

Indigenous People and Cognitive Disability: An Introduction to Issues in Police Stations

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This article draws together some of the major themes which emerged from an exploratory study of the issues facing Indigenous people who have a cognitive disability and come into contact with the criminal justice system as victims and offenders. This study was commissioned by the (now defunct) Aboriginal and Torres Strait Islander Services in May 2004 and was conducted over a period of two months. During this time interviews, focus groups and consultations were conducted with people working in the areas of Indigenous health, disability and criminal justice. In addition questionnaires were sent to key government and non-government organisations and the relevant literature was surveyed. 40 participants from 4 states contributed to the project during this period. Although the project had a brief to examine the issues for this group nationally, due to the tight timeframe of the project, the research focused primarily on the criminal justice systems in NSW, Western Australia and the Northern Territory.

The project examined the needs and issues for Indigenous people with cognitive disabilities who come into contact with police stations, courts and prisons. It also explored the specific legal issues for this group, the alternatives to mainstream criminal justice system processes for this group and the relationship between the human service needs of this group and their involvement in the criminal justice system. This article focuses on the

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issues for Indigenous people with cognitive disabilities in police stations. It is therefore in no way a 'synopsis' of the report but rather a selective overview of some of the major themes from one section.¹

The time frame and style of the project dictates that the claims made by its authors (both here, and in the project's final report) are best viewed in the context of an introduction to discussion, rather than as constituting any kind of final analysis. The authors of both this article and the ATSI project are not Indigenous, and cognitive disability was frequently identified in the project as a non-Indigenous concept. The project was therefore reliant on the time, input and goodwill of many Indigenous people who were willing to grapple with, and investigate, an idea of cognitive disability that was sometimes culturally alien. There would be enormous benefit if the task of investigating and responding to the needs of Indigenous people with cognitive disability who are in contact with the criminal justice system were to be carried forward by Indigenous organisations and communities.

Considerable care is needed when theorising at a high level of generality about the needs of disadvantaged populations, particularly groups who have frequently been further disadvantaged by the findings of 'expert' research. Although there were consistent themes that arose through the course of the consultation process for this project and some of these themes provide the basis for this article, there is clearly a diversity of opinion — and a diversity of need in this area. The issues identified by Aboriginal people in regional and urban centres are often different to the issues identified by those in remote desert areas. Different communities have different cultural understandings of disability and different capacities to support people within communities who have special needs. Although this project can make no claim to possessing exhaustive answers to the issues raised within it, it is hoped that it might be useful in provoking at least some of the right questions.

Cognitive disability refers to intellectual disability as well as brain injury as a consequence of trauma or substance misuse. Although human service agencies tend to utilise a very specific definition of intellectual disability² in their determinations as to the eligibility of potential clients, these definitions are not always meaningful to populations who have experienced multiple forms of disadvantage or who have limited access to human service agencies. Definitions which rely on an assessment of general intellectual functioning and 'impairment in adaptive behaviour' become muddled in the context of the criminal justice system, and complicated further when viewed in the context of the general disadvantage faced by Indigenous people in Australia.

It is important to note from the outset that in some Indigenous communities the terms 'intellectual' or 'cognitive' disability are themselves problematic. Participants in this project noted the associations such words have with the racism of phrenology as well as the frequently drawn implication that Aboriginality is itself the 'cause' of reduced intellectual functioning. The legacy of explicitly racist ideas about Aboriginal people and reduced intellectual capacity clearly has implications for the way in which cognitive disability in Indigenous communities is discussed. As a consequence of the history of removal of Indigenous children from Indigenous families, a strong mistrust of white government agencies, and the associated and fraught notion of 'protection' it was also identified in the

1 For a brief overview of all the findings of the report, see Simpson & Sotiri 2004.

2 Intellectual disability in most human service agencies in Australia is defined to include 'significantly subaverage intellectual functioning' — that is having an IQ score of below 70 or 75 which has manifested in the developmental stage — that is — become apparent prior to the person's 18th birthday (Wen 1997; Cocks 1998; Simpson, Martin & Green 2001).

project that there is some reluctance to name people (and especially children) as 'disabled'. There is often a strong sense that information gathered about disability will be used 'against' Indigenous communities (Smeaton 1998:16). An overriding theme in this project is the need to further consider how the needs of people with cognitive disabilities in Indigenous communities might be addressed, whilst avoiding the potentially damaging stigmatising impact of the label 'disability'. For want, at this stage, of an alternative, the term 'cognitive disability' is used throughout this article. However there remains a clear need to acknowledge the problematic relationship the term disability has with Indigenous communities, and continue to assess the viability of its use in future projects.

