

The invisible client: people with cognitive impairments in the Northern Territory's Court of Summary Jurisdictionⁱ

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Every Monday morning Aboriginal Legal Aid lawyers in Alice Springs descend into the cells beneath the courts to take instructions from prospective clients who have been locked up overnight and over the weekend. More often than not, the first time lawyers meet clients is in the cells. It can be a tense experience. The volume of matters is daunting and lawyers are aware of the time constraints. It is not unusual to speak to a client about the charges he or she is facing only to be met with stony cold silence. Communication is very often difficult. More difficult still can be determining the source of the communication barrier. Language, hearing, shyness, embarrassment, cultural reticence, obstinacies, substance withdrawal, illness or any combination of these factors can all contribute. Frequently communication is hampered by mental health issues, a cognitive impairment, or both. The lawyer's job is to find a way to get instructions, to work out which issue or issues, if any, are contributing to the communication barrier, and to decide what it all means for the client's case. In a court cell in Alice Springs, this can be very challenging.

Introduction

The overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system in the Northern Territory and across the nation has been the subject of extensive documentation, criticism and concern since the Royal Commission into Aboriginal Deaths in Custody brought the issue squarely into the national spotlight. Despite the thousands of pages dedicated to this issue, the Northern Territory is locking up more Aboriginal people than ever before. Anyone working in the system will know that there is no quick fix. The criminal justice landscape is pitted with holes and Aboriginal people in the Northern Territory are continually trapped in them, but it is beyond the scope of this paper to map all of the problems with the system. Rather, this paper will focus on one major shortcoming of the Northern Territory criminal justice system: the manner in which the Court of Summary Jurisdiction deals with people with cognitive impairments brought before it.

Given the variations in definitions of the term "cognitive impairment" and related terms in legislation, commentary and research papers, in this paper we have adopted the definition of the term "cognitive impairment" used in the NSW Law Reform Commission's recent report on the diversion of people with cognitive and mental health impairments in the criminal justice system. After extensive consultation, the NSW Law Reform Commission recommended the following definition:

“Cognitive impairment is an ongoing impairment in comprehension, reason, adaptive functioning, judgement, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind. Such cognitive impairment may arise from, but is not limited to, the following: intellectual disability; borderline intellectual functioning; dementias; acquired brain injury; drug or alcohol related brain damage; [and] autism spectrum disorders.”¹

A cognitive impairment is different to, and distinct from, a mental illness or a mental disturbance as it is an ongoing, permanent condition that cannot be ‘treated’ (although a person may have a dual diagnosis and more complex needs as a result).²

Despite the large number of matters dealt with summarily, and the evidence indicating an overrepresentation of people with a cognitive impairment, particularly Aboriginal people with a cognitive impairment, in the criminal justice system, there is no legislative scheme in place in the Northern Territory specifically designed to assist the court to deal with people with a cognitive impairment charged with lower level offences. By failing to appropriately respond to their needs and circumstances, the criminal justice system is failing some of the most vulnerable members of our society.

This is not a new issue. Our colleagues at the North Australian Aboriginal Justice Agency (NAAJA), Jonathon Hunyor and Michelle Swift, identified this gap in the system in their paper on mental impairment and fitness to plead in the Northern Territory, which they delivered at the 2011 Criminal Lawyers Association of the Northern Territory (CLANT) Bali Conference.³ In this paper, we seek to build on the work carried out by Hunyor and Swift by looking further at the needs of people with a cognitive impairment brought before the Court of Summary Jurisdiction. It is argued that the current system is inadequate: the Northern Territory must develop a flexible, pragmatic and well-resourced legislative diversion scheme that moves people with a cognitive impairment charged with relatively low-level offences out of the criminal justice system, back into the community for care and assistance, and permanently away from the prison system.

Overrepresentation

Nobody knows exactly how many people, let alone Aboriginal people, with a cognitive impairment are dealt with in the Northern Territory’s lower courts each year. We know that the Magistrates Court, where most summary matters are heard, is a very busy court. In 2011-12, over 12,000 matters

¹ New South Wales Law Reform Commission (NSW Law Reform Commission), *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report 135 (2012) 136.

² NSW Law Reform Commission, above n 1, 122, 137; E Baldry, L Dowse and M Clarence, “People with Mental and Cognitive Disabilities: Pathways into Prison” (Background Paper for Outlaws to Inclusion Conference, 2012)<www.app.unsw.edu.au/sites/app.unsw.edu.au/files/mhdcdbbackgroundoutlaws_conf1.pdf> 14-15; see also Mindy Sotiri, Patrick McGee and Eileen Baldry, *No End in Sight: The imprisonment, and indefinite detention of Indigenous Australians with A Cognitive Impairment* (Aboriginal Disability Justice Campaign, September 2012) 26-27, http://elizabethrussell.com.au/rffada.org/images/stories/documents/No_End_in_Sight_-_Report_from_the_Aboriginal_Disability_Justice_Campaign_on_the_Inprisonment_and_Indefinite_Detention_of_Indigenous_Australians_with_a_Cognitive_Impairment-1.pdf;

³ Jonathon Hunyor and Michelle Swift, ‘A Judge short of a Full Bench: mental health in the NT criminal justice system’ (paper presented at the Criminal Lawyers Association of the Northern Territory Thirteenth Biennial Conference, Bali, 30 June 2011).

were finalised in the Northern Territory's Magistrates Court.⁴ This figure provides some indication of our criminal law practice's caseload on a day to day basis. Unfortunately, we can only guess how many of the clients we represent in the Court of Summary Jurisdiction have a cognitive impairment. Despite the large number of clients we see, it would be rare for us to see a client with a formal diagnosis of a cognitive impairment. We doubt that this is because few of our clients have a cognitive impairment; it is more likely to be due to the under-diagnosis of Aboriginal people with cognitive impairment in Central Australia.⁵ Because few of our clients have received a formal assessment and diagnosis, because cognitive impairment can be difficult to identify due to masking factors such as significant language and cultural barriers and also because of a lack of culturally appropriate assessment tools and services in Central Australia, and because CAALAS' lawyers are not health practitioners, it is likely that we completely fail to identify a cognitive impairment in many clients who do not display "obvious" signs of cognitive impairment.⁶

There is anecdotal evidence that there is a disproportionately high number of people with cognitive impairment in the Northern Territory's prison system, and there is concern that far too many of these people are Aboriginal. The 2008 Northern Territory Ombudsman's 'Report of the Investigation into complaints from women prisoners at Darwin Correctional Centre' reported anecdotally high numbers of women with a mental illness or cognitive impairment in the prison system, but noted that "at present there is no quantitative or qualitative data which would reliably indicate the level of mental health and disability needs among Northern Territory prisoners or the actual types of needs present". The 'No End in Sight: The imprisonment and indefinite detention of Indigenous Australians with a cognitive impairment' report released recently by the Aboriginal Disability Justice Campaign observed that at the time of writing the report, all of the nine people on supervision orders in the Northern Territory (because of mental impairment) were Aboriginal.

