

A series of Research Briefs designed to bring research findings to policy makers

Indigenous People, Mental Health, Cognitive Disability and the Criminal Justice System

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Introduction

There is rising disquiet at the over-representation of Aboriginal and Torres Strait Islander people with mental health disorders and cognitive disability in Australian criminal justice systems, in particular amongst those considered unfit to plead and subject to indefinite detention. This has resulted in a recent increase in research and interrogation of policy in this area (First Peoples Disability Network 2016; Senate Community Affairs Reference Committee 2016; Baldry et al. 2015; NSW Law Reform Commission 2012; Sotiri, McGee & Baldry 2012; Aboriginal and Torres Strait Islander Social Justice Commissioner 2008).

This research brief examines available data on prevalence rates of Indigenous people with mental health disorders and cognitive disability in Australia and outlines the challenges in obtaining accurate data. It sets out particular issues facing these groups of Indigenous people in their contact with police, in courts, in custody and post-release, highlighting the lack of appropriate diversionary programs at all stages of this contact. The brief concludes with key principles and strategies for policy and programming reform in this area, drawn from available research and evaluations.

Mental health disorders and cognitive disability

'Mental health disorder' is used in this brief to refer to a temporary or continuing disturbance of thought, mood, volition, perception or memory

that impairs emotional wellbeing, judgment or behaviour so as to affect functioning in daily life to a material extent (NSW Law Reform Commission 2012: 138). It includes psychoses, anxiety and depression.

'Cognitive disability' is used to refer to an ongoing impairment in comprehension, reason, adaptive functioning, judgment, learning or memory that is the result of any damage to, dysfunction, developmental delay or deterioration of the brain or mind (NSW Law Reform Commission 2012: 136). It includes intellectual disability, learning disability, borderline intellectual disability, acquired brain injury and Fetal Alcohol Spectrum Disorder. While 'impairment' relates to an individual condition, 'disability' signifies ways in which a person with impairment may be excluded from full participation in society.

Indigenous people with mental health disorders and cognitive disability in criminal justice systems

Indigenous peoples are over-represented in criminal justice systems and amongst people with mental health disorders and cognitive disability (First Peoples Disability Network 2016; Australian Bureau of Statistics 2015; Baldry et al. 2015; Cutcher et al. 2014; Australian Institute of Health and Welfare (AIHW) 2011). However, obtaining accurate data on their prevalence is difficult. A lack of access

to professionals for diagnosis in and out of custody, misdiagnosis or lack of recognition of certain disorders, and under-diagnosis of others due to cultural bias in testing affecting accuracy are major factors impeding both support for this group and data gathering (Cutcher et al. 2014; MacGillivray and Baldry 2013; Aboriginal and Torres Strait Islander Social Justice Commissioner 2008).

Available data shows that Indigenous people in custody in Australia experience high rates of poor mental health and wellbeing, including intergenerational trauma, grief and loss (Australian Bureau of Statistics 2015). Indigenous women in custody experience particularly poor mental health, with common histories of multiple traumatic events (Heffernan et al. 2015; Baldry & McEntyre 2011; Indig, McEntyre, Page & Ross 2010).

After extensive Aboriginal-led research with Aboriginal communities in New South Wales and the Northern Territory, the authors found that institutionalised racism, the taking of land, forcible removal of children, poor education, over-crowded housing, a lack of appropriate health care, early loss of family and community members, over-policing and high rates of incarceration all continue to impact negatively on Indigenous peoples' mental health and wellbeing (Baldry et al. 2015). This and other research indicates that Indigenous people with cognitive disability are over-represented in their contact with all criminal justice agencies. They are more likely to

come to the attention of police; more likely to be charged; and more likely to be imprisoned (Victorian Legal Aid 2011); and spend longer in custody (Hunyor & Swift 2011). They have few opportunities for program pathways when incarcerated. They are less likely to be granted parole (Victorian Legal Aid 2011); and have substantially fewer options in terms of access to programs and treatments (Rushworth 2011) than Indigenous people without cognitive impairment (Sotiri, McGee & Baldry 2012).

It is estimated that rates of acquired brain injury and traumatic brain injury are up to three times higher amongst Indigenous people than non-Indigenous people captured in criminal justice agencies (Rushworth 2011: 3-4).

Indigenous young people, who make up more than half of the juvenile population in custody, also have very high rates of intellectual disability, borderline intellectual disability and mental health disorders. For example, the most recent health survey of young people in custody in NSW (NSW Justice Health and Forensic Mental Health Network and Juvenile Justice 2016) indicates that 24.5% of Indigenous young people in custody had a diagnosed intellectual disability compared to 11% of non-Indigenous young people. 41.2% of Indigenous young people were in the borderline intellectual disability range compared with 38% of non-Indigenous young people. The survey also revealed that 59.8% of Indigenous young people in custody had severe difficulties in core language skills and 85% had severe difficulties in reading comprehension. 65.4% of Indigenous young people in custody in NSW had been diagnosed with a mental health disorder (NSW Justice Health and Forensic Mental Health Network and Juvenile Justice 2016).

