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FROM RESEARCH TO POLICY AND PRACTICE CHANGES FOR OFFENDERS WITH AN INTELLECTUAL DISABILITY

By

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FROM RESEARCH TO POLICY AND PRACTICE CHANGES FOR OFFENDERS WITH AN INTELLECTUAL DISABILITY

Abstract

In New South Wales, Australia, research has established that people with an intellectual disability are over-represented in appearances before courts, in prisons and juvenile justice centres, in probation and parole supervision, and in presentations to legal aid offices. These data have been used in a unique way, to inform the process of law reform. The NSW Law Reform Commission employed the data to demonstrate the need for reforms in many forms of interaction between people with intellectual disabilities, both offenders and victims, and the criminal justice system. Other practice and policy changes which have resulted from the research findings include: - improvement in the methods used by departments of corrective services and juvenile justice to identify and manage offenders with an intellectual disability, educational programs for the judiciary, and in-service training for legal aid solicitors, public defenders and public prosecutors.

Using the theoretical framework of "reintegrative shaming", this paper examines strategies for encouraging reforms based upon empirical findings, the pitfalls and obstacles which can arise when attempting to implement policy and practice changes, and the positive outcomes for people with intellectual disabilities, the criminal justice system, and the community in general.

Introduction

A recent paper emanating from the Welsh Centre for Learning Disabilities Applied Research Unit (Todd, Felce, Beyer, Shearn, Perry and Kilsby, 2000) refers to attempts to establish joint agency consensus as a "long and winding road". This sentiment can readily be echoed in the process of reform of policy in the area of offenders with an intellectual disability. Professionals and service agencies can all see the strategies which need to be implemented, can articulate the necessity of change in policy and practice on the part of governments and non-government agencies, provide workable, cost-effective solutions, develop protocols which deliver services to the "at risk" groups, and design educational programs for under-graduate and in-service training – and still progress is glacier-like. Influencing the myriad of agencies, lobby groups, caregivers and government departments so that they arrive at agreement about a point of major change at roughly the same time is nearly impossible. Just as all parties feel they are within striking distance of a major break-through, the government changes and like a demented game of snakes and ladders, everyone slides down the snake's back and ends up at "Start" again. If re-inventing the wheel is a waste of time, then re-inventing the policy solution is even more so, and yet after years in the field of criminal justice and intellectual disability, there is a distinct sense of *déjà vu.*

Using research to influence policy

In New South Wales (Australia) an interesting interactive process has occurred during the process of changing the law, and policies about the management of offenders with an intellectual disability, as demonstrated by this approximate time line.

Community and lobby group interest in rights of people with intellectual disability mid-70s-80s (Hayes and Hayes, 1984)

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Research on prevalence of intellectual disability in NSW prisons (Hayes and McIlwain, 1988)

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Other rights issues accelerate, including establishment of NSW Guardianship Tribunal

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Review of mental health and criminal law, especially provisions on fitness to be tried (Hayes and Craddock, 1992)

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Attorney General's reference on *People with an intellectual disability and the criminal justice system* given to the NSW Law Reform Commission – 1992

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Research on prevalence of intellectual disability amongst people appearing before local courts (Hayes, 1993; 1996)

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NSW Law Reform Commission consults widely with intellectual disability lobby groups and service providers, and with agencies involved in the criminal justice process

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Publication of the NSW Law Reform Commission Report which receives wide media coverage (NSW Law Reform Commission, 1996)

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Recommendations of the Report filter down to government agencies including Police, Corrective Services, Juvenile Justice, Community Services, Ageing and Disability

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The Criminal Law Review Division of Attorney General's Department works on implementing the recommendations of the Law Reform Commission

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Research on prevalence of ID among juvenile and adult prisoners (Hayes, 2000)

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Research on prevalence of ID amongst clients presenting to Legal Aid (Hayes, 1999)

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Department of Corrective Service trials a screening test for intellectual disability amongst offenders 1999 – shows growing rate of ID amongst offenders (Hayes, 2000)

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NSW Parliament Standing Committee on Law and Justice Inquiry into Crime Prevention through Social Support – 1999 (transcripts of evidence may be accessed on the NSW Parliament website, following the "Committees" links – www.parliament.nsw.gov.au)

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NSW Parliament Select Committee Inquiry into Increase in the Prisoner Population – 2000

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Parliamentary Committees make recommendations to government departments, following up recommendations of Law Reform Commission

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Government departments and other agencies attempt to revise policies 1996-2000

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Law Week takes up the theme of disability, resulting in media attention focused on the plight of offenders with ID -2000

This time line illustrates a number of interesting interactions between research findings, media coverage of intellectual disability rights issues, pressure by lobby groups, and inquiries by Parliamentary Committees, which did not always reflect government policy. In the meantime, the prevalence of people with an intellectual disability in the criminal justice system increased, from 12% in 1988 to 20% in 1999.