Whilst comprehensive data on the number of people with a cognitive impairment in the criminal justice system in the Northern Territory is not yet available, there is a growing body of research from other jurisdictions indicating that people with a cognitive impairment are overrepresented in the criminal justice system at all points of contact,⁷ and that Aboriginal people are overrepresented within that population.⁸ For example, a large research project in NSW into the life course of people

⁴ Australian Bureau of Statistics, *Criminal Court, Australia, 2011-12*, 'Criminal Courts, Northern Territory - Table 8: Summary outcomes of all defendants, Magistrates' Courts – Northern Territory, Selected principal offence', Datacube: Excel spreadsheet, cat. no. 4513.0, (14 February 2013) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02011-12?OpenDocument>. (This number includes matters commenced by the prosecution and subsequently withdrawn.)

⁵ Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 'Mental illness and cognitive disability in Aboriginal and Torres Strait Islander prisoners – a human rights approach' (Paper presented at 22nd Annual THEMHS Conference – National Mental Health Services Conference 2012: Recovering Citizenship, Cairns, 23 August 2012), <http://www.humanrights.gov.au/news/speeches/mental-illness-and-cognitive-disability-aboriginal-and-torres-strait-islander>; see also Kylie M Dingwall, Jennifer Pinkerton, Melissa A Lindeman, "'People like numbers": a descriptive study of cognitive assessment methods in clinical practice for Aboriginal Australians in the Northern Territory' (2013) 13 *BMC Psychiatry* 42; New South Wales Law Reform Commission, above n 1, 17.

⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous young people with cognitive disabilities & Australian juvenile justice system: a report* (Human Rights and Equal Opportunity Commission, 2005), 26; see generally Kylie M Dingwall, Jennifer Pinkerton, Melissa A Lindeman, above n 5.

⁷ Law Reform Committee, Parliament of Victoria, *Inquiry into access to and interaction with the justice system by people with an intellectual disability* (2013) 14; Eileen Baldry, Leanne Dowse and Melissa Clarence. 'Background Paper for the National Legal Aid Conference Darwin 2011: People with mental and cognitive disabilities: pathways into prison' (Paper presented at the National Legal Aid Conference, Darwin, 2011); New South Wales Law Reform Commission, above n 1, 11-13.

⁸ Eileen Baldry, Leanne Dowse and Melissa Clarence, above n 7, 4-6; NSW Law Reform Commission, above n 1, 17.

with mental health disorders and cognitive disabilities in the NSW criminal justice system has found that having a cognitive disability is associated with earlier police contact and a higher number of police contacts, a higher incidence of contact with the criminal justice system generally, and a higher rate of episodes of custody, especially when the person with a cognitive disability has complex needs due to mental health issues or drug and alcohol disorders.⁹ Aboriginal people with a cognitive disability in the study came into even earlier contact with the criminal justice system than non-Aboriginal people with a cognitive disability, had a higher number of police contacts in total and rate per year, experienced more custodial admissions, but shorter stays in custody, and spent a larger proportion of their lives incarcerated than non-Aboriginal Australians in the cohort.¹⁰ Despite evidence of high-levels of contact with the criminal justice system, offences committed by those surveyed with complex cognitive disability (co-morbidity or dual diagnosis) were almost all low level offences,¹¹ indicating that the lower courts are the gateway into the system for many cognitively impaired people with complex needs.

There is also a quickly expanding body of research on the prevalence of foetal alcohol spectrum disorders (FASD), a distinct sub-category of cognitive impairment, in the criminal justice system in Australia, and growing concern around the issue, particularly in jurisdictions like the Northern Territory where high rates of alcohol consumption have been well-documented. International research documents a high prevalence of people with a FASD in the criminal justice system, with one review of studies on the prevalence of FASD in the Canadian corrections system estimating that individuals with a FASD were 19 times more likely to be imprisoned than individuals without FASD.¹² The report on the recent Commonwealth Inquiry into the prevention, diagnosis and management of FASD noted that anecdotal evidence suggests that people with a FASD are also overrepresented in the Australian legal system.¹³ Similarly, the Western Australian Parliament's 2012 Report "Foetal Alcohol Spectrum Disorder: the invisible disability" found that a person with a FASD is at high risk of committing offences, is more likely to be apprehended and refused bail, be unresponsive to authority, be undeterred from reoffending through punishment, be convicted, and, if convicted, be sentenced to a term of imprisonment, than a person without FASD.¹⁴

There seems to be consensus that we need better data on the number of people with a cognitive impairment in the criminal justice system in the Northern Territory. Whilst we don't yet have the numbers we need, we don't have time to wait for them. Our experience at CAALAS is that there are too many Aboriginal people with a cognitive impairment in the criminal justice system in Central

⁹ Eileen Baldry, Leanne Dowse, Melissa Clarence, *People with intellectual and other cognitive disability in the criminal justice system*. Sydney, University of New South Wales (2012) 2-3, 13-20, http://www.adhc.nsw.gov.au/data/assets/file/0003/264054/Intellectual_and_cognitive_disability_in_criminal_justice_system.pdf.

¹⁰ Eileen Baldry, Leanne Dowse, Melissa Clarence, above n 9, 2-3, 28-30.

¹¹ Eileen Baldry, Leanne Dowse and Melissa Clarence, above n 7, 16.

¹² Raewyn Mutch et al, 'Fetal Alcohol Spectrum Disorder: Knowledge, attitudes and practice within the Western Australian justice system: Final Report' (Foundation for Alcohol Research and Education and Telethon Institute for Child Health Research, The University of Western Australia, April 2013) 2, citing SJ Astley et al, 'Neuropsychological and behavioural outcomes from a comprehensive magnetic resonance study of children with fetal alcohol spectrum disorders'(2009) 16(1) *Canadian Journal of Clinical Pharmacology*, 178-201.

¹³ Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *FASD: The Hidden Harm - Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders* (2012) 137; see also Samantha Parkinson and Sara McLean, 'Foetal Alcohol Spectrum Disorder in children: Implications for judicial administration' (2013) 22(3) *Journal of Judicial Administration* 138, 139-140; Raewyn Mutch et al, above n 12, 3.

¹⁴ Education and Health Standing Committee, Parliament of Western Australia, *Foetal Alcohol Spectrum Disorder: the invisible disability*, Report no. 15 (2012) 82.

Australia, and that most people with a cognitive impairment who enter the criminal justice system will be dealt with by the Court of Summary Jurisdiction. If research carried out in other jurisdictions provides some indication of the extent of the problem in the Northern Territory, at least broadly, then the research suggests that we're right. As the vast majority of criminal matters dealt with in the Northern Territory are dealt with by the lower courts, we need to establish mechanisms in these courts to address this issue.

Needs

Whilst it is important to recognise that not all people with a cognitive impairment offend, the particular needs of people with a cognitive impairment and the multiple forms of social disadvantage many people with a cognitive impairment experience render many at high risk of entering and re-entering the criminal justice system, and leave many disadvantaged and vulnerable to poor treatment within the system.

