

Fact sheet

People with cognitive and mental health impairments in the criminal justice system: Diversion

Outline

The NSW Law Reform Commission report finds that there is significant over-representation of people with cognitive and mental health impairments in the criminal justice system.

The current legislative provisions to divert people with impairments into treatment and services under s 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) are underutilised.

Our report makes recommendations to extend diversion powers to police, to strengthen the existing diversionary powers of the court, and to establish a specialist court list for people at risk of imprisonment.

Just as importantly, we recommend extension of the current court-based assessment and case management services to ensure that diversionary orders can work to link people to services that will reduce their chance of reoffending and improve outcomes for them.

Over-representation of people with cognitive and mental health impairments – the evidence

There is evidence of over-representation of people with cognitive and mental health impairments at all stages of the criminal system justice system. For example:

- A 2002 survey of police officers in Sydney found that police reported spending an average of 10% of their time with “mentally disturbed people”. Some reported spending up to 60% of their time.
- A 2007 BOCSAR study at two NSW local courts found that 55% of defendants surveyed suffered from one or more psychiatric disorders. There was apparent over-representation in all categories of mental health impairment, when compared with the general rate in NSW.
- A 2009 study of 60 defendants appearing before four local courts in Greater Sydney found that people with cognitive impairments were over-represented in those courts.
- A 2003 study of NSW prisoners found that 74% of inmates experienced at least one psychiatric disorder in the 12 months prior to being interviewed. For example, 9% of prisoners were identified as having psychosis, whereas the representation in the general population is 0.42%.

Arrest or imprisonment of people with impairments without providing access to services that address needs related to offending behaviour may not provide the best outcome for that person or the community, and is unlikely to be effective in reducing future offending. Yet the rate of impairments in prison is high, and use of Local Court diversionary provisions is very low – only amounting to about 1.5% of finalisations.

Why are people with cognitive and mental health impairment over-represented in the criminal justice system?

The reasons for over-representation of people with cognitive and mental health impairments in the criminal justice system are complex and multi-factored. A person may have complex needs and face multiple sources of disadvantage, thereby increasing their likelihood of coming into contact with the criminal justice system. For example, a 2010 BOCSAR study suggested that rates of reoffending are “substantially elevated” among those with a mental health impairment only where it occurs alongside a substance disorder. Yet, factors such as mental health impairment and substance abuse issues may be amenable to treatment or other intervention. Addressing an impairment or other need could help reduce future offending.

How can diversion help?

Diversion provides opportunities for police and courts to respond more effectively to people with cognitive and mental health impairments. For example, instead of charging a person, it may be better for police or the courts to refer someone who has committed a trivial offence and has an impairment to services that address offending behaviour.

Studies have shown:

- Reductions in reoffending associated with diversionary programs that identify people with mental health impairments and refer them to treatment or other support.
- Reductions in reoffending, cost savings and mental health improvements associated with diversionary approaches that case manage and support people with complex needs.
- Reductions in the nature and extent of reoffending for participants in specialist lists or court programs for people with mental health impairments.

We have drawn from the characteristics of such programs, and the legislative mechanisms that support them, in developing a response that best addresses the concerns of the community and the needs of the individuals.

The benefits of diversion have been identified in *NSW 2021 – A plan to make NSW number one*, which includes goals such as preventing and reducing reoffending, and keeping people healthy. These goals are accompanied by targets such as increasing completion rates for key treatment and intervention programs, and diverting people with mental health impairments out of the criminal justice system and into services.

Why is diversion not being used more extensively now?

Unless people with cognitive and mental health impairments are first identified and assessed, the criminal justice system cannot respond appropriately to them. Yet, the burden of identification and management of people with cognitive and mental health impairments in the criminal justice system often falls on people who do not have the required skills or expertise. The existing Statewide Community and Court Liaison Service, which assists in identifying and assessing people with mental health impairments and referring them to mental health services, is only available in 20 of the 148 Local Court locations in NSW, and there is no equivalent service for cognitive impairment.

Even where particular impairments are identified, those who work in the criminal justice system are not likely to be expert in linking them to the complex service systems in the community that may

break the cycle of offending. So while courts have power to divert under s 32, those powers may not be used, or may not be effective, because the right services have not been identified. A pilot program, Court Referral of Eligible Defendants into Treatment (CREDIT), is addressing these issues, but it only operates in two NSW Local Courts.

Similarly, community service providers may not be familiar with criminal justice system processes and the expectations of courts. The current system for reporting non-compliance with court ordered treatment plans or orders under s 32 is ineffective.

An important factor in successful diversion appears to lie in the provision of a “bridge” between the criminal justice system and the service sectors. “Bridges” are often provided by specialist case workers attached to courts, who can translate the needs of the criminal justice system to the service sector and the needs of the service sector to the court.

In summary, there is a need to improve our identification of people with impairments, link them with the right services that will focus on dealing with their offending behaviour, and provide a framework to keep them engaged with those services.

What changes to law is the NSW Law Reform Commission proposing?

At the stage of contact with police: Where a person with an impairment has committed a relatively minor offence police should be able to refer that person to services without the need to go to court first. We recommend providing police with a clear power to discontinue proceedings in appropriate cases in favour of referral to services. In our view, diversion should be available more than once pre-and post charge, and be supported by referral to support services. It should not require admissions or take the place of warnings and cautions.

At the court stage: We recommend an amendment of s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) to increase and clarify the diversionary options available. These should include:

- unconditional discharge
- discharge to carry out a diversion plan involving engagement with relevant services
- court supervision of the defendant’s participation in a diversion plan.

If the defendant is at imminent risk of imprisonment, we recommend there should be an option of referral to a specialist court list – the Court Referral for Integrated Service Provision (CRISP) list. This list would adopt a problem solving approach, and would be managed by specialist magistrates and Judges assisted by a dedicated team of lawyers and case managers.

We recommend that these options also be made available to higher courts where appropriate.

What service improvements is the NSW Law Reform Commission proposing?

We recommend expansion of the Statewide Community and Court Liaison Service and the CREDIT programs. These services will assist the police and courts with identification of impairments, assessment of needs, and arranging and maintaining links to services. CREDIT will also provide a “bridge” between courts and services. Expansion of CREDIT will ensure ongoing engagement with appropriate services and effective reporting back to the court.

Overview of proposals

Services

- Expanding programs available that assess people with cognitive and mental health impairments involved in the criminal justice system and refer them to services. This includes expansion of the Statewide Community and Court Liaison Service (SCCLS).
- Expanding the Court Referral of Eligible Defendants into Treatment (CREDIT) program, which identifies the requirements of people with complex needs involved in the criminal justice system, links them to services that address their offending, and case manages their progress.

Police

- Providing police with legislative authority to divert people with cognitive and mental health impairments who have committed less serious offences.
- Providing police with access to court-based programs that can assist in linking people to services.

Courts

- Strengthening the legislative options available to courts, including giving a clear power for increased court oversight of diversionary programs to ensure that individuals remain connected with the programs they are referred to.
- Creating a specialist list to provide intensive judicial supervision and service provision to address needs and reduce reoffending of people with impairments at risk of imprisonment