A 2010 study of 800 young people on community orders in NSW, 20% of whom were Aboriginal, found that Aboriginality and intellectual disability status make separate and combined contributions to the risk of re-offending

in young people (Kenny & Frize 2010). Aboriginal young offenders in that study had a much higher rate of intellectual disability than their non-Aboriginal peers (27.1% and 11.9% respectively), and young people with an intellectual disability were more likely to have had more court attendances; recorded offences; bonds/probation; committed more property offences; and have had higher numbers of Apprehended Violence Orders than young offenders without an intellectual disability (Kenny & Frize 2010).

A study by Haysom and others found the rates for Aboriginal young people with intellectual disability in NSW custodial centres to be 10 times those of all young people in the general population, and three times the rates of Indigenous young people in the community (2014: 104).

Fetal Alcohol Spectrum Disorder (FASD)

Fetal Alcohol Spectrum Disorders (FASD) is an umbrella term for the range of physical, cognitive, behavioural and neurodevelopmental disorders that result from the exposure of a fetus to maternal alcohol consumption during pregnancy (AIHW 2015b). While there is limited data available in Australia on the prevalence of FASD, both national and international research indicates that it may be affecting a large number of Aboriginal children and adults and in particular those who are caught up in criminal justice systems (Fitzpatrick et al. 2015; Ospina 2011; Baldry et al. 2015: 156).

The first ever and ongoing prevalence study on FASD in Australian Aboriginal communities is being conducted in the Fitzroy Valley, Western Australia (WA). The Lilliwan Project has found that children born in 2002/2003 and living in the Fitzroy Valley in 2010/2011 had one of the highest prevalence rates of FASD recorded world-wide (Fitzpatrick et al. 2015). Those with FASD have been noted to be particularly vulnerable to contact with the criminal justice system due to low levels of understanding and lack of diagnosis and appropriate disability support (Sotiri, McGee & Baldry 2012).

Under-diagnosis

Many Indigenous people with these disabilities who come into contact with criminal justice systems may have never had their disability appropriately recognised or diagnosed nor received support from disability services. Those with intellectual disability, for example, may not have received a diagnosis as a child and instead were perceived as disruptive and disengaged from school, or families may have been reluctant to seek a diagnosis given concern that it may lead to stigma or negative intervention by government services (Baldry et al. 2015). Cognitive impairment can also be 'masked' by alcohol and other drug misuse, and or other disability such as mental illness, hearing impairment or learned coping strategies (Sotiri, McGee & Baldry 2012: 27; Baldry & Cunneen 2014; Baldry 2014; Baldry et al. 2015: 18).

For many Indigenous people in the criminal justice system, diagnosis of their disability comes with assessment on entry to prison. However such a diagnosis does not often lead to appropriate services or support while in or after custody. Research reveals that subsequent interventions tend to focus on offending behaviour rather than complex social disadvantage or disability, mental health or alcohol and other drug support needs (Baldry et al. 2015: 12).

Cognitive disability and mental health disorders

People with cognitive disability are often confused with those with a mental health disorder and are less recognised as an over-represented and vulnerable group in prisons (Baldry & Cunneen 2014). They are often merged in the law with people with cognitive impairment and dealt with under mental health legislation (Baldry 2014). Many staff in criminal justice agencies are unsure of what cognitive impairment is (Snoyman 2010) and there is an under-recognition of the need for special supports for this group (Intellectual Disability Rights Service 2008).

People with cognitive disability who are charged with offences require specific cognitive disability support programs

and diversions from criminal justice processes. Mental health treatments are not effective or appropriate responses for people with a cognitive disability (Baldry et al. 2015).

While people with cognitive disability also frequently experience mental health disorders, it is important to identify the existence of a cognitive disability regardless, as mental health legislation may not provide adequate support and protection for those with a cognitive disability. For example, people with cognitive disability are often seriously disadvantaged by being included in the forensic system - not least because their disability is not amenable to medication or treatment in the same way that mental illness often is. This can result in people with cognitive impairment being detained indefinitely or for longer than they would be were they to be given a sentence for their offence. This can be because they are found unfit to plead or not guilty by reason of mental impairment, but may be thought to be a risk to the community, have no other place to go and/or are not seen to improve (Baldry 2014: 381).

