

EQUAL JUSTICE PROJECT

**Neurodisability and
Therapeutic Justice**

Neurodisability and Therapeutic Justice

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Making the justice system more therapeutic? The case for a different approach.

1. Introduction

According to a 2013 Disability Survey, conducted by Statistics New Zealand, approximately one in four New Zealanders is limited by a physical, sensory, learning mental health or other impairment.¹ People affected by neurodisabilities are placed in an extremely vulnerable situation when they come into contact with the justice system.

As a result, neurodisability has become a complex issue for New Zealand's criminal justice system, and is an issue of growing concern due to the significant over-representation of people affected by neurodisabilities in both the adult and youth justice systems.

This report will provide an overview of neurodisability, consider the current short comings of our justice system, and discuss whether therapeutic jurisprudence should be incorporated into our legal system to a greater extent. The focus of the report will be on youth offenders.

2. Neurodisability and Therapeutic Jurisprudence

2.1 Defining neurodisability

Neurodisability is a broad, umbrella term for conditions that impair the nervous system. Examples of such conditions include, intellectual disabilities, Foetal Alcohol Syndrome Disorder, and Attention Deficit Hyperactivity Disorder (ADHD). These conditions may occur simultaneously. Characteristics symptomatic of most neurodisabilities include impulsivity, low IQ, cognitive impairment, and alienation.² Under s 21(h) of the Human Rights Act 1993, disability is defined to include intellectual or psychological disability or impairment.

2.2 Neurodisability and the Criminal justice system

Having a neurodisability does not mean that a young person will offend. But neurodisability is a risk factor for anti-social behaviour and criminal offending, particularly where a young person is undiagnosed and does not receive appropriate support.³

Broadly speaking, having a neurodisability increases any individual's likelihood of encountering the criminal justice system. This is due to various challenges faced by those with a neurodisability and characteristics associated with neurodisabilities.

It is common for people with a neurodisability to face different degrees of difficulty in various aspects of their lives. There can be mental, social, economic and physical consequences not just for individuals, but for their family and community.⁴ Challenges include struggling to secure employment, difficulties in maintaining relationships and an overall lack of integration

¹ Statistics New Zealand, "2013 Census Population and Dwelling Tables" (03 December 2013) Stats NZ < <http://www.stats.govt.nz/Census/2013-census/data-tables/population-dwelling-tables.aspx>>.

² Kate Peirse-O'Byrne "Neurodisability and Youth Offending: the connection has been made" *The Youth Court of New Zealand* (online ed, New Zealand, 7 October 2014).

³ Nessa Lynch "Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice" (summary of the 2016 Neurodisabilities Forum, Wellington, 12 May 2016) at 7.

⁴ Charlotte Best "Criminal Minds: A Therapeutic Jurisprudence Perspective on Neurodisability and the Criminal Justice System" (2016) 3 PILJNZ 162 at 165.

into society. These challenges are worrisome as they can lead to further deterioration of an individual's disability.

In New Zealand, there is no comprehensive research or statistics on neurodisabilities and its prevalence in youth offenders. However, it is sufficient to note that in a study of 1205 young persons who engaged in sexually harmful behaviour, 54.3% had developmental problems and 25.4% had ADHD.⁵ Further, out of 184 female youth offenders listed on the Auckland Regional Forensic Service client register, 29% had ADHD and 15% had low intellect and/or cognitive impairment.⁶ These figures suggest that a significant percentage of youth offenders have some form of neurodisability

2.3 Defining Therapeutic jurisprudence

Therapeutic jurisprudence supplements the normative role of the law and seeks to minimise law's destructive effects by looking at the potential impact of the law on emotional well-being and psychological health.⁷ Traditionally, therapeutic jurisprudence focused on mental health law and practice, but now it has expanded into many areas of law including criminal law, correctional law, and labour arbitration.

An important feature of therapeutic justice is that it is interdisciplinary, and relies on social sciences to inform legal theory, thus achieving more effective outcomes.⁸ It takes a solution-based approach, and draws upon a range of disciplines to develop or reform new laws or offers procedural guidelines for courts.

3. Youth Justice System

3.1 Overview of the Youth Justice System

This section will provide a brief overview of the youth justice system in Aotearoa New Zealand. It will then consider how certain aspects of the justice system such as, fitness to stand trial, the trial process, and sentencing, impact people with neurodisabilities.

3.2 Summary of the Youth Justice System

The Youth Justice system is primarily governed by the Children, Young Persons and Their Families Act 1989. The youth justice system is designed to respond quickly and appropriately to youth offending.⁹ The system emphasises diversion from courts and custody. It aims hold offenders accountable for their actions, however at the same time to facilitate and provide for the rehabilitation and reintegration of young people, and provide support for their families.¹⁰

Youth who have committed a crime are managed within the justice system dependant on

⁵ Lynch, above n 3, at 7.

