

# **‘Cruel and unusual punishment’: an inter-jurisdictional study of the criminalisation of young people with complex support needs**

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## **Abstract**

Although several criminologists and social scientists have drawn attention to the high rates of mental and cognitive disability amongst populations of young people embroiled in youth justice systems, less attention has been paid to the ways in which young people with disability are disproportionately exposed to processes of *criminalisation* and how the same processes serve to further *disable* them. In this paper, we aim to make a contribution towards filling this gap by drawing upon qualitative findings from the *Comparative Youth Penalty Project* - an empirical inter-jurisdictional study of youth justice and penalty in England and Wales and in four Australian states. We build on, integrate and extend theoretical perspectives from critical disability studies and from critical criminology to examine the presence of, and responses to, socio-economically disadvantaged young people with multiple disabilities (complex support needs) in youth justice systems in our selected jurisdictions. Four key findings emerge from our research pertaining to: (i) the criminalisation of disability and disadvantage; (ii) the management of children and young people with disabilities by youth justice agencies; (iii) the significance of early and holistic responses for children and young people with complex support needs; and (iv) the inadequate nature of community based support.

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## **Troubled biographies: socio-economic disadvantage, mental health disorders, cognitive disabilities, complex support needs and youth justice**

Youth justice systems<sup>2</sup> in Australia and England and Wales are typically filled with highly marginalised young people, who are almost exclusively drawn from economically disadvantaged neighbourhoods (Goldson 2002; Vinson 2007; Jacobson et al 2010; Haines et al 2012; Baldry et al 2015; Vinson and Rawsthorne 2015). Research suggests that young people enmeshed in youth justice systems often lead chaotic lives characterised by: high levels of drug and alcohol use (Prichard and Payne 2005; NSW Health and NSW Juvenile Justice 2016); sporadic or interrupted education (Kenny et al 2006; Ward and Williams 2014), and periods of homelessness and housing instability (Indig et al 2011). In many cases, young people who enter youth justice systems have further been exposed to multiple traumatic experiences including victimisation and abuse, often resulting in placements in out-of-home care (OOHC)<sup>3</sup> (Fernandez et al 2014; Redmond 2015; Fitzpatrick and Williams 2016; Prison Reform Trust 2016; AIHW 2016).

Entwined with varying degrees of mental health disorders and cognitive disabilities (conditions that have largely been overlooked in youth justice research), these multiple factors, when not addressed early in life, tend to compound and interlock to create ‘complex support needs’.<sup>4</sup>

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<sup>2</sup> The term ‘youth justice system’ is taken to refer to the laws, policies, processes and practices that define the interaction of children and young people with the criminal law. We take the youth justice system in Australia and England and Wales to include all of the agencies that respond to children and young people who have committed, or allegedly committed, a criminal offence. In Australia, the terms ‘youth justice’ and ‘juvenile justice’ are often used interchangeably.

<sup>3</sup> In Australia, the term ‘out-of-home-care’ (OOHC) refers to the care of children and young people (up to 18 years of age) who are unable to live with their families (often due to child abuse and/or neglect). This includes residential care, family group homes and home-based care (AIFS 2015). In England and Wales, the preferred term for children in OOHC is ‘looked after children’.

<sup>4</sup> ‘Complex support needs’ refers to persons ‘who have a disability and are experiencing (or are at risk of experiencing) multiple and interrelated conditions or factors which contribute to an intensity of support need’ (Department of Family and Community Services 2014: 25). Such conditions and factors include: multiple disabilities and impairments, poverty, disadvantaged family and geographical housing, homelessness, abuse and so on. The term multiple and complex needs is sometimes used interchangeably with complex support needs (see Baldry and Dowse 2013; Dowse et al 2014; Baldry 2014; Baldry 2017).

Indeed, summarising the international literature Goldson (2006: 454) notes that for children and young people most heavily embroiled in youth justice systems:

... the fabric of life invariably stretches across: poverty; family discord; public care; drug and alcohol misuse; mental distress; ill-health; emotional, physical and sexual abuse; self-harm; homelessness; isolation; loneliness; circumscribed educational and employment opportunities and the most pressing sense of distress and alienation.

This is further compounded in Australia for Indigenous young people who experience significantly higher rates of complex support needs and criminal justice involvement than their non-Indigenous peers (Indig et al 2011; Baldry et al 2015; NSW Health and NSW Juvenile Justice 2016). Notwithstanding this, and with few notable exceptions, the intersections between socio-economic disadvantage, mental health disorders,<sup>5</sup> cognitive disabilities,<sup>6</sup> complex support needs and youth justice are conspicuously under-researched and under-theorised.