Complex support needs

People with mental health disorders and cognitive disability who are managed in criminal justice systems often face a variety of negative factors and circumstances which compound to create 'complex support needs' (Baldry et al. 2015; Baldry et al. 2013). Indigenous people with more than one type of impairment from backgrounds of significant social disadvantage experience particular difficulty in finding appropriate support and services and are more likely to be imprisoned (NSW Law Reform Commission 2012).

Indigenous persons with disability are highly likely to experience multiple, interlocking and compounding disadvantageous circumstances. This often results in Indigenous persons being forced into criminal justice systems at an early age due to an absence of alternative pathways to an even greater extent than non-Indigenous people with cognitive disabilities (Baldry et al. 2015).

The authors have previously reported that Indigenous people with disability

also experience institutional racism, stigma and discrimination on the basis of their Indigenous heritage and disability, with the result that their behaviour often comes to the attention of police and other authorities. This affects access to education, employment, housing and just legal outcomes.

Significantly poorer physical health may also be a contributing factor to the increased likelihood of Indigenous Australians with mental health disorders and cognitive disability being criminalised. There are reportedly few positive health and wellbeing options for Indigenous people with complex support needs who may live in areas without drug and alcohol rehabilitation services, or even when these are available they may exclude people with a cognitive impairment (Baldry et al. 2015).

Research by the authors and others has found that while there are some diversionary programs that aim to assist people with drug and alcohol related offending, they usually do not accept people with a history of violence and are rarely equipped to support people with cognitive disability (Baldry et al. 2015; Sotiri, McGee & Baldry 2012).

In the absence of available or appropriate community-based care, housing or support, incarceration can be considered the only available option for Indigenous persons with complex support needs (Baldry et al. 2015: 11).

Previous research involving the authors has created a dataset of 2,731 people who have been in prison in NSW and whose diagnoses of mental and cognitive disability are known, a quarter of whom are Indigenous Australians (Baldry et al. 2015; Baldry & Dowse 2013; Baldry et al. 2012).

Analysis of the data found that Indigenous people in the cohort have the highest rates of complex needs (multiple diagnoses and disability), with Indigenous women with complex needs having significantly higher convictions and episodes of incarceration (Baldry et al. 2015) when compared with their non-Indigenous peers. Yet the data also highlights that, like their non-Indigenous peers, most of the offences by Indigenous people in the cohort were in the less serious categories of offences

and included theft and related offences, public order offences, offences against justice procedures, government security and government operations, and traffic and vehicle regulatory offences (Baldry et al. 2015).

Police

The authors have found that Indigenous people with mental health disorders and cognitive disability often have difficult interactions with police that escalate in frequency and intensity (Baldry et al. 2015; Baldry & Dowse 2013). Indigenous people with cognitive disability have a significantly lower age of first police contact and a significantly higher number of police contacts than their non-Indigenous counterparts (Baldry et al. 2015; MacGillivray & Baldry 2013).

The authors and others have previously reported that due to a long history of poor relationships between police and Indigenous people, including racism and violence (Cunneen 2007), limited understanding and identification of disability has contributed to:

- a lack of support provided in interactions between Indigenous people and police;
- the tendency of people with cognitive disability to 'agree' with police versions of events for a number of reasons;
- people with cognitive impairment, particularly brain injuries, appearing to understand more than they really do;
- the stressful nature and high speed of police interviews and people with cognitive impairment having a limited understanding of what their rights are; and
- police training in dealing with people with cognitive impairment being inadequate (Baldry et al. 2015; Baldry & Dowse 2013; Sotiri, McGee & Baldry 2012: 43).

It is concluded that this is problematic given police have become the default frontline managers for many Indigenous people with mental health disorders and cognitive disability in the absence of appropriate community based services, particularly in regional and remote areas (Baldry & Dowse 2013).

Courts, lawyers and magistrates

Lawyers, court support workers and magistrates may also not have the training to recognise, understand and appropriately respond to people with cognitive disability and complex support needs. Research has identified that, despite mental health and cognitive impairment support and diversion in many courts, high numbers of Indigenous people with cognitive disability appearing in local courts either have their impairments unrecognised by the court, or if they are identified, are left unassisted (MacGillivray & Baldry 2013: 25).

One of the reasons for this is that solicitors may have insufficient time with their client to establish their background and any indication of disability. If a client's impairment is recognised, then it is usually the responsibility of the solicitor representing them to make an application for a diversion or non-custodial sentencing option, unless the client has a disability service case manager, which is particularly rare for Indigenous people (Baldry et al. 2015).

There is often insufficient time or capacity to make diversion orders and arrangements in or out of court, or guarantee that they are available in the community. To make such orders, magistrates usually require evidence such as up-to-date medical reports and assessments which are frequently unavailable, particularly in regional and remote areas and without them, such applications tend to be unsuccessful (Baldry et al. 2015: 151).

