptualising disability in the criminal justice system has wide-ranging implications for policy and practice, not least for the application of relevant human rights instruments. If disablement is an interaction between aspects of the individual and that person’s social context, and human rights instruments ostensibly provide for protection of the rights of persons with disabilities and of those in the criminal justice system, including

prisons, it would appear from our findings that the support and realisation of such rights for people with MHD&CD in the criminal justice system remain problematic. The UN Convention on the Rights of Persons with Disabilities upholds the right not only to the support, but also to be able to access the support, that people with mental health and cognitive disabilities may require. This applies to appropriate support assisting to keep someone out of the criminal justice system altogether, as well as support in exercising their legal capacity (Art 12.3) and in accommodations in legal proceedings. Such changes require the appropriate training of criminal justice officers, including those in police, prisons and courts (Art 13). Based on the MHD&CD study's observations of siloed systems of intervention and management, considerations of the multifaceted nature of justice and support issues for this group have not been sufficiently addressed in policy, planning and practice. This also raises the stark question of whether some people with MHD&CD have their human rights breached by being sent to prison in the first place. It is also unclear whether the rights to liberty and security (Art 14) and freedom from cruel or degrading treatment and punishment (Art 15) are taken into consideration in the everyday experience of the criminal justice system for persons with a disability. Of particular interest in the International Covenant on Civil and Political Rights (Art 10.3) is the requirement for states to provide for reformation and social rehabilitation. For many with an impairment, we suggest that the criminal justice system itself may be disabling (Harrington 1999; Hayes 2007) and there may be a conflation in conceptualisation of impairment effects associated with cognition and understanding and with offending behaviour (Baldry et al 2008a). This relates to our observation that for impairments such as intellectual disability, the impairment itself is not amenable to rehabilitation and may be exacerbated by experiences in prison, thus breaching sections of these human rights conventions. In the spirit of the intention of Arts 10 and 11 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the lack of systemic attention to developing appropriate understanding by staff and appropriate support of this group should be a matter of priority in criminal justice reform.

Conclusion

Taking a life course view has the potential to highlight the ways in which impairment, gender, socioeconomic status, ethnicity, age and criminality interact with one another in unique and uncharted ways for each individual. To take the dimension of impairment, which can be variable and episodic, it is clear from the early findings of the MHD&CD study that for an increasing number of people with mental health disorders and cognitive disabilities, the presence of impairment at critical points in the life course has several overarching and significant implications which can be broadly identified in the following key insights.

- Certain types of impairments can result in or heighten vulnerability to social exclusion.
- The presence of impairment and social exclusion can result in increased vulnerability to being caught in the criminal justice system.
- Entry into the criminal justice system is itself likely to be further disabling to someone who is already experiencing impairment.

We suggest that this 'disabling critical criminology' — that is, the integration of critical conceptualisations of disability with a critical stance in criminology — provides a way of integrating the multiple impairments evident among a large number of people in prison and brings dimensions of disadvantage and exclusion together with the experience of disability in the context of offending. We think it may provide a powerful means by which to analyse the experiences of impairment and social disadvantage seen in the pathways of persons with MHD&CD who are caught in the criminal justice system. Developing an understanding of these processes can offer an integrated account of criminal justice and human service pathways for people with mental health disorders and cognitive disabilities and of the disabling operations of institutions and systems themselves. This evokes a human rights appraisal of these persons' treatment because it displays exclusionary practices affecting their capacity to claim these rights. ●

References

- Abberley P (1987) 'The concept of oppression and the development of a social theory of disability' 2(1) *Disability, Handicap & Society* pp 5–21
- Aderibigbe Y (1996) 'Deinstitutionalisation and criminalization: tinkering in the interstices' 85 *Forensic Science International* pp 127–34
- American Association on Mental Retardation (2002) *Mental Retardation: Definition, Classification, and Systems of Supports* American Association on Mental Retardation, Washington, DC
- American Psychiatric Association (2000) *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR* American Psychiatric Publishing, Inc, Washington, DC
- Anthony T and Cunneen C (eds) (2008) *The Critical Criminology Companion* Hawkins Press, Sydney
- Arrigo B (2006) 'Towards a critical penology of the mentally ill offender: on law, ideology and the logic of "competency"', in W S DeKeseredy and B Perry (eds) *Advancing Critical Criminology: Theory and Application* Lexington Books, New York

