

Criminal justice system

Families said people with intellectual disability often didn't understand how the justice system worked or what was criminal conduct.

Wendy said her adult daughter, Kate, had poor impulse control and no understanding of the consequences of her actions:

'She takes people's credit cards where she can get them and uses them to buy all the [smart phone] apps and things that she can. ... She's done it to my sister. She's done it to me. She's run up thousands of dollars in, you know, charges and I suspect she's done it to other people as well. No one has ever made a complaint to the police about it, but if there was a complaint made to the police about it, then I have been told by the police that there would be likely to charge her. And the problem with that is that she does know at some level that it's wrong to do that, and obviously she's smart enough to go and do it, but at the same time she is no understanding of the consequences of that action and what illegal is. ... She has very poor impulse control.'

Wendy said Kate found some laws difficult to comprehend:

'She was talking to another young boy and was sharing quite a lot of pornographic material. ... That boy then started sharing pictures of young girls with her. The difficulty in explaining to her that that was illegal to go and do that — it was a real challenge. ... At first, we tried the gentle approach of talking about it and then — see, this is the thing. You get to the stage where you get so frustrated and you say, "If you don't stop doing this we'll have to go to police about it or will have to go and speak to the boy's parents."'

Advocates said that people with intellectual disability were often at the mercy of the justice system — their complaints ignored if they were the victims of crime, their rights often not understood and therefore inaccessible if they were accused of a crime.

Jessica, an advocate specialising in the justice system, said:

'One of the things I think that's hugely problematic ... is the criminalisation of behaviour. When institutions closed a lot of those people who came out of institutions became caught up in the criminal justice system because they came with a range of behaviour that was socially unacceptable. ... And when you have people who've been used to institutional life and those standards, you know, the terrible shock of coming out into a society that doesn't accept that kind of behaviour is terrible. And it's really, really traumatising to people.

'Over the years I've worked with a number of clients who've been convicted of sexual offences — very kind of low-level sexual offenses — that were exactly that cohort of people. They're men in their 50s and 60s who grew up in institutions ... There was no idea that people with intellectual disability might want to have a sexual relationship.

'I worked with a man a few years ago who had that exact life story. He'd grown up in an institution, had spent a lot of time in institutions. As an adult he had a lot of very problematic

behaviour, including sexual behaviour and fire lighting. ... And, so, he lived in a group home, and he had been convicted of sexual offences on a few occasions, but the time that I encountered him was just after he'd been convicted of masturbating on a bus [in 2014].

'He used masturbation to self-regulate and to self-soothe. He had huge anxiety and found it very difficult to go outside ... due to his institutional upbringing. ... And so, there were times when he became incredibly anxious and, you know, he would do things like run away from people, run home and cry. ... But also, masturbation was one of the things that he did when he felt really upset and unable to cope.

'He was on a bus. One day he started to feel really anxious. He started masturbating. ... The bus driver diverted the bus and took him to the police station. He was held at the police station. He was interviewed. He didn't understand any of it. He was a man with a moderate intellectual disability and schizophrenia. He didn't really understand what was going on.

Jessica said that people with a cognitive disability found it very hard to not speak in an interview:

'So, this guy of course went to the police station, had an ITP [independent third person], broke down crying, unable to deal with it, incriminated himself. So, of course, then there's absolutely no chance that the person can plead not guilty once they've done that. And then the pathways for that kind of thing in the court system are so limited that, basically, even though that behaviour was accepted for him in an institution ... the result for him is being criminalised.'

Jessica said her client received a suspended sentence:

'Even though the justice system is very gentle on people like that, it's still the fact that that behaviour is criminalised, the message that he then receives is: your behaviour is not safe and if you go out in public, there's a chance the police might come and pick you up and take you to be questioned, which is an absolutely terrifying experience. ...

'You can't really understand that you're not going to prison. ... It can really change the way that they live their lives. It can mean that they become scared to do normal activities because they're not able to identify what might get them into trouble and what won't. I've had lots of people I've worked with who haven't understood that they're allowed to have an adult sexual consensual relationship, because as soon as they did get into trouble for any kind of sexual behaviour, the message they get is, "Well, I guess I'm not allowed to have any sexual behaviour."'

