



Mental Health Commission
of New South Wales



Towards a just system

Mental illness and cognitive impairment
in the criminal justice system

DIRECTIONS FOR ACTION

July 2017

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To the Minister



Under the *Mental Health Commission Act 2012*, the Commission is charged with considering the interaction of people with a mental illness with the criminal justice system. This is a Report on that issue under Section 14 (1) (c) of the Act.

When examining this issue it is equally important for the Commission to consider the needs of individuals with a cognitive impairment, due both to the legislative structure and the overlapping needs of these groups.

We know that people with a mental illness or cognitive impairment are much more likely to come into contact with the criminal justice system, and are overrepresented within the prison population. There have been many previous research studies and government reports looking at the reasons why this occurs and recommending pathways forward.

This Report does not intend to re-examine that wealth of material. Rather, building on the Commission's work in *Living Well: A Strategic Plan for Mental Health in NSW 2014-2024*, it provides a high-level synthesis of this evidence with the aim of providing a useful framework for ongoing discussion and planning across government about how to alter the trajectory of individuals with a mental illness or cognitive impairment away from the criminal justice system.

Generally, this Report is concerned with any person with a mental illness or cognitive impairment who is in contact with the criminal justice system. However, there are some issues that specifically affect people within the forensic system and this Report speaks to those as well.

In common with *Living Well*, the Report takes a whole-of-Government, whole-of-life and whole-of-community perspective. These issues are about much more than what happens within the Department of Justice itself. They are about what happens across the full range of social services to support prevention, early intervention and co-ordinated supports to reduce the likelihood of contact with the criminal justice system arising from a person's mental illness or cognitive impairment.

That is not to say that there is a complete vacuum. There is a range of services and programs currently underway in NSW. However, overwhelmingly these are not offered at sufficient scale to offer appropriate supports for the number of people with a mental illness or cognitive impairment who come into contact with the criminal justice system.

There are also a number of more strategic pieces of work underway on specific aspects such as the Department of Justice's work to develop a Disability Justice Strategy and the recently announced review of the Mental Health Review Tribunal in relation to its Forensic Division. While these individual pieces of work are valuable, there is currently no overarching whole of

government framework which brings together the existing efforts of various government departments, or provides a clear pathway for collaborative service planning.

In 2012 and 2013 the NSW Law Reform Commission released reports on people with cognitive and mental health impairments in the criminal justice system, making 114 recommendations and presenting a blueprint for action. There has been no formal implementation of these actions to date. The Commission called for action in response to these reports in 2015 in its public report, *One Year On*¹.

Now is a critical time to recommit to addressing the needs of these individuals. There is increasing pressure on the criminal justice system from the growing prison population, which disproportionately affects individuals with a mental illness or cognitive impairment. Additionally, there are reforms at both the state and Commonwealth level in the delivery of mental health services as well as the transition to the National Disability Insurance Scheme.

This convergence of changing context across the justice, health and disability sectors further highlights the need for whole-of-government co-ordinated effort to ensure the complex needs of individuals with a mental illness or cognitive impairment are effectively addressed. This Report offers a foundation for such a process.

I commend this Report to you and recommend it be made public immediately.

John Feneley

A handwritten signature in black ink, appearing to read 'John Feneley', written in a cursive style.

NSW Mental Health Commissioner

11 July 2017

A note on terminology

In the justice system, mental ill health and cognitive disability are often discussed together, although they are very different things.

One reason is that the criminal law is mainly interested in whether a person's mental functioning is impaired. For example, a person's criminal responsibility may be reduced if they have an impairment of their ability to understand what is happening around them, or their ability to reason and make judgements.

Historically, the law has been less interested in what causes the person's mental functioning to be impaired, and this has presented many problems, particularly for people with cognitive disabilities who are sometimes wrongly dealt with as though they have a mental illness².

This confusion is apparent in the legislation which deals with impaired mental functioning in the criminal justice system, which is called the *Mental Health (Forensic Provisions) Act 1990*, even though it applies both to people with mental illness and to people with cognitive disabilities.

There has been extensive work on defining cognitive and mental health impairments, which we do not seek to repeat³. Our concern is with systemic changes required to better serve all people with mental health and/or cognitive impairments who are in contact with the NSW criminal justice system.

In its reports on how the criminal justice system deals with mental illness and cognitive disability, the NSW Law Reform Commission (LRC) rejected the idea of an 'umbrella' definition which covers both types of impairment. It found that using an umbrella definition would lead to further confusion about the nature of cognitive disability, and the fact that it is very different from mental illness.

The LRC used the term 'people with cognitive and mental health impairments in the criminal justice system' throughout its reports to refer to the group with which the forensic mental health law is concerned.

This report focuses on this same group of people. For brevity, we use the term 'people with a relevant impairment', instead of the lengthier 'people with cognitive and/or mental health impairments'. When we say 'people with a relevant impairment', we mean people living with mental illness and/or cognitive disabilities. Many people live with both mental illness and cognitive disability. Our use of this term does not mean that we think cognitive disability and mental illness are the same thing.