Whilst the impact of a cognitive impairment on an individual varies depending upon the type of cognitive impairment a person suffers from, the severity of the impairment and the circumstances of the individual, people with a cognitive impairment generally have needs that are different to the needs of the general population.¹⁵ The effect of a person's cognitive impairment may place a person at risk of contact with the criminal justice system, and may make it immensely challenging for a person to negotiate the criminal justice system once the person enters it. A person with an acquired brain injury (ABI), for example, might be easily confused and overwhelmed; have difficulty taking in new information; have memory problems and difficulty planning ahead; have difficulty judging situations; difficulty problem solving; difficulty controlling emotions (especially anger); and may experience a decline in inhibitions or a decline in social skills and capacity.¹⁶ These kinds of symptoms may increase the risk of a person entering and re-entering the criminal justice system, particularly where the ABI creates problems with impulsive behaviour, anger, aggression or is combined with an increased use of alcohol and other drugs.¹⁷

Similarly, a person with FASD may have some characteristics common to a person with ABI, including memory problems, impulsivity and difficulty controlling behaviour.¹⁸ A person with a FASD might also have difficulty understanding the consequences of their actions, difficulty reasoning, and difficulty learning from experience, planning ahead and complying with instructions or directions.¹⁹ This places people with a FASD in the criminal justice system at a considerable disadvantage and at a much greater risk of repeated interactions with the system.²⁰

These challenges are compounded by the multiple and complex forms of social disadvantage people with a cognitive impairment are also likely to experience.²¹ In the Central Australian context, some of the multiple forms of social disadvantage our clients with a cognitive impairment might experience

¹⁵ Mindy Sotiri, Patrick McGee and Eileen Baldry, above n 2, 51-52, see also NSW Law Reform Commission, above n, 125.

¹⁶ Ibid.

¹⁷ NSW Law Reform Commission, above n 1, 125-126.

¹⁸ Mindy Sotiri, Patrick McGee and Eileen Baldry, above n 2, 58.

¹⁹ Mindy Sotiri, Patrick McGee and Eileen Baldry, above n 2, 58; Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 138.

²⁰ Education and Health Standing Committee, Parliament of Western Australia, above n 14, 74-75; Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n, 138.

²¹ Law Reform Committee, Parliament of Victoria, above n 7, 11; Abigail Gray, Suzie Forell and Sophie Clarke, 'Cognitive impairment, legal need and access to justice' (Justice Issues Paper 10, Law and Justice Foundation of NSW, March 2009) 2.

include lack of access to early intervention assessment and treatment services, lack of access to culturally appropriate health and social services, language barriers, poverty, drug or alcohol problems, mental health problems, lack of safe and secure housing, early disengagement from education, and family violence. Having regard to these kinds of challenges, Dingwall, Pinkerton and Lindeman observe, in the context of discussion on the need for culturally appropriate assessment tools in the Northern Territory, that:

“[w]hen in contact with the criminal justice system, being both Aboriginal and having a cognitive disability may be a ‘dual disadvantage’. Such individuals may be less likely to know their rights when questioned by police, less able to assist in their defence, be at risk of victimisation in custody, and at risk of reoffending. Aboriginal people may therefore experience detention as a result of inadequate assessment, treatment and services [citations omitted].”²²

Victims of the system: sentencing and prison

Even if a person with a cognitive impairment is fit to plead, fit to stand trial and is held criminally responsible for an offence, a person’s cognitive impairment may reduce the person’s culpability for the offence and may render standard sentencing options largely ineffective and inappropriate.²³ Whilst a court may generally take into account these types of issues when making decisions in relation to a person with a cognitive impairment (if the cognitive impairment is identified and brought to the court’s attention),²⁴ the ability of the court to formulate an appropriate response is limited by the constraints of the system.²⁵

This is particularly apparent when one considers the effect of a sentence of imprisonment on a person with a cognitive impairment, which the research indicates is an all too common outcome of interaction with the criminal justice system. For example, a FASD sufferer may have a long criminal history linked to the FASD. The offending may have occurred in the context of impulsive and somewhat irrational behaviour. The FASD sufferer may not understand, or fully understand, the seriousness of the crime he or she has committed, and may find it difficult to make the causal connection between the offending behaviour and a sentence handed down a year or more after the offending has occurred.²⁶ The court might consider that it has no option, in the circumstances, other than to hand down a sentence of imprisonment. In a case of this kind, the normal purposes of sentencing, other than the short-term protection of the community, are unlikely to be served.²⁷ This

²² Kylie M Dingwall, Jennifer Pinkerton, Melissa A Lindeman, above n 5.

²³ NSW Law Reform Commission, above n 1, 28; Mindy Sotiri, Patrick McGee and Eileen Baldry, above n 2, 97-98; see also NSW Law Reform Commission, above n 15, 40-41.

²⁴ *R v Tsiaras* [1996] 1 VR 398 at 400; *Waye v The Queen* [2000] NTCCA 5 at [17]-[21]; see also *R v Verdins*; *R v Buckley*; *R v Vo* (2007) 16 VR 269, [13]; *R v McIntosh* (2008) 191 A Crim R 370 ; [2008] VSCA 242, [84]-[104]; Law Reform Committee, Parliament of Victoria, above n 7, 298-302.

²⁵ Law Reform Committee, Parliament of Victoria, above n 7, 302.

²⁶ Samantha Parkinson and Sara McLean, above n 13, 140-142.

²⁷ Heather Douglas, ‘Sentencing and Fetal Alcohol Spectrum Disorder (FASD)’ (2010), 15-17, <http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2010/Sentencing%202010/Papers/Douglas%20FASD%20Sentencing%202010.pdf>; Samantha Parkinson and Sara McLean, above n 13; see also the discussion of the application of sentencing principles to offenders with a cognitive or mental health impairment in *R v Tsiaras* [1996] 1 VR 398 at 400; *Waye v The Queen* [2000] NTCCA 5 at [17]-[21]; see also *R v Verdins*; *R v Buckley*; *R v Vo* (2007) 16 VR 269, [13]; *R v McIntosh* (2008) 191 A Crim R 370 ; [2008] VSCA 242, [84]-[104].

process is unlikely to deter or rehabilitate the offender; his offending behaviour will remain unaddressed.