Jessica said:

'For a person who displays offending behaviour in the community, the first response should be from a disability system. It shouldn't be from the criminal justice system. It shouldn't be pathway into incarceration and a lifetime of torture. There should be greater funding for forensic disability services in the community that actually have human rights as the focus and quality of life and aren't about the risk-treatment paradigm, because you know what you find frequently for people with intellectual disability who offend is that their quality of life in the community is terrible anyway. And so, there are times where the offending is a protest against that. So, it might be a protest against kind of restriction discrimination.

'If there are disability services that are able to wrap around a person and create the kind of life that gives the person agency and self-determination, then there is likely to be less need for the criminal

justice response. ... There needs to be a much, much, much bigger response from the state to manage people when their needs are related to disability. ...

'It's about cognitive privilege. ... As soon as you start talking about anyone with a cognitive problem, there's so much discrimination and so much of people saying, "Well, that's not what we do. We do this thing and we can't work with people like that because they won't understand our program." ... The state needs to invest in addressing discrimination in this area, to address the reasons why people end up in prison.

'People with cognitive disability in general – so brain injury and intellectual disability – should have the right to have their offending related needs addressed by disability systems, not by the justice system. It's almost like they need a translator or something [to navigate the justice system].'

Jessica said another glaring issue was the lack of services and supports in the justice system for female offenders with disability. In Victoria, for example, she said that the Department of Health and Human Services ran the Forensic Disability Program that worked with offenders with a cognitive impairment to reduce recidivism.

She said:

'It was only last year that they [DHHS] even considered the idea of taking women there [to the Program], which meant that any woman who had committed a serious enough offense and needed treatment just didn't have that option, had to sit out a sentence in prison because there was no other option. ...

'There's one woman [aged in her 20s] that I worked with last year who was unfit to be tried, so she ended up on a custodial supervision order, so she ended up doing a stint in prison. Often, when people end up in prison on a custodial supervision order ... it's because of lack of support and services in the community. ...

'In that woman's case, it was because she didn't have the support available to be in the community, so she ended up in prison for about six months. ... She's a woman with a moderate intellectual disability, she presents as very, very, very naive. Very unable to cope with the prison environment. If she'd been out in a mainstream unit, she would have been taken advantage of in about 20 seconds. Her interests were kind of talking about makeup and jewellery and Taylor Swift, painting her nails. Very kind of feminine and girly, but not necessarily in a conventional way.'

Jessica said the only safe place in the prison system for such a naive inmate was the mental health unit:

'And, so, the staff in the mental health unit had to provide extra resources to be able to basically supervise her 24/7 because they weren't able to leave her on her own. ... She also had borderline personality disorder and was very much unable to manage emotion. She was not able to regulate herself and so she would become incredibly distressed and at times, when she became very very distressed, they were not — they weren't really able to manage her and so she ended up having to sometimes to be secluded, essentially, because that was the only way that they could manage it.

'So, her time there was incredibly stressful and difficult ... because the staff put in so much work and to try to make her feel safe and to try to help her to manage that she became very dependent

and very reliant on the staff, and so then it meant that it was much harder for her to transition out of prison.'

While in prison, the woman made friends with another inmate, who then died by suicide.

Jessica said:

'The impact of prison for people with disability is so much greater and the punishment is ... so beyond what it is for any other member of the community because ... you're not just punishing them by withdrawing them from society and making them feel bad. You're also causing massive impact on their mental health. ...

'We take a person who we acknowledge is not able to understand the wrongness of their own conduct. We accept that she's not able to understand the legal process. We accept that in some senses she's not guilty because she's not able to be held accountable. And yet we put her in prison and make sure that she stays in prison for a length of time where she becomes completely disconnected from her community and that she's traumatised by what she sees around her. She's traumatised by the fact that she doesn't have disability-specific support that is able to work on living skills and capacity building. ... And then we expect her to go out into the community again after this incredibly damaging experience and function ... and not go and offend again.'

Another advocate, Sophie, said:

'I've certainly had examples of people who were left in a jailhouse ... because legal aid was refused and the public trustee wouldn't release funds to pay for legal representation, which is not particularly good for someone who's not able to communicate verbally.

'I had a gentleman who, unfortunately, made the choice to stab one of my support workers and threaten somebody else. The police came and he was arrested and he was taken to the local courthouse and I had a phone call from the legal aid lawyer he was given that day, saying that he wasn't communicating with the court, but that my choice as the manager of the service was to either have him going to ... our forensic mental health service here ... or allow him back in the house that day with those residents ... because there was no in between. So, I had to choose. ... I tried to refuse to choose and I think I even cried at the man and said, like, "You can't make me do this," but I ended up having to choose for him to be detained for the safety of other people. And that's not [my] decision to make.'

