



The justice system and mental health

Introduction

The Commission is highly concerned about how we as a society criminalise people who live with a mental health difficulty. We know that people living with mental illness are over-represented in our prisons, in the number of police incidents and in the number of police shootings.^{205, 206}

We were dismayed to learn that in 2012, *38% of all people entering our prison system* reported having been told they have a mental illness.⁷⁰ If these findings were applied to the 29,000 prisoners in Australia,²⁰⁷ then this would equate to *around 11,000 people each year*.

We are highly concerned about what opportunities there were for them to get the right support and treatment when they needed it. This could have helped them avert a life in prison, a loss of their liberties and human rights, and therefore avoid the punitive and mental health-eroding environment of prison. It would have stopped the subsequent double discrimination from having a criminal history as well as having a mental illness, when trying to re-establish a life in the community.

The case for alternative pathways is clear. The current pathway costs governments up to \$1 million each year for each person with a mental health disorder or cognitive impairment who come into frequent contact with the justice system.²⁰⁸

The case for early intervention – for young people and families – is also clear. Compared to other prison entrants, those with poor mental health have more extensive and early imprisonment histories, poorer school attainment, higher unemployment rates and higher rates of substance use.⁴⁶

This is a cycle of vulnerability that crosses generations. Twenty-one per cent of all prisoners reported that they had a parent imprisoned while they were a child, 22 per cent had themselves been in juvenile justice detention and 73 per cent had been in prison before.⁷⁰

This is a tragic cycle and one that has to stop.

This chapter will shine a light on the opportunities to provide interventions to improve mental health and reduce offending. It will focus on ways to create alternatives to imprisonment for those with mental health difficulties, to reduce offending behaviour whilst simultaneously protecting their human rights.

We will also shine a light on the particular concerns we have about the mental health of Aboriginal and Torres Strait Islander prisoners, and of those who are detained under forensic orders.

What do we mean when using the term 'forensic'?

The term 'forensic' means connections with or to the court or justice system in relation to a mental health condition or matter.

As such, the discussion on forensic mental health services includes court assessment and liaison services, hospitals, community services and follow-up, juvenile justice services, police and prisons.

People with a mental illness who come into contact with a court or the criminal justice system can be either diverted from the criminal justice system into treatment, or may be found not guilty by reason of mental illness or unfit to plead due to their mental illness.

Diversion programs are usually run by courts that consider minor offences and how the person's mental health can be supported to reduce the chance of re-offending. This involves the court arranging a mental health assessment of the person, development of a treatment plan and diversion into community-based treatment which is then regularly monitored by the court.

People who are considered by a court as not guilty or unfit to plead due to their mental illness are sent for treatment in a mental health facility – such as a forensic hospital. Forensic hospitals are generally operated by health services, not the corrections or prison system. Upon discharge into the community, the forensic service can continue to monitor and provide treatment and follow-up services for the person. People within this broad group are *forensic patients*.²⁰⁸

There are also many people with a mental illness who are sentenced or on remand whose mental illness worsens during custody. Like others who may develop a physical health problem, they are transferred to a hospital or mental health facility for treatment, and upon improvement are transferred back. People within this group are *correctional patients*.²⁰⁹

Appropriate outpatient-type services in the prison setting can also be provided by a forensic health service to provide ongoing treatment

for a mental illness, just as there would be if the person had diabetes or chronic heart failure.

What we know

In 2012 almost two in five people when entering prison reported they had a history of mental illness.⁴⁶

This is shocking. It is almost *double* the 12-month prevalence of mental illness in the general population.⁴⁹

We know that these elevated levels of mental health difficulties are consistently seen across studies in Australian prisons and correctional facilities. This relates to high levels of psychological distress and mental health disorders.

It is a national problem.

We know that prisoners with a mental health difficulty present with some of the most complex health needs.

Thirty-two per cent of overall prison entrants reported having chronic health conditions and a mental illness,⁴⁶ or a mental illness as well as a specific impairment. For example, one study has found that 66 per cent of prisoners with a cognitive impairment also had a mental health and or a substance use disorder.²¹⁰

These are people with complex health and social challenges.