There are, of course, inter-jurisdictional differences *between* the youth justice systems in Australia and in England and Wales, as well as a series of state-level intra-jurisdictional variations *within* Australia. Despite such differences, however, there are also striking similarities amongst the young people who are managed within and across such systems. While neither Australia nor England and Wales collect comprehensive national data on the mental health and cognitive disability status of those under youth justice supervision, the limited available research conducted by state-government bodies, custody inspectorates, academic

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<sup>5</sup> For the purposes of this article, the term ‘mental health disorder’ is used to refer to a ‘temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgement or behaviour, so as to affect functioning in daily life to a material extent’ (NSW Law Reform Commission (NSWLRC) 2012: 138)

<sup>6</sup> We use the term ‘cognitive disability’ to refer to 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’ (NSWLRC 2012: 136). This is sometimes also referred to as ‘neurodisability’. Both cognitive disability and neurodisability incorporate a wide range of specific neurological conditions including, but not limited to: intellectual impairment; communication disorders; attention deficit hyperactivity disorder; autism spectrum disorders; acquired/traumatic brain injury; epilepsy and foetal alcohol spectrum disorders (Hughes et al 2012: 18-19).

researchers, and non-government and advocacy organisations, all indicate a high prevalence amongst youth justice populations within and across the jurisdictions.

The Australian NSW Young People in Custody Health Survey found that 83 per cent of young people in penal custody have symptoms consistent with psychological disorder (NSW Health and NSW Juvenile Justice 2016). Previous NSW custody health surveys from 2003 and 2009 found similarly high levels of psychological disorders amongst incarcerated young people, at 88 per cent and 87 per cent respectively (Allerton et al 2003; Indig et al 2011). Studies from England and Wales have also revealed that the prevalence of mental health disorders amongst young people in penal custody is significantly higher than that within the general population. The Youth Justice Board, for example, reported that 23 per cent of detained children and young people were classed as having a mental illness, and 47 per cent reported being referred to a mental health service at some point (Gyateng et al 2013). Children and young people in youth justice systems also experience higher levels of substance abuse disorders when compared with general youth populations (NSW Health and NSW Juvenile Justice 2015; Newbury-Birch et al 2015). Evidence indicates that substance abuse disorders are themselves often closely related to mental health disorders and disability (Wing Ting et al 2014) and, further, that young people engaged in youth justice systems who experience drug and alcohol related problems are significantly more likely than others to: have been victims of family violence; have low education outcomes; have endured trauma; have poor physical health and to experience mental health disorders (Standing Committee on Social Policy and Legal Affairs 2012; NSW Health and NSW Juvenile Justice 2016; Jacobson et al 2010).

The prevalence of young people with cognitive disabilities in youth justice systems is also evident. Despite the fact that this, too, is an under-researched area, the studies that have been undertaken suggest that 18 per cent of young people in custody in NSW, Australia, and 23 per cent in England and Wales have cognitive functioning in the low-range (IQ <70) indicating cognitive impairment. Furthermore, between 39 and 46 per cent of such young people in NSW, Australia (Kenny and Nelson 2008; Haysom et al 2014; NSW Health and NSW Juvenile Justice 2016), and between 36 and 41 per cent in England and Wales, fall into the borderline range of cognitive functioning (IQ 70-79) (Chitsabesan et al 2007; Harrington and Bailey 2005). Such rates are significantly higher than those that relate to young people in the general population

(ABS 2016). Studies from Australia and England and Wales also show that young people in contact with youth justice systems have higher levels of: speech and language impairments (Hughes et al 2012; Snow et al 2015; Anderson et al 2016); head injury and acquired brain injury (Kenny and Lennings 2007; Farrer et al 2013); attention deficit hyperactivity disorder (ADHD) (Young et al 2015); and fetal alcohol spectrum disorders (FASD) (Education and Health Standing Committee 2012).

Furthermore, young people enmeshed in youth justice systems invariably experience multiple impairments (complex support needs). For example, disadvantaged young people who have experienced traumatic brain injuries are more likely than their non-disabled peers to: be diagnosed with mental health disorders; suffer from psychological distress; endure cognitive disabilities; express associated behavioural problems; be victims of bullying and to engage in problematic patterns of drug and alcohol use (Kenny et al 2006; Williams et al 2010; Moore et al 2014; Vaughn et al 2014). Equally, young people with cognitive disabilities are more likely than others to develop mental health problems or have additional developmental disorders such as autism spectrum disorders and attention deficit hyperactivity disorder (Hughes et al 2012).

