

**Submission
No 8**

INQUIRY INTO THE ADEQUACY OF YOUTH DIVERSIONARY PROGRAMS IN NSW

Organisation: Mental Health Commission of NSW
Name: Ms Catherine Lourey
Position: Commissioner
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Mental Health Commission
of New South Wales

Inquiry into the Adequacy of Youth Diversionary Programs in NSW

*Submission to the Committee on Law and Safety by the
Mental Health Commission of New South Wales*

January 2018

The Mental Health Commission of New South Wales

The Mental Health Commission of NSW is an independent statutory agency responsible for monitoring, reviewing and improving mental health services and the mental health and wellbeing of the people of NSW. It works with government agencies and the community to secure better mental health and wellbeing for everyone, to prevent mental illness, and to ensure the availability of appropriate supports in or close to home when people are unwell or at risk of becoming unwell.

The Commission promotes policies and practices that recognise the autonomy of people who experience mental illness and support their recovery, emphasising their personal and social needs and preferences as well as broader health concerns.

The Commission is guided in all of its work by the lived experience of people with a mental illness.

The Commission makes this submission with regard to its functions prescribed under its establishment legislation, the *Mental Health Commission Act 2012*, and specifically in regard to the function under section 12 (2)(c):

“to take into account issues related to the interaction between people who have a mental illness and the criminal justice system.”

Should you wish to discuss any of the issues raised in this submission in more detail please contact Ms Julie Zieth, Executive Officer, on [REDACTED] or Mr Louis Parry, Senior Advisor, on [REDACTED]

Catherine Lourey

[REDACTED]

NSW Mental Health Commissioner

January 2018

Introduction

Many prisoners live with mental health or cognitive impairments. Half of all adult inmates have been assessed or treated by a doctor or psychiatrist for a mental health problem¹. A 2009 survey showed that 87% of young people in custody have at least one psychological disorder.² In 2015 the figure was over 83%, with 63% having two or more psychological disorders.³

In the 2015 survey, 16% of young people in custody scored as having a potential intellectual disability.⁴ In 2009, the figure was 14%, with 32% scoring in the borderline range for intellectual ability.⁵ The rates are higher for Indigenous young people in custody.⁶

The very high rate of cognitive impairment among prisoners means that as prisoner numbers increase, so does the demand for mental health and disability services within the correctional system. The number of people within the forensic mental health system also continues to increase.⁷

Access to diversion

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 years.⁸ Young adults are the most prolific adult re-offenders, with more than 60 per cent reconvicted within 10 years.⁹ Nearly all Indigenous male juvenile offenders and a large majority of Indigenous female juvenile offenders re-offend.¹⁰ A focus on young offenders has the potential to reduce the rate of adult offending and re-offending.

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 term.¹¹

NSW has legislation that enables courts to make diversion orders.¹² However, the legislation is not used to its full extent. Reasons for this include 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 court.¹³

The prevalence of cognitive and mental health impairments among defendants in court proceedings is high. Studies in the Local Court indicate that 23% of defendants (57% in locations with high Indigenous populations) have an IQ in the range for possible intellectual disability or borderline intellectual disability, and 55% have one or more psychiatric disorders.¹⁴

Despite this, only around 1.5% of all defendants in the Local Court have their matter diverted under mental health legislation.¹⁵ The rates of diversion in the Children's Court are similarly low,¹⁶ despite the very high rates of impairment among young offenders, and the desirability of intervening early to avoid entrenchment in the criminal justice system.

In its 2012 paper, the NSW Law Reform Commission 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 to Justice Health to provide early indication, assessment, advice, and linkage to case management supports and services.¹⁷

To achieve this, we need 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.

Any examination of youth diversionary programs needs to look at the three phases of a young person's criminal justice journey – the periods prior to, during and following the young person's contact with the criminal justice system.

Prior to contact with the criminal justice system

Experiences of early neglect, abuse and trauma are common among people who become entrenched in the criminal justice system.

In 2009, 60% of young people in detention reported experiencing at least one form of childhood abuse or neglect.¹⁸ In 2015, the figure was 68%.¹⁹ The real number is likely to be higher, as suggestions are that many young people either deny or under-report these experiences.²⁰

A significant number of young people 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% of young people appearing before the Court identified as being in care or thought extremely likely to be in care.²¹ Only 38% 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 14.²² These statistics suggest that impairments are not identified early enough, and/or young people are not linked to services to help them live well in the community.