Although there is a considerable body of literature examining Indigenous people and the criminal justice system, and a smaller but substantial number of articles exploring people with cognitive disabilities and the criminal justice system, the intersection of these two areas has received very little attention. Additionally, although there is a very small body of research examining disability and Indigenous people, this has not tended to focus on the criminal justice system. Analysis of the needs of Indigenous people with cognitive disability in contact with the criminal justice system is not however borne out by simply combining these fields of research. In addition to identifying some of the more obvious instances of 'double disadvantage' that arise for this group there is also the need for a more rigorous analysis of the distinct factors that result from the interplay of Aboriginality and disability as offenders and victims in criminal justice settings.

The starting point for this task is somewhat complicated by the dearth of solid statistical information pertaining to the prevalence of cognitive disability in Indigenous populations, and the extent of cognitive disability in criminal justice settings. There is strong anecdotal evidence to suggest that the number of Indigenous people with cognitive disabilities is higher than in the non-Indigenous population. This is at least partially attributable to the impacts of severe poverty, the resulting health disadvantages (Tipper & Dovey 1991:4) and the flow on effects of dispossession and cultural alienation. The incidence of foetal alcohol syndrome, brain damage as a consequence of inhalant use, alcohol related brain damage and acquired brain injury as a consequence of head injuries sustained in violent institutions or violent communities led participants in this project to estimate that the incidence of cognitive disability is at least twice as high in Indigenous communities than in non-Indigenous communities.

There is a solid body of research examining Indigenous over-representation in criminal justice settings. The 1991 Royal Commission Report into Aboriginal Deaths in Custody succeeded in placing this issue with clarity on the public policy agenda, along with 339 recommendations aimed at addressing the many factors that resulted in Aboriginal deaths in custody.³ Indigenous people are still over-represented in all jurisdictions in Australia as both juvenile and adult prisoners. It is 15.5 times more likely for a young Aboriginal person to be locked up in a Juvenile Justice Centre than a non-Aboriginal young person, with 40% of the Juvenile Justice Population identified as Indigenous (AIC 2000 in Cunneen 2002:35). There are similar figures for adult prisons, although there are some jurisdictions which report an even more dramatic over-representation. 50% of the Western Australian adult prison population is Indigenous (Aboriginal Justice Advisory Council in Cunneen 2002:36) and participants in this project suggested in the Northern Territory Indigenous prisoners make up around 85% of the general prisoner population.

3 It is of note that there is no specific reference to disability in the 339 recommendations handed down by RCIADIC.

Although it is generally accepted that the incidence of intellectual disability in the general population sits between 1 and 3% there is less certainty with regard to estimating the numbers of people with intellectual disability in criminal justice settings. Again, although there is agreement that there *is* over-representation (NSW Law Reform Commission 1996b:2.5–2.9) there are varying estimations as to the extent of this. The variations in estimations in this area relate to lack of data collection, differences in terms of the inclusion of people with ‘borderline’ disability, disagreement with regard to how best to recognise and then test for cognitive disability in stressful settings such as police stations, courts and prisons as well as the use of different testing methods. In NSW different researchers have put the number of people in prison with cognitive disabilities between 7.65% (Butler & Milner 2003⁴) and 13% (Hayes & McIlwain 1988) of the general prisoner population.

Research into the numbers of people with intellectual disability attending court is limited, but similarly variable. Hayes (1996) found that 36% of her sample appearing before courts in Bourke and Brewarrina had an intellectual disability. 73% of the respondents in this research were Aboriginal (Hayes 1996 in NSW Law Reform Commission 1996a). In earlier research conducted by Hayes (1993) which focused on local courts in Sydney and regional NSW, 3% of respondents were Aboriginal and 14% of the sample were found to have an intellectual disability (Hayes 1993 in NSW Law Reform Commission 1993).

Given what is known about the over-representation of Aboriginal people in criminal justice system settings, the over-representation of people with cognitive disabilities in criminal justice settings, and the higher incidence of disability in Aboriginal communities outside of the criminal justice system, it would seem to reasonable to assume that there is also an over-representation of Aboriginal people with cognitive disabilities in the criminal justice system. Future research would do well to further examine the extent of this over-representation.