⁶ Lynch, above n 3, at 7.

⁷ Warren Brookbanks "Therapeutic jurisprudence – moving forward" (26 June 2015) Auckland District Law Society < www.adls.org.nz>.

⁸ Best, above n 4.

⁹ Ministry of Justice, "Youth Justice Principles & Processes" (07 September 2016) Youth Court <www.youthcourt.govt.nz/youth-justice/youth-justice-principles-and-processes/>.

¹⁰ Peirse-O'Byrne, above n 1.

their age and circumstances.¹¹ The factors that are considered when placing youth within the CJS are outlined below.

- In New Zealand the minimum age of criminal responsibility is 10.
- Offenders aged between 10 and 13 are regarded as child offenders and are generally dealt with in the Family Court. This is because the offending in this age group is generally caused by lack of parental care and protection.
- 10 and 11 year old children may only be prosecuted if the crime they committed is homicide.
- 12 and 13 year old children may be prosecuted in the Youth Court if their offending is serious and/or persistent.
- 14 year old offenders can be prosecuted for any offence. Almost all prosecutions are conducted in the Youth Court.
- Cases of homicide are always dealt with in the High Court. Certain cases of serious offending may be tried and sentenced in the High Court.
- At the age of 17 a young person is considered to be an adult for the purposes of the CJS, and prosecuted accordingly.

The majority of offences are dealt with through police warning or diversionary procedures.¹² This scheme, known as “alternative action”, gives police wide discretion to deal with youth offending without prosecution.¹³ This will be discussed in more detail in the section 4.2 of this report.

3.3 Fitness to stand trial

For youth that are prosecuted in the court system, fitness to stand trial can become an issue. The law requires that defendants are fit to stand trial. The Criminal Procedure (Mentally Impaired Persons) Act 2003 defines a person *unfit* to stand if they are unable to, due to mental impairment, conduct a defence or to instruct a counsel to do so.¹⁴ This includes a defendant who, due to mental impairment, is unable to plead, adequately understand the nature or possible consequences of the proceedings.¹⁵

Therefore, the standard required to be ‘fit to stand trial’ is reasonably low. Whilst the fitness to stand trial protections are likely to protect those suffering from higher level neurodisabilities, they afford little protection to offenders who suffer from low level neurodisabilities, often placing them in vulnerable situations.¹⁶

3.4 The Trial Process

Of particular concern for people affected by neurodisability is that most of the procedures in the justice system are language based. Language plays a huge role in the legal process – both the written and oral communication. Youth defendants affected by neurodisability will

¹¹ Lynch, “above n 3, at 6.

¹² Lynch, above n 3, at 6.

¹³ At 6.

¹⁴ Criminal Procedure (Mentally Impaired Persons) Act 2003, s 4(a).

¹⁵ Section 4(a).

¹⁶ Lynch, above n 3 at 13.

often have language difficulties that significantly hinder their ability to participate in the legal process. Dr Lynch notes that ‘in the justice system, where all procedures are essentially word-based, a person’s inability to quickly process written or verbal information and comprehend leaves them open to manipulation and entrapment’.¹⁷ Additionally, an inability to communicate can be misinterpreted to the detriment of the defendant. For example, where a defendant struggles to respond, or responds with a grunt or a tempered answer, this may be interpreted as a lack of remorse. The law has the ability to mitigate these issues, however. There is a movement to appoint speech and language specialists as Communication Assistants in a variety of courts including the Youth Court.¹⁸

On the other hand, people with neurodisabilities who display a high ability to communicate are also at risk. Best points out that ‘individuals with FASD are particularly at risk in this area as, despite often having considerable language deficits, many will appear “chatty” or display superficial verbosity. This can lead to legal professionals overestimating their level of understanding and overall competence, reducing the chance that the process will be modified to help the individual better understand the proceedings’.¹⁹

Defendants with neurodisabilities may also make untruthful statements at trial. This can be due to the characteristics of their neurodisability, combined with a lack of understanding of the consequences of the trial. Thus all statements made by those affected by a neurodisability should be corroborated. However, as noted, the neurodisability may not always be apparent to the judge. If so, the judge is unlikely to depart from the procedures used for other witnesses.²⁰ The Evidence Act leaves the determination of whether or not corroboration is necessary to judges’ discretion.²¹ If corroboration is found to be unnecessary in a trial involving a person with a neurodisability, there is a risk of false evidence being admitted. Individuals who lie at trial may be charged with perjury. The punishment for perjury is between 7 and 14 years’ imprisonment.²²

3.5 Sentencing

The Sentencing Act 2002 governs the sentencing process in New Zealand.²³ Sentencing can be one of the most exacting tasks undertaken by a judge. By law, sentences must reflect a number of considerations. For example, the seriousness of the offending,²⁴ the interests of the victim,²⁵ consistency with sentences involved for similar offences,²⁶ and the personal circumstances of the offender.²⁷

For youth, who are affected by neurodisability, striking the right balance between these considerations can be a very challenging task. For example, in certain cases, the presence

¹⁷ Lynch, above n3.