It is the complex and multiple interfaces across socio-economic disadvantage, mental health disorders, cognitive disabilities, complex support needs and processes of criminalisation that interest us here: the governance of particularly disadvantaged and structurally vulnerable young people through mechanisms of control, regulation and youth justice intervention.

### **Theoretical framework: towards critical disability criminology**

This study is nested within, and derives from, a larger-scale research project – the *Comparative Youth Penalty Project (CYPP)* – that is examining the development and functioning of youth penalty and justice regimes in four selected states in Australia (New South Wales, Queensland, Victoria and Western Australia) and in England and Wales.

A key aim here is to build on, and extend, recent theoretical work emerging from critical disability studies and critical criminology and to contribute further to the development of a critical disability criminology (Baldry and Dowse 2013; Dowse et al 2014; Baldry et al 2015; Baldry 2017). This situates our theoretical orientation unequivocally within the ‘social model

of disability' (Oliver 1996), which makes a crucial distinction between 'impairment' as a characteristic of an individual's body or mind, and 'disability' as a socially constructed systemic phenomenon that serves to create and compound discriminatory barriers and obstructive social arrangements that disable people. Embedded in this is a critical criminological orientation that - in attempting to understand and address criminalisation, crime and justice - foregrounds the contexts of power and the institutional/social-structural relations that give rise to systemic inequalities. When combined, these theoretical approaches take the power relations embedded in age/generation, class, 'race', gender and ableism as cross cutting analytic lenses to interrogate critically the relations between socio-economic disadvantage, disability(ies) and processes of criminalisation and, ultimately, to comprehend the substantial over-representation of young people with complex support needs in youth justice systems.

Such critical disability criminology aims to address the absences identified by Dowse et al (2009: 38-39) when noting that critical disability studies have tended to overlook criminal/youth justice, whilst critical criminology has failed to engage with the criminalisation of disability, notwithstanding the fact that criminal/youth justice systems are often the *de facto* institutions within which disadvantaged (young) people with complex support needs are 'managed' (Baldry and Dowse 2013). As Dowse et al (2009: 31) have identified:

There is a pressing need, recognised among researchers, criminal justice agencies, practitioners and advocacy groups, to move beyond traditional theoretical approaches which examine social support systems, processes of criminal justice and the presence of impairment as separate issues and towards an integrated conceptualisation of the over-representation of people with MHD&CD [mental health disorders and cognitive disabilities] in the criminal justice system as a complex human, social and political phenomenon.

We are attempting, therefore, to apply the analysis of our empirical data towards advancing a theoretical framework that might enable us to better comprehend the dynamic interactions between individuals, institutions and systems that lead to disadvantaged and marginalised young people with disability (and/or complex needs) being funnelled into, around, and often

back into, youth justice systems before eventually being discharged into adult prisons (see also Dowse et al 2009; Baldry 2014).

### **Method, participants and analysis**

The empirical foundations of our paper principally comprise primary qualitative data collected as part of the wider CYPP. We undertook 124 semi-structured in-depth interviews with a range of practitioners, managers and experts directly engaged in, or with an interest in, youth justice services.<sup>7</sup> Each interview was structured around 10 thematic sections comprising 40 questions. Non-probability purposive sampling was employed to identify and select our interviewees. Interview participants were drawn from six research sites in England and Wales - two Youth Offending Team (YOT) areas in the North of England, two similar areas in the South of England and two in Wales. In Australia participants were drawn from four states: NSW; Queensland; Victoria and Western Australia.

All interviews were recorded, transcribed and manually coded. A coding frame was developed based on the 10 interview themes to facilitate thematic analyses using the principles of grounded theory (Corbin and Strauss 2008), and Braun and Clarke's (2006) six phases of thematic analysis were followed: familiarisation of the data; generating initial codes; searching for themes; reviewing themes; defining and naming themes; and writing up.

In addition to the interview data, we also undertook an extensive review of interdisciplinary research literature (including criminology, the health sciences, law, sociology and social policy), alongside a substantial volume of reports published by government agencies and NGOs. For the purposes of this paper we present and analyse the dominant themes that emerged from the practitioner, manager and expert interviews.

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<sup>7</sup> Interviewees included: Family and Children's/Youth Court lawyers, judges and magistrates; youth justice practitioners and managers; youth workers; police officers; children's rights advocates; academics; policy officers from government and non-government organisations; independent consultants and civil servants.