Factors which facilitated changes in law and policy

- Involvement of people with an intellectual disability in the research and law reform process
- Self-advocacy on the part of people with an intellectual disability
- Accessible information for people with intellectual disabilities, their families and lobby groups
- Pressure for change from lobby groups and professional organisations, such as the Law Society
- Placing the pressure for change within a "rights" framework, which gave direction and moral strength
- Increased numbers of people with an intellectual disability in the criminal justice system, either as perpetrators or victims, as indicated by research
- Frustration on the part of the magistracy, especially concerning offenders with an intellectual disability, leading to requests for more sentencing options, and in-service education
- Key leadership on the part of some high-influence and high profile individuals and government agencies – the NSW Law Reform Commission, and the Criminal Law Review Division of the Attorney General's Department
- Positive responses from some government departments, including Corrective Services and Juvenile Justice
- Breakaway parliamentary committees which undertook their own investigations
- Media coverage of research, criminal cases, and parliamentary committee investigations
- Wider community interest in and knowledge about people with intellectual disabilities, as victims or perpetrators of crimes
- Coverage of disability issues in professional journals, such as the Legal Aid Bulletin and the Law Society Journal

Factors that hampered change

- Negative responses from some government departments and agencies arising from:
  - Competition between departments for funds
  - Lack of awareness of the magnitude of the problem of offenders with an intellectual disability
  - Lack of cooperation between departments
  - No political motivation to address or solve the problem
  - Stigmatisation of offenders with intellectual disability by some departments
  - Funding cutbacks
  - Lack of pressure to change – the issue is seen as not important

- Lack of funding for intellectual disability services, and staff training, generally and especially within agencies for whom this area is new, including the Police Service and the judiciary
- Delays on the part of various government inter-departmental committees
- Lack of agreement between government departments, and the lapse of time, culminating in the postponement of further implementation of law reforms until early 2001
- Lack of consensus between agencies about their responsibilities
- Lack of a cohesive government policy concerning offenders with an intellectual disability, resulting in "buck passing" between departments
- Powerlessness and marginalisation on the part of offenders with an intellectual disability and their families
- Negative media portrayals of offenders with an intellectual disability
- Burnout on the part of lobby groups and professional groups
- Lack of political will

Reintegrative shaming – responses of the community, the media and government agencies

John Braithwaite, a leading Australian criminologist, developed the theory of 'reintegrative shaming", which provides a useful framework for understanding the phenomenon of over-representation of offenders with an intellectual disability, and the difficulty experienced by social institutions in addressing the problem (Braithwaite, 1989). Braithwaite emphasises the concept of social consensus, maintaining that societies with high degrees of social consensus and effective ways of shaming criminal conduct (such as Japan and Switzerland) have lower crime rates. He distinguishes between reintegrative shaming and disintegrative shaming. The former expresses the community's disapproval of the offending behaviour, with the aim of showing respect for the offender as a person and "making citizens actively responsible, of informing them of how justifiably resentful their fellow citizens are toward criminal behaviour which harms them" (Braithwaite, 1989, p. 10). On the other hand, disintegrative shaming or stigmatisation occurs when there is no effort to reconcile the offender with the community, and no attempt at inclusion. The outcome is that the community is divided, and a class of outcasts is created. The solution to lower crime rates, he argues, is to build consensus in society, and to reintegrate the offenders into the mainstream of society, rather than driving them away into an outcast social group, where they experience further humiliation and marginalisation, as well as acquiring better skills in criminal behaviour rather than appropriate adaptive behaviour.

In applying this theoretical framework to offenders with an intellectual disability, it is immediately apparent that in many cultures including Australia, people with an intellectual disability are already part of a disintegrative shaming process, whether or not they are offenders. Stigmatised even if they are not offenders, most people with an intellectual disability are not included in the mainstream of society, and form part of an outcast group. Those who are poor, unemployed,

substance abusers, or who lack family support are more likely to feel stigmatised, but even those who do not possess these characteristics may feel powerless and humiliated at some points during their lives. Whilst not every person with an intellectual disability may experience these feelings, every **offender** with an intellectual disability will. Doubly stigmatised groups such as indigenous offenders with an intellectual disability have little hope of escaping the sense of belonging to an outcast group. Not only does this theory have relevance for people with intellectual disabilities, especially those who are offenders, but it is also useful in explaining the responses of some of the other players in the disability field. Government and non-government agencies, disability lobby groups, and professional working in the disability area may experience disintegrative shaming, too.

Powerful government departments engage in **disintegrative shaming** towards other government agencies; those which provide services for people with intellectual disabilities, or for offenders, are often regarded as "lesser" departments. Thus, the government departments take on the stigma attached to their clients. Resource-wealthy departments such as the Police Service do not perceive offenders with an intellectual disability as part of their "core business". The stigmatisation of this group is illustrated by the in-service culture which expresses views such as, "They shouldn't be in the community", or "They're not our problem – community services should be taking care of them. We're not social workers". Therefore, not only are the clients forced into an outcast group, but so are their service providers.

The media, too, play a strong role in either encouraging or discouraging (mainly the latter) the process of disintegrative shaming. For a brief moment, publicity about research into intellectually disabled offenders can stir public sympathy and interest, but rarely in a truly sustained integrative fashion. Offenders and people with intellectual disabilities may be portrayed as not belonging within the mainstream of society. The media can choose to emphasise either the point of view that offenders with an intellectual disability have rights and need to be included in society, or the view that they are "evil doers", dangerous to the non-disabled members of our community, and that to observe their rights is tantamount "to going soft on crime". The media coverage of recent criminal cases involving defendants with an intellectual disability illustrates this dichotomy of perception.

