Diversion for Dementia: Access to Justice for People with Dementia

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SUMMARY

This article examines the intersections between dementia and crime. It presents two case studies of elderly offenders with dementia who were seen by the author in her role as a clinical neuropsychologist and diverted from the criminal justice system. The case studies draw on data from interviews with a carer and a lawyer involved in each case and highlight the experiences of the person with dementia, from the time of police interaction to the conclusion of court proceedings. The findings illustrate the challenges faced by elderly people engaged with the criminal justice system and the need for reforms given our ageing population and increasing number of older people alleged to have committed criminal offences, both recent and historical. A specialist 'Elder Court' model is proposed to provide an individualised and multidisciplinary approach to ensure appropriate and efficient management of elderly people accused of criminal offences during legal proceedings.

This paper complements the author's oral presentation of 'Diversion for Dementia: Access to Criminal Justice for People with Dementia' at the 42nd Australian & New Zealand Association of Psychiatry, Psychology and Law Congress available here.

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INTRODUCTION

This article summarises the journey that led me to pursue this research project and provides a brief overview of dementia and its intersection with crime. It also includes a link to my conference presentation at the 42nd *Australian & New Zealand Association of Psychiatry, Psychology and Law Congress* from November 2024. Two case studies of successful section 14 *Mental Health and Cognitive Impairment Forensic Provisions Act* (2020) diversion applications for elderly offenders with dementia are provided. The case studies draw on data from interviews with a carer/family member and lawyer involved in these cases. Finally, I outline a proposed Elder Court model to provide an individualised and multidisciplinary approach for elderly offenders facing the criminal justice system.

MY JOURNEY TO THIS PROJECT

I have worked as a clinical neuropsychologist for over 20 years, seeing people with cognitive and/or mental health impairment due to actual or suspected brain injury or disease. A few years ago, I saw an 80 year old man who I will call Isaac. He had been charged with a sexual assault offence against a resident with dementia at his aged care facility. This case was complex and challenging for everyone involved: aged care staff, police, the victim's family, Isaac's family, and Isaac himself. Isaac had significant cognitive impairment. His frontal lobes were not functioning well and caused him to be disinhibited and sexually inappropriate. He was diagnosed with dementia after his alleged offence. Over one year later when his case was heard at the Local Court, he was found unfit to be tried. His son said to me at the courthouse "it should never have got to this".[1] Isaac's case inspired me to study law and set me on the journey of exploring the intersection of criminal law and dementia.

WHAT IS DEMENTIA?

Dementia is a syndrome characterised by cognitive decline due to brain injury or disease. There are over 400,000 Australians with dementia, and most live in the community.[2] There is currently no cure for dementia. Clinical diagnosis of dementia is based on cognitive assessment results, biomarkers and neuroimaging findings. There are many different types of dementia. The cognitive and behavioural effects depend on the type of dementia and location of neuropathology. For example, Alzheimer's Dementia (AD) is the most common and well-known type, with the predominant feature of impaired memory due to neuropathology typically affecting temporal lobes. Behavioural variant Fronto-Temporal Dementia (Bv-FTD) primarily affects social and emotional functioning due to neuropathology affecting frontal lobes.[3]

1 To read more about Isaac see my book 'Sex in the Brain' (2019) New South Press (pages 168-174).
2 See Dementia Australia website for statistics about dementia https://www.dementia.org.au/about-dementia/dementia-facts-and-figures
3 See Dementia Australia website for discussion of types of dementia https://www.dementia.org.au/about-dementia/types-dementia

DEMENTIA AND CRIME

People with certain types of dementia are more likely than others in the community to engage in behaviour that attracts police attention and leads to criminal charges. Specifically, people with Bv-FTD are more likely to engage in physical aggression and criminal behaviour than those with AD.[4] Criminal behaviours such as theft, trespassing, public urination and sexual offences can be the presenting symptoms of behavioural change in people with Bv-FTD.[5] These observations prompted a call from academics that any person over 50 years of age with new onset criminal behaviour should undergo investigation of a potential dementia diagnosis.[6]