High levels of hearing problems can exacerbate other disabilities, and there is evidence that hearing problems may not be picked up during court processes which means that appropriate support is not provided (Australian Human Rights Commission 2014: 25).

Fitness to plead

Fitness to plead provisions may be intended to help people with mental and cognitive impairment avoid unfair trials; however, such laws can undermine access to justice for Indigenous people

with disability. A fitting example is people with cognitive disability being subject to indefinite detention if they have been charged with committing a crime but are found unfit to plead.

In Western Australia and the Northern Territory, this detention is generally in special units within maximum security prisons. In other jurisdictions people with cognitive disability found unfit to plead may be detained as forensic detainees in a psychiatric or other secure facility, often for a longer period than if they had been convicted and sentenced.

Different jurisdictions have different fitness to plead regimes (for an examination of fitness to plead laws, see Gooding et al. 2016). The over-representation of Indigenous people with cognitive disability amongst those considered unfit to plead and subject to indefinite detention is under increased scrutiny (McCausland & Baldry 2017; First Peoples Disability Network 2016).

Custody

Research, including by the authors, has reported that Indigenous people with disability are sometimes incarcerated due to a lack of other options and in order to be assessed or receive 'treatment', particularly in the case of those in rural and remote areas (Baldry et al. 2015; Sotiri, McGee & Baldry 2012). However Indigenous people are also more likely than non-Indigenous people to be in custody on remand or on short sentences and therefore less likely to access the diagnosis, treatment and programs available to prisoners.

Once sentenced, a person may be diagnosed with a disability, however there may not be appropriate support and interventions available in prison, and when it is available, it may not be culturally responsive (Baldry et al. 2015).

Many Indigenous people with cognitive disability who are incarcerated are severely stressed by being removed from family and country and this can make the task of addressing offending behaviour or learning new skills in prison even more difficult (Sotiri, McGee and Baldry 2012). In addition, Indigenous persons with disability are frequently unable to connect the punitive

experience of imprisonment to their offending behaviour, or transpose or generalise that learning to a community setting (Sotiri, McGee and Baldry 2012), leading to a high likelihood of reoffending and reimprisonment.

Post-release

Williams (in First Peoples Disability Network 2016) notes that assessments of Indigenous prisoners' needs and risks of reoffending have been criticised as being not suited to or relevant for Indigenous people, and are limited in their consideration of the complexity of issues Indigenous people with cognitive disability may face on release, or their unique complex support needs.

In all jurisdictions in Australia, Indigenous people on release need intensive case management, medication and accommodation support (Sotiri, McGee & Baldry 2012). However Indigenous organisations are rarely funded adequately to work with people with mental health disorders and cognitive disability when they return to the community (Baldry et al. 2015).

The authors' research revealed that there are limited diversionary options for Indigenous people with cognitive disability in NSW and the Northern Territory, particularly for those living in regional and remote areas, with a lack of community-based accommodation and a lack of culturally specific programs that can address underlying causes of their offending including alcohol and other drug dependency, and a lack of specialist programs for Indigenous women (Baldry et al. 2015: 149). While this is also the case for non-Indigenous people with mental and cognitive disability, Indigenous people face additional barriers in accessing diversionary programs that are culturally appropriate and responsive (McCausland & Baldry 2017; Baldry et al. 2015).

National Disability Insurance Scheme

The National Disability Insurance Scheme (NDIS) is the Australian Government's new system of individual

funding packages for people with disability, and these packages can be used to purchase disability supports. The NDIS's eligibility criteria is based on a strong diagnostic framework and to be eligible for the NDIS, persons need to have an assessment of their impairment, as well as the effects of the impairment on their functioning (Soldatic et al. 2014: 9).

The NDIS eligibility criteria raise the risk that Indigenous people with mental health disorders and cognitive disability in the criminal justice system who lack access to appropriate diagnostic processes will not be able to establish their claim for eligibility. The presence of mild or borderline cognitive impairment may not meet NDIS eligibility criteria for 'substantial and ongoing disability needs' despite these commonly co-occurring with mental illness, substance use and entrenched social disadvantage precipitating their contact with the criminal justice system (Soldatic et al. 2014: 9). As Indigenous people with mental health disorders and cognitive disability in contact with the criminal justice system may be unable or unwilling to identify with a disability label for cognitive, social or cultural reasons, requirements to claim this label for the purpose of NDIS eligibility may limit their participation.