Conducive to constructive public debate were articles headed:

> *"More humanity, not more jails" (Sydney Morning Herald, 21 February 2000, p 13)*
>
> *"One inmate in five intellectually disabled" (Sydney Morning Herald, 28 March 2000, p. 5)*
>
> *"Out of mind, out of sight – the NSW prison system has become a dumping ground for society's intellectually disabled" (Sydney Morning Herald, 1 April 2000, p. 40)*

Less helpful, and more stigmatising was a full-page article, which led as follows:

> *"Lost lives. She was white. She had a university education. Her killers were black, ill educated, addicted to alcohol and frequent drug users. VF, 24, and his brain damaged cousin, B, 23, will die in gaol for the crime, but their sentencing has split the NSW justice system" (Sydney Morning Herald, 3 January 1998, p. 6)*

(The defendant, B, was mildly intellectually disabled and suffered from brain damage, possibly as a result of a long history of substance abuse, including glue and petrol sniffing. He maintained that he was innocent of the murder, and that police had forced him to confess while he was still affected by drugs. The journalist's prediction that he would die in gaol was proved correct when he was murdered, allegedly by his cousin and co-defendant, in a maximum-security prison only months later.)

Reforms achieved

Despite the gloomy picture painted in this paper, there have been in new South Wales some substantial reforms which have significantly improved the access to justice by people with an intellectual disability, and their lot in the justice system. Many of these have mirrored similar reforms and advances which have occurred elsewhere across the globe:

- Establishment of the Guardianship Tribunal, which can appoint a guardian for the purposes of assisting a person with an intellectual disability with issues pertaining to life choices, medical consents, and assistance in accessing justice
- Removal of intellectual disability from mental health legislation, unless the person has a psychiatric illness
- Fitness to be tried legislation, which provides for a trial of the facts for an unfit defendant, and if found guilty, a finite sentence which cannot exceed the sentence that may have been imposed had the person not been unfit. Thus, offenders with intellectual disability who are unfit no longer run the risk of indeterminate incarceration
- Legislation establishing protections for people with an intellectual disability during police interviews, and whilst in police custody
- Anti-Discrimination Tribunal which deals with discrimination issues, such as those which can arise in relation to employment
- NSW Privacy Commission which can investigate matters such as unauthorised release of medical and other records
- Special units for inmates with intellectual disabilities in NSW prisons, catering for those with significant disabilities and challenging behaviours, which may place them at risk in the mainstream of the prison
- Development of a screening instrument for detecting “vulnerable suspects” in police custody, and for determining those inmates in the adult and juvenile correctional services who are likely to have an intellectual disability and need to be referred for full-scale diagnostic assessment
- Establishment of specialist legal offices for people with intellectual disability (including the Intellectual Disability Rights Service)
- Greater awareness of intellectual disability issues on the part of the NSW Parliament, government departments, the legal profession and the media

Creating a climate for change

Change can only be effected in this area if there is a strong political will to follow through on the agenda of law reform and policy implementation. This can only be achieved if there is a clear government policy regarding the management of offenders with an intellectual disability, and one which survives changes in government.

First, in the light of a strong clear policy, the long and winding road towards joint agency cooperation could be shortened significantly by establishing and mandatory workable inter-departmental links. At present, government agencies behave as if they have the capacity to opt in or out of any coordinated effort to address the increase in offenders with an intellectual disability. A standard tactic which works remarkably well is simply to send a different agency representative to each inter-departmental meeting, and to ensure that the representative is constrained to take each suggestion back to their home agency for ratification. This strategy can ensure committee deliberations go around in circles and take years to do so. Nevertheless, interdepartmental agency task forces have worked well in other areas, such as domestic violence, demonstrating that if the will is there, the links can be established. Furthermore, government agency funding must be altered to take into account the client load of people with an intellectual disability, and funding needs to be contingent on the demonstrated implementation of policy reforms.

Secondly, the process of law reform could then be speeded up. One delaying factor is the time lag between initial discussion of a proposed reform and its transformation into proposed legislation. At present, the time lag is such that community and professional groups do not recognise or have

forgotten that an issue was thoroughly debated some years previously. Thus, when they hear that the issue is again before parliament, they complain about lack of consultation.

Lastly, lobby groups and people with intellectual disabilities must develop a strong and cohesive voice, which reflects their own policy decisions. Differences of opinion or approach about issues such as possible programs for diversion from the criminal justice system, or protection of the rights of offenders with an intellectual disability during police interviews, can sabotage any chance of a sustained push towards more effective policies for people with intellectual disabilities. Lobby groups need to become more adept at conveying their viewpoint to the media, and providing instant and incisive responses to issues as they arise.

In this process, the role of the researcher is not only to pursue the answers to research questions, but also to act as an advocate for people with intellectual disabilities by ensuring that the research results are in the public domain and can be used to inform public debate.

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