The No End in Sight Report prepared for the Aboriginal Disability Justice Campaign strongly argues that a sentence of imprisonment is an inappropriate, unsuitable and ethically unacceptable response to offending by people with a cognitive impairment.²⁸ It argues that a sentence of imprisonment may not only be ineffective when applied to a person with a cognitive impairment; it is also often tougher on a person with a cognitive impairment than it is on a person without a cognitive impairment.²⁹ Jonathon Hunyor and Michelle Swift also considered this issue in their paper on mental impairment and fitness to plead.³⁰

Similarly, the Western Australian Parliament's 2012 Report "Foetal Alcohol Spectrum Disorder: the invisible disability" found that prisoners with a FASD are likely to 'do harder' than other prisoners because of their high levels of suggestibility; memory deficits; possible hearing deficits; difficulty in understanding sarcasm, idiom or metaphor and a lack of apparent empathy.³¹ This means that they may have more trouble with other inmates, and have trouble complying with directions and prison rules.³² Indeed, it is our experience that in the Northern Territory, where programs and support for prisoners with cognitive impairment are limited,³³ prisoners with cognitive impairment are more vulnerable and suffer more in prison than prisoners without a cognitive impairment because of these kinds of challenges.

If a prison sentence is imposed on a person with cognitive impairment, it should be supported by appropriate programs and a period of supervision post-release to assist the prisoner to cope with prison life and to facilitate reintegration.³⁴ Because this rarely occurs in the Northern Territory, people with a cognitive impairment become victims of the prison system because they have been unable to avoid the criminal justice system in the first place, and then 'do harder' during their term of imprisonment.

Case study one: Josh

**(Note that all case studies in this paper have been de-identified, and may constitute compound case studies to protect the privacy and confidentiality of CAALAS' clients.)*

CAALAS has been acting for Josh for a number of years. Josh first came to CAALAS as a juvenile charged with a number of relatively minor property offences. Josh is now an adult and CAALAS has acted for him in a number of property offence matters before the Court of Summary Jurisdiction.

Josh had limited family support and little success complying with court ordered bail or good

²⁸ Mindy Sotiri, Patrick McGee and Eileen Baldry, above n 2, 40-41.

²⁹ Mindy Sotiri, Patrick McGee and Eileen Baldry, above n 2, 40-41; See also Law Reform Committee, Parliament of Victoria, above n 7, 315-317.

³⁰ Hunyor and Swift, above n 3, 15.

³¹ Education and Health Standing Committee, Parliament of Western Australia, above n 14, 74-75.

³² *Ibid.*

³³ See, for example, *The Queen v Doolan* [2009] NTSC 60 where Martin CJ made a supervision order under Part IIA of the Criminal Code requiring the defendant, who had a significant cognitive impairment, to remain in Alice Springs Correctional Centre. His Honour made special orders to ensure that the defendant received special care and therapy in the Correctional Centre as his Honour considered that "[i]t was apparent from the evidence that without special arrangements Mr Doolan would not receive the optimum therapeutic intervention" in the Correctional Centre ([23]).

³⁴ Heather Douglas, 'The Sentencing Response to defendants with foetal alcohol spectrum disorder' (2010) 34 *Criminal Law Journal* 221, 236-237; Law Reform Committee, Parliament of Victoria, above n 7, 328-329.

behaviour bonds. He was prone to reoffending by committing further minor property offences and soon developed a fairly long history. He increasingly spent periods on remand and received relatively short imprisonment sentences.

Josh has impulsive and irrational behaviours. His offending is not pre-meditated. When arrested by the police, he is often confused and has difficulty remembering events and understanding the seriousness of his offending. He usually agrees to whatever version of events the police put to him following his arrest. He has no coping skills and becomes upset quickly.

Early pre-sentence reports ordered by the court did not suggest any cognitive impairment. However, over time questions were raised about his level of cognitive functioning. Attempts were made to have him assessed; however, reports came back as inconclusive and indicated a lack of assessment tools to properly determine his level of functioning. Cultural and language barriers made it difficult to obtain a conclusive assessment. He has now been assessed as having a suspected FASD and has been placed under an adult guardianship order.

Despite CAALAS' best efforts to link Josh with appropriate services and to seek alternatives to custodial sentences, Josh is still stuck in the system. The support services he needs to minimise the risk of future offending and to enable Josh to live safely in the community are simply not available to him. Because he has no capacity to abide by conditions, he continues to receive short sentences of imprisonment for his offending. The prison system is unable to address his needs, and on returning to the community, he commits further offences.

Case study two: Tom

Tom has been under adult guardianship orders from time to time because of an organic brain injury. However, he has little contact with the guardian because he is not compliant with the guardian's directions, he lives remotely and he is very transient.

Tom has a history of mental health issues, substance abuse, low-level offending and regular contact with the police. He has also been placed on community management orders under the *Mental Health and Related Services Act* in the past. However, the community management orders did not address Tom's needs relating to his cognitive impairment, and were largely ineffective in addressing his mental health needs.

Unfortunately, the court usually considers that it has no option other than to sentence Tom to short terms of imprisonment for his relatively minor offending behaviour. This is because he is non-compliant with existing support structures, is unlikely to comply with suspended sentences, is likely to breach good behaviour bonds, and has little access to supported accommodation and other support within the community to improve his chances of successfully complying with a suspended sentence or conditions of a good behaviour bond.

He has difficulty adjusting to prison life and is often confused and agitated. He is an extremely vulnerable inmate because of his poor social skills and his lack of coping skills. Whilst he receives medication in prison for his mental illness, he has not received any ongoing or targeted support to assist him to address his offending behaviour.

NT response

As the research from other jurisdictions and anecdotal evidence indicates, it is too easy for people with a cognitive impairment, including Aboriginal people with a cognitive impairment, to enter the criminal justice system and it is too hard for them to get out. The Court of Summary Jurisdiction in the Northern Territory is just one of the many entry points into the system, but as it is a significant and frequent entry point, it is deserving of attention.

Given the special needs and vulnerability of many people with a cognitive impairment, and the mismatch between normal criminal justice system processes, including mainstream sentencing options, and the experience of cognitively impaired people, it is quite surprising that there is no legislative scheme specifically designed for cognitively impaired people charged with lower level offences in the Northern Territory. An appropriate response to offending by people with a cognitive impairment is a tailored response; however, no special legislative scheme exists to encourage and facilitate a tailored response. As our NAAJA colleagues Jonathon Hunyor and Michelle Swift have previously noted, currently the needs of cognitively impaired people are overlooked in our lower courts.³⁵

There are a number of schemes operating in the Northern Territory that may be relevant to a person with a cognitive impairment. Unfortunately, most of these schemes focus on the needs of people with a mental health problem, which are generally quite different to the needs of cognitively impaired people.³⁶ None of the existing schemes effectively cater for the needs of people with cognitive impairment charged with lower level crime; certainly, none of these schemes offer clear, appropriate and pragmatic diversion options out of the criminal justice system. As Hunyor and Swift provided a comprehensive overview of some of the key schemes in their paper, we do not intend to consider all of the schemes in detail, nor do we propose to consider the legal issues relating to fitness to plead and fitness to stand trial in any depth. However, to provide some legislative context, it is useful to review the scope of the key schemes, and to consider the effect of recent amendments to the *Mental Health and Related Services Act*.