Some of the LRC's recommended changes to NSW forensic mental health law are intended to make it clear that there is a difference between mental illness and cognitive disability⁴. The Commission supports those changes. Mental illness and cognitive disability require different approaches, and this should be reflected in the law by making clear distinctions between the two.

Introduction

Many previous reports⁵ have identified opportunities for improving the criminal justice system's response to people with mental illness and cognitive impairments, but action has been slow and fragmented. The best intentions of state governments over the last 10 years, numerous calls for change, and repeated goals and commitments under state plans have not resulted in significant improvements. As a result, many in the sector feel fatigued and despondent about the prospect of change.

To achieve positive change that makes a real difference in people's lives, reforms need to be implemented simultaneously and systematically, and the process should begin immediately. The way forward requires:

- recognising that many vulnerable people are not getting the help they need within the current health, disability and criminal justice frameworks
- bringing together key proposals from past reports to create a single, coherent roadmap for NSW to follow to achieve positive change
- setting out a transparent pathway for reform, with clear allocation of responsibilities and a timeframe for implementation.

This Report summarises the evidence and sets out the most promising opportunities for change across multiple domains, within the criminal justice system, forensic system and more broadly across the full spectrum of Government responsibility.

Whole-of-government direction and guidance is required for NSW to achieve better outcomes for people with relevant impairments, reduce the number of people entering prisons, reduce re-offending, offer better support to victims and make justice spending more efficient.

Recommendation

The Commission recommends that:

The NSW Government establish a high-level, whole-of-government working group to develop a comprehensive response to the needs of people with mental illness and/or cognitive impairment who are in contact, or at risk of contact, with the criminal justice system

It will be essential that this group is authorised to act meaningfully so that its work is not viewed as tokenistic or a bureaucratic hurdle that delays practical change.

Why is it critical to take action?

We know that many prisoners live with mental health or cognitive impairments. Half of all adult inmates have been diagnosed or treated for a mental health problem⁶ and 87 per cent of young people in custody have a past or present psychological disorder⁷. Rates are higher for Indigenous young people in custody⁸.

Estimates of the rates of intellectual disability or borderline intellectual disability among prisoners range from eight to 20 per cent⁹. This figure relates to people who meet the diagnostic criteria for intellectual disability. The rate of inmates with cognitive impairment is likely to be higher, given that a significant number of inmates report ongoing neurological effects and psychological symptoms because of a traumatic brain injury¹⁰.

The very high rate of impairment among prisoners means that as prisoner numbers increase, so does demand for mental health and disability services within the correctional system. We are currently experiencing an unprecedented increase in the prison population: it has risen 37 per cent in the past two years taking it to a record high. According to the NSW Bureau of Crime Statistics and Research, prisoner numbers reached 12,729 in December 2016 - up from 9720 in 2012 in a system designed for 11,000 inmates¹¹.

The number of people within the forensic mental health system¹² also continues to grow, and each year more people are referred by the courts than are discharged from the system. Between 2012 and 2016, the number of forensic patients increased by more than 17 per cent from 350 to 411¹³. As at 1 July 2016 there were 411 forensic patients across a variety of settings¹⁴.

As the number of prisoners continues to increase, it is clear that prison is not working to deter people from re-offending. Since 2011, the re-offending rate in NSW has been increasing, with those who have previously been to prison more likely to re-offend than those given alternative community-based orders¹⁵.

Around 48 per cent of NSW inmates are back behind bars within two years of their release, according to 2014–15 Productivity Commission data. The figures are much higher for juveniles – more than half of all young offenders will re-offend within two years. Of those young offenders who are sentenced to detention, 76 per cent are convicted again within two years¹⁶.

In highlighting the over-representation of people with mental illness and cognitive impairment in prisons and re-offending statistics, we are not suggesting a simple cause and effect relationship. Rather, these statistics in large part reflect a failure to provide appropriate services and supports to people with relevant impairments in our community¹⁷.

Given these statistics, it is clear that reducing offending and re-offending rates among individuals who have relevant impairments is key to achieving an overall reduction in recidivism.

Improvements to health and disability services within the justice system could interrupt the cycle of reoffending and improve public health and safety¹⁸, contributing to the achievement of the NSW State Priority to reduce reoffending by 5 per cent by 2019¹⁹.

In this respect, mental health advocates and criminal justice agencies have a shared goal. Supporting people with relevant impairments so that they can live well without offending has enormous benefits for individual and community wellbeing. It is also a cost-effective approach to crime reduction, which, in contrast to investment in prisons, will have increasing returns into the future²⁰.

In addition, people with relevant impairments are at far greater risk of victimisation than the general population²¹. Being a victim of crime can be traumatic for anyone, and for people with relevant impairments, the trauma of victimisation can exacerbate existing conditions, and lead to critical mental health incidents²².

Poverty, homelessness and substance abuse are all associated with increased risk of victimisation. As such, providing appropriate early intervention for people with relevant impairments, to help them avoid and address these difficulties will help to reduce their vulnerability to victimisation²³.