Early intervention initiatives

In 2016 the Government announced new funding to reform the out-of-home care system, and increase initiatives to improve outcomes for young people in care.²³ 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 that could be further developed is Youth on Track, a voluntary early intervention scheme to which police and schools can refer people aged 10-17 years who are at medium to high risk of offending.

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

During the period of contact with the criminal justice system

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).

The failure of mainstream services early in people's lives contributes to their eventual contact with the criminal justice system. Where contact with the criminal justice system occurs, it must be used 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.

A large proportion of young offenders in custody experience high levels of psychological distress and mental health conditions.²⁴ It is essential to provide appropriate services throughout a young 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: A Strategic Plan for Mental Health in NSW, 2014-2024*,²⁵ 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 likelihood 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 conditions within the prison environment, such as over-crowding in cells and long periods spent in cells due to staffing shortages. Softening the environment within juvenile justice centres may also go towards creating a more calming setting in which staff can work constructively with incarcerated young people.

We know that a history of trauma is particularly common among people who come into contact with the criminal justice system.²⁶ This means that all services provided to this cohort need to be recovery-oriented and trauma-informed. 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.

Best practice service provision within the criminal justice system

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.

In *Living Well: A Strategic Plan for Mental Health in NSW, 2014-2024*, the Commission espoused bringing a holistic therapeutic approach to youth justice, and recommended that cross-agency responses should:

- Aim to promote normal developmental trajectories, reduce aggressive behaviour and help young people acquire vocational and basic social skills
- Help to improve the way mainstream community services respond to the needs of young people who have been in contact with the justice system
- Help build a young person's connections with family and community as appropriate and safe
- Be flexible enough to apply to a range of custody periods
- Consider opportunities to improve training for specialist child and adolescent mental health practitioners, including links with the Sydney Children's Hospital Network.²⁷

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.

Building the Aboriginal workforce

Aboriginal people with relevant impairments are significantly overrepresented in the criminal justice system. Research reveals that holistic integrated support holds promise for this group.²⁸ Any strategies that are implemented 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 behaviour²⁹ 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 young people with relevant impairments, so that responses are always culturally appropriate.

A systematic approach to expanding 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 workforce³⁰ 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.

Better through care and transitional support

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 episodes in custody, typically for offences in the lowest 10 per cent of seriousness.³¹

These short stints of incarceration interrupt links to community-based services. At the same time, there is insufficient time for Juvenile Justice or 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.

Significant numbers of adult ex-inmates are released from custody into homelessness.³² Similarly, despite a case manager working with a young offender to plan for their re-integration into the community, 10.5% of juvenile detainees who had previously been released from custody report difficulty finding accommodation within six months of being released.³³

It is 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 safer.³⁴

Following contact with the criminal justice system

Regardless of the duration of a young person's stay in detention, 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 young people with relevant impairments to establish an identity outside of the criminal justice system.

These approaches entrench young 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 prison.³⁵ 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.

Endnotes

Note: Much of the information provided in this submission has been adapted from the Commission's previously published paper: Mental Health Commission of NSW (2017) *Towards a just system: Mental illness and cognitive impairment in the criminal justice system*. Sydney, Mental Health Commission of NSW. The paper is available on the Commission's website at <<https://nswmentalhealthcommission.com.au/resources/towards-just-system>>.

¹ This figure is likely higher, as inmates who had an intellectual disability or mental illness that prevented them from consenting to participate in the study were excluded: 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. P 17 and 19.

² 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 15.

³ Justice Health & Forensic Mental Health Network and Juvenile Justice NSW (2017) *2015 Young People in Custody Health Survey: Full Report*. Justice Health & Forensic Mental Health Network and Juvenile Justice NSW. Sydney. P xxi.

⁴ Justice Health & Forensic Mental Health Network and Juvenile Justice NSW (2017) *2015 Young People in Custody Health Survey: Full Report*. Justice Health & Forensic Mental Health Network and Juvenile Justice NSW. Sydney. P 80.

⁵ 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 15 and 154.

⁶ 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 15.

⁷ NSW Mental Health Review Tribunal, *Annual Report 2016/17*, P 6.

⁸ Chen S, Matruggio T, Weatherburn D and Hua J (2005) The transition from juvenile to adult criminal careers (Crime and Justice Bulletin No. 86) Sydney: NSW Bureau of Crime Statistics and Research.

⁹ Agnew-Pauley W and Holmes J (2015) Re-offending in NSW (Bureau Brief. Issue paper No. 108) Sydney: NSW Bureau of Crime Statistics and Research.