A recent Australian study of criminal offenders with dementia, from court cases from 1995 to 2020, found that the most common dementia type was vascular. Various offences were committed by people with dementia ranging from shop lifting to tragic cases of murder. Violent crimes were largely driven by frontal executive dysfunction rather than a specific dementia type. Victims of murders committed by people with dementia are most commonly a female partner or carer.[7] These cases often receive media attention.[8] The issue of where to place convicted offenders with dementia is complex. Prison is not an appropriate environment, but many aged care facilities are unwilling to accept convicted murderers or paedophiles with dementia. Given the ageing prison population, there is an urgent need to address this issue and consider purpose-built facilities.

There are challenges faced by people with dementia charged with a criminal offence throughout all stages of the criminal justice process.[9] The timing and accuracy of an offender's dementia diagnosis can affect legal outcomes. When considering an offender's fitness to plea, the timing of diagnosis and characterisation of the nature of cognitive impairment are critical. This may require repeated assessments over time, particularly if there are lengthy delays in trials. Depending on the type of dementia and rate of decline, the offender may become unfit at any stage and this needs to be monitored and reviewed. A timely diagnosis is necessary for appropriate sentencing and for a special verdict and appropriate placement of offenders with dementia.

Diversion out of the criminal justice system may be possible if the dementia diagnosis is known at the time of offending or shortly after. In NSW, the *Mental Health and Cognitive Impairment Forensic Provisions Act* (2020) provides a statutory definition of cognitive impairment that includes dementia. Section 14 of this Act allows diversion out of the criminal justice system for those people who have a mental health or cognitive impairment as defined in section 5, which includes dementia.

4 Mario F Mendez, 'The Unique Predisposition to Criminal Violations in Frontotemporal Dementia' (2010) 38 *Journal of the American Academy of Psychiatry and Law* 318.
5 Madeleine Liljegren et al, 'Criminal Behavior in Frontotemporal Dementia and Alzheimer Disease' (2015) 72 *Journal of the American Medical Association Neurology* 295.
6 Adonis Sfera et al, 'Neurodegeneration Behind Bars: From Molecules to Jurisprudence' (2014) 5 *Frontiers in Psychiatry* 1.
7 Amee Baird et al, 'Homicide and Dementia: An Investigation of Legal, Ethical, and Clinical Factors of Australian Legal Cases' (2020) 71 International Journal of Law and Psychiatry 7.
8 For example, see the recent case of 93 year old Mr Dimasi, https://www.abc.net.au/news/2025-01-24/francesco-dimasi-not-guilty-of-stabbing-murder-of-wife-maria/104854416
9 John Anderson and Amee Baird 'Sentencing and Placement of Offenders with Dementia: A Significant Contemporary Challenge for the Criminal Justice System' (2024) *Journal of Psychiatry, Psychology and Law* (published online 9 Sept 2024).

EXAMINING THE INTERSECTION BETWEEN DEMENTIA AND CRIMINAL LAW

There has been scarce research attention directed to the intersection between dementia and criminal law. My project sought to address this current gap and explore the broad issue of access to criminal justice for people with dementia. I examined cases of successful section 14 applications for people with dementia from my own neuropsychology practice, and interviewed a lawyer (Case 1, Mrs A) and daughter/carer (Case 2, Mr G) involved in these cases. This project received ethics approval from the University of Newcastle Human Research Ethics Committee and involved semi-structured interviews with the participants to understand their experience and that of the alleged offender with dementia, from the time of arrest/police interaction to the conclusion of the court proceedings.

The Law and Justice Foundation of NSW Justice Fellowship funding allowed me to attend and present my project at the 42nd Australian & New Zealand Association of Psychiatry, Psychology and Law Congress (ANZAPPL 2024) in Melbourne in November 2024. Please see a link to my abstract and presentation slides here.