We know that people with a mental illness who find themselves before a court or in prison have had a journey that may have involved previous court appearances as a juvenile, little involvement in treatment programs for their mental illness and a high chance of a co-existing alcohol or other drug problem. We know that for new prisoners mental health nurses, psychiatrists, psychologists and social workers are the most accessed health professionals.⁴⁶

Sadly we know that opportunities are repeatedly missed for turning lives around – *in a 2012 survey 33 per cent of prisoners who had been told they had a mental health condition had been in prison five or more times, compared to 26 per cent of prisoners who had no condition.*⁴⁶



Re-establishing a life after prison is even more challenging when a person is also experiencing high levels of mental illness.

People in the community who have been in prison report twice the prevalence of any 12-month mental disorder compared to people with no history of imprisonment. Compared to the general population, they have:

- *Almost five times* the likelihood of experiencing a substance use disorder in the previous 12 months (22.8 per cent compared with 4.7 per cent);
- *Three times* the likelihood of experiencing an affective disorder such as depression or bipolar disorder in the previous 12 months (19.3 per cent compared with 5.9 per cent); and
- *Double* the likelihood of an anxiety disorder in the previous 12 months (27.5 per cent compared with 14.1 per cent).⁴⁹

We know that support for family members is often lacking and they are often at a loss about what they can do if their relative becomes involved with the criminal justice system. As a family or support person, the arrest of someone you care for can be shocking, frightening and stressful, and throw you or the whole family into crisis. In addition, children struggle with adjusting to having their family member in the criminal justice system, especially when it is a parent.

Families often do not know what to expect or how to navigate the criminal justice system, especially if the person they care for experiences mental illness. There is worry and fear for the person who is in the criminal justice system and uncertainty about what will happen next.

Mental health and wellbeing impacts of prison for Aboriginal and Torres Strait Islander peoples



Aboriginal and Torres Strait Islander peoples are over-represented in Australian prisons. While they comprise only **three per cent of **Australia's population** at 30 June 2012, they made up **27 per cent** of the **adult prison population.**^{207, 211}**

This is shocking.

Of this group, nine per cent were female, with an increase of 20 per cent in the female Aboriginal and Torres Strait Islander prisoner population since 30 June 2011.²⁰⁷ Further, Aboriginal and Torres Strait Islander young people aged ten to 17 years were 24 times more likely to be in detention than non-Indigenous people that age, 15 times more likely to be under supervision, and 15 times more likely to be under community-based supervision in 2010-2011.²¹²

Incarceration has serious mental health impacts for Aboriginal people;²¹³ and in turn, mental health conditions are associated with high incarceration rates.

A 2009 survey of NSW prisoners reported that 55 per cent of Aboriginal men and 63 per cent of women reported an association between drug use and their offence.²¹⁴ In the same sample group, 44.5 per cent of men and 51.9 per cent of women had previously been assessed or treated by a doctor or psychiatrist for an emotional or mental health problem.

*In a more recent Queensland study, at least one mental health condition was detected in 73 per cent of male and 86 per cent of female Aboriginal and Torres Strait Islander prisoners; with 12.1 per cent of males and 32.3 per cent of females diagnosed with posttraumatic stress disorder.*²¹⁵

What the evidence shows is good practice

While our states and territories have adopted different practices, worryingly little is known about how these *align* with best practice approaches.



Furthermore, the evidence of good practice is underdeveloped. We do not fully understand how access to treatment and ongoing support can reduce relapse into ongoing crime or improve mental health in the long term.

Despite the massive burden of mental illness borne by this population and their heavy use of public services, there is a paucity of research to identify good practice, what interventions are most effective and what works best for different groups of people who come into contact with the justice system. Some specific studies and some services have been positive.²¹⁶

The only evidence we do have is from isolated examples of promising practice. Some of these are models that focus on diverting people into earlier treatment and support, or funding into early intervention approaches.