For those who are able to access and become participants in the NDIS there could also be a mismatch between the individualised nature of support, which is a cornerstone of the NDIS approach, and Indigenous community and culturally holistic approaches to support and care (Baldry et al. 2015). The NDIS is a market based approach, with clients with disabilities purchasing services from providers. Some researchers including the authors have raised concerns that this may not be an appropriate approach for Indigenous people with multiple or complex needs, particularly in regional, rural and remote settings (Baldry et al. 2015; Soldatic et al. 2014). This is because specialist services may not be available in those areas, and these clients may not be able to make informed choices when purchasing services.

Evaluated programs

There are very few holistic, targeted programs for people with mental health disorders and cognitive disability in contact with Australian criminal justice systems and there are none specifically for Indigenous Australians. Rigorous evaluations for only two such programs that are relevant to Indigenous people and show positive outcomes for this group could be found. The authors are not aware of any formally evaluated programs in New Zealand or Canada.

Victorian Court Integrated Services Program (CISP)

The Victorian CISP is a coordinated, multidisciplinary, team-based approach to the assessment and treatment of defendants including Indigenous defendants in the Magistrates' Court of Victoria at the pre-trial or bail stage. The Department of Justice and the Magistrates' Court established the CISP in November 2006 due to the very large unmet need for specialised treatment and support services for defendants at court (Ross 2009).

The aims of the CISP are to:

- provide short term assistance before sentencing for people with health and social needs;
- work on the causes of offending through individualised case management;
- provide priority access to treatment and community support services; and
- reduce the likelihood of re-offending.

The program provides case management for up to four months for medium and high risk clients, and links people to services including mental health and disability services and the Koori Liaison Officer program.

A 2009 evaluation of the CISP considered the outcomes of the program for Indigenous and non-Indigenous participants (Ross 2009). The evaluation commenced in late 2006 and the findings covered the implementation and operation of the program to the middle of 2009. The evaluation also included an econometric (cost-effectiveness) component (Pricewaterhouse Coopers 2009).

Overall the CISP saw a significant reduction in reoffending, improvement in self-reported physical and mental health, higher engagement with treatment services and a range of other positive outcomes. The evaluation found that CISP teams demonstrated a high degree of integration across the service areas of drugs and alcohol, mental health, disability, Indigenous support and accommodation support. The primary barriers to effective team operation were the high levels of staff turnover and work demand.

Clients of the CISP who identified as Indigenous comprised 8.1% of all those who participated. More female clients were Indigenous than male (11.7% female versus 7.3% male), and Indigenous clients were more likely to be on the intensive program level than the intermediate level.

Almost half the Indigenous people surveyed in the evaluation completed the program, however Indigenous clients were found to be less likely overall to complete than non-Indigenous clients (46% versus 60%). The economic evaluation found that on average, the CISP produced savings of \$2.60 for every dollar invested by the government (Pricewaterhouse Coopers 2009).

NSW Community Justice Program (CJP)

The NSW CJP is a specialised, holistic, person-centred, community-based program supporting people including Indigenous persons with cognitive disability in the NSW criminal justice system. The CJP is the NSW Government's community forensic disability service, established in 2006 (NSW Family and Community Services 2016). The CJP works with a range of non-government organisations to provide case management, behaviour intervention, psychological therapy, drop-in support and accommodation services to clients across NSW. The CJP supports people with an intellectual disability who have a significant ongoing risk of offending or who have committed serious offences.

The CJP was formally evaluated by NSW Treasury in 2014 but the evaluation is not publicly available.

Nevertheless, the dataset from the research contains some relevant information as the cohort includes 86 people who have participated in the CJP, 34 of whom are Indigenous (Baldry, Dowse & Clarence 2012). This evidence shows that the CJP is taking people, especially Indigenous people with the most complex support needs, as a 'back end' program - that is, after numerous custody and offending episodes and a failure of other services to continually support them in the community.

A number of case studies of Indigenous people with mental health disorders and cognitive disability drawn from the dataset show the positive impact of the CJP model of intensive specialist disability supported accommodation in reducing their contact with the criminal justice system and improving their overall quality of life (Baldry et al. 2012).

The need for policy reform

There is a dire lack of understanding, services and support for Indigenous people with mental health disorders and cognitive disability in criminal justice systems, leading to frequent and harmful contact with police, courts and time in prison.

Drawing on existing research and evaluations in the field from Australia (First Peoples Disability Network 2016; Sotiri, McGee & Baldry 2012) and original quantitative and qualitative research (Baldry et al. 2015), the following principles and strategies are considered key to policy and programming reform in this area:

Principle 1: Self-determination

Self-determination is key to improving access to and exercise of human rights and to the wellbeing of Aboriginal and Torres Strait Islander people with mental and cognitive disability, especially for those in criminal justice systems.