It is also critical to note the nexus between childhood abuse and neglect and juvenile and later offending. It has been found that 81 per cent of young women and 57 per cent of young men in custody had been abused or neglected, and for 49 per cent of the young women and 19 per cent of the young men, that abuse or neglect was "severe"²⁴. An adequate and appropriate response earlier on can support young people to work through their traumatic experiences. Early intervention and prevention processes are important to ensure that young people receive the support they need and avoid the criminal justice system.

The process of the Royal Commission into Institutional Responses to Child Sexual Abuse has highlighted the prevalence and impact of childhood trauma and raised community expectations that prompt and concerted action will be available to improve responses and support to this vulnerable group. Early intervention and prevention approaches will be an important part of this response.

What are the costs?

The costs related to managing people with a mental illness and/or cognitive impairment through the criminal justice system are substantial, complex and difficult to determine. They include:

- costs of both adult and juvenile detention
- health services provided in detention, including to forensic patients
- costs of those being supervised in the community (this can include probation and parole as well as health and other community support services, such as housing)
- lost potential productivity of the individuals concerned
- costs and potential loss of productivity for the victims of crime, particularly for violent offences
- Justice administration costs that include:
 - Police resources
 - courts and tribunals
 - legal aid and prosecution costs

Currently NSW spends an average recurrent cost per inmate per day of between \$125 and \$145²⁵. No estimate is available of court costs associated with justice processes that may result in custodial or non-custodial sentences as court costs are not currently broken down to distinguish between civil and criminal. Nor are the costs associated with post-release support (such as community mental health services and housing) able to be clearly ascertained.

The costs for the provision of mental health support and associated costs in the prison system are similarly hard to establish; currently the NSW Budget papers do not separately itemise these costs. However, the Justice Health & Forensic Mental Health Network reported that 83 per cent of its \$194 million net cost of services in 2015/16²⁶ was directed towards its custodial and forensic health clinical operations directorates – which amounts to more than \$161 million.

Case study: Roy's story

The costs of providing services to people with a mental illness and/or cognitive impairment were comprehensively explored by a team comprising of academics and PwC Australia in 2013²⁷. They also examined the savings that could be realised if early intervention approaches were adopted. The following case study²⁸ reproduced from that report illustrates the economic benefits that could be realised using a different approach.

Roy's life course institutional costs by age 30 are

\$ 1,958,292

This includes 1876 days in custody, more than 209 incidents, and 5110 contacts under the Pharmaceutical Drugs of Addiction System (PHDAS)

Roy is a 30-year-old Aboriginal man with an intellectual disability and antisocial personality disorder. He has spent more than 1800 days in adult custody, 100 days in hospital for drug-related mental health and self-harm, and has had more than 5000 days of methadone treatment.

Roy's engagement with the criminal justice system at a relatively young age appears to be significantly related to the presence of cognitive impairment. His brothers and friends use his identity as an alias when committing other offences. As an adult, his offending is linked to his misuse of alcohol and drugs, which also precipitate his mental health disorders. He has received some support from Centrelink and NSW Housing, but that support has been insufficient.

Table 1: Selected agency costs over life course: Roy

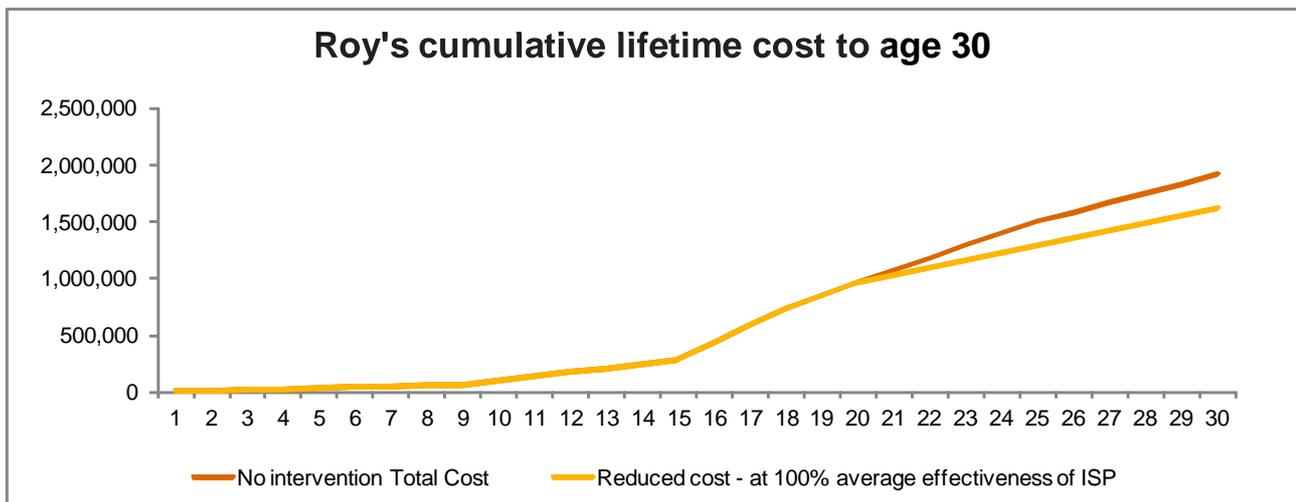
	<10	10 to 15	16 to 18	19 to 21	22 to 25	26 to 35	Total Cost
Police		\$46,893	\$51,582	\$98,475	\$109,416	\$89,096	\$395,462
Juvenile Justice		\$70,088	\$308,642	\$17,205	\$0	\$0	\$395,935
Corrective Services		\$0	\$0	\$96,746	\$186,067	\$180,026	\$462,838
Other agencies	\$64,987	\$100,584	\$93,804	\$124,776	\$133,399	\$186,507	\$704,057
TOTAL	\$64,987	\$217,565	\$454,028	\$337,201	\$428,882	\$455,629	\$1,958,292