## Results

Four overarching themes emerged from the analyses of the interview data pertaining to: (i) the criminalisation of disability and disadvantage; (ii) the management of children and young people with disabilities by youth justice agencies; (iii) the significance of early and holistic responses for children and young people with complex support needs; and (iv) the inadequate nature of community based support.

### *The criminalisation of disability and disadvantage*

Troubled family backgrounds, chaotic home lives, experiences of trauma and abuse, contact with child protection services, poor school attendance, low educational achievement, homelessness, problematic drug and alcohol use, varying degrees of mental health disorders and cognitive disabilities and the complex compounding of such phenomena - usually framed by poverty, disadvantage and structural exclusion - were consistent reference points for our interview respondents from Australia and England and Wales:

It's the usual stuff isn't it? Exclusion from school, early contact with children's social care, lots of welfare issues that have been unmet over a period of time. Difficulties at school, behavioural problems... we are one of the poorest boroughs in England (E&W, Community Supervision Manager).

You name every problem and usually they'll tick at least one of those boxes, whether its physical health, mental health, learning problem, family stability... all of them (Aus, Children's Court Magistrate).

Indeed, almost all interviewees made observations on the prevalence of mental health disorders and cognitive disabilities amongst youth justice populations, with respondents commenting that most young people who come through the system have 'a mild issue or impairment or disability' (Aus, Juvenile Justice Manager) and 'the number of people we see with a mental handicap [sic], or mental disabilities of some level worries me' (E&W, Magistrate).

The dissonance between the chronological age of young people coming before the courts and the level of their cognitive functioning was a further concern for interview respondents across

all study sites. It was reported that many young people appearing before the courts have cognitive functioning and reading and writing levels at an age well-below the age of criminal responsibility (10 years of age) in Australia and England and Wales. Many respondents reported that children and young people with cognitive and borderline cognitive impairments have a reduced capacity to understand and comprehend the implications of their offending and to follow, and actively engage with, the legal process (see also Haines et al 2012: 150-151). One respondent's observations echoed many others:

Chronological age can be very deceiving. You know we have 18 year olds who really are functioning as 10 year olds... their lives have been so chaotic... emotionally and indeed intellectually they are miles behind (E&W, District Judge).

Children and young people with complex support needs were typically characterised as falling 'through a very, very big gap' (Aus, Policymaker) and as 'frequent fliers' with 'the trifecta' of cognitive impairment, mental health disorders and youth justice contact (Aus, Policymaker). We were informed that such young people 'tend to become criminalised and their trajectory along the criminal justice system is pretty well set' (Aus, Youth Worker). Participants also commented on how the interrelation between a child's poor familial and state care experiences, together with their cognitive impairment and skewed emotional processing, served to exacerbate poor emotional and behavioural control which, in turn, often resulted in more intensive/punitive youth justice responses:

They tend to be in the looked after system...which has probably left them damaged and vulnerable and prone to poor decision making because of all the things around stresses... delayed development, numeracy, literacy, etc.... it would take them longer to modify their behaviour, or for agencies to support them to modify their behaviours. Therefore they are likely to have a greater number of offences on the go at any one time. *Quid pro quo*, the courts will get fed up with them and they will end up in custody (E&W, YOT Manager).

High levels of exclusion from school for young people with cognitive impairment and complex support needs lead to poor levels of literacy and numeracy that are ultimately criminalised. As one Magistrate from England and Wales commented: 'the reason we have so many traffic

offences by young [people], is because they can't pass the test because they can't read and they can't get a licence' (E&W, Judicial Participant). Relatedly, it was suggested that young people are often subject to overly onerous bail or community supervision conditions even though, in reality, they have insufficient understanding and/or capacity to comply with them. An Australian policymaker, for example, commented:

They're vulnerable young people, they're easily exploited, their brains are poorly developed in terms of understanding consequences, and you put a bunch of conditions on them that they don't even hear, let alone understand... so then they breach, in and out in short bursts... or quite long periods on remand where they're not getting much of anything (Aus, Policymaker).