Civil schemes

There are two civil law schemes which now provide for the involuntary admission of some people with a complex cognitive impairment. These schemes are found under the *Mental Health and Related Services Act* and the *Disability Services Act*. Historically, the *Mental Health and Related Services Act* only provided for the care and treatment and admission of people with a mental illness or mental disturbance. The *Disability Services Act* merely set out principles for the delivery of services to people with disabilities, and established some guidelines for research in the field.

The *Mental Health and Related Services Act* and the *Disability Services Act* were amended in 2012 to facilitate the operation of secure care facilities in the Northern Territory, to establish a legislative basis for involuntary admissions and ‘treatment’ and care of a person with a complex cognitive impairment under the Acts, and to enable an application under the new complex cognitive impairment provisions to be made for a person already admitted to an approved treatment facility

³⁵ Jonathon Hunyor and Michelle Swift, above n 3.

³⁶ Eileen Baldry, Leanne Dowse and Melissa Clarence, above n 7, 4.

under existing 'mental disturbance' criteria. The *Mental Health and Related Services Act* now provides for the short-term involuntary admission of a person with a complex cognitive impairment by way of an order made by the Mental Health Review Tribunal, whilst the *Disability Services Act* confers power on the Local Court to make more long-term orders for the admission of a person with a complex cognitive impairment to a secure care facility.

The amendments recognise that a person with a cognitive impairment may require care, 'treatment' or admission to an appropriate facility, and to an extent, recognise that the health response to a person with a complex cognitive impairment is different to the response to a person with a mental illness or mental disturbance. Whilst the 2012 amendments indicate that the legislature recognises that people with a cognitive impairment have special needs, the amendments did not extend to establishing a detailed scheme for dealing with people with a cognitive impairment brought before our lower courts.

Criminal law schemes

There are also a number criminal law schemes which may apply to a person with a cognitive impairment charged with an offence; however, none of the schemes specifically provide for the needs of a person with a cognitive impairment charged with a summary offence.

Bail Act

The Court of Summary Jurisdiction is frequently required to make bail decisions in relation to a person with a known or possible cognitive impairment; however, there are no special provisions under the *Bail Act* for people with a cognitive impairment or a mental health problem. Our experience is that, under the current *Bail Act*, it is generally more difficult for people with a cognitive impairment or mental health problem to obtain bail than it is for people without special needs and circumstances.³⁷ Experience and research indicates people with a cognitive impairment or mental health problem often have a history of offending related to their disability, therefore making it more difficult to obtain bail;³⁸ are less likely to live in secure accommodation and are accordingly at a greater risk of being refused bail,³⁹ and may have difficulty understanding and complying with increasingly onerous bail conditions, particularly where bail conditions are imposed without the provision of additional support.⁴⁰

The operation of the presumptions provisions in the *Bail Act*, and the failure to specify the matters a decision-maker is to take into account when considering whether to grant bail or remand a person with mental health impairment or a cognitive impairment disadvantages people with a cognitive impairment charged with lower level offences. CAALAS has made an extensive submission on the operation of the *Bail Act* to the Northern Territory government's Review of the *Bail Act*, and it is hoped that the Northern Territory government will address this issue through the review process.

³⁷ See also NSW Law Reform Commission, above n 1, 152.

³⁸ See generally Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008) 18-20., http://humanrights.gov.au/social_justice/publications/preventing_crime/cog_disr.pdf, 17-19. This was also noted as a significant issue in New South Wales Law Reform Commission, *Bail*, Report 133 (2012), 179 (NSW Bail Review).

³⁹ NSW Bail Review, above n 36, 179; Australian Human Rights Commission, above n 36, 20.

⁴⁰ NSW Bail Review, above n 36, 179; NSW Law Reform Commission, above n 1, 156.

Sentencing Act

Part 4 of the *Sentencing Act* confers power on the Court to make mental health orders, including orders for assessment and treatment, for a person with a mental illness or mental disturbance found guilty of an offence. Similar provisions do not exist under the *Sentencing Act* for a person with a cognitive impairment found guilty of certain offences. (Note that the effect of mandatory sentencing is discussed below).

Supreme Court proceedings

Part IIA of the Criminal Code establishes a special scheme for people with a mental impairment prosecuted before the Supreme Court. The term “mental impairment” is defined to include “senility, intellectual disability, mental illness, brain damage and involuntary intoxication”, and therefore covers a range of cognitive impairments.⁴¹ The scheme provides for determination of fitness to plead, fitness to stand trial, special hearings, special verdicts and supervision orders following a special verdict. The policy underlying the scheme is well-intentioned; however, as Jonathon Hunyor and Michelle Swift discussed in their paper, and as the recent No End in Sight report by the Aboriginal Disability Justice Campaign has noted, because of a lack of adequate resourcing, this scheme can result in a client spending much longer in prison than they probably would have had they been dealt with through the normal system. In some cases, a client could receive an indefinite supervision order under Part IIAA of the Criminal Code, which might be served in prison due to a lack of appropriate secure facilities. It was hoped that the opening of new secure care facilities in the Northern Territory would go some way to addressing this issue. However, the Northern Territory government’s recent announcement that 50% of the beds in the Alice Springs facility will be temporarily allocated to the new mandatory alcohol rehabilitation scheme raises concerns about the capacity of the facility.⁴² As the scheme currently operates, many legal practitioners are wary of utilising it. It is certainly not an easy or appropriate alternative to proceeding with a matter in the Court of Summary Jurisdiction.

Courts exercising summary jurisdiction: powers under the Mental Health and Related Services Act

Under the *Mental Health and Related Services Act*, a court exercising summary jurisdiction has a number of different powers in relation to a person requiring care or treatment under the Act.⁴³ None of the powers are specifically directed towards people with cognitive impairment before the Court of Summary Jurisdiction.

Section 77

Section 77, for example, imposes a mandatory requirement on a court exercising summary jurisdiction to dismiss a charge in certain circumstances where it is satisfied that a person was suffering from a mental illness or mental disturbance and, essentially, should not be held criminally responsible because of the mental illness or mental disturbance. Section 77 does not apply to a person with a cognitive impairment, unless that person has a dual diagnosis of mental illness or also

⁴¹ *Criminal Code* (NT), Sch 1 cl 43A.

⁴² Robyn Lambley, Minister for Health, ‘Alice Springs Mandatory Alcohol Assessment Site Secured’ (Media Release, Northern Territory Government, 18 June 2013).

⁴³ Jonathan Hunyor and Michelle Swift, above n 2.

meets the “mental disturbance” criteria. This provision, and its many shortcomings, was discussed extensively in Jonathon Hunyor and Michelle Swift’s paper.⁴⁴

Section 78-78B

Sections 78-78B confers power on the court to adjourn proceedings to enable a person with a mental illness or mental health impairment who pleaded guilty to an offence or has been found guilty of an offence to complete a voluntary treatment plan and, if the person completes the voluntary treatment plan, dismiss the charge. Once again, these provisions do not apply to a person with a cognitive impairment.