Substantial savings and great improvements to Roy’s wellbeing could be achieved if:

- at age 19, Roy is instead provided with intensive case management support services, such as the Intensive Support Program (ISP)²⁹
- this support helps him to access the following supports from age 21 (after 2 years on the intensive intervention program):
 - Housing support (at \$27,905 pa)
 - Disability Support Pension (\$19,706 pa)
 - In-home support ranging from between 4 hours per week and 2 hours per day (\$10,587 pa)
- the support results in reducing Roy’s court costs, prison days and hospital admissions in line with the ISP.

The figure below compares the trajectory of Roy’s lifetime cost without investment to the average effectiveness of the ISP.

Figure 1: Case study from lifetime cost of homelessness – Roy



If the expected effect of the ISP is realised then the net saving at age 30 will be **\$352,826**. Even if the program is only half as effective as expected, the costs to government by age 30 are roughly the same, but likely to result in higher wellbeing for Roy.

There is no extra investment needed in Roy’s case to achieve a much better and cost effective outcome.

By age 30 the benefit cost ratio is estimated to be **1.4**

The report provided further case studies that indicated that the estimated benefit cost ratios ranged from 1.4 to 2.4. That is, for every dollar spent on the early investment, between \$1.40 and \$2.40 in government cost is saved in the longer term. This is apart from the benefits to the individual in terms of improved health and outcomes, but also to the broader community.

Broader than justice

As Roy's case demonstrates, effectively addressing offending and re-offending does not require action only by justice agencies, but across the full range of social services.

Particularly relevant for this cohort, there are significant reforms at both the Commonwealth and State level in relation to mental health and disability. Both reform agendas have a particular focus on individualised community-based care, whether through the roll out of the National Disability Insurance Scheme, or the mental health reforms being rolled out through Primary Health Networks.

In February 2015, the NSW Government launched its Disability Inclusion Plan - a requirement under the *Disability Inclusion Act 2014*. That legislation articulates the responsibilities of government authorities towards people with a disability, including people who experience psychosocial disability³⁰. The NSW Disability Action Plan sets out the whole of government goals to support the inclusion in the community of people with disability and to improve access to mainstream services and community facilities for people with disability. It also provides for collaboration and co-ordination among government departments, local councils and other entities in the provision of supports and services.

Individual public authorities are also required under the legislation to develop their own inclusion action plans, adopting the principles contained in the Act, and setting out the measures they intend to put in place so that people with disability can access general supports and services available in the community, and can participate fully in the community³¹.

Under the *Mental Health Commission Act 2012*, public sector agencies are also required to have regard to the following principles in exercising their functions³²:

- (a) people who have a mental illness, wherever they live, should have access to the best possible mental health care and support,
- (b) people who have a mental illness and their families and carers should be treated with respect and dignity,
- (c) the primary objective of the mental health system should be to support people who have a mental illness to participate fully in community life and lead meaningful lives,
- (d) the promotion of good mental health and the effective provision of mental health services are the shared responsibility of the government and non-government sectors,
- (e) an effective mental health system requires:
 - (i) a co-ordinated and integrated approach across all levels of government and the non-government sector, including in the areas of health, housing, employment, education and justice, and
 - (ii) communication and collaboration between people who have a mental illness and their families and carers, providers of mental health services and the whole community.

What needs to change?

Whole-of-Government action and reform are needed in the domains set out below to reduce the criminalisation of people with a relevant impairment.

In considering all of these, the following principles should be applied to shape the development of responses, programs and services:

Impairments can affect anyone

Living with an impairment does not mean that a person will offend

The combination of an impairment with other adverse life circumstances, in particular social disadvantage, increases the risk of offending

Helping people with a relevant impairment to live well in the community reduces the risk of offending

Health and disability services have a responsibility to support people with a relevant impairment, whether or not they are in contact with the criminal justice system

Many risk factors for offending are identifiable in childhood. Support for children and families can change the trajectory of young people at risk of offending

The criminal justice system must have capacity to identify and support people with relevant impairments

Providing evidence-based holistic support for people with relevant impairments when they exit custody reduces the risk of re-offending

Prisons are costly and there are more cost-effective responses that keep the community safe and respond appropriately to the needs of people with relevant impairments

Prison sentences should be the punishment of last resort and should be accompanied by evidence-based therapeutic programs and intensive reintegration support

Justice strategies that focus on keeping Aboriginal communities strong can reduce the number of Aboriginal people entering the criminal justice system

Keeping women out of prison will help to prevent the cycle of offending in the next generation

Interventions must be flexible to the needs of different communities and individuals

1. Development of a sustainable and ongoing funding model

Deliver improved services with sustainable and ongoing resources

Despite a shared intention among government agencies to improve the response to people with relevant impairments, it is often not possible for agencies to invest in large program expansions or new initiatives within their existing resources.