Although disability is frequently not named as disability within Indigenous communities there is often an awareness and acknowledgement of community members who have different or special needs. Although there is clearly a great deal of variation with regard to the ability of communities to meet these needs, the notion that these needs are necessarily a deficit or an impairment is frequently challenged. Some researchers and project participants point out that disabilities in Indigenous communities tend to be seen more in terms of interpersonal or social relations, rather than in terms of intellectual impairment (Sloane 2003:17).⁵

4 The 2003 inmate health survey conducted by Corrections Health found that ‘18% of women and 27% of men scored below the pass rate on the intellectual disability screener’. This screener (known as the ‘HASI’ — the Hayes Ability Screening Index) is a fairly brief evaluation tool, and so the majority of those who were found to have an intellectual disability according to this test, were sent to have a more detailed and intensive screening. Of this group who were further assessed using the WAIS-R (The Weschsler Adult Intelligence Scale-Revised) 59% of women and 39% of men were found to have an intellectual disability. (Butler & Milner 2003:93). Although it is not made explicit in the Corrections Health Survey, when looking at the actual numbers (or people who were found to have an ID in the WAIS-R) it is possible to extrapolate that *at least* 7.65% of men and 8.3% of women in prison have an intellectual disability..

5 This approach is more reflective of a social model of disability which rejects the notion that disability is a consequence of individual failings or pathology and posits that people are marginalised as a consequence of the social (and physical) barriers in their communities. Utilising the social model, it is the elimination of such barriers which should constitute the focus of the provision of disability support and advocacy (Hauritz, Sampford & Blencowe 1998:157–158).

Where cognitive impairment *is* viewed as a disability, this is frequently in the context of a whole series of disadvantages endured by Indigenous people (Ariotti 1998; Smeaton 1998; Mokak 1997; Gething 1994; Bostock, 1991; Tipper & Dovey 1991). Cognitive disabilities tend not to be seen as disconnected from other health concerns⁶ nor viewed as discrete individual problems (Tipper & Dovey 1991:4). When viewed in conjunction with other forms of disadvantage (poverty, homelessness, cultural alienation, serious primary health problems, high levels of imprisonment, the ongoing cultural damage of dispossession) disability is not necessarily a disadvantage which is viewed as a priority for action within communities (Smeaton 1998:24).

Whilst remaining mindful of the dilemmas of adopting the term disability, and the difficulties in adopting a definition which is meaningful for Indigenous populations, there are clearly some common themes with regard to the manifestation of the 'disability' in the context of the criminal justice system. People with cognitive disability are more likely to have difficulty understanding complex legal processes; are more likely to be easily led by people in positions of authority (like police or lawyers); are less likely to have a comprehensive understanding of laws, community attitudes, and social norms; are more likely to have a reduced ability to plan ahead; are more likely to have difficulty controlling impulses; and are more likely to have trouble with literacy and verbal communication. In addition, people with cognitive disability are more likely to be victims of crime, and more likely to have experienced discrimination and devaluing community attitudes in other aspects of their lives (Simpson, Martin & Green 2001; Simpson & Rogers 2002).

Cognitive disability is frequently unrecognised by workers in criminal justice settings. There are a number of factors that increase the likelihood of disability being masked in criminal justice settings for Indigenous people. These factors can include:

- Hearing impairment.⁷
- English as a second (or third or fourth language).
- The influence of alcohol and/or other drugs.
- Cultural factors such as shame influencing the type of interaction with criminal justice staff.⁸
- The impact of inadequate educational opportunities with regard to literacy and numeracy.
- Racism.

If disability has not been recognised outside of criminal justice settings then participants considered it unlikely that the disability would be identified for the first time in police stations. This is particularly the case for Indigenous communities situated in remote desert or regional areas where there is very poor access to medical and disability services. For instance if the acquisition of brain injury is never assessed, then it is quite likely that

6 Participants noted that this is particularly the case where the cognitive disability is caused by alcohol or other substance misuse.

7 Otitis media is common in Indigenous populations. The inability to hear properly has a significant impact on the attainment of educational skills.

