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Persons With Intellectual Disabilities in the Criminal Justice System

Review of Issues

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Although the vast majority of individuals with intellectual disabilities (ID) are law-abiding citizens, there is a small percentage with offending behaviour that is considered antisocial, socially inappropriate, or defined as illegal. It has long been recognised that individuals with ID or mental-health needs who break the law should be dealt with differently from the general population. There have been an increasing number of empirical studies in this area; however, these have been plagued by various definitional and methodological issues. Prevalence estimates of offenders with ID are complicated by diagnostic variations and inconsistencies in the criminal justice process. International studies have shown a large range, from 2% to 40%, depending on methodological approaches. The following review will highlight the salient issues including prevalence of offending, characteristics of offenders, vulnerabilities within the legal system, assessment, and a brief overview of intervention and treatment approaches.

Keywords: *offenders; intellectual disabilities; learning disabilities; mental retardation; forensic; review*

As with any other group of people, the majority of individuals with intellectual disabilities (ID) are law-abiding citizens and only a small percentage present with antisocial or offending behaviour that is considered socially inappropriate or illegal under a criminal code. It is recognised that individuals with ID or mental-health needs who break the law should be dealt with differently from the general population, but at the same time the field of forensic ID has been minimally researched to date. Despite numerous studies in the area, the majority of research has been based on professional opinion and commentary, with few well-controlled studies and systematic reviews.

There appear to be multiple reasons for the limitations of research in this field. There is a consistent challenge in assessing ID and defining offending behaviour; and there is limited evidence for the reliability of assessments and effective treatment approaches specifically for this client group. Within the last decade, interest of

professionals and society in ensuring fair and just treatment for individuals with ID has increased, and with it the number of empirical studies has also improved. However, there are several issues influencing this work that demand professional attention and scrutiny. The purpose of this article is to delineate and clarify these issues to assist both researchers and clinicians in understanding the complex challenges and needs facing persons with ID who come into contact with the law and the criminal justice system (CJS).

Prevalence

Estimates of offenders with ID are complicated by definitional variations and inconsistencies in the process of the CJS. Studies report a large range of estimates, from 2% to 40%, depending on methodology and diagnostic approach (Holland, 1991, 2004; Lindsay, Law, & Macleod, 2002; Noble & Conley, 1992). Identifying ID is complicated by the wide range of diagnostic and classification criteria used, as well as the variety of assessment tools utilised by clinicians and researchers. The severity of intellectual impairment required for identification has varied substantially across research studies. There are numerous definitions used, including mental retardation, developmental or learning disability, or intellectual delay, although the majority include the three factors of intellectual impairment (IQ below 70), deficits in social functioning (impaired adaptive behaviour), and onset during childhood (below age 18 years). However, it is the different severity levels of ID (i.e. borderline, mild, moderate) studied, either independently or in combination, which complicate estimates and cause inconsistent findings (American Psychiatric Association, 2000). It is therefore difficult to identify the number of individuals with ID who commit crimes; although it is known that illegal and antisocial behaviour is much more common in this population group than is actually reported to police. The increased incidence of people being charged with major and minor offences suggests that the process of resettlement into the community following the deinstitutionalisation movement is often more difficult and challenging for individuals with ID than initially thought.

Defining offending behaviour within this population is also complicated because of criminal statistics not representing true offending prevalence and incidence but more actual arrest and conviction rates. Research emphasis has been placed on recidivism rates rather than understanding the path of criminal offending or the process of decision making within the CJS for offenders with ID. Similar to the general population, when an individual with ID is arrested and charged there is no presumption of conviction, as the decision to prosecute depends on the likelihood of conviction and the need for public protection. Prosecution depends on the perceived intent and "guilty state of mind" of the individual arrested, which becomes less clear yet crucial when an individual with ID is charged.

Past studies have reflected two distinct groups of individuals with intellectual or cognitive impairments who come into conflict with law. The first group consists of individuals who are legally and diagnostically defined ID and are already known to or supported by the developmental service sector; they may, following charges, be sentenced to hospital-based services, community residences or incarcerated in prison. It has long been known that health care and social services have a reputation for high tolerance levels, overprotection, and underreporting to the police; therefore reported statistics reflect a selective sample and underestimate the actual number of this group in contact with the CJS (Holland, Clare, & Mukhopadhyay, 2002; Thompson & Brown, 1997).

The second group consists of individuals who do not have a legally or diagnostically defined ID per se but are socially and cognitively disadvantaged compared to the general population and require intermittent supports and services. These individuals are overrepresented in the CJS, and research regarding their prevalence and incidence reflects distinctively different issues and challenges for professionals and researchers that will not be addressed in this article.