Listening to people with lived experience

Promising practice must incorporate the views and stated needs of the people who will be affected by it. This is no different in the justice system, and we are encouraged that the voices of people with a mental illness in the justice system are being heard and documented in reports such as *Not for Service Experiences of Injustice and Despair in Mental Health Care in Australia*⁸¹ and *Mad in Australia: The state's assault on the mentally ill*.²¹⁷

It is also positive to see that the recent prison health surveys incorporate self-reporting by prisoners about their own health.

Mental health courts and diversion schemes

Diversion approaches are based upon the principle of 'therapeutic jurisprudence' – that people with a mental illness who offend do so because of their illness, and appropriate responses are to provide health treatment, not criminal penalties. They have been operating in Australia since the early 1990s.

Evaluations of mental health court liaison services in both Victoria and New South Wales have been found to be promising.^{218, 219}

Court diversion programs, designed to divert people into mental health care rather than into custody, are also in place. Individual evaluations of the Tasmanian mental health court diversion program and the New South Wales court liaison service have shown them to have reduced the incidence of offending.^{220, 221}

Australia has a history of court diversion since the 1990s when the Magistrate's Court Diversion Program was established in South Australia in 1991 and was followed by the Hobart Mental Health Diversion List in 2007. Victoria and Queensland also have variations of these schemes.

As a principle, people who commit a crime because of their mental illness should be given the opportunity to be diverted into either mental health treatment services in the community, or into the forensic system to receive appropriate mental health treatment and support. The evidence would show that it is effective to do so.

Supporting frontline workers

Police are involved more and more frequently as first responders in crisis situations involving people with mental health difficulties. In New South Wales for example, there was a 25 per cent increase in the annual number of police incidents involving people with a mental health problem between 2008-2009 and 2011-2012. This period saw the number grow from about 22,000 incidents in 2007-2008 to around 30,000 in 2011-2012.²⁰⁵

Tragically for the person, their family and the officers involved, across Australia over the 11 years 1989-1990 to 2010-2011, 42 per cent of people shot by police had a mental illness.²⁰⁶ Police do not join the force to shoot people or to be de facto mental health workers.



There are some promising approaches being taken by police to train their officers and to improve their integration with mental health professionals. The Commission visited the ACT Police this year and saw one such program in operation.

Use of skills training of police forces, such as through Mental Health First Aid, and the establishment of specialist crisis intervention teams (CIT) have indicated reduced arrest rates, reduced use of force and cost savings.²¹⁶

Training of other frontline workers in the justice system who come into frequent contact with people who experience mental health difficulties, such as corrections or court staff, should also draw upon evidence-based approaches.

Restorative justice

Good practice can also include restorative justice approaches which focus upon the whole-of-person needs of the offender as well as the victim. This can help minimise the negative impacts upon mental health, support community re-integration and reduce re-offending.²²²

Supporting people

People in the criminal justice system need to be provided with information about how their families can help them, and families too need to know how they can receive help. The development of guides or handbooks for families, such as that in New South Wales, is a positive step to provide families and support people with knowledge of what to expect and the ways of the justice system.²²³

What we don't know

Where we need more evidence and to shine a light

We need a nationally consistent picture to see more clearly the experience of people living with a mental health difficulty in the criminal justice system, and how service and supports are provided, and innovative and evidence-based practices are taken up.

We do not have a national reporting system or consistent framework across the criminal justice, police and court system in Australia.

It is therefore not surprising that being able to see a national picture is difficult. It has only been since 2009 that a regular prison health survey has been undertaken.

We do not have an understanding of the most effective mix of services, and here we especially need more evidence and evaluation. Aside from the promising results of justice reinvestment modelling, we know little of the cost-effectiveness of current or potential services in terms of either health or crime outcomes.

We want to better understand what opportunities there are to intervene early or to support a person living with a mental health difficulty in prison or to divert them from becoming a 'repeat offender'.