### ***The management of children and young people with disabilities by youth justice agencies***

Respondents reported that criminalisation begins when young people with complex support needs are processed by the police. These young people are overrepresented amongst those excluded from school and, paradoxically, they are often turned away from health and welfare services as a consequence of their 'disruptive' behaviour. Accordingly, they have a higher than normal public presence/profile and are often left to the police to 'manage' (see also Baldry and Dowse 2013: 230-233). Many respondents referred to problematic police engagement with young people with complex support needs (even targeting), and commented that following initial contact with the police such young people become marked and subsequent, repeated and increasingly frequent contact often becomes routine. It follows that ongoing negative interactions and inadequate police responses to disability-related behaviours have the effect of propelling young people deeper into the youth justice system:

It snowballs... they look suspicious, whatever that means. The police speak to them... they make a [data base] entry on the system... next time they come across this person they... check and... this young person is known to police. So even though this kid might not have done anything, they quickly build up this profile (Aus, Solicitor).

Interview respondents from Australia and England and Wales considered police to be ill-equipped to deal with young people with complex support needs, and spoke of the need for

adequate training for police officers (and legal professionals) to provide them with the skills to recognise disability and impairment and to respond appropriately:

The police don't, or they haven't had a great deal of training I don't believe on these mental handicaps [sic], and they don't always recognise when a person they're apprehending actually has one of these spectrums (E&W, Magistrate).

Conversely, the positive outcomes that arise when police officers do receive adequate training were also highlighted:

We did a bit of work with a couple of police officers on the beat about a young man who had autism. He was constantly being arrested... so we organised a meeting, we got a psychiatrist who dealt with autism in and he talked about why he reacts the way he does... We spent quite a long time with them explaining it... things did improve after that. They were more tolerant and more careful about how they dealt with him (E&W, YOT Court Orders and Remand Manager).

Practitioners told us that young people with cognitive disability in particular often enter the youth justice system after offending in an OOHC setting (see also Taylor 2016; Shaw 2016; Prison Reform Trust 2016; Victoria Legal Aid 2016; Staines 2017). Many interview respondents attributed the disproportionately high numbers of 'looked after' young people and/or those engaged in child protection proceedings entering youth justice systems to the criminalising actions of OOHC staff. In particular, a tendency for such staff to call the police to manage behaviour that would ordinarily be dealt with by parents in family home environments:

... things are run on the basis that if you behave as you might well do as a child in distress in a family home, break a window slam a door or whatever it is. On the whole, you would be encouraged to mend it maybe pay some money, use your pocket money. In the [children's] home you are much more likely to be charged with criminal damage and sent to court (E&W, Senior NGO Officer).

Respondents spoke of the ‘crushing need to stop criminalising that sort of behavioural stuff... particularly the correlation with young people with cognitive disabilities’ (Aus, Youth Worker). Paradoxically, some interviewees felt that penal custody provides an opportunity to identify, diagnose and support young people with complex support needs. For example, a Director of Juvenile Justice in Australia opined that custody is ‘an opportunity to do really good health checks... for some, it's the only time they go to school... which is really sad, but that's the truth of it’ (Aus, Juvenile Justice Director). Similarly, in England and Wales some Magistrates expressed the view that the only way to secure welfare support for young people with complex support needs was to imprison them: ‘The help and support that’s needed goes beyond what is available in the community, but it is available in a young offenders unit and there are certain young people...who can only benefit by going away’ (E&W, Magistrate).

However, most respondents across the jurisdictions considered custody to be an inappropriate response for young people with disabilities and acknowledged that it often serves to exacerbate trauma:

There would be genuinely very few magistrates, or virtually none, who would actually say, “if we can’t do anything for them in the community then we will lock them up”, but inevitably that’s what ends up happening because if they don’t get any services whatsoever then... their issues just continue (Aus, Judiciary).

A striking contradiction emerged from the data. Respondents were asked whether there are any groups of young people for whom custody is especially inappropriate and many referred to young people with mental health disorders and cognitive disabilities: ‘... some young people with significant learning difficulties who can’t really take responsibility for their actions’ (E&W, YOT Senior Practitioner), and ‘particularly for kids with mental illness or intellectual disability, and also kids with serious drug problems, obviously it would be much better for them to go into a therapeutic community’ (Aus, Judiciary). Equally, many respondents explained that young people with mental health disorders and cognitive disabilities have particularly negative experiences of penal custody: ‘it’s cruel and unusual punishment really... for young people with any form of impairment or mental health problem. It’s horrendous’ (Aus, Youth Worker). Similarly, in England and Wales a former Senior Civil Servant remarked:

The idea that you can put a child in prison and they are going to come out the other end reformed and be a better person is nonsense... [prison] is a very damaging experience for people. Particularly...[for]...boys with severe mental health or learning disabilities or family breakdowns, you can't fix that in a prison (E&W, Former Senior Civil Servant).