¹⁸ At 3.

¹⁹ Best, above n 4, at 175.

²⁰ Ibid.

²¹ Evidence Act 2006, s 121.

²² Crimes Act 1961, s 109.

²³ Sentencing Act 2002.

²⁴ Section 8(a).

²⁵ Section s 8(f).

²⁶ Section 8(b).

²⁷ Section 8(h).

of neurodisability and the age of an offender may be deemed a mitigating factor, making offenders less culpable and deserving of punishment. However, on other occasions, being affected by neurodisability may be deemed an aggravating factor because an offender may be viewed as unpredictable, and therefore posing a greater risk to the community.²⁸ How neurodisability will be treated by the courts in sentencing can be very unpredictable. This uncertainty may influence the case put forward by the offender, who may miss out on the opportunity for their neurodisability to be taken into account for fear of it being used as an aggravating factor.

Moreover, within the youth justice system, neurodisability often goes unnoticed, which means that offenders will be sentenced without evidence of their neurodisability being brought to the court's attention. This is highly anti-therapeutic as these offenders will be held to a standard that they cannot attain and will be sentenced in a manner that does not reflect their individual needs.

Further, certain standard sentencing considerations may be irrelevant to youth offenders with neurodisabilities. The principle of 'deterrence' assumes that offenders are able to make connections between cause and effect, remember the connection and then generalise that connection to future situations.²⁹ For those affected by neurodisability, this is often not possible due to executive function deficits. An issue which even more prominent to youth offenders, who are still developing neurologically. This suggesting that certain principles of sentencing, are based on levels of cognitive function and abilities that are not usually present in you offenders with neurodisability.

4. Making the justice system more therapeutic? The case for a different approach.

4.1 Introduction

Within New Zealand's current criminal justice system there is an awareness of the issues of neurodisabilities, but there are inconsistent policies in place to adequately rehabilitate people suffering from a neurodisability. The current state of affairs is best described as a "work in progress".³⁰

This section will outline the current approach taken by the New Zealand police, judiciary and government agencies (such as the Ministry for Vulnerable Children) to dealing with the interplay between neurodisability and justice. With regard to examples from the United Kingdom, an analysis of the strengths and weaknesses of the current New Zealand position will be offered alongside suggestions for improvement toward ensuring fair and equal access justice for defendants with neurodisabilities.

4.2 New Zealand Justice System: How does having a neurodisability affect access to justice?

Neurodisabilities, in some cases, are recognised and legally protected, by the New Zealand criminal justice system.

²⁸ Best, above n 4.

²⁹ Lynch, above n 3.

³⁰ Lynch, above n 3, at 3.

New Zealand Youth Court's system is considered "best practice" from an international legal perspective in its approach to rehabilitative justice. Under the Children, Young Persons and Their Families (CYPF) Act 1989 there are specific provisions that ensure a court identifies and takes the effects of a neurodisability into account where required. A good example of addressing neurodisability as a possible causation factor in criminal offending is located at s 208 of the Act.³¹

New Zealand's Youth Court system places a greater focus on mental illness and psychological interventions.³² An example of this, is the Christchurch Youth Drug Court, which was set up in 2002.³³ The underlying philosophy behind the specialist court is therapeutic jurisprudence, and it aims to improve young people's health and decrease drug usage. It focuses on enhancing the treatment of highly drug dependent youth offenders and seeks to offenders from re-entering the criminal justice system through softer approaches such as involving family/whānau in every step of the restorative justice process. Moreover, Youth Justice processes including Family Group conferences (FCG's) and CYF social workers are in place, and have been implemented to identify neurodisabilities and take steps to ensure that a young person affected by these fully understands and can comprehend justice procedures they are subject to.

4.3 Concurrent Example – The United Kingdom

As a fellow common law jurisdiction from which New Zealand draws much of its legal code, the United Kingdom provides perhaps the most relevant comparison to New Zealand. This was recently brought to the forefront in a report to the Office of the Children's Commissioner for England aptly titled "Nobody made the Connection: The Prevalence of Neurodisability in Young People Who Offend" where ground-breaking linkages between youth recidivism and mental impairment were made.³⁴

In the United Kingdom, a study by the British Psychological Society in 2015 found that 32% of youth offenders have a borderline intellectual disability and 30% of the youth prison population have clinical ADHD (attention hyper-deficit disorder). 60% of youth offenders were also found to have had a previous TBI (traumatic brain injury) yet there were few, if any, practical measures in place to address the issue.³⁵

Instead, a "mass incarceration" model was used which lead to a situation that may (to an extent) exist in New Zealand, that being the criminalisation of mental health issues which are better resolved through the healthcare, education or social welfare systems. Armed with effective empirical information from the academic sector, a multiplicity of professional bodies in the United Kingdom commented as to the need for government departments, courts and

³¹ Children, Young Persons and Their Families (CYPF) Act 1989, s 208.