Section 73A(2)(b) and related provisions

Interestingly, since the amendment of the *Mental Health and Related Services Act* last year to provide a scheme for the involuntary admission of people with a complex cognitive impairment under the Act, it is arguable that, in certain circumstances, the court may have power under s. 73A(2)(b) to dismiss charges against a person with a complex cognitive impairment dealt with summarily. Section 73A provides:

“Application of Division

- (1) This Division applies to a person who:
 - (a) is charged with an offence in proceedings before a court; and
 - (b) in the opinion of the court, may require treatment or care under this Act.
- (2) The court may:
 - (a) make one or more orders under this Division for the person; or
 - (b) dismiss the charge at any time if:
 - (i) the court is exercising summary jurisdiction in the proceedings; and
 - (ii) the proceedings are not proceedings for a committal or preliminary hearing; and
 - (iii) the court is of the opinion that, if the person were found guilty, under the Sentencing Act the court would dismiss the charge unconditionally or otherwise decline to record a conviction.
- (3) Subsection (4) applies if:
 - (a) the offence is one to which section 121A(1)(b) of the Justices Act applies; and
 - (b) the court is of the opinion that the person lacks the capacity to consent to the charge being heard and determined summarily.
- (4) For section 121A(1)(d) of the Justices Act, consent is taken to have been given by the person if the person's legal representative consents to the charge being heard and determined summarily.
- (5) For subsections (1)(b) and (3)(b), the court may have regard to the following in forming its opinion:
 - (a) the appearance and behaviour of the person when brought before the court;
 - (b) information given to the court during the proceedings.”

However, there are a number of problems with this option. First, it would only apply to a person with a complex cognitive impairment, mental disturbance or mental illness who the court considers may meet the criteria for care or treatment of the Act. The Act expressly makes a distinction between a cognitive impairment, and a complex cognitive impairment. It also sets a fairly high threshold for treatment or care under the Act on the grounds of complex cognitive impairment. This

⁴⁴ Ibid.

is because the treatment and care of a person with a complex cognitive impairment under the Act is primarily limited to involuntary admission on the grounds of complex cognitive impairment, and care and treatment related to an involuntary admission. The scope of the power is further narrowed by the qualification that the court can only exercise the power to dismiss the charge if the court is satisfied that “if the person were found guilty, under the *Sentencing Act* the court would dismiss the charge unconditionally or otherwise decline to record a conviction”. Accordingly, s. 73A(2)(b) would not apply to many clients with a cognitive impairment as they would not meet the threshold.

Secondly, the remainder of the Division, including the provisions which enable the court to obtain advice from health professionals on the defendant’s health needs and possible care or treatment under the Act, is premised on the powers under the Division being exercised in relation to a person with a mental illness or mental disturbance, not a person with a cognitive impairment. For example, under s. 74A(1)(b) and (2)(b), following advice from the Chief Health Officer, the court can order an assessment and a report of the assessment of a person who may require care and treatment under the Act. The remainder of s. 74A specifies the contents of the report and sets out detailed requirements in relation to mental illness and mental disturbance, but is silent on the possibility of an assessment of complex cognitive impairment. Section 75 confers powers on the court to act on the assessment ordered under s. 74A to facilitate the care and treatment of the person under the Act. However, the powers are only available if the court is satisfied, after receiving a report prepared under s. 74A, “that the person fulfils the criteria for involuntary admission on the grounds of mental illness or mental disturbance”. Once again, the provision is silent on the question of complex cognitive impairment.

Having regard to the scheme as whole, it seems that it was not intended that the powers conferred on the court under the Division be exercisable in relation to a person with a complex cognitive impairment; rather, the scheme was designed to confer powers on the court in relation to people with mental illness or mental disturbance, and has not been amended to take into account the amendments made to the civil scheme under the Act for the involuntary admission of people with complex cognitive impairments. Section 73A(2)(b) doesn’t quite fit with the provisions concerning people with complex cognitive impairments. Without a scheme for obtaining guidance from health professionals on the needs of a person with a complex cognitive impairment who may fall within the scope of the s. 73A(2)(b) power, it is little wonder that this provision has not yet, as far as we’re aware, been utilised for people with a complex cognitive impairment.

Finally, despite the underlying policy of the division, the “all or nothing” approach under s. 77 also applies to an order under s. 73A(2)(b), given that the related provisions conferring power on the Court to facilitate the treatment and care of the person under the Act (such as s. 75) only apply to defendants with a mental illness or mental disturbance. Thus, the parties and the Court may be reluctant to utilise the scheme in circumstances in which a person requires care or assistance, or some form of limited supervision by the Court or service-providers to protect the defendant, the victim or the community from a risk of harm, and to protect the defendant from repeated contact with the criminal justice system.⁴⁵

Implications

⁴⁵ Law Reform Committee, Parliament of Victoria, above n 7, 232.

The absence of a specific scheme for people with cognitive impairment before the Court of Summary Jurisdiction poses very difficult challenges for legal representatives of people with cognitive impairment charged with low-level offences. The legal representative essentially needs to decide whether to advise the client to proceed with the matter in the lower court and accept that the client may be dealt with in the same way as any other client despite the special needs and circumstances of the client, or the legal representative may seek to have the matter dealt with in the Supreme Court under Part IIA if questions of fitness arise and risk an indefinite supervision order which could be served in prison, if secure care facilities are unavailable. This choice has recently become even more difficult with the introduction of a new, onerous mandatory sentencing scheme in the Northern Territory.

Mandatory sentencing

The new mandatory sentencing scheme, which commenced on 1 May 2013, is a significant expansion on the limited mandatory sentencing scheme in place immediately before its commencement. It applies to a broad range of violent offences, and will see many defendants receiving a sentence of actual imprisonment in circumstances in which it would be more appropriate to deal with the defendant in another way. The interaction between s. 73A(2)(b)(iii) and the mandatory sentencing scheme creates some specific and quite technical complications. Arguably, the Court could not dismiss a charge against a person who, if found guilty, would be subject to mandatory sentencing under the *Sentencing Act*. This is because, in those circumstances, it would not be possible under the *Sentencing Act* to dismiss the charge unconditionally or decline to record a conviction. Thus, mandatory sentencing would effectively narrow the scope of the already very limited diversion option even further.

The mandatory sentencing scheme is also problematic more generally in its application to people with a cognitive impairment. It epitomises how irrational, unjust and unfair mandatory sentencing is, given how inappropriate and ineffective a sentence of imprisonment may be when imposed on a person with a cognitive impairment convicted of a low-level offence. Justice Mildren's scathing criticism of mandatory sentencing in *Trennery v Bradley* (1997) 6 NTLR 175⁴⁶ once again rings true: "[p]rescribed minimum mandatory sentencing provisions are the very antithesis of just sentences".

Case study three: Joe

Joe has been diagnosed with a cognitive impairment and is under an adult guardianship order. He receives 24/7 care and lives with his son, who is now a young adult. Joe has been charged with aggravated assault. The victim of the assault was his carer. The assault occurred when Joe became agitated and frustrated by a small change in routine. The carer was unable to de-escalate the situation. This is not an unusual situation.