This conference presentation included five case examples of successful section 14 applications for people with dementia and a discussion of the common issues and challenges they faced. For example, most of the people with dementia were unable to recall their alleged criminal offence. Many were arrested, charged and interviewed alone by police. They had difficulty understanding legal processes/court proceedings or potential outcomes, and feared going to jail. Their cases were delayed by hospital admissions and placement into aged care facilities. Their family members/carers were all distressed by the entire process. Two case examples are discussed below to demonstrate these issues.

CASE 1: MRS A

Mrs A was a 76 year old woman who had known cognitive difficulties but no dementia diagnosis at the time of her alleged offence (destroy/damage property, common assault and stalk/intimidate with intention to cause physical or mental harm) committed in a domestic violence context against her husband. She was seen for neuropsychological assessment one month after the alleged offence. The only person who could bring her to this appointment was the victim (husband) of the alleged offence, which created a challenging atmosphere. Mrs A thought the pending court hearing would help find somewhere for her to live. Mrs A showed prominent memory and executive dysfunction and was diagnosed with possible Alzheimer's or vascular dementia.

Mrs A's lawyer was the duty lawyer for Legal Aid when she met Mrs A, who was in hospital at the time she was charged. Police questioned her alone. Mr. A's lawyer noted ***"it is a difficult situation for police trying to do their job, but they could use discretion. It really depends on the individual and experience of the police involved"***. Mrs A had "obvious memory difficulties" in their first meeting and an adjournment was sought with a plan for a section 14 application. There had been previous Apprehended Violence Order matters between Mrs A and her husband which had been withdrawn. Mrs A had no capacity to understand what was happening during interviews with the lawyer. Instructions were provided to her, but she misplaced letters or forgot what she was told, and then became very stressed when she found the court papers. Mrs A never attended court due to her hospital admission and subsequent transfer to an aged care facility. Mrs A's lawyer commented that it was fortunate that the magistrate involved "understood the situation". She said, ***"these are difficult, time-consuming matters. Legal Aid funding barely scratches the surface of the time involved"***.

Mrs A's lawyer was highly supportive of the idea of an Elder Court. She said that tailored support, quicker access to services such as geriatrician reviews, and court staff who are experienced with elderly people would be helpful in such cases. Mrs A's lawyer said police could be better trained, and they could have a particular staff member who was equipped to deal with people with dementia. She commented, ***"the whole system needs to change with the ageing population"***.

CASE 2: MR G

Mr G is an 88 year old man who received a diagnosis of dementia three months prior to his alleged criminal offence (driving with mid-range prescribed concentration of alcohol). He had a minor accident in an RSL Club car park. He had difficulty managing a roadside breath test and was taken to hospital for a blood test. He was charged and interviewed by police alone. He was seen for a neuropsychological assessment five months after the alleged offence. He suspected there had been a "mix-up" and did not know what the charge was, why he had to go to court, or who his lawyer was. He showed significant cognitive dysfunction, predominantly affecting recall memory, and executive and speed of processing functions. The findings supported the previous diagnosis of a dementia, with likely differentials being alcohol related dementia, mixed Alzheimer's/vascular dementia or vascular dementia.

Mr G's daughter, who was also his carer, was first aware of his cognitive difficulties five years prior to the alleged offence. She arranged a geriatrician review and engaged aged care support services. She first became aware of his arrest when the hospital staff rang her late at night after he was taken there from the accident scene. They asked for her to come and take him home. She lives several hours drive away from her father, and requested if he could stay overnight, but the nurses drove him home. She visited the next day and spoke to the RSL Club barman who had known her father for a decade and said that Mr G was "not himself". The barman had offered to drive him home and the accident occurred when Mr G was attempting to park.