³² Peirse-O'Byrne, above n1, at 2.

³³ Best, above n 4, at 332.

³⁴ Nathan Hughes, Huw Williams, Prathiba Chitsabesan, Rebecca Davies and Luke Mounce *Nobody Made the Connection: The Prevalence of Neurodisability in Young People who Offend* (Office of the Children's Commissioner to England, Report to the Commissioner, October 2012) at 14.

³⁵ *Children and Young People with Neuro-Disabilities in the Criminal Justice System* (British Psychological Foundation, Position Paper, March 2015) at 2.

prisons to take a joint approach to tackling the high rates of people with neurodisabilities in the justice system³⁶.

The New Zealand justice system should take into account the failings of the approach previously adopted by the United Kingdom in order to avoid the same mistakes being replicated here. Often New Zealand follows behind British jurisprudence but in this case, it is important for New Zealand specific considerations (such as the role of Tikanga Maori) to be taken into account when deciding on what avenue to pursue.

5. Making the New Zealand Justice System more adaptable to neurodisability

Although in comparison to other countries New Zealand fares quite well with regard to treatment of persons suffering from neurodisability, there are a few outstanding policy issues that impact on people suffering with neurodisability through each stage of the criminal justice process.

Firstly, the age of penal majority is 17 whereas for all other purposes (from voting through to the purchase of alcohol) the age of majority is 18. This is an inconsistency which can have a major negative effect on people with a neurodisability currently in the justice system. Treating somebody with the physical age of 17 but the intellectual age of 14 as an adult before the law does not best serve the interests of justice³⁷.

Secondly, there is not much in the way of intervention outside the Ministry for Vulnerable Children and Youth Court systems for neurodisability. Early intervention is considered one of the best methods in dealing with, and reducing re-offending rates of, criminal offenders with neurodisabilities. The police and other government agencies lack an awareness at the ground-level of symptoms of neurodisabilities which can be a crucial factor during processes such as arrest, questioning, cross-examination and dealing with legal professionals where language difficulties pose a major barrier.³⁸

Third, there is a lack of empirical research on neurodisability within New Zealand. Without further information there is little basis from which the aforementioned entities can reform processes and improve access to therapeutic justice. It is therefore important that this information gap be addressed in order for specific policy improvements to be made.

6. Possible recommendations for improving access to justice

There are a number of possible recommendations for better identifying, balancing and rehabilitating neurodisability in the justice system.

(a) During the first stages of contact with the criminal justice system (either intervention by social welfare or police action in the case of criminal acts) there needs to be greater access to mental health professionals in concert with training for frontline staff in identifying major symptoms of recognised neurodisabilities. This will allow for early intervention and ensure that, especially in the case of youth, the individuals are taken down the appropriate and responsive path toward restorative justice.

³⁶ Hughes, Williams, Chitsabesan, Davies and Mounce, above n 10, at 57.

³⁷ Lynch, above n 3, at 6.

³⁸ Kate Peirse - O'Byrne, above n 1, at 8.

(b) If a matter is referred to the courts, mental health experts, family and educational services should be involved from the beginning of the proceedings as they can be a crucial part of preventing recidivism. Although the Youth Court already employs similar procedures (such as a Family Group Conference) this system needs to take into account the young person's neurodisability as an important underlying cause of offending.

(c) The age of penal majority should be adjusted in cases where neurodisability was a significant factor in criminal activity. It is recommended that the regular age be shifted to 18 (in line with international law and other similar age limits in New Zealand legislation) but that, where neurodisability is involved, courts be given the power to grant leave for offenders who are aged between 18-21, and do not have the mental capacity of a reasonable person without a neurodisability at that age, to be dealt with in the youth justice system.

(d) For any of the previously mentioned recommendations to be successfully implemented, more information is required. Therefore, it is highly recommended that a comprehensive, well-funded empirical study on neurodisability within the justice system be conducted. This would include statistics for the adult and youth populations at all stages of the criminal justice process. This study would empower decision makers, policy experts and the legal profession to properly assess and take action to improving access to justice for people with neurodisabilities.

6. Conclusion

The prevalence rates of neurodevelopment disorders amongst New Zealand youth offenders are high. With the proposed recommendations, it is believed that a more therapeutic, dynamic approach to neurodisability could be achieved within the New Zealand criminal justice system. This will reduce social harm caused by re-offending, decrease incarceration rates that lead to the criminalisation of mental health issues, and ensure a fairer system of justice for those with mental impairments who would otherwise be neglected.