Characteristics of Offenders with ID

Difficulties in prevalence studies influence the identification of specific characteristics among offenders with ID. Very few individuals with moderate-to-severe ID are found within the CJS (Holland et al., 2002; Lyall, Holland, Collins, & Styles, 1995; Noble & Conley, 1992). This may be a reflection of their high dependency and supervision by caregivers, their perceived lack of criminal intent by mental-health and legal professionals, their diminished fitness or capacity to stand trial, and/or the poor likelihood of conviction. Numerous studies suggest a higher proportion of individuals with mild-to-borderline ID and a corresponding higher risk of detection (Cullen, 1993; Holland, 2004; Holland et al., 2002; Lindsay, Law, et al., 2002).

The relationship between intelligence and offending has been widely investigated, and the majority of studies have demonstrated that similar characteristics and risk factors within the general population lead people with ID to increased contact with the CJS. These factors include: youth, male gender, psychosocial disadvantage, familial offending, history of behavioural problems, unemployment, and co-morbid mental-health needs (Day, 1988; Farrington, 2000; Hodgins, 1992; Holland, 2004; Murphy, Harnett, & Holland, 1995; Noble & Conley, 1992; Simons, 2000; Winter, Holland, & Collins, 1997). With the increased demands associated with community living, recent studies have suggested an increased risk of offending for this population given their individual vulnerabilities of poor coping strategies and limited independence (Holland, 2004; Lindsay, Smith, & Law, 2002).

Studies have also examined the risk of individuals with ID for committing particular offences. However, there has been much debate amongst researchers and

clinicians on the misinterpretation of research findings and official statistics. Although now refuted, it was previously believed that sexual and arson offences were more common with offenders with ID (Day, 1993; Walker & McCabe, 1973). This theory was based on biased samples of individuals already diverted to hospital or prison for serious crimes and therefore the findings cannot be attributed to the larger population of offenders with ID (Holland, 2004; Lindsay & Smith, 1998; Marshall, Anderson, & Fernandez, 1999). There are some commonsense assumptions that "white-collar" crime such as fraud is less represented by individuals with ID. Past studies have also found a higher rate of violent crimes in offenders with ID; however, the majority of offences were misdemeanours and less serious offences compared to the general population. Physical violence and injury were also found to be uncommon in offences committed by offenders with ID (Day, 1993; Noble & Conley, 1992). Generally, in the absence of population studies it is now concluded that the types of offences committed by individuals with ID seem to be similar to those of individuals without ID (Hodgins, Mednick, Brennan, Schulsinger, & Engberg, 1996; Holland et al., 2002; Lindsay, 2002a; Murphy & Mason, 1999).

Vulnerabilities Within the CJS

When an individual with ID enters the CJS multiple challenges and vulnerabilities become apparent. Some are obvious but most relate to their understanding of their rights and the legal process (Baroff, 1996; Baroff, Gunn, & Hayes, 2004; Hayes, 2002). It has been found that there are particular difficulties for individuals with ID in understanding "cautions" or "rights" given to them by police at the time of arrest because of poor comprehension levels. It has also been demonstrated that they have more difficulty in understanding written information detailing their legal rights when compared to offenders without ID (Clare, Gudjonsson, & Harari, 1998). Furthermore, individuals with ID are more likely to be suggestible and acquiesce to statements made to them in interrogative interviews (Clare & Gudjonsson, 1993), to misunderstand basic legal terms such as "guilty" and "not guilty," and to presume that a false confession is transparent and reversible (Clare & Murphy, 1998).

These difficulties experienced by individuals with ID have been acknowledged and in some jurisdictions special provisions have been established for these suspects within the legal and service system (Police and Criminal Evidence Act, 1984). However, problems exist at the initial stages when police have difficulty actually identifying someone with an ID at the point of arrest (Bean & Nemitz, 1994; Hayes, 2002). One special provision adopted is court-diversion programmes, where individuals with an ID are identified early after arrest and potentially diverted with a community or hospital disposition order. Individuals may be diverted when they are "unfit to plead," or "not competent to stand trial." In some jurisdictions, offenders are also identified prior to arrest and diverted to appropriate agencies without entering the CJS.

Competency is generally based on an individual's ability to follow the legal process, consult with his or her lawyer, and to understand the consequences of the process against himself or herself. Some professionals argue that a further element required is the understanding of the nature of the consequences of an offence. In addition to competence, criminal responsibility or culpability is also assessed, which refers to whether an individual knows right from wrong at the time of his or her offence (Baroff, 1996; Baroff et al., 2004; Smith & Broughton, 1994). These two terms are sometimes confused but, in general, it is rarer for individuals to be judged not culpable than to be judged not competent, and those judged not culpable would also likely be judged not competent (Baroff et al., 2004; Johnson, Nicholson, & Service, 1990; Parry & Drogin, 2000; Petrella, 1992). For offenders with ID, the evaluation of competence and culpability is extremely important yet difficult given their cognitive deficits and limited problem-solving abilities.

