
INDIGENOUS AUSTRALIANS, MENTAL AND COGNITIVE IMPAIRMENT AND THE CRIMINAL JUSTICE SYSTEM:

A COMPLEX WEB

by Peta MacGillivray and Eileen Baldry

INTRODUCTION

The over-representation of Aboriginal and Torres Strait Islander people with mental and cognitive impairment in the Australian criminal justice systems ('CJS'), particularly in prisons, is of grave concern. Social justice, human rights and anti-discrimination challenges emerge from the systematic enmeshment of this group in criminal justice systems in all Australian jurisdictions.

In response, there has been recent investigation of the multi-faceted and complex intersections that this group experience in interactions with police, courts, juvenile detention and prisons and the relationship with human service systems (for example housing, health, disability services). In 2012 and 2013 the New South Wales ('NSW') Law Reform Commission ('LRC') tabled reports from its reference *People with cognitive and mental health impairments in the criminal justice system*¹ documenting the significant challenges for people with a disability in contact with the criminal justice system, and recommended significant change to legislation and approaches.

Additionally, since 2011 the *Indigenous Australians with Mental Health Disorders and Cognitive Disability Project* ('IAMHDCD' Project)² based at the University of New South Wales has been investigating the life course pathways of Aboriginal and Torres Strait Islander people with mental and cognitive disability in contact with the criminal justice and human service systems. The project is using qualitative research, as well as analysis of a linked dataset of 2731 people, 680 of who are Aboriginal and/or Torres Strait Islander.³ As part of the project, the views on these pathways and on how system, policy and program dynamics impact Indigenous people and their communities have been sought from the full range of stakeholders that are accountable and responsible for this client group in NSW and the Northern Territory ('NT'). Most importantly, the views of Indigenous people with cognitive and mental impairments with experience in the criminal justice system, as well as family, carers and community members have been collected.

This article will provide an overview of the system and legal issues in NSW that have been identified through the IAMHDCD Project, with reference to the NSW Law Reform Commission Report ('LRCR') on diversion.⁴ Initially, an explanation of the experiences that Indigenous people with cognitive and mental impairments have in criminal justice and human service systems will be provided using a case study.⁵ This illustrates the critical and fundamental problem of the way the key legal issues that emerge for this group, with police and courts, are a product of cumulative challenges in service system design and function. Finally, key findings in regard to the criminal justice system's syndrome-like interaction with human and community services will be offered, including a summary of the challenges to the successful diversion of Indigenous people with cognitive and mental impairments out of the criminal justice system.

A PICTURE OF COMPLEX NEEDS AND THE CRIMINAL JUSTICE SYSTEM

This section will provide an account of the breadth and depth of needs that Indigenous people with cognitive impairments have, and the relationship to offending and contact with the criminal justice system. This is informed by the work undertaken as part of the IAMHDCD Project and the NSW LRCR, which includes currently available data. The over-representation of Aboriginal and Torres Strait Islander people in Australia's criminal justice systems has been acknowledged, and is reported on frequently.⁶ In NSW, the most recent available data shows that in 2012, 22.9 per cent of adults incarcerated in NSW were Aboriginal or Torres Strait Islander people.⁷ However, obtaining accurate data on the prevalence of mental and cognitive impairment in Indigenous communities is difficult, with additional challenges to those that regularly emerge in collecting population data. Lack of access to professionals for competent diagnosis is one difficulty that has emerged, as well as misdiagnosis of certain disorders, and under-diagnosis of others due to cultural bias in testing affecting accuracy.⁸ Despite these limitations, Sotiri and Simpson suggest that the incidence of cognitive disability might be twice as prevalent in some Indigenous communities due

to the impact of factors such as economic disadvantage, dispossession and associated inter-generational trauma, foetal alcohol spectrum disorder, and brain damage or brain injury as a result of alcohol consumption, inhalant use, accidents and violence.⁹ Furthermore the *NSW Aboriginal Health Plan 2013–2023* cites the social determinants of Aboriginal health—including historical factors, education, employment, housing, environmental factors, social and cultural capital and racism—as being important for addressing health inequality.¹⁰ But these are experienced in addition to the challenges that Indigenous people with impairment face daily. They must negotiate a labyrinth of requirements, events and disadvantages—a complex web which is currently being examined in detail by the IAMHDCD Project. Pathways of individual peoples’ life-long trajectories through diverse social, community and criminal justice institutions (often in the context of control rather than support) are presented through close analysis of unique individual quantitative and qualitative administrative data, which illustrates the perverse and damaging outcomes for individuals, families, and communities. Case studies developed using the Mental Health Disorders and Cognitive Disability (‘MHDCD’) dataset demonstrates the poor integration of system and agency responses, resulting in inadequate service and support across the life course of individuals. The example below illustrates some of the service and system challenges:

Ms K is a 24 year old Aboriginal woman who has been diagnosed as having an intellectual disability. Ms K experiences a range of social difficulties including maintaining appropriate housing, drug use and poor nutrition. She is poor and struggles with everyday functioning. She is enmeshed in the criminal justice system. Ms K has a history of childhood neglect and suspected abuse. Ms K absconded from a diversionary accommodation program, thereby breaking the conditions of a Section 11 bond. Ms K was taken back into custody and a magistrate decided Ms K should not return to the program. Her solicitor was not able to apply for bail until an alternative accommodation option could be found for Ms K in the community. The NSW Department of Ageing, Disability and Home Care (‘ADHC’) was unable to locate an accommodation option for several months, but eventually, Ms K was released from custody into a supported accommodation service called Comprehensive Lifestyle Accommodation and Support Program (‘CLASP’) funded by ADHC.¹¹

The NSW LRC relied upon case studies like Ms K’s, which were developed using state-agency administrative data, to demonstrate how the presence of a cognitive impairment in addition to various poor social determinants of health factors can reinforce and exacerbate offending.¹²

In the case of Ms K this included drug use, mental illness and homelessness, which compounded her difficult life experiences due to her cognitive impairment. Importantly, for individuals such as Ms K, police action such as arrest and being held in police custody or prison may be ineffective in addressing the offending behavior of people with cognitive or mental health impairments, and rather implicate them further into cycles of offending.¹³ Furthermore, the NSW LRC identified that broader social or structural factors (social determinants) are relevant in explaining the complex relationship between cognitive and mental health impairment and offending.¹⁴ For instance, in regard to intellectual disability, ‘the factors most likely to bring people with intellectual disability into contact with the criminal justice system are related to a number of deficits in life skills due to the lifestyle and the environment in which they grew up, rather than having an intellectual disability itself’.¹⁵ Also of importance is the group of Indigenous people who are embroiled in the criminal justice system with more than one type of impairment or disability along with significant social disadvantages, often referred to as having ‘complex needs’.¹⁶ Indigenous people, who have complex problems, find it particularly difficult to find appropriate service provisions are more likely to be imprisoned or involved in the criminal justice system.¹⁷

Importantly, the experience of how complex needs impact on the lives Indigenous people with impairments can be explained as not just the presence of a number of conditions, but rather it is argued that the combination and co-occurrence of these problems create an additional level of complexity that requires attention in its own right.¹⁸

EMERGING ISSUES WITH POLICE AND COURTS

The complex and multi-faceted needs of Indigenous people with mental and cognitive impairments creates particular legal issues which often manifest in high levels of contact with police, courts and prisons. While all of the criminal justice institutions in NSW have experience with complex needs, they vary in their degrees of success in addressing the issues. However, with a dearth of data relating to this group, the resolve to plan and coordinate effective and appropriate responses has been minimal. Yet the absence of reliable data is only one aspect of the challenge, as the inadequacies of integrated, collaborative and culturally appropriate human service systems provide significant barriers.

POLICE

Data from the MHDCD dataset, as part of the IAMHDCD Project, suggests that cognitive impairment in combination

with other conditions, especially drug and alcohol use, make it more likely that a person will have contact with police at a younger age than a person with no impairment or only a single impairment.¹⁹ Also, Indigenous youth with co-occurring impairments will come into contact with police approximately two years earlier than their non-Indigenous counterparts at 14 years of age.²⁰ Aboriginal people in regional and rural NSW report that the police are often the first respondents to a crisis involving Aboriginal people with MHDCD, followed by ambulance services. Often the presence of a cognitive impairment will not be recognised or acknowledged by police; being 'hidden' or misidentified as another kind of impairment, such as being affected by drugs and/or alcohol, or a drug-induced mental health episode. Other issues identified in the community were that Aboriginal people with cognitive and mental health impairments have long histories of offending, and that this is used as a justification for police 'hyper-surveillance' of them in the community. This is seen to bring these individuals into contact with the police more often for non-offending reasons, despite the fact that they are often victims as well, and that this contact does not result in positive outcomes.