Mr G's daughter said his lawyer was from the same country town as her father, and this made Mr G feel comfortable. Mr G "didn't take it all in" but accepted what the lawyer said and "did what he was told" in court. The magistrate allowed Mr G to sit at the back of the court with his family. Mr G's daughter said, "it could've been handled differently by the police initially" and there was "no point in him going to court". She commented, ***"It was a waste of the court time and a waste of money. He didn't understand any of it. All the legal jargon went over his head. It took all day, and he didn't engage at all"***. She said it was an expensive process for someone on an aged care pension, and the cost of an aged care worker attending court drained his aged care package. She described the court hearing as a ***"very stressful day for all of us. He didn't cope well and was so tired"***. He refuses to use public toilets and was incontinent on the drive home.

Mr. G had attended court the year before for an unregistered firearms offence. His firearm licenses were two weeks overdue. He had two vintage guns in a safe and one under his bed, which he had owned since the 1960s. Mr G's daughter suspects the aged care staff saw it. She was unsure if they were scared of him, but commented, "it's unlikely as he can hardly get out of a chair". Mr G's daughter arrived at his home 20 minutes after the police had "raided the house". She described the police as "too heavy handed. They caused a lot of stress. They escalated me, let alone Dad". She stated, ***"He's an isolated person with dementia in the country. They haven't taken this into account when needing to re-issue firearm licenses. The process was not explained well by Service NSW or the Firearm Registry, and there was a lack of support"***. When Mr G attended court for this offence, he was represented by a Legal Aid duty lawyer, convicted and given a $500 fine. His daughter queried whether the outcome would have been different if she had sought private legal representation.

Mr G's daughter noted there was no one there to support him at the time of his arrest for the drink driving charge, or initially when his house was raided when he received the unregistered firearm charge. She feels police should call someone when dealing with an older person and ***"shouldn't do anything until a carer, a family member or a lawyer are there. They shouldn't escalate the situation. They need to understand old people are not quick and they don't need stress. They need calm"***. She suggested there should be police training on how to manage older people. She was fully supportive of the idea of an Elder Court and suggested that the option of appearing via audio visual link would be useful.

THE ELDER COURT

Attending court is a stressful experience for anyone, but for an elderly person there are often a myriad of challenges. These include mobility and sensory problems (visual and hearing impairments), cognitive difficulties (including language, memory and attention difficulties, and reduced speed of processing), and fatigue. All of these factors can adversely impact their ability to engage effectively in court proceedings and can cause frustration for all parties involved. A specialised Elder Court could address these challenges and enable a more efficient process for older offenders.[10] The proposed Elder Court is akin to the Children's Court and other specialised courts such as the Drug Court. This specialised court or list would be for elderly offenders aged 65 years or older. It would provide access to a multidisciplinary team, legal practitioners and judicial officers experienced with older people. It would enable fast tracked cognitive assessments and geriatrician reviews. An Elder Court would cater for the common difficulties that elderly people face and ensure an older offender's experience of court is as efficient as possible. For example, in the case of Mrs A, a social worker assigned to her case would have been highly beneficial. For Mr G, a more streamlined and tailored approach to his hearing could have made his court experience more efficient. The Elder Court could provide a more individualised approach to such complex cases.

CONCLUSION

Our population is ageing and there are a growing number of offenders with dementia facing the criminal justice system. The neurodegenerative nature of dementia requires a unique approach at all stages of the criminal justice process, from interactions with police through to the Judiciary. There is a need for education, law reform and new policies to ensure just outcomes for this highly vulnerable population.

ACKNOWLEDGEMENT

Thank you to the NSW Law and Justice Foundation for supporting this project which gave me a kick start in my legal career and has inspired me to continue undertaking research in this area and develop my proposed Elder Court model.

10 An article on the proposed Elder Court model is currently in preparation with co-author Professor John Anderson, University of Newcastle Law School and has been submitted for presentation at the 43rd ANZAPPL Conference.

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