Baldry E, Dowse L, Snoyman P, Clarence M and Webster I (2008a) 'A critical perspective on mental health disorders and cognitive disability in the criminal justice system', in C Cunneen and M Slater (eds) *Proceedings of the 2nd Australian and New Zealand Critical Criminology Conference* University of New South Wales, Sydney pp 30-45

Baldry E, Dowse L, Snoyman P, Clarence M and Webster I (2008b) 'Reconceptualising disability in the criminal justice system', *ANZ Society for Criminology Conference*, December, Canberra [Online] Available: <www.anzsoc.org/conferences/2008/142-Baldry.pdf>

Barnes C (1991) *Disabled People in Britain and Discrimination* Hurst & Co, London

Barnes C, Mercer G and Shakespeare T (1999) *Exploring Disability: A Sociological Introduction* Polity Press, Cambridge

Belcher J (1988) 'Are jails replacing the mental health system for the homeless mentally ill?' 24(3) *Community Mental Health Journal* pp 185-95

Bickenbach J E, Chatterji S, Badley E M and Üstün T B (1999) 'Models of disablement, universalism and the international classification of impairments, disabilities and handicaps' 48 *Social Science & Medicine* pp 1173-87

Brain Injury Australia (undated) [Online] Available: <<http://braininjuryaustralia.com.au>> [2009, May 14]

Busfield J (2000) 'Introduction: rethinking the sociology of mental health' 22(5) *Sociology of Health & Illness* pp 543-58

Butler T and Allnut S (2003) *Mental Health Among NSW Prisoners* Corrections Health Service, Sydney

Chappell A (1998) 'Still out in the cold: people with learning difficulties and the social model of disability', in T Shakespeare (ed) *The Disability Reader: Social Science Perspectives* Cassell, London

Conrad P (1999) 'A mirage of genes' 21 *Sociology of Health and Illness* pp 228-41

Corker M and Shakespeare T (2002) *Disability/Postmodernity: Embodying Disability Theory* Continuum, London

DeKeseredy W S and Perry B (2006) (eds) *Advancing Critical Criminology: Theory and Application* Lexington Books, New York

De Swann A (1990) *The Management of Normality: Critical Essays in Health and Welfare*

Dowse L (2007) *Stand Up and Give 'Em the Fright of Their Lives*, unpublished PhD thesis, University of New South Wales, Sydney

Dowse L (2009) "'It's like being in a zoo": researching with people with intellectual disability' 9 *Journal of Research in Special Educational Needs* p 3

Erevelles N (2000) 'Educating unruly bodies: critical pedagogy, disability studies and the politics of schooling' 50(1) *Educational Theory* pp 25-47

Finkelstein V (1980) *Attitudes and Disabled People: Issues for Discussion* World Rehabilitation Fund, New York

Finkelstein V (1981) 'Disability and the helper/helped relationship: an historical view', in A Brechin, P Liddiard and J Swain (eds) *Handicap in a Social World* Hodder and Stoughton, in association with the Open University, Sevenoakes

Finkelstein V (1993) 'The commonality of disability', in J Swain, V Finkelstein, S French and M Corker (eds) *Disabling Barriers — Enabling Environments* Sage, in association with the Open University, London

Garton S (1994) 'Sound minds and healthy bodies: re-considering eugenics in Australia 1914-1940' 26(103) *Australian Historical Studies* pp 163-81

Goodley D (2000) *Self-advocacy in the Lives of People with Learning Difficulties* Open University Press, Buckingham

Harrington S (1999) 'New Bedlam: jails — not psychiatric hospitals — now care for the indigent mentally ill' 59(3) *The Humanist* pp 9-10

Hayes S (2004) 'Pathways for offenders with intellectual disabilities', in W R Lindsay, J Taylor and P Sturmey (eds) *Offenders With Developmental Disabilities* John Wiley and Sons Ltd, Chichester pp 67-90