¹⁰ Ringland C, Weatherburn D and Poynton S (2015) Can child protection data improve the prediction of re-offending in young persons? (Crime and Justice Bulletin No. 188). Sydney: NSW Bureau of Crime Statistics and Research.

¹¹ Baldry E, Johnson S, McCausland R, Cohen A (2013) *People With Mental Health Disorders And Cognitive Impairment In The Criminal Justice System: Cost-benefit Analysis of Early Support And Diversion* August 2013 – Report for the Australian Human Rights Commission.

¹² *Mental Health (Forensic Provisions) Act 1990* (NSW), s32 and s33.

¹³ See, for example, NSW Law Reform Commission (2012), *People With Cognitive And Mental Health Impairments In The Criminal Justice System – Diversion*, report 165.

¹⁴ NSW Law Reform Commission (2012), *People With Cognitive And Mental Health Impairments In The Criminal Justice System – Diversion*, report 135 p 64 and 66.

¹⁵ NSW Law Reform Commission (2012), *People With Cognitive And Mental Health Impairments In The Criminal Justice System – Diversion*, report 135 p 67 and 68. Under section 32 and 33 of the *Mental Health (Forensic Provisions) Act*, magistrates can divert a person with a mental illness or intellectual disability, or order that a mentally ill person be taken to a mental health facility for assessment.

¹⁶ Borowski, A. (2013) A Portrait of Australia's Children's Court: Findings of a National Assessment. In Sheehan, R., Borowski A. (eds) *Australia's Children's Courts Today and Tomorrow*. Children's Well-Being: Indicators and research, vol 7. Springer, Dordrecht.

¹⁷ NSW Law Reform Commission (2012), *People With Cognitive And Mental Health Impairments In The Criminal Justice System – Diversion*, Report 135.

¹⁸ 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 158.

- ¹⁹ Justice Health & Forensic Mental Health Network and Juvenile Justice NSW (2017) *2015 Young People in Custody Health Survey: Full Report*. Justice Health & Forensic Mental Health Network and Juvenile Justice NSW. Sydney. P 74.
- ²⁰ 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.
- ²¹ McFarlane K *From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System*. Current Issues in Criminal Justice – Volume 22 Issue 2 (Nov 2010). P 346.
- ²² 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 13.
- ²³ NSW Government Media Release – NSW budget – *Reforms For Kids Needing Care* 18 June 2016.
- ²⁴ 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.
- ²⁵ NSW Mental Health Commission (2014). *Living Well: A Strategic Plan for mental Health in NSW*. Sydney, NSW Mental Health Commission.
- ²⁶ See, for example 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 and Whitton G (2011) *2009 NSW Young People in Custody Health Survey: Full Report*. Justice Health and Juvenile Justice. Sydney.
- ²⁷ NSW Mental Health Commission (2014). *Living Well: A Strategic Plan for mental Health in NSW*. Sydney, NSW Mental Health Commission, p 79.
- ²⁸ Baldry E, McCausland R, Dowse L and McEntyre E, 2015 *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*. UNSW, Sydney.
- ²⁹ Baldry E, McCausland R, Dowse L and McEntyre E. 2015 *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*. UNSW, Sydney.
- ³⁰ A 'peer worker' is a person who is employed on the basis of their lived experience of mental illness and recovery, and who brings this experience to assist other people with recovery.
- ³¹ Baldry E, Dowse L and Clarence M *People with mental and cognitive disabilities: pathways into prison* (Background Paper for Outlaws to Inclusion Conference February 2012).
- ³² Community Restorative Centre submission to Family and Community Services *Homelessness in Ex-Prisoner Populations: A CRC Submission for FACS* by Sotiri M and Faraguna A (2016).
- ³³ Justice Health & Forensic Mental Health Network and Juvenile Justice NSW (2017) *2015 Young People in Custody Health Survey: Full Report*. Justice Health & Forensic Mental Health Network and Juvenile Justice NSW. Sydney. P 17.
- ³⁴ New South Wales Auditor-General's report, Performance Audit: *Reintegrating Young Offenders Into The Community After Detention* April 2016.
- ³⁵ Sotiri M (2016) *An Exploration Of Best Practice In Community Based Reintegration Programs For People Leaving Custody In The US And The UK* – report for The Winston Churchill Memorial Trust of Australia.



Mental Health Commission
of New South Wales

Locked Bag 5013
Gladesville NSW 1675

T 02 9859 5200
F 02 9859 5251

E mhc@mhc.nsw.gov.au
W www.nswmentalhealthcommission.com.au