Although police protocols and court-diversion schemes attempt to improve the identification of individuals with ID, research and prevalence studies continue to highlight that many individuals are still overlooked or misidentified. Early on, McAfee and Gural (1988) notably concluded that "the criminal justice system appears to have adopted an informal, inconsistent and inequitable response to the problems of individuals with mental retardation who are accused of a crime" (p. 12). Clinical practice however has improved over time as agencies in the CJS, mental-health, and developmental service sectors are now collaborating on "special needs" offender programmes to provide support for offenders with ID and assist with identification early on in the process.

Assessment

It is widely acknowledged that a systematic and comprehensive approach is most appropriate when evaluating maladaptive problems or in particular offending behaviour in individuals with ID. It has been noted that although the approach is conceptually simple it is therapeutically sophisticated, with emphasis on understanding why the person is behaving in a particular way, identifying the contingences that maintain the behaviour, and subsequently developing alternative, adaptive strategies (Cullen, 1993). Assessment and intervention for offenders with ID must therefore expand beyond focusing on the offence-specific behaviour but also determine the purpose and function of the offending behaviour within the individual's environment and social context to modify it (Holland, 1991; Johnston, 2002; Taylor, 2002). This bio-psycho-social assessment approach is essential to understanding and minimising future maladaptive behaviours (Griffiths, Richards, Fedoroff, & Watson, 2002).

Lindsay and colleagues outline three areas of assessment for offenders with ID: assessments for court, risk assessments, and assessments for treatment planning (Lindsay, Law, et al., 2002). Court assessments tend to focus on the evaluation of

competence discussed earlier and whether an individual with ID has the capacity to be a participant in a trial and be able to defend oneself. In some jurisdictions this issue has become salient in determining exclusion criteria for capital punishment (Baroff et al., 2004). Risk-management assessments include offence-specific analysis, prediction of recidivism, and future probability of violent or sexual re-offending.

The ability of professionals to predict future offending behaviour is limited and there will always be a possibility of error. As with any forecasting, short-term predictions are likely to be more accurate than long-term predictions, and the most common errors are false positives. With mainstream forensic services, risk assessments usually involve probabilistic statements: i.e., an individual with X profile has a probability of Z% of re-offending within Y months of discharge. However, these statistical statements can be clinically misleading and can give a false impression of specificity.

Actuarial risk-assessment models use a combination of historical, clinical, and offence-specific information to provide a statistical predictive model and statement of risk for recidivism. Although these empirical assessments are widely established and validated within the mainstream forensic services few have been adapted and standardised for individuals with ID. There have been some promising studies (Harris & Tough, 2004; Quinsey, Harris, Rice, & Cormier, 1998) but there is still need for much further expansive research. More recently, researchers and clinicians have recognised the importance of evaluating dynamic risk for offenders with ID and several models have been developed to aid assessment and treatment planning (Lindsay, Murphy, Smith, Edwards, & Young, 2004; Quinsey, Book, & Skilling, 2004). A comprehensive review by Lindsay and Beail (2004) has outlined preliminary findings that support the practice for evaluating both static and dynamic factors in predicting future recidivism in offenders with ID.

Mikkelsen and Stelk (1999) described factors that lead to random overestimation and underestimation of risk that may impact on a clinician's perception of an offender with ID. They suggest a model of risk assessment for individuals with ID that examines the likelihood of historical behaviour patterns interacting with an environmental context. Their model outlines the clinical assessment of risk based on specific behaviours and a clear understanding of their relative severity, frequency, and latency. This probabilistic behavioural risk assessment is then utilised in a clinical profile identifying destabilizing, stabilizing, and system issues enabling an overall risk-management plan.

It is therefore essential that the reason for assessment is clearly outlined and that the assessment is comprehensive in addressing issues pertaining to an individual's future treatment needs, placement options following sentencing, and environmental risk-management strategies. In addition to an evaluation of recidivism, risk-management plans should also include assessments of intellectual functioning, offence history, sexual knowledge and history, psychological and psychiatric problems, and a functional analysis of the offending behaviour.

Intervention and Treatment

Research to date has looked at multiple different approaches to treatment and rehabilitation of offenders with ID from evaluating individual case studies to group treatment paradigms. The inappropriateness and ineffectiveness of traditional therapeutic approaches and mainstream criminal justice interventions for individuals with ID is widely acknowledged. A common dilemma identified is that people with ID who have offended, or who are at risk of offending, may be rejected by mainstream services as being too difficult and awkward to treat, and may also be rejected by developmental services as being too able or presenting too great a risk to others in the service (Hayes, 2004; Holland, 2001; Lindsay, Law et al., 2002; Murphy, 2000).