Hayes S (2007) 'Missing out: offenders with learning disabilities and the criminal justice system' 35(3) *British Journal of Learning Disabilities* pp 146-53

Hughes B and Patterson K (1997) 'The social model of disability and the disappearing body: towards the sociology of impairment' 12(3) *Disability & Society* pp 325–40

Lamb H R and Weinberger L (1998) 'Persons with severe mental illness in jails and prisons: a review' 49(4) *Psychiatric Services* pp 483–91

Lester H and Tritter J (2005) "'Listen to my madness": understanding the experiences of people with serious mental illness' 27(5) *Sociology of Health and Illness* pp 649–69

Link B G and Phelan J C (2001) 'Conceptualizing stigma' 27 *Annual Review of Sociology* pp 363–85

Mulvaney J (2000) 'Disability, impairment or illness? The relevance of the social model of disability to the study of mental disorder' 22(5) *Sociology of Health and Illness* pp 582–601

New South Wales Law Reform Commission (1993) *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts* Law Reform Commission, Sydney

Oliver M (1983) *Social Work with Disabled People* Macmillan, Basingstoke

Oliver M (1990) *The Politics of Disablement* Macmillan, London

Oliver M (1996) *Understanding Disability: From Theory to Practice* Macmillan, Basingstoke

Oliver M and Barnes C (1998) *Disabled People and Social Policy: From Exclusion to Inclusion* Longman, London

Parmenter T (2001) 'Intellectual disabilities — quo vadis?' in G Albrecht, K Seelman and M Bury (eds) *Handbook of Disability Studies* Sage, Thousand Oaks

Parsons T (1951) *The Social System* Free Press, New York

Pilgrim D (2008) 'The role of recovery in current "mental health" policy' 4(4) *Chronic Illness* pp 295–305

Pilgrim D and Rogers A (1994) 'Something old, something new ...: sociology and the organisation of psychiatry' 28(2) *Sociology* pp 521–38

- Prior L (1993) *The Social Organization of Mental Illness* Sage, London
- Radford J P (1994) 'Intellectual disability and the heritage of modernity' in M Rioux and M Bach (eds) *Disability Is Not Measles: New Research Paradigms in Disability* The Roeher Institute, Ontario
- Reed J L and Lyne M (2000) 'Inpatient care of mentally ill people in prison: results of a year's programme of semi-structured inspection' 320(7241) *British Medical Journal* pp 1031
- Rose N (1996) 'Psychiatry as a political science: advanced liberalism and the administration of risk' 9(2) *History of the Human Sciences* pp 1–23
- Schur E (1971) *Labelling Deviant Behaviour* Harper and Row, New York
- Scull A (1979) *Museums of Madness: The Social Organisation of Insanity in 19th Century England* Allen and Lane, London
- Shakespeare T (1998) 'Introduction', in T Shakespeare (ed) *The Disability Reader: Social Science Perspectives* Continuum, London
- Shakespeare T (2006) *Disability Rights and Wrongs* Routledge, London
- Shakespeare T and Watson N (2002) 'The social model of disability: an outdated ideology' 2 *Research in Social Science and Disability* pp 9–28
- Simpson M and Hogg J (2001) 'Patterns of offending among people with intellectual disability: a systematic review — Part III: predisposing factors' (45) *Journal of Intellectual Disability Research* pp 397–496
- Strauss A, Schatzman L, Bucher R, Ehrilch D and Sabahin M (1964) *Psychiatric Ideologies and Institutions* Free Press, Glencoe, Illinois
- Walmsley J (1997) 'Including people with learning difficulties: theory and practice', in L Barton and M Oliver (eds) *Disability Studies: Past, Present and Future* The Disability Press, Leeds
- Williams A (1996) 'Defining and diagnosing intellectual disability in New South Wales 1898 to 1923' 21(4) *Journal of Intellectual and Developmental Disability* pp 253–71
- Wright D and Digby A (eds) (1996) *From Idiocy to Mental Deficiency* Routledge, London