Other interviewees pointed out that the common practice of managing young people with complex support needs who display challenging behaviours, or who self-harm, by using isolation and segregation can exacerbate mental ill-health and cause significant psychological harm:

... the [detention centre unit], which is supposed to be a place where they do observations of kids with behavioural or mental health issues, but it's really the punishment wing. And they will put kids in there in effective solitary, with nothing to do (Aus, Judiciary).

Despite all of this, however – and herein lies the fundamental contradiction – young people, with these needs are substantially overrepresented in custodial institutions in Australia and England and Wales.

### ***The significance of early and holistic responses for children and young people with complex support needs***

Respondents emphasised the importance of a holistic strategy to enable early identification, diagnosis and proper support for children and young people with mental health disorders and cognitive disabilities, alongside comprehensive and consistent assessment and appropriate service responses as soon as the young person enters the youth justice system (see also Haines et al 2012). Interviewees stated there is a 'whole range of things that [are] not identified early enough' (Aus, Solicitor) and that 'the majority of young people coming through here have cognitive disabilities that should be recognised' (E&W, YOT Interventions Manager). Most respondents were critical of the lack of consistent assessment procedures and suggested that for many young people, diagnosis of their cognitive disability only occurs once the young person is already heavily enmeshed in the youth justice system: '... quite often it's not until

they come into juvenile justice that it's picked up' (Aus, Juvenile Justice Director). Proper diagnosis and the need for screening to divert children and young people with complex support needs from the youth justice system were common responses in both Australia and England and Wales. It was suggested that screening could be 'more embedded as a process... so that those young people [with] mental health or intellectual disability can be screened out before they've gone through a [criminal justice] process' (Aus, Youth Worker). This 'cognitive dissonance' (the stated need to keep young people with complex support needs *out of* youth justice systems on one hand, set against a tendency to propel them *into* youth justice systems on the other hand, in order that they might receive assessment, care and support) was a common and distressing theme to emerge from the interviews with practitioners, managers and experts.

Respondents pointed out that young people involved with youth justice systems are increasingly presenting with multiple disabilities and health problems and, therefore, must be screened for a whole range of conditions:

Whether it's intellectual disability, cognitive impairment or whether it's a very severe social disability, everything from the autism spectrum to... FASD, and then all the other aspects in between. It's very apparent to you as a magistrate how many people struggle from these things (Aus, Judiciary).

Early diagnoses were seen as particularly important in order to facilitate diversion and provide 'an opportunity of maybe catching some of these issues and not criminalising them' (E&W, District Judge). Equally, diagnoses were seen as vital for the youth justice system to respond appropriately:

You could have a 17 year old in front of you who has speech and language disabilities, special educational needs... won't have any concept or real understanding about why they did what they did. But the court needs to be made aware of that... that he is functioning at age seven and he actually does not understand what you are saying to him (E&W, YOT Court Team Manager).

Interviewees also spoke of the siloed service approach and of the need for information sharing between departments and agencies, as young people often bounce from service to service without important diagnostic and assessment information travelling with them.

### ***The inadequate nature of community based support***

Interview respondents commented on the ‘appallingly high’ proportion of young people with mental health disorders and cognitive disabilities in the youth justice system and questioned: ‘why is that where the funnel takes them?’ (Aus, Academic). Respondents also reported that ‘prisons are just full of people that need treatment not incarceration’ (E&W, YOT Manager). A lack of community-based provision and the inadequate nature of support available for children and young people with complex needs was a persistent theme to emerge from the primary qualitative data.

Programmes and strategies to systematically divert young people with complex support needs from youth justice systems were thought to be vital, but many interview respondents explained that diversion was only ever truly effective if there is something meaningful to divert the young person to.<sup>8</sup> This was often said not to be the case: ‘I could easily count it on one hand how many times we’ve actually successfully referred a client to our youth mental health services and they have actually proceeded to a service’ (Aus, Juvenile Justice Manager).

Some respondents drew attention to good practices. For example, in NSW the *Youth on Track* programme was considered to be ‘a good example of the appropriateness of early intervention for young people’ (Aus, Youth Worker), as a means of diverting them from the youth justice system:

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<sup>8</sup> In England and Wales pre-court/diversionary disposals include: triage (an informal measure); youth caution; and youth conditional caution. In Australia, diversion operates differently in each jurisdiction. In NSW, young people can be diverted by warnings, cautions and youth justice conferences. In Queensland, they can be diverted by cautions or referrals to youth justice conferences. In Victoria police are able to issue formal cautions, however, there is no legislated pre-court diversion scheme for young people and as a result diversion operates on an ad hoc basis. In Western Australia young people can be issued with a warning or referred to the multidisciplinary Juvenile Justice Teams.