8 Some researchers (see Sloane 2003) and participants in the project noted that some traditional Indigenous people are likely to feel shame if they are singled out from the group for special attention in contexts such as the criminal justice system.

behaviours that are related to the brain injury will not be properly attributed. Criminal justice system workers are more likely to connect any behaviour which might be considered problematic to the use of drugs and alcohol or even implicitly to the fact of Aboriginality rather than to a brain injury. For instance a failure to respond to questions might be attributed to language or cultural difference, rather than a lack of comprehension. It is however possible for the reverse to occur. Interview participants noted that an absence of sensitivity to cultural and language barriers can also result in an incorrect assumption of disability. It was noted by participants that Indigenous workers and community members are often better at identifying disability than non-Indigenous workers and communities because of their familiarity with potentially masking language and cultural factors. It was also noted that this expertise is rarely called upon by mainstream criminal justice agencies. The absence of recognition in criminal justice settings was also attributed to a lack of training and skills (amongst police, lawyers and court staff) at identifying disability, and also as a consequence of the time constraints and pressures of the criminal justice agencies.

Participants suggested that when a person is identified as 'Aboriginal' in criminal justice settings, that other 'special needs' become less of a priority. If the disability is very obvious, or communicated clearly to workers such as police and lawyers then there is the possibility of the disability being recognised and the process being adjusted accordingly. However there is suspicion with regard to the extent to which police would respond appropriately to information about disability. It was suggested that police would ignore information about disability (as it resulted in extra work for them), be suspicious of the information (see it as a ploy to 'get out of' arrest) or would use the knowledge of disability against the person in custody (by intentionally interviewing people in a way which would exploit the disability).

Although distinguishing cognitive disability from other forms of disadvantage in Indigenous communities can seem somewhat artificial, in the context of a number of criminal justice settings, the identification of disability has (at least theoretically) a concrete impact on the procedures and processes that unfold. For instance an identification of disability could lead to the right to a support person in police interviews and could also operate as a mitigating factor in sentencing. The effects of a cognitive disability — such as difficulty comprehending complicated instructions, or problems understanding implicit rules — can result in disadvantage at every point in the criminal justice system. The label of 'disability' is however potentially stigmatising and understandably resisted by an already disadvantaged and marginalised population. Ensuring that Indigenous people with disabilities are treated with fairness and are able to access the same rights as others in their dealings with the criminal justice system, without contributing to the disadvantage this group faces by adding an additional stigmatising label is a significant challenge for advocates and workers in this area.

Indigenous people are over-represented in police stations as alleged offenders and as victims of crime despite the fact that Indigenous people are less likely to report crime to the police (Fitzgerald & Weatherburn 2001:1). In addition to the (well documented) and fraught relationship between Indigenous people and the police (Royal Commission into Aboriginal Deaths in Custody 1991; Aboriginal and Torres Strait Islander Women's Taskforce on Violence 1999; Cunneen 2001; Lawrie 2003;) there are particular disadvantages faced by people who have a disability while in a police station. What is of significance here is the manner in which these disadvantages are exacerbated for Indigenous people with disabilities. For instance the combination of the difficulty understanding the police processes and susceptibility to being led by a person in a position of authority throughout the course of a police interview experienced by somebody with a cognitive disability is made more difficult if as an Indigenous person there is also a history of fear, intimidation and racism whilst in police stations.

The skills levels of somebody with a cognitive disability are frequently reduced by the stressful experience of being in a police station. This is especially the case if the stations are busy, if there are long periods of waiting, and if interviews are rushed. The ability of the police to obtain accurate information from somebody with a cognitive disability in these circumstances are slim. There is a need to provide an environment in police stations which is calm and free from distractions in which people with cognitive disability are given the time they need to understand and process their situation. There is also a need for a pro-active approach in assisting people with cognitive disability (as both victims and offenders) understand their rights whilst in custody. It was noted by some participants in the project that some police were less likely to make this effort if the person in custody identified as Aboriginal.

The NSW Law Reform Commission (1996) has suggested that there are a number of procedural issues which require attention in order to ensure that people with intellectual disability are treated fairly in police interviews including a limitation on the time a person with a disability might be detained,⁹ simplifying the police caution,¹⁰ checks for understanding of this caution, and the slow reading back of the record of interview in order that the person with the disability is able to confirm its contents prior to the interview transcript being adopted. It is frequently the case that people with cognitive disability who are brought to the police station as alleged offenders 'agree' to the police caution without having actually understood its content (Simpson, Martin & Green 2001:24–25). The right to legal representation, and the right not to participate in police interviews, are of particular significance for people with cognitive disability who are disadvantaged with regard to verbal communication. Where a person does agree to participate in an interview, there is often the need for people with cognitive disabilities to have frequent breaks because of difficulties concentrating for long periods of time. Participants in this project noted that it is sometimes the case that behaviours and needs that are attributable to a cognitive disability, such as lack of concentration, might be construed as someone being intentionally difficult or uncooperative. In addition behavioural problems that are considered to hinder police processes are sometimes more likely to be attributed to the Aboriginality of the person in custody, rather than the disability.