Strategies

- Indigenous-led knowledge and solutions and community-based services should be appropriately supported and resourced;
- The particular disadvantage faced by women and people in regional

and remote areas should be foregrounded in any policy response to this issue; and

- Resources to build the cultural competency and security of non-Indigenous agencies, organisations and communities who work with Indigenous Australians with mental and cognitive disability who are in contact with criminal justice systems should be provided.

Principle 2: Person-centred support

Person-centred support which is culturally and circumstantially appropriate is essential for Indigenous Australians with mental and cognitive disability, placing an individual and their support persons at the centre of their own care in identifying and making decisions about their needs for their own recovery.

Strategies

- Disability services in each jurisdiction, along with the NDIS, should ensure there is a complex support needs strategy supporting criminal justice involved Indigenous Australians with disability;
- Specialised accommodation and treatment options for this group of Indigenous Australians should be made available in the community to prevent incarceration and in custodial settings to improve wellbeing; and
- Indigenous Australians who are at risk of harm to themselves or others and who have been in the custody of police or corrections should not be returned to their community without specialist support.

Principle 3: Holistic and flexible approach

A defined and operationalised holistic and flexible approach in services for Indigenous Australians with mental and cognitive disability and complex support needs is needed from first contact with service systems.

Strategies

- Early recognition via maternal and infant health services, early childhood and school education, community health services and police should lead to positive and preventive support allowing Indigenous children

and young people with disability to develop and flourish;

- A range of 'step-down' accommodation options for people with cognitive impairment in the criminal justice system should be available. The NSW Community Justice Program (CJP) provides a useful template; and
- Community based sentencing options should be appropriately resourced, integrated and inclusive so they have the capacity and approach needed to support Indigenous people with mental and cognitive disability.

Principle 4: Integrated services

Based on evidence provided from evaluation of integrated services, they appear to be well equipped to provide effective referral, information sharing and case management to support Indigenous Australians with mental and cognitive disability in criminal justice systems.

Strategies

- Justice, Corrections and Human Services departments and relevant non-government services should take a collaborative approach to designing program pathways for people with multiple and complex needs who require support across all human and justice sectors; and
- All prisoners with cognitive disability must be referred to the public advocate of that jurisdiction.

The CISP in Victoria and NSW provide a workable model to enable this.

Principle 5: Culture, disability and gender-informed practice

Indigenous Australians' understandings of 'disability' and 'impairment' should inform all approaches to the development and implementation of policy and practice for Indigenous people with mental and cognitive disability in contact with criminal justice systems, with particular consideration of issues facing Indigenous women.

Strategies

- Better education and information for police, teachers, education support workers, lawyers, magistrates, health, corrections, disability and community service providers regarding understanding and working

with Indigenous women and men with cognitive impairment, mental health disorders and complex support needs;

- Information and resources for Indigenous communities, families and carers, provided in a culturally informed and accessible way; and
- The distinct and specific needs of Indigenous women should be foregrounded in such education and information.

Conclusion

The over-representation of Indigenous Australians with mental and cognitive disabilities' in criminal justice systems has only recently been recognised. There is very limited national data available and only a small number of research projects have been completed addressing this concern. Indigenous Australians' impairments are significantly underdiagnosed. There is a dire lack of culturally responsive post-release services and support and no programs specifically for criminal justice involved Indigenous Australians with mental and cognitive disabilities. The evidence is that community based and determined responses and support embracing person centred, holistic, integrated and culturally responsive practice, should be resourced to prevent criminalisation and the cycle of criminal justice management of this group of Indigenous Australians.

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References

Aboriginal and Torres Strait Islander Social Justice Commissioner 2008. *Preventing crime and promoting rights for Indigenous young people with cognitive disabilities and mental health issues*. Sydney: Australian Human Rights Commission. https://www.humanrights.gov.au/sites/default/files/content/social_justice/publications/preventing_crime/cog_disr.pdf

Australian Bureau of Statistics (ABS) 2016. *Corrective Services, Australia, 2016*. cat. no. 4512.0. Canberra: ABS. <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0>

ABS 2015. *Prisoners in Australia 2015*. cat. no. 4517.0. Canberra: ABS. <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2015~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics~7>

ABS 2012. *Intellectual Disability, Australia*. cat. no. 4433.0.55.003. Canberra: ABS

ABS 2011. *The health and welfare of Australia's Aboriginal and Torres Strait Islander peoples, 2011*. cat. no. 4704.0. Canberra: ABS

Australian Human Rights Commission 2014. *Equal before the law: towards disability justice strategies*, February. https://www.humanrights.gov.au/sites/default/files/document/publication/2014_Equal_Before_the_Law.pdf

Australian Institute of Health and Welfare (AIHW) 2015a. *The health and welfare of Australia's Aboriginal and Torres Strait Islander peoples*. cat. no. IHW 147. Canberra: AIHW. <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129551281>