So the idea is to pick up the kids who have been cautioned by police but who have issues which really need attention... possibly early signs of mental health problems, learning disabilities... to basically have a way of sort of picking up these kids, so once they've already come to the attention of police and possibly been cautioned a couple of times, but before they get really entrenched in the juvenile justice system, to actually have a kind of referral pathway for these kids to get some help (Aus, Solicitor).<sup>9</sup>

But the overwhelming message to emerge from the interview data pointed to the inadequate nature of community based, non-criminalising support for young people with complex support needs. In Australia, the closure and increasing fragmentation of community-based support services was a matter of concern and many respondents commented on the contracting-out of services to NGOs and the private sector:

Governments are always about saving money and pushing services out... to the non-profit or more scarily, the for-profit sector. The idea of Serco<sup>10</sup>... running a centre for disabled people scares the bejesus out of me (Aus, Policymaker).

Similar concerns were expressed by respondents in England and Wales who referred to the compelling need for properly resourced health, education, and community support services:

Sometimes we have to really push to get some form of mental health recommendation within the programme or drug course or whatever, because the YOTs just don't have the resources to offer that... [they] are on limited resources ... limited programmes (E&W, Magistrate).

## **Discussion**

The principal findings from the study contribute an inter-jurisdictional comparative perspective to the limited, but growing, body of research on young people with mental health disorders,

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<sup>9</sup> For a similar initiative in England and Wales see Haines et al 2012.

<sup>10</sup> Serco is a private company which operates young offender institutions in England and Wales and correctional centres in Australia.

cognitive disabilities and complex support needs in youth justice systems. While there are some notable differences both within and between the jurisdictions, the striking similarities endure. Over many years, in Australia and in England and Wales, there have been repeated calls - emanating from inquiries, research reports and practitioner experience - for improvements to diagnostic procedures for young people with complex support needs both before and after they enter youth justice systems. Despite this, together with the accumulated knowledge deriving from government bodies (Calma 2008; Noetic 2010), non-government organisations (Simpson et al 2001; IDRS 2008; Hughes et al 2012) the judiciary (Education and Health Standing Committee 2012), and academics (Chitsabesan et al 2007; Baldry et al 2011; Haines et al, 2012; Baldry et al 2015), there appears to be little, if any, reduction in the criminalisation of young people with disability.

The identification and diagnosis of disorders and disabilities for children in disadvantaged circumstances are beset with formidable challenges including: difficult home contexts, lack of capable adults in their lives, inconsistent definitions of cognitive impairments; a lack of standardised assessment processes; a shortage of culturally sensitive, appropriate and validated screening tools and unresolved debates as to who, when and/or which agency is best placed to undertake such assessments. Research and practice experience suggests that, in reality, the identification of disabilities often falls to schoolteachers, police officers and/or legal practitioners who rarely receive adequate training and who, more often than not, do not possess the required knowledge, skills and specialist expertise to undertake such a task (Gray and Beresford 2002; NSWLRC 2012; Young Minds 2013).

The findings from this strand of the wider CYPP project highlight the need, when appropriate and necessary, for comprehensive screening processes early in a young person's life. The compounding negative effects of childhood abuse and neglect, children who are looked after/in OOHC, complex support needs and contact with youth justice systems is well established across our focus jurisdictions. Many of these factors are identifiable early in life and, potentially at least, there are opportunities for government agencies and related services to mobilise appropriate support for such children, young people and their families. Early recognition of need and the concomitant provision of support through infant health services, early childhood programmes and pre-school and school-based interventions (see also Baldry

et al 2015) offer the prospect of positive and preventive outcomes for young people. In cases where these early opportunities are missed, the same young people are invariably criminalised and ‘washed-up’ into youth justice systems and, unless diversionary screening is activated at the *very first point* of contact with such systems, young futures are blighted.

If our research reveals that in Australia and in England and Wales there is a widespread lack of early identification of need, it is the complete absence of appropriate disability support in many geographical areas that is perhaps most troubling. As noted above, although there is evidence of some positive practice in discrete locations it is not consistently available at a sufficient scale and services are frequently fragmented, under-resourced and lacking strategic co-ordination. Our findings indicate that insufficient and/or ineffective communication and cooperation between government services and other agencies signal a clear need for improved referral pathways and greater case coordination (Baldry et al 2015). Many practitioners, managers and experts spoke of siloed service provision and recognised the need for a ‘joined up’ or ‘whole of government’ approach to young people with complex needs.