Most police jurisdictions have a specific set of guidelines to follow when they are interviewing somebody who is identified as Indigenous. These policies and guidelines have their basis in the recommendations of the Royal Commission into Aboriginal Deaths in Custody. In NSW for instance, police are required to notify Aboriginal Legal Services of the presence of an Indigenous person in custody. They are directed to contact a support person or friend and policies dictate that Aboriginal people should not be detained in police cells where this is avoidable, and when it is not avoidable they should not be placed in cells by themselves.¹¹

Most jurisdictions also have guidelines for working with people who have an intellectual disability, although these guidelines do not always have legislative backing. NSW and Victoria both classify people with intellectual disability as belonging to 'vulnerable' populations (along with people with mental illness, young people and Indigenous people).

9 This time period is limited to two hours for all Indigenous people under the *Commonwealth Crimes Act 1914*, section 356G.

10 A simplified version of the caution now exists in NSW.

11 These policies form part of the police code of practice for Custody, Rights, Investigation, Management and Evidence (CRIME).

The 'vulnerable' status of this group directs police to attempt to find a support person to assist the alleged offender or victim during their time in custody, with a particular emphasis on the process of the police interview (NSW Police 1998:19–22).

There is an ongoing debate about the usefulness of support workers in police custody. Some critics have noted that support workers often do not play an active enough role in advocating for the rights of the person in custody and might in fact lend the interview a legitimacy which is not warranted (Dean 1994:5). Participants also suggested that the maintenance and retention of those people who are acting in the support worker role was an area of concern. It was noted that successful schemes were those that were resourced, and able to pay workers for each police station call out. Reliance on volunteer workers and little formal support tended to result in high rates of burn out, and low levels of quality control. Encouraging police to utilise support worker schemes was considered by participants to constitute another potential barrier to the success of such programs.

Participants in this project noted that there was a need to train and resource Indigenous communities to support Indigenous people with cognitive disabilities in police stations. It was noted also that there might need to be a choice of support people from different family groups in some communities in order for the person in custody to feel able to access the service. Others suggested that there might be some benefit in having the option of non-Indigenous people as support workers also in case the person in custody did not feel comfortable with the support person being somebody who was well known in the Indigenous community.

There is also a need for support workers to work from a 'rights' based approach when supporting people in custody.¹² This means that extreme care needs to be taken to prevent conflicts of interest arising. For instance if family members acting as support people believe that their relative in custody 'needs to be taught a lesson' it is unlikely that the rights and interests of the person with the cognitive disability in custody are going to be supported. Accessing legal representation or choosing not to participate in a police interview are critical issues around which support people must feel confident to advocate. It was noted by some participants that police are more likely to want to use support workers who are not operating from a rights based framework; that is police would choose to use a support person who is a passive observer ahead of somebody who might actively intervene with regard to ensuring access to lawyers or the right not to participate.

There are also potential problems with support people being used *instead* of legal representatives in police interviews. The difficulty in obtaining affordable legal advice, and the frequent inability of Aboriginal Legal Services to physically attend police interviews, can mean that support people are used by police instead of a lawyer (Simpson, Martin & Green 2001:24). Although there is often 24 hour legal advice provided over the phone to Indigenous people in police custody, the absence of face-to-face legal representation can constitute a major barrier for Indigenous people with cognitive disabilities. Talking over the phone with a legal representative is often not the most effective form of communication for someone with a disability in police custody. Understanding, retaining and then communicating legal advice is a challenge for many people in the stressful environment of a police station. For people with cognitive disabilities, with no support, this task can be impossibly difficult.

12 The Intellectual Disability Rights Service in Sydney is currently operating a three year rights based pilot of a support network scheme called the Criminal Justice Support Network. This is funded through the Department of Ageing, Disability and Homecare, and uses a volunteer network to provide support to people with intellectual disability (as both offenders and victims) in police stations and courts.