Ordinarily, an offence of this nature would be dealt with summarily. However, Joe's lawyer is faced with a dilemma. If the matter is dealt with summarily, there are no diversion options available. The client does not have dual diagnosis of mental illness, and would not meet the criteria for dismissal of the charge under s. 73A(2)(b). If the matter is dealt with summarily, the client will probably be found guilty, and therefore there is a risk that the client would receive an actual sentence of imprisonment because mandatory sentencing would apply to this particular client.

⁴⁶ *Trennery v Bradley* (1997) 6 NTLR 175, 187.

The alternative is to seek to have the matter sent up to the Supreme Court so that the matter may be dealt with under Part IIA of the Criminal Code. The first issue is that the question of fitness is not clear-cut, so there is a risk that by dealing with the matter in the Supreme Court, Joe will be exposed to a higher maximum sentence. The second issue is that Joe may be at risk of spending an indefinite period of time in prison under a custodial supervision order, should the Court find that Joe is not guilty of the offence because of his mental impairment.

Prison is a real risk one way or another. If the matter is dealt with summarily, there is no guarantee that Joe's lawyer will be able to satisfy the court that the mandatory minimum sentence of imprisonment should not apply on the grounds of exceptional circumstances. Even if the court is satisfied that exceptional circumstances exist, the court only has the power to partly suspend a sentence of imprisonment (see *Sentencing Act*, ss. 78DO and 78DG). On the other hand, if the court is satisfied that it is required to impose a mandatory minimum sentence of imprisonment, Joe will receive the minimum three months sentence of imprisonment, and thus will not receive the programs and support he needs in prison because he will only be serving a short term. Joe is unlikely to fully understand why he has been sent to prison, and will be unsettled by the separation from his daily routine and familiar people. It is highly possible that, in a state of agitation, he will assault a prison officer or another inmate, starting another round of criminal proceedings.

Recommendations

If the current mental health regime in the Northern Territory is largely inapplicable to people with a cognitive impairment and the normal criminal justice system mechanisms are often inappropriate, ineffective and unfair in their application to people with a cognitive impairment, what should be done? To stop cognitively impaired people charged with relatively low level offences from entering and re-entering the prison system, it is important that we identify, assess, divert and support those who come before the Northern Territory's Court of Summary Jurisdiction.⁴⁷

Currently, because of the absence of a legislative scheme specifically designed for the needs of people with a cognitive impairment charged with low-level offences, because of mandatory sentencing, and because of the absence of comprehensive and culturally appropriate assessment and support services and options, we consider that the Northern Territory is contributing to the overrepresentation of Aboriginal people with cognitive impairment in the prison system, and the overrepresentation of Aboriginal people more generally in the prison system. Unless the law is changed and the system is appropriately resourced, our lower courts, which deal with the vast majority of criminal matters, will continue to hand down inappropriate and ineffective sentences, including custodial sentences, to people with a cognitive impairment. The needs of people with a cognitive impairment with offending behaviour will remain unaddressed.

Changes to existing legislation

As a starting point, is essential that mandatory sentencing does not apply to a person with a cognitive impairment. It is also essential that the *Bail Act* is amended to make bail more accessible, and that programs and services are put in place to support people with a cognitive impairment on

⁴⁷ Mindy Sotiri, Patrick McGee and Eileen Baldry, above n 2, 11; NSW Law Reform Commission, above n 1; Mick Gooda, Aboriginal and Torres Strait Islander Social Justice, above n 5.

bail to ensure that they are not disadvantaged in bail decisions because of a lack of access to suitable accommodation and appropriate support services.⁴⁸

New legislative diversion scheme

The Northern Territory needs to develop a legislative scheme particular to the needs of cognitively impaired people proceeded against summarily which provides effective diversion and therapeutic intervention options to the court. The scheme must not conflate mental illness and cognitive impairment, but it must also be flexible enough to be work effectively in cases in which an individual has a dual diagnosis of mental illness and cognitive impairment.⁴⁹

The legislative scheme should confer broad and flexible powers on the court to enable the court to utilise a range of pragmatic diversion options, where appropriate. The term diversion is used in the wide sense to refer to “any alternative [to the mainstream] processing option”.⁵⁰ Thus, it is recommended that the court have broad powers to adjourn proceedings or make other case management orders, dismiss proceedings and discharge the defendant, order the development of a diversion or management plan and tailor orders to facilitate completion of the diversion plan, or make referrals to appropriate programs or support services.⁵¹ As the needs of people with a cognitive impairment vary considerably, and the circumstances of each case will necessitate different responses, it is important that the court has considerable flexibility in determining how best to deal with a defendant with a cognitive impairment.⁵²

Diversion is generally recognised as an important response to offending by people with a cognitive impairment,⁵³ although some concern is sometimes expressed in relation to the risk of ‘net-widening’ and trapping people in the criminal justice system for longer than is necessary or is appropriate in order to facilitate the completion of a diversion program.⁵⁴ Whilst the NSW Law Reform Commission acknowledged this concern in its recent report on the diversion of people with cognitive and mental health impairments in the criminal justice system, and acknowledged that the evidence-base underpinning specific diversionary options and programs is still in development, it concluded that, “taking all the evidence into account, it is our view that diversion can be an effective means of reducing reoffending and producing better outcomes for people with cognitive and mental health impairments”.⁵⁵ We consider that some of the potential problems with diversion schemes, including the risk of ‘net-widening’ could be addressed by ensuring that any legislative diversion scheme confers broad discretion on the court to dismiss proceedings and discharge the defendant

⁴⁸ See generally, Eileen Baldry, Leanne Dowse and Melissa Clarence, above n 7, 4; NSW Law Reform Commission, above n 1, 156.

⁴⁹ See generally Abigail Gray, Suzie Forell and Sophie Clarke, above n 22, 2.

⁵⁰ NSW Law Reform Commission, above n 1, 26.

⁵¹ NSW Law Reform Commission, above n 1; see generally Law Reform Committee, Parliament of Victoria, above n 7; Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 142.

⁵² See NSW Law Reform Commission, above n, Ch. 9.

⁵³ Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 14, 139, 142; NSW Law Reform Commission, above n 1; Samantha Parkinson and Sara McLean, above n 13, 144; Abigail Gray, Suzie Forell and Sophie Clarke, above n 21, 11; Linda Steele and Andrew Howells, ‘Enabling Justice: A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System’ (Intellectual Disability Rights Service, Coalition on Intellectual Disability and Criminal Justice and NSW Council for Intellectual Disability, May 2008) .

⁵⁴ NSW Law Reform Commission, above n 1, 45.

⁵⁵ *Ibid.*

unconditionally, and to make unsupervised referrals to appropriate services or programs. This means that the court can deal with matters quickly and fairly, where appropriate.