Although we know alternatives to prison are cost-effective, a broad, systemic approach to reform requires substantial new funding. An additional complexity is that alternative investments in education, health, and family and community services do not necessarily produce savings in those portfolios, which are mainly realised through the justice system. This is a major stumbling block on the pathway to reform, and without sustainable investment, major change is unlikely.

There needs to be a commitment to ongoing cost-benefit analyses which take into account this complexity and provide the ongoing evidence base to improve joined-up services. Any costing exercise should be undertaken with input from service providers who currently manage justice programs, and from researchers who have undertaken analysis on the costs and benefits of alternative justice approaches to people with a relevant impairment.

Certainly the implementation of the National Disability Insurance Scheme (NDIS) will have an impact for some people with relevant impairments. However, the NDIS targets individuals with the most severe needs for individualised supports, and these are only a small subset of people with relevant impairments in contact with the criminal justice system.

While it will be important for any costing exercise and ultimate funding to have regard to NDIS, a broader commitment is required to fund a systemic approach to addressing the needs of people with a relevant impairment so as to reduce their contact with the criminal justice system.

2. Early intervention initiatives

Increase holistic, culturally and gender sensitive support for children, youth and adults with impairments living in the most socially disadvantaged communities in NSW

Early neglect, abuse and trauma are common experiences among people who become entrenched in the criminal justice system.

Among young people in detention, 81 per cent of females and 57 per cent of males report some form of childhood abuse or neglect. The real number is likely to be higher, as we know that many young people either deny or under-report these experiences³³.

A significant number of people with relevant impairments who come into contact with the justice system are already well known to government and community services. There are high rates of contact with the child protection system and the link between out of home care and offending has

long been established. These early childhood interactions with support services present a key opportunity to identify impairments and to provide the supports these children need to deal with their challenging life circumstances. However, children in care are 68 times more likely than other children to appear before the Children's Court, with 56.5 per cent of young people appearing before the Court thought to be in care³⁴. Only 38 per cent of young people in custody were attending school prior to being detained. Those who had left school did so, on average, at the age of 14³⁵. These numbers suggest that impairments are not identified early enough, and/or people are not linked to services to help them live well in the community.

All of this has serious and ongoing repercussions for the individuals, families and communities, and results in significant economic costs through crime and the high costs of incarceration.

The Government has recently announced new funding to reform the out of home care system, and increase initiatives to improve outcomes for young people in care³⁶. This is a positive step but should not be seen as the sole solution to improve outcomes for vulnerable children.

An example of the type of multi-agency approach which could be further developed is Youth on Track, which is currently available at six sites across NSW. Police and schools can refer people aged 10-17 years who are at medium to high risk of offending to this voluntary program.

While initiatives such as this hold promise, an intensive, cohesive effort across all service agencies is needed to identify opportunities for improving holistic prevention and early intervention approaches.

3. State-wide access to diversion

Develop effective, flexible diversionary options and court support services

The failure of mainstream services early in people's lives often results in their eventual contact with the criminal justice system. Where contact with the criminal justice system occurs, we must use this as an opportunity to redress these failures and connect people with the services they need. By providing access to the right support we can change the trajectory of people's lives.

Diverting people with relevant impairments towards health and disability services at the earliest opportunity helps to reduce the number of people entering the criminal justice system. Diversion can occur at multiple points, including at police contact, prior to court presentation, at court, or as part of sentencing. When done well, diversion is also very cost-effective. Providing intensive support can result in significant savings over the long term³⁷.

NSW has legislation that enables courts to make diversion orders³⁸. However, the legislation is not used to its full extent, in part because of a perceived lack of accountability for defendants who are diverted, a lack of programs and services to which courts can turn to support a diversion order, and a lack of capacity and willingness within some health service providers to accept people diverted from court³⁹.

The prevalence of cognitive and mental health impairments among defendants in court proceedings is high. Studies in the Local Court indicate 23 per cent of defendants (57 per cent in locations with high indigenous populations) have an IQ in the range for possible intellectual disability or borderline intellectual disability, and 55 per cent have one or more psychiatric disorders⁴⁰.

Despite this, only around 1.5 per cent of all defendants in the Local Court have their matter diverted under mental health legislation⁴¹. The rates of diversion in the Children's Court are similarly low⁴², despite the very high rates of impairment among young offenders, and the desirability of intervening early to avoid entrenchment in the criminal justice system.

While Justice Health provides important support through the Statewide Community & Court Liaison Service, this is only available at 22 of the more than 160 local courts in NSW. Additionally, a pilot Cognitive Impairment Court Diversion Service will soon commence in two locations.