Studies have emphasised that any treatment for individuals with ID who offend should acknowledge and address issues of limited socialisation, impulsivity, poor social learning skills, low self-esteem, and lack of education and occupational skills (Clare & Murphy, 1998; Day, 1993; Lindsay, 2002b). Management and intervention approaches should include specific strategies for recognising and responding to problem situations and developing adaptive coping skills and decision-making abilities that may replace the offending behaviours. A multitude of treatments and comprehensive behavioural, social, and cognitive therapies have been described in the literature with case series and clinical service reviews involving offenders with ID (Clare & Murphy, 1998; Lindsay, Smith et al., 2002; Murphy, 2000). Treatment approaches have ranged from individual cognitive behaviour therapy, bio-psycho-social interventions, group therapies, and multimodal approaches with psychopharmacology.

Interventions and treatment should also be combined with individually tailored offence-specific approaches. For example, sexual-offending behaviour may be addressed by focusing on issues of attachment, intimacy, sexual knowledge and interests, cognitive distortions, emotional loneliness, social skills, and assertiveness training (Clare & Murphy, 1998; Griffiths et al., 2002; Lindsay, Smith et al., 2002; Taylor, 2002). Several studies have shown the efficacy of anger-management programmes that have focused on cognitive attributions and misconceptions prevalent in offenders with ID. Anger-management groups have emphasised a cognitive behavioural approach aimed at arousal reduction, cognitive restructuring, problem-solving strategies, and skills training (Benson & Ivins, 1992; Rose, West, & Clifford, 2000; Taylor, 2002; Willner, Jones, Tams, & Green, 2002).

In addition to therapeutic approaches, social interventions have included a range of service models and environmental programming that emphasise community rehabilitation and sociovocational models (Hayes, 2004; Lindsay, Smith et al., 2002; Noble & Conley, 1992). Numerous studies have reviewed a range of criminal justice and social service community based programmes for offenders with ID (Clare & Murphy, 1998; Davidson, Cain, Sloane-Reeves, & Giesow, 1995; Haaven, Little, & Petre-Miller, 1990). Although the models are all distinctly different because of geographic and administrative issues, they highlight the need for educational and rehabilitative programmes

developed on an individual's changing needs and treatment supports as he or she addresses his or her offending behaviour.

Conclusion

It appears likely that the precise prevalence and incidence of individuals with ID who become involved with the CJS is not known and estimates vary with the laws, definitions, and social policies available in the many jurisdictions studied. Furthermore, individuals with ID who offend enter the CJS much as other people, although their treatment within the system depends on the extent to which their disability is recognised. It is therefore important that future research expands from prevalence studies and focuses on understanding the nature and circumstances around when and how an individual with ID offends, and identifies the variability in service response by the legal system compared to the general population.

It is generally accepted that the majority of individuals with ID who offend should not be institutionalised or incarcerated, partly because of their vulnerability but also because of their increased risk of victimisation within the CJS and correctional facilities. This is somewhat reflected in current governmental policies and legislation that recommend that offenders with ID should be provided with the "least restrictive environment" available and alternative supports and supervision in the community should be found whenever possible. Indeed, this service response has to be equally balanced with the issue of fair justice and restitution. Programme and service evaluation should therefore go beyond cost comparisons and start evaluating the service implications of the emerging trend of criminalisation of the mentally disabled because of limited resources and funding in the community.

In relation to assessment, treatment, and rehabilitative services, studies have highlighted the difficulties of service provision and planning for this client group. Three areas are addressed in the literature regarding assessment and treatment of offenders with ID: direct intervention with the individual to address offending behaviour; liaison with the client's support system to enhance his or her environment and facilitate rehabilitation; and coordination of services to assess and manage future treatment plans to minimise risk of recidivism. Given the lack of appropriate mainstream approaches for offenders with ID, future studies that are able to identify the most efficient assessments and effective therapies across all levels of support are highly needed. In particular, risk assessments that take into account the unique characteristics of this population are crucial to better sentencing and treatment planning.

Although studies to date have evaluated a range of effective treatments and therapeutic approaches for offenders with ID, these individuals are still neither readily accepted in mainstream offender services nor in services for those with ID. Further debate should be encouraged in regard to the need for a distinct legal response and treatment process for this population or a focus on increased education within the

legal system about offenders with ID. There is however increasing evidence of improvements in research seen within the forensic and ID fields that suggests a growing awareness of the specific issues that these individuals pose for the developmental, mental-health, and criminal justice systems. Indeed, the application of theory into evidence-based practice remains a substantial challenge both to clinicians and to researchers to date in addressing the complex needs of this population.

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