A need was identified in some regions for police to utilise interpreters for Indigenous people with cognitive disabilities. This can be the case even when it appears that the person in custody has reasonable English language skills. The additional pressure of communicating in a second language, as well as attempting to comprehend the complex processes inside the police station can reduce the skill level and ability of the person in custody with regard to comprehension and communication.

People with cognitive disabilities, and Indigenous people are also over-represented in police stations as victims of crime, despite the fact that both these communities are less likely to report crime when it does occur (Fitzgerald & Weatherburn 2001; Keilty & Connelly 2001). People with cognitive disabilities are particularly vulnerable to being the victims of particular types of crime such as sexual assault, harassment and exploitation (Simpson & Rogers 2002:2). There is some research which indicates that the incidence of physical and sexual assault is three times more likely for people who have an intellectual disability than those without (Wilson, Nettelbeck, Potter & Perry 1996:1). Other researchers have suggested that this number is higher with as many as 90% of women who have a cognitive disability having experienced sexual assault or exploitation (Simpson & Rogers 2002:26). Whilst there are clearly high levels of victimisation and low levels of reporting for both Indigenous people and people with intellectual disability, there are different reasons why these groups do not report crime. For Indigenous people the profound mistrust which has developed between the police and Indigenous communities, in addition to fears about what might happen to the offender (if they are also Aboriginal)¹³ whilst in custody, frequently prevents reporting of crime. For victims of crime, there is often also a sense that the fact of their Aboriginality will prevent them from receiving fair treatment whilst they are in a police station (Aboriginal and Torres Strait Islander Women's Task Force on Violence 2000:98). The fear that Aboriginal people will be intimidated or hurt whilst they are in custody¹⁴ has a considerable impact on levels of reporting also. Criminal justice system agencies are generally not viewed in Indigenous communities as 'impartial' or fair, and their usefulness for victims of crime is therefore considered somewhat limited (AJAC 2001:5).

The barriers for people with cognitive disability reporting crime are largely related to the level of support that is needed in order to simply access criminal justice processes. Barriers which are a direct consequence of the disability — such as not identifying criminal behaviour — are frequently exacerbated by disadvantages such as a fear of being disbelieved or not taken seriously. The difficulties people with cognitive disabilities have in terms of knowing how to get help severely compromises their ability to report crime. This combination of obstacles has the potential to dramatically limit the ability of Indigenous people with cognitive disabilities to report crime to mainstream criminal justice system agencies.

Research into women with cognitive disabilities has found that quite aside from the problems this group might experience with regard to accessing police, when they do report sexual assault the attitudes of the police presented further barriers. Police were found to

13 In cases involving an Aboriginal victim, in 73% of sexual assaults, 72% of child sexual assaults, 85% of domestic violence cases and 86% of assaults occasioning grievous bodily harm, the offender was also Aboriginal (Fitzgerald & Weatherburn 2001:2).

14 A number of people interviewed remarked that Aboriginal people frequently sustain injuries whilst in police custody. Whilst the cause of these injuries was generally argued by police to be as a consequence of 'drunken accidents', there was a strong suspicion that suspects in police custody were being assaulted by police officers. Lawrie in AJAC (2001) notes that there are well founded fears that Aboriginal people will die whilst in police custody (2001:5).

make premature judgements with regard to the ability of women with intellectual disability to make reliable witnesses and decisions were frequently made on behalf of women with regard to their capacity to cope with the challenges of an eventual court case. Police also had formed beliefs about the 'promiscuity' of this group of women, which influenced their decisions as to whether to take sexual assault seriously (Keilty & Connolly 2001).

The range of potential obstacles which arise in relation to Indigenous people in police stations admits of no tidy series of recommendations. The complexity of this situation should not however simply lead to one more refrain of a call for 'more research to be done' — a call which, in effect, often signals the indefinite deferral of remedial action. It is perhaps useful to consider social action and policy recommendations as *always* premature — that is — there is always more work that can be done to increase understanding, but this does not remove their necessity. The issues for action identified in the report for AT SIS pertaining to Indigenous people with cognitive disabilities in police stations are as follows:¹⁵