COURTS

There are various studies that have found people with cognitive and mental health impairments are over-represented in the NSW Local Court jurisdiction for criminal matters.²¹ Diversion is considered the most appropriate response when considering how co-occurring impairments influence offending behavior, particularly in the absence of social and care supports. Currently, diverting this group out of the criminal courts is attempted through Section 32 and Section 33 of the *Mental Health (Forensics Provisions) Act 1990* (NSW). If the magistrate considers it appropriate, Section 33 can be applied to people who are seriously mentally ill at the time of their court appearance, otherwise Section 32 is used as the main diversionary mechanism.²²

However, evidence from the MHDCD dataset indicates that very few people who meet the disability criteria for Section 32 are granted it, with only 142 out of 2731 people being given a Section 32. Aboriginal people are far less likely than non-Aboriginal people to receive a Section 32.²³ The observations and impressions of Aboriginal people, gathered for the IAMHDCD Project, recognise this extreme under use. They believe this is due to the extremely high volumes of matters that magistrates, Aboriginal legal services solicitors and NSW legal aid lawyers deal with in local courts. The IAMHDCD project has identified two significant reasons why high numbers

of Indigenous people who appear in local courts either have their impairments unrecognised by the court, or if they are identified, are left unassisted.

The first is the impact of the drive for efficiency in summary courts, as well as the application of the crime-control model in court processes. The second is in regards to the capacity of solicitors to represent their clients under the high-volume conditions, and lack of viable options in the community.

Firstly, the expansion of 'technocratic justice' is obvious in regional and remote courts in NSW, as demonstrated by circuit court arrangements in the far-western parts of the state. The high numbers of matters heard back-to-back in a circuit court, together with the high caseload for prosecuting police and defence solicitors, appear to compel all court personnel to process matters quickly. This has routinized the handling of matters, including those involving people with mental and cognitive impairment, with little flexibility. Furthermore, the conformity to a crime control model is most identifiable in the heavy reliance on the offending histories of those appearing. This will be the primary source of information used to deliberate on the sentencing of the individual. This static assessment appears to disproportionately impact Aboriginal people with impairments, as they have much longer offending histories.²⁴

Secondly, the factors that influence whether someone's impairment will be recognised include whether that person has been allowed bail, and therefore whether the solicitor has had sufficient time to speak with their client to establish their background and any indication of an impairment. Data from the IAMHDCD dataset suggests that people with impairments have a greater number of remand episodes, especially those people with co-occurring disorders.²⁵ Feedback from solicitors in the field was that they rarely see their client outside of custody before their court appearance. Receiving enough information from a client in the court environment, while a client is in custody, to establish the presence of a cognitive or mental health impairment is challenging. Nevertheless, if a client's impairment is recognised, then the responsibility for making a diversion application or any non-custodial sentencing option generally falls upon the solicitor representing the client, unless the client has an ADHC case manager, a very rare situation for Aboriginal people. In the cases observed for the IAMHDCD Project this was very difficult given that there is little time or capacity to make these arrangements in or out of court, or guarantee that they are available in the community. For

instance, the objective evidence relied upon for a Section 32 application must be accepted by the deciding magistrate. Evidence such as thorough and up-to-date medical reports and assessments are preferred, and if these are unavailable in regional and remote areas, they are disregarded as realistic options. In their absence Section 32 applications are repeatedly futile.

DISCONNECTIONS BETWEEN COMMUNITY-BASED SERVICES AND CRIMINAL JUSTICE SYSTEM

The criminal justice system's interaction with human and community services can be described as syndromic when it concerns Aboriginal people with cognitive and mental health impairment. The culmination of structural system deficiencies, institutional racism, policy experiments, and service 'silos'—both budgetary and in service terms—leaves a brittle safety net in child, disability and education service areas. Non-criminal justice services and agencies have the most potential for preventative and support capacity, yet their siloed nature counteracts attempts at holistic and integrated support for adults and children with complex needs.²⁶ Aboriginal adults and children who have these multiple needs often fall outside of the remit of any one service (which are often voluntary) and yet this group cross into the domain of many services, raising questions about the role and responsibilities of government and non-government agencies.²⁷