Crucially, a new legislative diversion scheme must include a clear process to enable the Court to obtain an expedient assessment of an individual's known or suspected impairment from appropriately qualified health practitioners, and to require appropriately qualified health practitioners and welfare professionals to develop a management plan, provide advice or report on the health and welfare response to the defendant's offending behaviour.⁵⁶ This is essential. Neither legal practitioners nor magistrates are qualified to identify and assess a suspected cognitive impairment, determine the best response to complex behaviours related to that impairment, or to assess the effectiveness of support or programs provided to an individual with a cognitive impairment to address offending behaviour.⁵⁷ Without access to expert advice and information, the court will not be able to respond to the individual's needs.⁵⁸

Specialist list or court

An additional measure the Northern Territory may wish to consider implementing is a specialist list or specialist court to facilitate a 'problem-solving approach' to serious offending by a person with complex needs, such as a person with a mental illness, a cognitive impairment, or both, who is at risk of receiving a sentence of imprisonment.⁵⁹ Problem solving (or solution-focused) courts offer a mechanism for addressing both the offender's health needs, and aspects of the social disadvantage the offender is experiencing, such as lack of housing and drug and alcohol issues, which contribute to the offending.⁶⁰ The process is non-adversarial and involves examination of the causes of the offending behaviour, and the development of a sentence that connects the offender with appropriate services and programs. The judicial officer must actively engage the offender in the process, should review the matter regularly, should use techniques informed by therapeutic jurisprudence, and should use evidence-based interventions aimed at addressing the underlying causes of offending behaviour in collaboration with a multidisciplinary team and external service providers.⁶¹ Research indicates that because problem solving courts sit between the criminal justice system and health and human services, "to be effective, collaboration, coordination and communication is essential".⁶²

It is notable that, after reviewing existing problem-solving courts operating in Victoria, the Victorian Parliament's inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers recommended the expansion of problem-solving court models currently operating in the Magistrates' Court to improve accessibility. However, whilst the problem-solving model can be an effective and positive response to offending by people with a cognitive impairment, it may not be an appropriate response to more minor offending, given that it will result in people spending a relatively lengthy period of time under court supervision. Research

⁵⁶ NSW Law Reform Commission, above n 1, 170-171,260.

⁵⁷ Ibid.

⁵⁸ See Heather Douglas' discussion on this issue in relation to FASD, above n, 228-230.

⁵⁹ See NSW Law Reform Commission, above n 1, 298-303.

⁶⁰ Michelle Edgely, 'Solutions-focused court programs for mentally impaired offenders: What works?' (2013) 22(4) *Journal of Judicial Administration* 207, 216; Law Reform Committee, Parliament of Victoria, above n 7, 247-248.

⁶¹ Michelle Edgely, above n 60; see also Law Reform Committee, Parliament of Victoria, above n 7, 247-248.

⁶² Michelle Edgely, above n 60, 219.

also indicates that this approach is more effective when applied to people with serious offending behaviours.⁶³

Resourcing

Interestingly, Baldry et al. have noted that diversion and therapeutic initiatives implemented in Australia seem to have had limited success over the long term in preventing people with mental health problems and cognitive disabilities from having repeated contact with the criminal justice system. However, they state that:

“This has been due to poor planning, inadequate identification and referral; lack of commitment from and integration with psychiatric services; inadequate resources and lack of suitable accommodation.”⁶⁴

Accordingly, it is critical that any new legislative scheme implemented is well-resourced as the integrity and effectiveness of the scheme will depend on the quality and accessibility of the services supporting it.⁶⁵

The need for increased resources includes funding education and training for practitioners, courts and other people working in the criminal justice sector to ensure that all stakeholders are equipped to identify a person with a possible cognitive impairment and can make the appropriate referral for an assessment.⁶⁶ If a cognitive impairment is not identified, legal representatives, prosecution and the court cannot respond appropriately, even in a model system.⁶⁷

Funding must also be provided to support the development and implementation of reliable, appropriate and comprehensive assessment tools and to ensure that comprehensive assessments can be carried out expediently when required by a legal practitioner or the court. This is critical to the success of any lower court diversion scheme as both legal practitioners and the court may be reluctant to utilise diversion options if pursuing it will significantly delay resolution of the matter.⁶⁸

There must be a range of services, both in the community and in the criminal justice system, capable of supporting the varied and complex needs of people with cognitive impairments. This includes the provision of services capable of supporting people with a cognitive impairment who live in remote communities, do not speak English as a first language, or have a dual diagnosis or co-morbidity. These services must also be able to work with the court efficiently and effectively. In this regard, the NSW Law Reform Commission has noted that a ‘bridge’ between the criminal justice system and the service sector is an important factor in a successful diversion scheme. The ‘bridge’ might be a specialist case worker who can move between the criminal justice system and the service-sector,

⁶³ Michelle Edgely, above n 60, 222-223.

⁶⁴ Eileen Baldry, Leanne Dowse and Melissa Clarence, above n 7, 5; see generally Michelle Edgely, above n 60.

⁶⁵ See Linda Steele and Andrew Howells, above n 53, 45. This report discusses this issue in the context of the legislative diversion scheme available to NSW Local Courts.

⁶⁶ See generally Heather Douglas, above n 30, 12; see also Abigail Gray, Suzie Forell and Sophie Clarke, above n 21, 11; Linda Steele and Andrew Howells, above n 53, 60; Law Reform Committee, Parliament of Victoria, above n 7, 222.

⁶⁷ See for example, discussion in Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n 13, 141-142.

⁶⁸ See Linda Steele and Andrew Howells, above n 53, 36.

report back to each sector on developments, and can provide a case management service or work closely with a case manager.⁶⁹

For those who slip through the net and become victims of the prison system, we need to ensure that appropriate programs and supervision exist to support their health and social needs during their term of imprisonment and post-release. This is vital if we are to prevent them from coming before the court again, as so often happens.

Conclusion

Properly resourcing the services and programs needed to support legislative and policy changes is perhaps the most challenging aspect of the response for all jurisdictions, but it is particularly challenging in the Northern Territory where the remoteness of many communities makes the delivery of services difficult. However, the difficulty of implementing a responsive and effective system cannot be used as an excuse. We need to help the most vulnerable members of the community avoid the criminal justice system and safely continue life in the community. The first step is to pull off the invisibility cloak and recognise their existence, and their particular needs. This should be at the forefront of every practitioner's mind.

⁶⁹ NSW Law Reform Commission, above n 1, 173.

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ⁱ The title of this paper was inspired by the title of the recent report by the Education and Health Standing Committee, Parliament of Western Australia: *Foetal Alcohol Spectrum Disorder: the invisible disability*, Report no. 15 (2012).

ⁱⁱ The author acknowledges the contribution of Mark O'Reilly , Principal Legal Officer of the Central Australian Aboriginal Legal Aid Service (CAALAS). The author also acknowledges the contribution of Tania Collins, Senior Criminal Lawyer at CAALAS whose experience representing clients with a cognitive impairment provided the impetus for this paper.