

The discrimination and criminalisation of childhood neurodevelopmental impairment

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Definitions

Childhood neurodevelopmental impairment: physical, mental or sensory functional difficulties caused by disruption in the development of the nervous system, such as:

- cognitive or executive functioning deficits;
- specific learning difficulties;
- communication difficulties;
- difficulties in regulating and expressing emotions, or understanding the emotions of others.



Definitions

Neurodevelopmental disorders: ‘a group of conditions... [which] typically manifest early in development, often before the child enters grade school, and are characterized by developmental deficits that produce impairments of personal, social, academic, or occupational functioning.’ (APA, 2013)

Such disorders include:

- intellectual / learning disability;
- specific learning disabilities, e.g. dyslexia;
- communication disorders;
- attention-deficit / hyperactivity disorder;
- autism spectrum disorder;
- fetal alcohol spectrum disorder.

Nobody made the connection:



The prevalence of neurodisability in young people who offend

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Prevalence of neurodevelopmental disorders (Hughes et al, 2012)

Neurodevelopmental disorder	Definition (based on APA, 2013)	Prevalence among young people in general population	Prevalence among young people in custody
Learning / Intellectual Disability	Deficits in: cognitive capacity (measured by an IQ score of less than 70); and adaptive functioning (significant difficulties with everyday tasks)	2 - 4%	23 - 32%
Communication Disorders	Problems with speech, language or hearing that significantly impact upon an individual's academic achievement or day-to-day social interactions.	5 - 7%	60 - 90%
Attention-Deficit / Hyperactivity Disorder	Persistence in multiple symptoms of inattention, hyperactivity and/or impulsivity	1.7 – 9%	12%
Fetal Alcohol Spectrum Disorder	Reduced height, weight, or head circumference; characteristic facial features; deficits in executive functioning, memory, cognition, intelligence, attention, and/or motor skills; resulting from prenatal alcohol exposure	0.1 – 5%	11 – 21%

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The Prevalence of Traumatic Brain Injury Among Young Offenders in Custody: A Systematic Review

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Prevalence of traumatic brain injury (Hughes et al, 2015)

Nature of TBI	Prevalence among young people in general population	Prevalence among young people in custody
Any head injury	24 – 42%	49 – 72%
Head injury resulting in loss of consciousness	5 - 24%	32 - 49.7%
Head injury resulting in loss of consciousness for 20 minutes or more	5%	18.3%
More than one head injury	9.2 – 12%	45 – 55%

Understanding pathways into custody

1. Symptoms and expressions may increase propensity to antisocial behavioural traits (e.g. social communication; socio-cognitive skills; impulse control; cognitive empathy)
2. Such deficits may increase exposure to social and environmental risk factors (e.g. educational disengagement; peer pressure; parenting challenges)
3. Criminal justice processes and practices may *disable and criminalise* young people

Policy and practice responses need to address all three of these effects

Risk factors for childhood aggressive and antisocial behaviour

Poor theory of mind

Executive functioning deficits

Social communication difficulties

Poor emotional literacy

Difficulties with abstract reasoning

Poor emotional regulation

Poor cognitive empathy

Impulsivity

High arousal

Reactive aggression

Failure to recognize consequences of action

Impairments associated with antisocial behaviour

- **Deficits in executive functioning** can lead to decreased inhibition, poor anticipation of consequences of action and/or an inability to recognise inappropriate behaviour
- **Communication impairments** can result in inappropriate language and non-verbal communication for the social context, difficulties understanding and expressing emotions and the use of challenging behaviour as a means to communicate feelings
- **Emotional functioning deficits** can lead to misreading of social cues that may elicit aggression, rule breaking, or an inability to empathize with the feelings of potential victims

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The social model of disability

‘Impairment is the functional limitation within the individual caused by physical, mental or sensory impairment. Disability is the loss or limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical and social barriers.’

(Barnes, 1991, p.2)

BUT we need to:

- move beyond the binary distinction of ‘impairment’ and ‘disability’ to recognize their inter-relationship
- understand the intersections between disability of other forms of social disadvantage and difficulty (e.g. poverty)

(Dowse et al, 2009)

Lack of screening, assessment and awareness

- Screening or assessment to identify neurodevelopmental impairment is rare within criminal justice agencies, prior to sentencing, or even custodial intervention (Baldry et al, 2018; Stewart, 2016; Hughes et al, 2017)
- Criminal justice professionals are not routinely provided with training or operational guidance regarding how to identify and respond to signs of developmental difficulties (Baldry et al, 2018; Booth et al, 2017)
- Restricted access to specialist services can mean that a criminal justice response may be the only way to ensure access to support, contributing to the routine and deliberate criminalisation of mental illness (Hughes et al, forthcoming; Skowrya and Cocozza, 2007).