AIHW 2015b. *Fetal alcohol spectrum disorders: a review of interventions for prevention and management in Indigenous communities*. cat. no. 36. Canberra: AIHW. <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129550296>

AIHW 2011. *The health and welfare of Australia's Aboriginal and Torres Strait Islander people: an overview*. Catalogue no IHW 42. Canberra: AIHW. <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737418955>

Baldry E 2014. Complex needs and the justice system in Chamberlain C, Johnson, G & Robinson C. *Homelessness in Australia: an introduction*. UNSW Press: Sydney. Ch 10: pp 196-212

Baldry E & Cunneen C 2014. Imprisoned Indigenous women and the shadow of colonial patriarchy. *Australian and New Zealand Journal of Criminology* 47: 276-298

Baldry E, Dowse L, McCausland R & Clarence M 2012. *Life course of institutional costs of homelessness of vulnerable groups*. Report for FaHCSIA. <http://www.mhdcd.unsw.edu.au/sites/www.mhdcd.unsw.edu.au/files/u18/Lifecourse-Institutional-Costs-of-Homelessness-final-report.pdf>

Baldry E, Dowse L & Clarence M 2012. *People with intellectual and other cognitive disability in the criminal justice system*. Report for NSW Family and Community Services Ageing, Disability and Home Care. https://www.adhc.nsw.gov.au/_data/assets/file/0003/264054/Intellectual_and_cognitive_disability_in_criminal_justice_system.pdf

Baldry E, Dowse L, Xu H & Clarence M 2013. *People with mental and cognitive disabilities: pathways into prison*. Mental Health Disorders and Cognitive Disability in the Criminal Justice System Background Paper. <https://www.mhdcd.unsw.edu.au/sites/www.mhdcd.unsw.edu.au/files/u18/Pathways%20from%20school%20to%20prison.pdf>

Baldry E, McCausland R, Dowse L & McEntyre E 2015. A Predictable and Preventable Path: *Aboriginal people with mental and cognitive disabilities in the criminal justice system*. Mental Health Disorders and Cognitive Disability in the Criminal Justice System Project. https://www.mhdcd.unsw.edu.au/sites/www.mhdcd.unsw.edu.au/files/u18/pdf/a_predictable_and_preventable_path_2nov15.pdf

Baldry E & McEntyre E 2011. Prison bars are health barriers. *O&G Magazine* 13(3): 53-54

Cutcher Z, Degenhardt L, Alati R & Kinner SA 2014. Poor health and social outcomes for ex-prisoners with a history of mental disorder: A longitudinal study. *Australian and New Zealand Journal of Public Health* 38(5): 424-429

Cunneen C 2007. Policing in Indigenous Communities in Mitchell, M and Casey, J (eds). *Police Leadership and Management*. Leichardt: Federation Press pp 231-243

First Peoples Disability Network 2016. *Aboriginal and Torres Strait Islander Perspectives on the Recurrent and Indefinite Detention of People with Cognitive and Psychiatric Impairment*. *Submission to the Senate Inquiry on the Indefinite Detention of People with Cognitive and Psychiatric Impairment by the First Peoples Disability Justice Consortium*. http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Indefinite_Detention/Submissions

Fitzpatrick JP, Latimer J, Carter M, Oscar J, Ferreira ML, Carmichael Olson H, Lucas BR, Doney R, Salter C, Try J, Hawkes G, Fitzpatrick E, Hand M, Watkins RE, Martiniuk AL, Bower C, Boulton J, Elliott EJ. 2015. Prevalence of fetal alcohol syndrome in a population-based sample of children living in remote Australia: The Lillivan Project. *Journal of Paediatrics and Child Health* 51: 450-457