For children and young people with complex support needs who are propelled into youth justice systems, our research has found that too many are being placed on custodial remand, owing to a combination of an absence of suitable alternative accommodation, the lack of community-based support or, perversely and paradoxically, ‘for their own good’ in order to access programmes and services that are more readily available in penal custody than they are in the community. Indeed, whilst remanding young people with complex support needs in penal custody was recognised by many interviewees as deeply problematic, it was also often seen as the only realistic means of accessing necessary services. This not only reflects a profoundly distorted incentive but it also stands in breach of both Australia’s and England and Wales’ obligations under international human rights law, including the Convention on the Rights of Persons with Disabilities and the United Nations Convention on the Rights of the Child. Furthermore, such practices negate a substantial volume of authoritative research that confirms that penal custody routinely damages young people’s emotional, mental and physical wellbeing and often increases the risk of depression, self-harm and, at the extremes, self-inflicted death (see Goldson and Coles 2005; Goldson 2006; Holman and Ziedenberg 2006; Schnittker and John 2007; British Medical Association 2014).

Police officers are the gatekeepers to youth justice systems and our respondents made it abundantly clear that, in their view, police are not normally sufficiently trained to interact appropriately with young people with complex support needs. This echoes findings that have emerged from surveys of police officers themselves. In England and Wales, for example, a survey of police officers found that just 42 per cent were satisfied with how they had worked with individuals with autism spectrum disorders (Crane et al 2016). On the other hand, on several occasions we were told of the positive benefits that can flow for young people once police become aware of their disability and are able to respond appropriately. It is imperative, therefore, that police officers receive appropriate training on mental and cognitive impairments and are given more options when processing young people with complex support needs. Until such time as police officers are suitably trained and appropriately-resourced and custom-tailored community-based services are made available, young people with complex support needs will, in effect, continue to be ‘written off’ as ‘difficult’ and ‘too hard to manage’ and exposed to processes of undue criminalisation.

## **Conclusions**

Although respondents in Australia and England and Wales are clearly troubled by the large numbers of seriously disadvantaged young people flowing into youth justice systems, to-date there is little, if any, evidence that such concern is serving to stem the flow. That being said, however, and despite the commonality across the comparative jurisdictions, there are some grounds for believing that there is a greater level of recognition in Australia than there is in England and Wales. A series of funded national research projects - starting in 2006 (see, for example, the MHDCD Project ([www.mhdcd.unsw.edu.au](http://www.mhdcd.unsw.edu.au)) – have revealed not only the prevalence, but also the nature of the pathways that direct children and young people (especially Indigenous Australian children and young people) with complex needs into youth justice systems. In this way, successive Australian governments are being increasingly called to account especially for the criminalisation of growing numbers of Indigenous children with (unmet) complex support needs. In some Australian state jurisdictions, this has led to the development of mental health and cognitive assessment screening for children and young people entering youth justice systems. It has also contributed to Law Reform reports (Calma et al 2008; NSWLRC 2012; 2013), Commonwealth, State and Territory inquiries

(Commonwealth of Australia 2011; 2016), and high-profile media attention (Perpitch 2014; Maddocks 2016; Medhora 2016; Baldry 2016). However, across all jurisdictions (with the exception of NSW) there remains a lack of available quality quantitative data on the mental health and disability status of those within youth justice systems.

The research presented here adds to an emerging body of evidence that young people who endure socio-economic disadvantage(s) and myriad complex needs are excessively criminalised in the absence of community-based education, health and welfare services and disproportionately and quite inappropriately processed, governed and regulated by systems of control (and punishment) rather than care (and welfare). Moreover, repeated contact with youth justice systems can impose devastating long-term impacts on individuals, families and communities by both creating and compounding complex support needs and embedding this vulnerable population within the apparatus of punishment. This is, of course, ultimately contingent on social class and the material resources available to young people and their families. For the poor and dispossessed (and especially for Indigenous children and young people in Australia), too often imprisonment becomes the norm in lieu of the community-based holistic support services that are increasingly reserved for those who are able to purchase them. Recalling the theoretical priorities of critical disability criminology, the relations between socio-economic context, disability(ies) and criminalisation are plain to see. Ultimately, such unnecessary cruel and unusual punishment is not justice. Rather it is criminal.

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None declared

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