Vicky said police could be both overbearing and understanding — illustrating her point with two stories about Trevor, a man with an intellectual disability.

In the first case, Trevor became upset and threatened a support worker. The police were called. When the police arrived, Vicky offered to help talk to Trevor to calm him down. The police ignored the offer — immediately subduing Trevor with capsicum spray and manhandling him into a divisional van.

In the second case, Trevor burned down his house.

'I met him at the police station where he was interviewed,' Vicky said. 'We took him to the hospital and in the hospital they said, "He can't stay here. He's not sick." I said, "See the man who's extremely agitated? He's just burned his house down." ... I said, "There's nowhere to go. It's not safe in a motel." And then my big bosses called me and the guardian [had] said, "Just relinquish care to the hospital. Just walk out."'

Vicky said that the police deemed it wasn't in the community's interest to press charges for the fire: 'Another person would have been charged with arson.'

Another advocate, Donald, said that there were 'lots' of examples of police demonstrating 'gross indifference' towards the rights of people with intellectual disability.

He said:

'We had young woman with Down syndrome who was raped, but the police weren't interested in really taking a statement. We had to also do things to get them to take a statement. And then you know when it went to court ... we couldn't take any further because the other side made it very clear that to the process would rip her to bits. ...

'I got an email from the sister of a young man with autism. ... She still hasn't got over — I'm sure that her brother hasn't either — an experience at St Kilda police station a few years ago where they went in to ask for some assistance for something. And they were waiting, and her brother started to demonstrate his behaviours. And the police reacted. Jumped on him, basically. Applied a knee to his neck. Incredibly traumatic. And, luckily, it was caught on video. ...

'Police have been increasingly used to sort out problems in group homes. ... Staff, these days, will just, rather than try and mediate or try and resolve issues between ... residents and staff or residents and residents, they'll phone the cops. And the cops get very sick of that, so they sometimes come in more frustrated than they should be. ... Systemically, at that frontline, it is the failure of the system and it's the abuse of the police, putting them into roles that they should not be in. The staff themselves need to be skilled. They need to have crisis-response teams. There needs to be a whole lot of things to back up that support right before they start phoning the police. It's just way over the top. ...

'The failings of the service system often show themselves up, show up and play out in the justice system. Lots of people get to the justice system that are only there because the disability support system has failed them.'

Case Study: Torture

This is a story of how the criminal justice system treats people with intellectual disability.

Keith was 19.

He had an intellectual disability and schizophrenia. He had grown up largely within the child protection system, been fostered, experienced trauma and, by the age of 13, started using drugs.

'He had become quite heavily reliant on heroin at one point and then subsequently ice, and so his offending was, you know, armed robberies, car-jackings, that kind of thing,' an advocate said.

'He ended up in prison and when he first went to prison, he went off his anti-psychotic medication and so psychosis started to come back. His behaviour became really unmanageable. He went to Thomas Embling [forensic psychiatric hospital] for a while, was treated, was stabilised, went back to prison. Then, you know, his behaviour was not manageable from that point on, despite the fact that he was technically mentally well, and so he ended up in management.'

In the Victorian corrections system to be placed in 'management' — which is colloquially called 'the slot' — means that an inmate is locked in their cell for 23 hours a day, receiving meals through a slot in their cell door and allowed out for one hour to exercise by themselves.

The advocate said:

'Some of the very worst stuff I've seen in the justice system is people with intellectual disability being held in management units, which again is not uncommon. Often, people with intellectual disability when they go to prison, if they are pretty street smart ... they might go to a mainstream prison unit or they might go somewhere where there's some level of protection, but it's not a specialist unit. But then there are specialist units for people with intellectual disability, but often their behaviour can't be managed in that unit, and so the only other option is ... the slot. ... Some people end up there for months. ... There have been a few women with cognitive impairment who've been in the slot for months at a time.'

The advocate vividly remembered visiting Keith after the 19-year-old after he had been in management — and therefore solitary confinement — for more than a month:

'I went to visit him in management and he came out in handcuffs and leg shackles and was handcuffed to the table and I was basically told not to not to go anywhere near him because he might hit me. ... He was a completely different person. He was just, he was just broken. ... If you look at the UN definition of torture it [the slot] fits the definition of torture. It was cruel and inhuman treatment for a person with disability.'