- Gooding P, Arstein-Kerslake A, Andrews L & McSherry, B 2016. Addressing the Indefinite Detention of People with Cognitive and Psychiatric Impairment Due to Unfitness to Plead Laws. *Submission to The Senate Community Affairs References Committee with regard to the indefinite detention of people with cognitive and psychiatric impairment in Australia*. Melbourne Social Equity Institute: The University of Melbourne
- Haysom L, Indig D, Moore E and Gaskin C 2014. Intellectual disability in young people in custody in New South Wales, Australia – prevalence and markers. *Journal of Intellectual Disability Research* 58(11): 1004-14
- Hunyor J & Swift M 2011. A judge short of a full bench: mental impairment and fitness to plead in the NT criminal legal system. *Criminal Lawyers Association Northern Territory Conference*, Sanur, Bali, 30 June
- Indig D, McEntyre E, Page J & Ross B 2010. *2009 Inmate Health Survey: Aboriginal Health Report*. NSW Justice Health
- Intellectual Disability Rights Service (IDRS) 2008. *Enabling Justice*. Sydney: Intellectual Disability Rights Service
- Kenny DT & Frize M 2010. Intellectual Disability, Aboriginal Status and Risk of Re-offending in Young Offenders on Community Orders. *Indigenous Law Bulletin* 7(18)
- MacGillivray P & Baldry E 2013. Indigenous Australians, mental and cognitive impairment and the criminal justice system: a complex web. *Indigenous Law Bulletin* 8(9)
- McCausland R & Baldry E 2017. I feel like I failed him by ringing the police: Criminalising disability in Australia. *Punishment & Society* 19(3)
- NSW Family and Community Services 2016. *Community Justice Program*. NSW Family and Community Services, Ageing, Disability and Home Care. http://www.adhc.nsw.gov.au/sp/delivering_disability_services/community-justice-program
- NSW Justice Health and Forensic Mental Health Network and Juvenile Justice 2016. *2015 Young People in Custody Health Survey: Key Findings for All Young People*
- NSW Law Reform Commission 2012. *People with cognitive and mental health impairments in the criminal justice system: Diversion*. Report 135. Sydney: NSW Law Reform Commission. <http://www.lawreform.lawlink.nsw.gov.au/agdbasev7/wr/lrc/documents/pdf/r135.pdf>
- New Zealand Ministry of Health 2006. *Results from the Prisoner Health Survey 2005*. Public Health Intelligence Occasional Bulletin 37. Wellington: Ministry of Health. <http://www.health.govt.nz/system/files/documents/publications/prisoner-health-survey-2005.pdf>
- New Zealand National Health Committee 2010. *Health in Justice: Kia Piki te Ora, Kia Tika! – Improving the health of prisoners and their families and whānau: He whakapiki i te ora o ngā mauhere me ō rātou whānau*. Wellington: Ministry of Health. <http://www.nzdoctor.co.nz/media/263363/health-in-justice.pdf>
- Ospina M, Moga C, Dennett L and Harstall C 2011. A Systematic Review of the Effectiveness of Prevention Approaches for Fetal Alcohol Spectrum Disorder, in *Prevention of Fetal Alcohol Spectrum Disorder FASD: Who is responsible?* First Edition (eds S. Claren, A. Salmon and E. Jonsson), Wiley-VCH Verlag GmbH & Co. KGaA, Weinheim, Germany
- Pricewaterhouse Coopers 2009. *Economic evaluation of the court integrated services program: Final report on economic impacts of CISP*. Victoria: Pricewaterhouse Coopers. https://www.magistratescourt.vic.gov.au/sites/default/files/Default/cisp_economic_evaluation_final_report.pdf
- Queensland Government 2009. *Inside Out – The mental health of Aboriginal and Torres Strait Islander people in custody report*. Brisbane: Queensland Government
- Ross S 2009. *Evaluation of the court integrated services program: Final report*. The University of Melbourne. https://www.magistratescourt.vic.gov.au/sites/default/files/Default/CISP_Evaluation_Report.pdf
- Rushworth N 2011. *Out of sight, out of mind: People with an acquired brain injury and the criminal justice system*. Australian Institute of Judicial Administration. Sydney: Brain Injury Australia
- Senate Community Affairs Reference Committee 2016. *Inquiry into the Indefinite detention of people with cognitive and psychiatric impairment in Australia*. http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/IndefiniteDetention45
- Snoyman P 2010. *Staff in the NSW criminal justice system understanding of people with and without disability who offend*. PhD thesis. New South Wales: University of New South Wales
- Soldatic K, van Toorn G, Dowse L and Muir K 2014. Intellectual Disability and Complex Intersections: Marginalisation under the National Disability Insurance Scheme. *Research and Practice in Intellectual and Developmental Disabilities* 1(1): 6–16
- Sotiri M, McGee P & Baldry E 2012. *No end in sight: The Imprisonment and indefinite detention of Indigenous Australians with a cognitive impairment*. Aboriginal Disability Justice Campaign report for The National Justice Chief Executive Officers Working Group
- Victorian Legal Aid 2011. *Access to and interaction with the justice system for people with an intellectual disability and their families and carers*. Melbourne: Victorian Legal Aid
- Williams M 2016. Supported transition from prison to community, in First Peoples Disability Justice Consortium (eds). *Aboriginal and Torres Strait Islander perspectives on the recurrent and indefinite detention of people with cognitive and psychiatric impairment: A Submission to the Senate Inquiry on the Indefinite Detention of People with Cognitive and Psychiatric Impairment*. Australia: First Peoples Disability Justice Consortium http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Indefinite_Detention/Submissions

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