1. There is a need for rights based support networks for Indigenous people with cognitive disabilities who are being interviewed by the police. Where existing support services (either for Indigenous people or for people with cognitive disabilities) exist, the capacity of these services need to be increased in order that they are able to provide an accessible service to this group. Support networks are needed both to recruit and provide support people and to provide information, training and support to informal sources of support such as family members.
2. There needs to be an examination of resourcing support networks so that support workers can be paid for attending police interviews rather than relying exclusively on volunteer networks.
3. Support networks for Indigenous people with cognitive disability should be Indigenous run and Indigenous controlled. However the option of a non-Indigenous support worker attending police stations should be available for Aboriginal people in custody who would prefer this.
4. There needs to be a renewed effort to find ways of enhancing access to face to face legal advice for Aboriginal people with cognitive disabilities who are suspects in police interviews, especially when they are faced with indictable charges. The possibility of establishing a duty solicitor scheme requires examination, as does increasing the capacity of existing Aboriginal Legal Services.
5. Police need ongoing training in the identification of cognitive disability, with a particular emphasis on the impact of the disability in police interviews, as well as a focus on potentially masking factors. Training on the particular needs of victims of crime in interviews is also a priority.
6. The wording of the police caution should be simplified in all jurisdictions, and utilised in its simplified version. Suspects should be asked to explain the content of the caution back in their own words, rather than being asked to give a 'yes or no' answer as to whether or not they understand it. Adequate time should be spent with suspects going over statements that have been made, and there should not be a reliance on the suspect sighting written accounts when signing off on the accuracy of a statement.

15 The issues for action listed here are taken directly from the discussion paper prepared by the authors for AT SIS.

7. There should be a time-limit of two hours on the amount of time an Aboriginal person with a cognitive disability can be held in a police station following arrest. The likelihood of increased confusion and agitation should be taken into consideration with regard to both ability to participate in an interview after a long wait, and safety whilst in police cells.
8. Whenever possible police should build respectful and consultative relationships with Aboriginal communities in order to get to know what the needs of people in those communities are should they come in contact with police as either offenders or victims.
9. If English is not the first language, and it is a possibility that the person in police custody has a disability, then the use of an interpreter should be assumed essential.
10. When interviewing Aboriginal people with cognitive disability who are also victims of crime, interviews should be conducted gently and respectfully, with plenty of breaks, and the presence of an appropriate Indigenous support person. The fears of Aboriginal women with regard to personal safety in police stations should be acknowledged, as should concerns regarding being believed.

Conclusion

At a more abstract level, further research needs to be undertaken on the viability of the label 'intellectual disability' as applied to Indigenous populations and the need to distance its application from its association with those kinds of evolutionary judgements which have, in the past, often underwritten its legitimacy. Further, a more 'dialogical' approach to the label of 'disability' is needed and its use parenthesised until we gain a more adequate sense of its applicability to Indigenous populations. This is necessary, not simply for the reason that Indigenous peoples need to be consulted about its use when applied to them, but because the Indigenous use may have something to teach social researchers about which they could usefully learn — quite independent of its context of application to Indigenous populations. That Indigenous understanding of what we call 'intellectual disability' is often seen in Indigenous communities as inseparable from social relations and inequalities (such as poverty, alienation, and substance abuse) makes not just good sense in relation to Indigenous populations — it makes good sense *per se*. The overly 'atomistic' conception of 'disability' which has characterised its social and psychological applications needs to be opened up to take greater account of the way in which disability is undoubtedly imbricated in broader social contexts.

Additionally, we need to recognise that issues of disability and its over-representation are not localised to Indigenous populations — but apply to those in the criminal justice system as a whole. In all of these contexts, the deleterious impact of disabilities impairs not just procedural issues (although that they do), they — by implication — have concrete impacts on the application of what we call justice. There is a particular need to emphasise the *ethical* imperative of police and other criminal justice system personnel to identify disability and to use such information in ways which increase rather than undermine the rights of people in contact with law enforcement and court agencies. That this need is enormously difficult to meet does nothing to diminish its importance.

The issues and procedures relating to Indigenous people with cognitive disabilities in police custody need prompt and serious reconsideration. As it stands, the lack of provisions and supports in this area reflects a decidedly sad state of affairs. Yet as important as this issue is for Indigenous peoples as a whole — and specifically for those with cognitive

disabilities — it is one which extends beyond this. At question here is not just the embarrassing lack of consideration and provisions relating to a specific population but the broader question of the proper application of the descriptor 'justice' to our criminal justice system.

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