Restricted access to justice

- Cognitive functioning may not correspond to the levels expected at the age of criminal responsibility, or therefore match inherent assumptions about capacity to engage in the legal process at a certain age
- Terminology and conceptual language can be particularly difficult for young people with neurodevelopmental impairment to understand (Sanger et al, 2001; Wszalek and Turkstra, 2015)
- Forensic interviewing techniques pose barriers to those with difficulties in narrative language skills (Wszalek and Turkstra, 2015)
- Communication difficulties can lead to 'monosyllabic, poorly elaborated and non-specific responses', 'poor eye-contact and occasional shrugs of the shoulders', which may be misinterpreted as 'deliberate rudeness' and 'willful non-compliance' (Snow and Powell, 2012)

Inappropriate criminal justice interventions

- A lack of awareness of neurodevelopmental impairment leads to a lack of understanding of the causes and contexts of offending behaviour
- Specific learning support needs can affect an ability to engage with criminal justice interventions, e.g. receptive language, learning difficulties, memory.
- Interventions are often highly verbal or utilise metacognitive skills to reflect on behaviour ('thinking about one's own thinking'), which pose considerable barriers for young people with impairment (Snow and Powell, 2012)
- There is typically limited specialist services or responsive provision, despite evidence for the effectiveness of particular approaches
- Inappropriate interventions may exacerbate or create new difficulties, and amplify the risk of future criminalisation, e.g. through failure to addressing causes of offending, or through increased risk of breach of an order

Criminalising TBI?

This is inherently tautological: the failings of the system to effectively support these young people so as to prevent re-offending reinforce their involvement with the system and its continued failure to do so, resulting in a higher subsequent risk of eventual custodial intervention.

Hughes, N. and Chitsabesan, P. (2015) **Justice Matters: Support for young people with neurodevelopmental impairments**, Centre for Crime and Justice Studies Working Paper, CCJS: London.

Damaging experiences of custody

- The transition between community and custody can effect continuity of care and support, and cause stress that can exacerbate certain difficulties
- Young people with neurodevelopmental difficulties are at greater risk of being subject to restraint techniques, due to a lack of understanding of the influence of functional deficits on compliance (e.g. Talbot, 2008)
- Educational and rehabilitative interventions rarely take account of specific learning needs and styles
- Young people with neurodevelopmental difficulties are at greater risk of bullying (Gooch and Treadwell, 2015), and self-harm or suicidal thoughts (Chitsabesan et al, 2015; Hughes et al, 2018)

Rethinking principles of youth justice?

To what extent do the key principles underpinning youth justice apply in the context of impairment?

- ‘Deterrence’: sentencing a person guilty of a crime in such a way as to ensure that the punishment is sufficient to deter the guilty person, and others, from committing the same crime.
- ‘Rehabilitation’: interventions are intended to reform / change behaviour and promote general well-being.
- UN Standard Minimum Rules for Juvenile Justice: intervention must be ‘in proportion... to the circumstances and the needs of the juvenile’ (17.1(a)); ‘The well-being... of the juvenile shall be the guiding factor’ (17.1(d)).

Implications: *increase awareness of cognitive, emotional and communicative impairments*

- ✓ Neurodevelopmental impairment should be recognized as a strong determinant of adolescent involvement with a criminal justice system
- ✓ Routine screening of functional impairments that might influence offending behavior or engagement should be undertaken in court and community justice, as well as custodial settings
- ✓ Screening tools should be adapted for use by criminal justice professionals – i.e. presenting needs, not diagnosis of disorder
- ✓ All staff should have a basic awareness of how neurodevelopmental impairment might influence behaviour and engagement, with significant training for nominated specialist staff

“Recognising signs of possible neurodisability”

(Hughes and Jensen, forthcoming?)

“When speaking to a young person consider whether he or she:

- Has difficulty explaining him or herself
- Relies on other people to answer questions for them
- Shows signs of hyperactivity, fidgeting or can't sit still
- Is easily distracted, or does not listen or concentrate
- Is easily angered or responds aggressively
- Divulges information without considering the consequences of doing so

You might also use a range of short tasks to test certain skills, such as asking the young person to recall a list of words, to name objects, or to write a sentence.”

Implications: *reforming justice processes*

- ✓ Develop generic policing and youth justice procedures, practices and interventions that do not assume cognitive and communicative competence or understanding of procedures – or therefore rely on assessment and diagnosis (*e.g. on next slide*)
- ✓ Awareness of the underlying reasons for presenting difficulties should support more effective measured responses, including in reducing the use of breach proceedings and of restraint in custody. There should be no assumptions that non-compliance is willful or attitudinal.

E.g. altering communication techniques

- ✓ Speaking slowly and carefully, using simple, everyday language, and avoiding technical terms or abstract concepts.
- ✓ Keeping questions simple, avoiding complex sentences with multiple clauses.
- ✓ Enabling a defendant or witness to recall events or tell their story chronologically.
- ✓ Giving sufficient time to process a question, avoiding interrupting during pauses.
- ✓ Maintaining eye contact and ensuring body language is neutral.
- ✓ Supporting communication through visual aids (e.g. prompt cards or photos) and appropriately trained intermediaries (e.g. speech pathologists).

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Implications: *adapting interventions*

- ✓ Interventions must be adapted to take account of specific learning needs or barriers to engagement – e.g. the use of shorter, repeated inputs
- ✓ Evidence-based specialist services should be employed in criminal justice settings to address specific underlying needs
- ✓ The principles of ‘therapeutic justice’ should be applied so as to offer ‘more holistic and less punitive’ support to address causes of vulnerability linked to offending
- ✓ *Please note: This is not about excusing the crime of young people with impairments, but about responding in the most appropriate ways*

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