In its 2012 paper the LRC recommended significant changes to the diversion framework to improve accountability and increase the uptake of diversion orders. These recommendations included both changes to the legislation itself, and the expansion of services like those offered by Justice Health to provide early identification, assessment, advice, and linkage to case management supports and services⁴³.

To achieve this, we need a large-scale investment in effective diversion programs across NSW. This investment should include flexibility in the design of programs, to support their use by people in remote and regional areas, where access to services is limited.

4. Adjustments to investigative and court processes

Ensure that people with a relevant impairment can fully understand and participate in investigative and court processes

The high prevalence of relevant impairment among defendants presents a strong argument that, rather than being viewed as an exception which requires adjustments, the existence of some form of impairment should in fact be assumed as the norm, creating an impetus to re-evaluate our approach to suspects and defendants so that they can understand and effectively participate at every stage of the justice system.

Court attendance notices, and standard orders such as the conditions attached to bail and non-custodial sentences, could be revised to ensure the language and format are more easily understood and accessible. This has the potential to reduce re-offending related to justice procedures.

However, more specialised supports are also needed.

South Australia has introduced a broad communication support scheme as part of its Disability Justice Plan. The scheme provides volunteer communication partners to assist people with communication difficulties to understand questions put to them. NSW introduced a similar scheme in 2016, Children's Champions, which provides support to child witnesses giving evidence in child sexual assault matters.

Both models drew on the witness intermediary scheme in the UK where specialists are available from police contact through to court to guide those conducting the investigation and court matter in how best to communicate with the individual, and identify and provide appropriate communication aids. Similar supports should be available state-wide in NSW to courts, police and legal representatives to allow the full participation of both witnesses and defendants with a relevant impairment.

5. Reorientation of youth justice

Reorient youth justice towards a more therapeutic approach to avoid young people who have been convicted re-offending as adults

Young offenders make up a small proportion of all offenders, however a large proportion of young offenders eventually end up before adult courts. More than one in ten children who appear in Children's Court will end up in an adult prison within eight years⁴⁴. Young adults are the most prolific adult re-offenders, with more than 60 per cent reconvicted within 10 years⁴⁵. Nearly all Indigenous male juvenile offenders and a large majority of Indigenous females re-offend⁴⁶. A focus on young offenders has the potential to reduce the rate of adult offending and re-offending.

It is also crucial to ensure that there are sufficient services and support to assist young people to re-integrate once released from custody, an approach endorsed by the NSW Auditor General in her 2016 report *Reintegrating Young People Into The Community After Detention* which acknowledged that:

Australian and international research has shown that programs to reintegrate young people into the community can have flow on effects for the community. They can reduce the risk that young people will enter the adult criminal justice system. This in turn helps reduce the cost of crime and makes our communities safer⁴⁷.

The overwhelming majority of young offenders in custody have a relevant impairment and experience high levels of psychological distress and mental health conditions⁴⁸. A recent survey undertaken by Justice Health and Juvenile Justice (soon to be released) concerning the health of young people in custody will further help us understand the needs of this cohort. However, research reveals the promise of holistic integrated support for this group⁴⁹.

Intensive intervention for young people needs to be provided very early during their contact with the criminal justice system, ideally when they first come to police attention or are made the subject of an apprehended violence order (AVO).

In *Living Well: A Strategic Plan for Mental Health in NSW 2014-2024*, the Commission made a series of recommendations related to youth justice, which provide a framework for moving towards a more therapeutic approach to youth justice⁵⁰.

A new approach to young offenders, based on *Living Well*, will support changing the trajectory for young offenders away from the criminal justice system and deliver support for people who are overwhelmingly the victims of abuse and neglect.

6. Best practice service provision in the criminal justice system

Ensuring all services in the criminal justice system are recovery-oriented and trauma-informed, and support offenders to live meaningful lives, especially through work and education

It is essential to provide appropriate services throughout a person's criminal justice journey, from support to remain on bail in the community through to safeguarding against the negative mental health impacts of incarceration.

In *Living Well*, the Commission pointed to the importance of self-agency, and building strength and resilience through social and economic participation. This is even more critical in the criminal justice system, where community engagement and self-empowerment can not only maintain good mental health and wellbeing, but also reduce the chances of re-offending.

Boredom, and a lack of social inclusion and meaningful activity can generate and aggravate mental illness. These problems can be exacerbated by aspects of restrictive community-based orders and the prison environment, such as over-crowding in cells and long periods spent in cells due to staffing shortages.

Many offenders with relevant impairments come from backgrounds of severe social disadvantage including lack of support for education and employment. It is therefore a vital part of rehabilitation to ensure that appropriate education and work opportunities are accessible in prison and detention facilities, and/or that offenders are linked with continuing education and training in the community. Similarly, holistic disability support programs that include employment post-release are needed.

We also know a history of trauma is particularly common among people who come into contact with the criminal justice system⁵¹. This means all services provided to this cohort need to be recovery-oriented and trauma-informed. It is promising that Victims Services NSW has begun trauma-informed training of staff within detention settings, including a recent trial to provide counselling for juvenile detainees who had been the victim of interpersonal violence. Improved general awareness and capability of all staff in the criminal justice system will be critical to reducing the re-traumatisation of individuals, and increasing engagement in rehabilitative programs.