The key challenge emerging is service implementation and delivery for those with complex needs, as this is difficult for one individual service provider or service type to deliver.²⁸ Attempts at co-location and an 'all under one roof' approach have not adequately provided full service integration. Aboriginal people with mild or borderline intellectual disabilities, who also have drug and alcohol issues or lengthy offending histories, are the most at risk of being excluded from all service support, propelling them back into offending pathways and homelessness.²⁹ As a consequence, diversion from prison is difficult as services in the community lack the required information and expertise to appropriately and effectively support Aboriginal people with MHDCD and complex needs. This is particularly the case in rural and regional NSW, in addition to the social and economical pressures experienced daily by some Aboriginal communities. Presently, even minimal service integration for the wider community is a challenging endeavor for government agencies. However, Indigenous community controlled health organisations seem well placed to attempt comprehensive service integration—consistent with already established holistic practices. If implemented more broadly, by government and non-government

organisations, preventing the high rates of incarceration of Aboriginal people with cognitive and mental health impairments could be achieved much sooner.

CONCLUSION

The IAMHDCD Project aims to provide detailed evidence of the experiences of Indigenous people with complex needs cycling through the community and CJS spaces, particularly the systemic 'funneling' of this group into the CJS from an early age. It is suggested that these trajectories, which leave this group much more disadvantaged, are established through the practice and processes of our social, community and CJS organisations and institutions. However, with new detailed understandings of these trajectories, including the multiple intersections of needs such as disability and rehabilitative interventions, we can identify key points for positive and supportive interventions; as well as system failures for reform and change.

Peta MacGillivray (BA/LLB) is field researcher and project manager for the IAMHDCD Project in the School of Social Sciences at UNSW. Eileen Baldry is Professor of Criminology and Lead Chief Investigator on the IAMHDCD Project in the School of Social Sciences at UNSW. The authors would like to acknowledge the IAMHDCD Project Chief Investigators and research team: Dr Leanne Dowse, Associate Professor Julian Trollor, Professor Patrick Dodson, Ruth McCausland, Elizabeth McEntyre (PhD candidate), Han Xu and Julian Trofimovs.

- 1 NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system*, Report No 135 (2012).
- 2 Indigenous Australians with Mental Health Disorders and Cognitive Disability in the Criminal Justice System Project (2013) is an ARC Linkage Project, Chief Investigators are Professor Eileen Baldry, Dr Leanne Dowse, Associate Professor Julian Trollor and Professor Patrick Dodson. The Project's PhD candidate is Elizabeth McEntyre. Profiles and report available <www.mhdcd.unsw.edu.au>.
- 3 The study included 2731 people in prison between 2000 and 2008. It drew lifelong data on this group of people from all criminal justice agencies and key human service agencies to allow an examination of individual and aggregate institutional life pathways including interactions with and between services. Available <www.mhdcd.unsw.edu.au>.
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- 17 *Ibid* 12-13.
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- 19 Baldry, Dowse and Clarence, above n 11, 10-11.
- 20 *Ibid* 10.
- 21 NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Appearance before Local Courts*, Research Report 4 (1993); NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Two Rural Courts*, Research Report 5 (1996); K A Vannay et al, 'Mental Illness and Intellectual Disability in Magistrates Courts in New South Wales, Australia' (2009) 53(3) *Journal of Intellectual Disability Research*; Craig Jones and Sandra Crawford, NSW Bureau of Crime Statistics and Research, *The Psychosocial Needs of NSW Court Defendants* (2007) 6.
- 22 NSW Law Reform Commission, above n 1, 142.
- 23 Linda Steele, Leanne Dowse and Julian Trofimovs, 'A Report on the Human Service and Criminal Justice Pathways of People Diagnosed with Mental Health Disorder and Cognitive Disability in the Criminal Justice System Who Have Received Orders Pursuant to Section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW)' (Research Report, University of New South Wales, 2013) 23.
- 24 Baldry, Dowse and Clarence, above n 11, 11-13.
- 25 *Ibid* 12-13.
- 26 Baldry, Dowse, McCausland and Clarence, *Lifecourse institutional costs of homelessness report*, above n 5, 77.
- 27 *Ibid.*
- 28 *Ibid* 78.
- 29 *Ibid.*

Baraltja, 2011
Gunybi Ganambarr

Natural earth pigments on bark
133cm x 60 cm