7. Building the Aboriginal workforce

The number of Aboriginal and culturally competent people working in the criminal justice system should be dramatically increased

Aboriginal people with relevant impairments are significantly overrepresented in the criminal justice system. All the strategies described in this report must consider the particular requirements of Aboriginal people, and the system as a whole needs to be better equipped to respond to this group.

Impairments may be wrongly identified as alcohol- or drug-induced behaviour⁵² through a lack of cultural and disability competence or institutional racism. Both Aboriginal and non-Aboriginal workers need skills to recognise, assess and support Aboriginal people with relevant impairments, so that responses are always culturally appropriate.

A systematic approach to growing the Aboriginal workforce within the justice sector, and to building cultural competency across the entire justice workforce, is needed. Reliance on small numbers of Aboriginal liaison officers, or Aboriginal-identified positions, is tokenistic and will not result in systemic change.

We need to build a strong, well-supported and well-resourced Aboriginal peer workforce across all stages of the justice system. This includes a greater number of Aboriginal mental health workers, with the necessary skills and tools to provide recovery-focused services.

8. Alternatives to prison for women

Invest in proven strategies to reduce offending by women and their children to reduce the number of women in prison

The incarceration rate for women is growing much faster than for men, and women represent a growing proportion of the overall number of prisoners in NSW⁵³.

Prisons should be reserved for serious offending, yet women rarely commit the most serious categories of offences⁵⁴. Women in prison are typically on remand or serving a short sentence⁵⁵.

Female prisoners have higher rates of mental illness⁵⁶. Most women in prison have a relevant impairment and/or a drug or alcohol disorder and these rates are higher for Aboriginal women⁵⁷. Indigenous women who are homeless and live with multiple impairments have more police contacts and episodes of custody than any other group⁵⁸.

A high proportion of female offenders have experienced child sexual abuse. Being in custody is often re-traumatising as well as increasing risk of further exposure to trauma in the future⁵⁹.

The use of prison for women with low-level offences results in family disruption, periods of out-of-home care for children and the start of a new cycle of offending amongst the next generation⁶⁰.

The use of Women's Centres in England demonstrates an effective model for providing a range of services to women who are in contact with, or at risk of contact with, the criminal justice system. These centres provide a range of services, such as mental health treatment, drug and alcohol services, employment assistance, domestic violence assistance and life skills training⁶¹. In her 2007 review of vulnerable women in the criminal justice system, Baroness Corston recommended women should not be imprisoned, except in a small minority of cases. She proposed the expansion of Women's Centres as an effective, low-cost alternative to imprisonment⁶². The centres have been shown to significantly reduce re-offending among participants⁶³.

In Australia, the Miranda Program is a pilot diversionary program for women which builds on the UK's Women's Centres and is an initiative of the Corrective Services Women's Advisory Council and a project of the Community Restorative Centre. The evidence-based program helps women address factors that lead to offending, build resilience, and develop positive connections.

To improve the outcomes for women offenders and their families, we need to invest heavily in effective, evidence-based programs such as these, to support women outside of prisons.

9. Better through care and transitional support

Ensure transitional support for people leaving custody starts well before release, is long-term, holistic and targeted towards individual needs

Many people with a relevant impairment who cycle in and out of prison are on remand or serving a short sentence. Those with multiple impairments are the most likely to have many short episodes in custody, typically for offences in the lowest 10 per cent of seriousness⁶⁴.

These short stints in prison interrupt links to community-based services. At the same time, there is insufficient time for Corrective Services to provide meaningful opportunities for rehabilitation. While Justice offers a range of reintegration services, offenders with a relevant impairment need support from a number of service sectors, particularly health and disability, if they are to stay well in the community and not reoffend.

An example of the disruption this can cause is the release of significant numbers of ex-inmates from custody into homelessness⁶⁵, despite NSW's case management policy which requires Corrective Services to begin planning for community re-integration as soon as an offender enters custody.

Regardless of the duration of a person's prison stay, there should be clear, consistent pathways for maintaining existing community connections, and providing holistic support to prisoners throughout their detention, and for as long as necessary after release.

Many transitional support services are short-term, and only provide support in relation to factors considered to be directly related to a person's offending. Focusing solely on offending behaviour does not assist people with relevant impairments to establish an identity outside of the criminal justice system.

These approaches entrench people with relevant impairments in the criminal justice system. By limiting our post-release support to justice-based 'criminogenic needs' we are simply repeating earlier failures to help those with such impairments, and who are at risk of offending, to live fulfilling and contributing lives in the community.

A promising program to address this issue is the Community Integration Team which provides multi-disciplinary case management for young people with a mental illness or drug and alcohol issues. The team works with individuals while detained and then provides support for up to three months into the community while the young person is transferred into suitable community-based support services. This continuity of care and pro-active case management across a range of government and non-government service providers is critical to ensuring the successful transition of these young offenders.

We must reinvest in long-term, holistic transitional support across NSW. This support must begin well before release, so that case managers can build trust with clients without the chaos of life outside of prison⁶⁶. Stable housing should be a critical component of transitional support.

Transitional support providers must have a good understanding of mental health, disability, substance abuse and trauma, and must have the skills and connections to assist people with the practical issues they face on release, such as complying with parole orders, securing housing, and gaining employment.

10. Keeping forensic patients out of prison

Ensure that placement options support the therapeutic rehabilitation of forensic patients

Fifteen per cent of all forensic patients in NSW are detained in prisons⁶⁷. This is commonly due to a lack of available places in non-custodial settings.

In 2013, the LRC noted that this issue had been raised consistently over many years⁶⁸, but that it could not be resolved without new facilities to enable forensic patients to step down towards leave and release. This is a particular concern for those forensic patients with a cognitive impairment, because the forensic system was developed to meet the needs of forensic patients with a mental illness. In recognition of this, the LRC recommended, as a priority, that a working group develop a strategy for the provision of non-custodial facilities for forensic patients with cognitive disability⁶⁹. In the three years since then, no such facilities have been established. Urgent action is required to meet the needs of this cohort, particularly in light of the full implementation of the National Disability Insurance Scheme.

However, there is also a pressing need for more non-custodial placement options for forensic patients with a mental illness. The current forensic system has too few placements in low and medium secure settings which restricts the ability to ensure forensic patients are accommodated in the most appropriate environment and causes a considerable backlog.

Many forensic patients in prison have orders stating they should be transferred to the Forensic Hospital, but the lack of available beds in the Hospital means they remain in prison for more than two years before transfer. The long wait for transfer to a therapeutic setting is detrimental to recovery⁷⁰.

Urgent action is required to increase the capacity of the forensic mental health system, across all security levels, and to transfer forensic patients out of prisons.

11. Supporting victims

Ensure the needs of victims with relevant impairments are recognised and catered for

Negative stereotypes about people with relevant impairments being violent or dangerous are unfortunately still common. However, people with such impairments are far more likely to be victims of crime than they are to be perpetrators⁷¹.

Ensuring that victims are supported through the justice process will contribute to their longer-term health and wellbeing. Where people with relevant impairments are the victims of crime, we should ensure that they receive communication support when giving evidence. We should also consider the expansion of support services like those being provided under the Children's Champions model to all victims with a relevant impairment.

We should also consider ways of engaging directly with people with relevant impairment who are vulnerable to victimisation, including through the development of crime prevention programs that reduce vulnerability by increasing skills in personal safety and conflict management⁷².

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- Alison Churchill, Community Restorative Centre
- Associate Professor Kimberlie Dean, University of New South Wales
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Endnotes

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⁷ Indig, D., Vecchiato, C., Haysom, L., Beilby, R., Carter, J., Champion, U., Gaskin, C., Heller, E., Kumar, S., Mamone, N., Muir, P., van den Dolder, P. & Whitton, G. (2011) *2009 NSW Young People in Custody Health Survey: Full Report*. Justice Health and Juvenile Justice. Sydney.

⁸ *ibid*

⁹ *ibid*

¹⁰ Over half of all inmates who have experienced a head injury reported ongoing impairments: Indig, D., Topp, L., Ross, B., Mamoon, H., Border, B., Kumar, S. & McNamara, M. (2010) *2009 NSW Inmate Health Survey: Key Findings Report*. Justice Health. Sydney as cited in NSW Law Reform Commission (2012), *People With Cognitive And Mental Health Impairments In The Criminal Justice System – Diversion*, Report 135. Estimates of the rates of traumatic brain injury among inmates vary from 10 to 100% of all offenders. Meta-analysis puts the estimated rate at 60.25%: Brain Injury Australia, *People with Acquired Brain Injury and the Criminal Justice System – Monash University’s Criminology Speaker Series*, 2016.

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- unfit to be tried for an offence and ordered to be detained in a correctional centre, mental health facility or other place;
- not guilty by reason of mental illness or nominated a limiting term and ordered to be detained in a prison, hospital or other place
- not guilty by reason of mental illness and released into the community subject to conditions.

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²⁹ ISP referred to in the case study was a program administered by ADHC and run together with the NSW Health Mental Health and Drug and Alcohol Office and Housing NSW, provides services to clients with mental health disorders or cognitive impairment that result in challenging behaviour.

³⁰ Defined in the legislation as “*disability*”, in relation to a person, includes a long-term physical, psychiatric, intellectual or sensory impairment that, in interaction with various barriers, may hinder the person’s full and effective participation in the community on an equal basis with others.”

³¹ See s12 *Disability Inclusion Act 2014*

³² See s16(2) *Mental Health Commission Act 2012*

³³ Indig, D., Vecchiato, C., Haysom, L., Beilby, R., Carter, J., Champion, U., Gaskin, C., Heller, E., Kumar, S., Mamone, N., Muir, P., van den Dolder, P. & Whitton, G. (2011) *2009 NSW Young People in Custody Health Survey: Full Report*. Justice Health and Juvenile Justice. Sydney. p 157.

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