Figure 11: Mental health history of prison entrants by the number of times previously in adult prison

The Commission believes there is an urgent need to shine a light on the following:

- Equity of rights and access to services across the different jurisdictional systems. There is also little-to-no evaluation or comparative assessment to see what systems or programs work best in early assessment, provision of treatment and provision of support during detention and after release.
- We need a clearer picture of the whole-of-life benefits for the person in terms of their mental health outcomes and success in other aspects of their lives such as getting secure housing, income and meaningful work. Evaluations of diversion or early intervention approaches need to move beyond reduction in recidivism or offending rates to encompass these aspects as well.
- We need a clearer view of the extent to which promising practice exists, and is able to be scaled-up across Australia; we need piloting and evaluation of diversion and restorative justice approaches; investment in evidence-based programs and court or prison alternatives.²²⁶

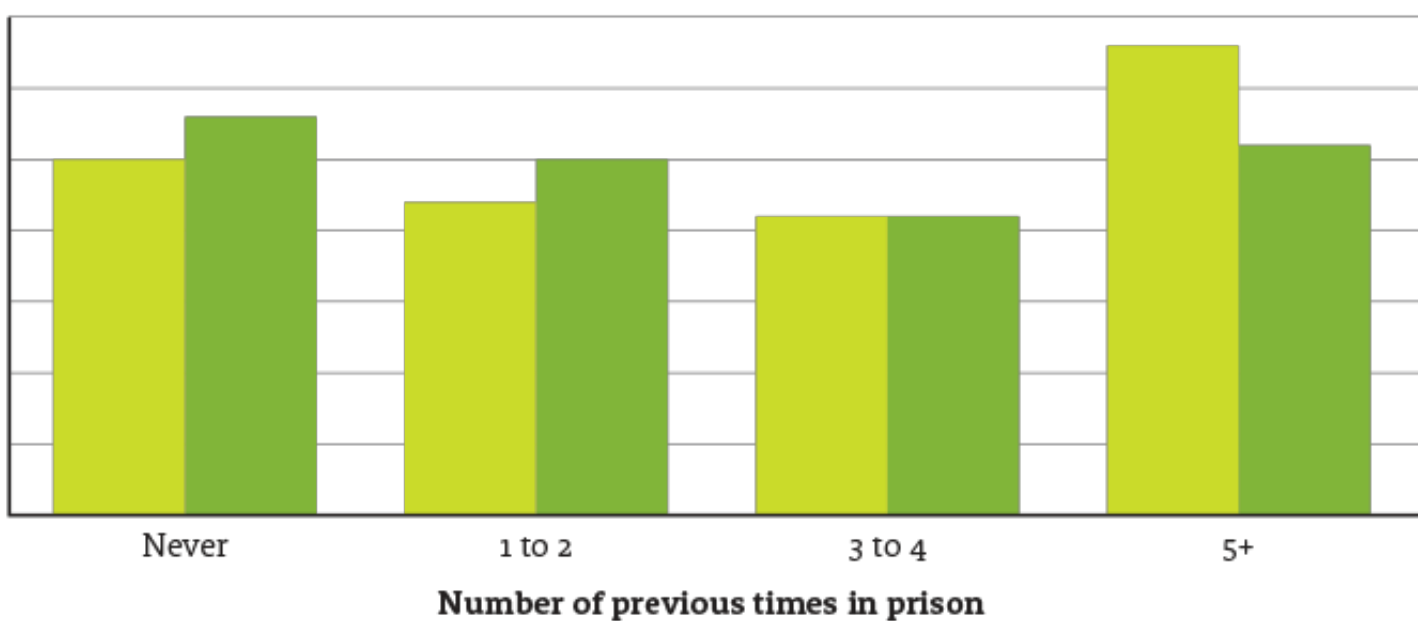
Figure 12: People in juvenile detention in NSW with a mental illness

Supporting young people

We need to know more about how to support young people to prevent a lifetime connected to the criminal justice system. Mental health problems have been described as being 'the most prominent of needs of young people in contact with the juvenile justice system.'²²⁷ In New South Wales the Young People in Custody Health Survey confirmed the extent of mental health problems, and highlighted the higher rates experienced by Aboriginal and Torres Strait Islander youth.

On average, young people in custody had 3.3 different psychological disorders.

Such a shocking figure requires a genuine and urgent response. We need to both more clearly see and understand what can be done



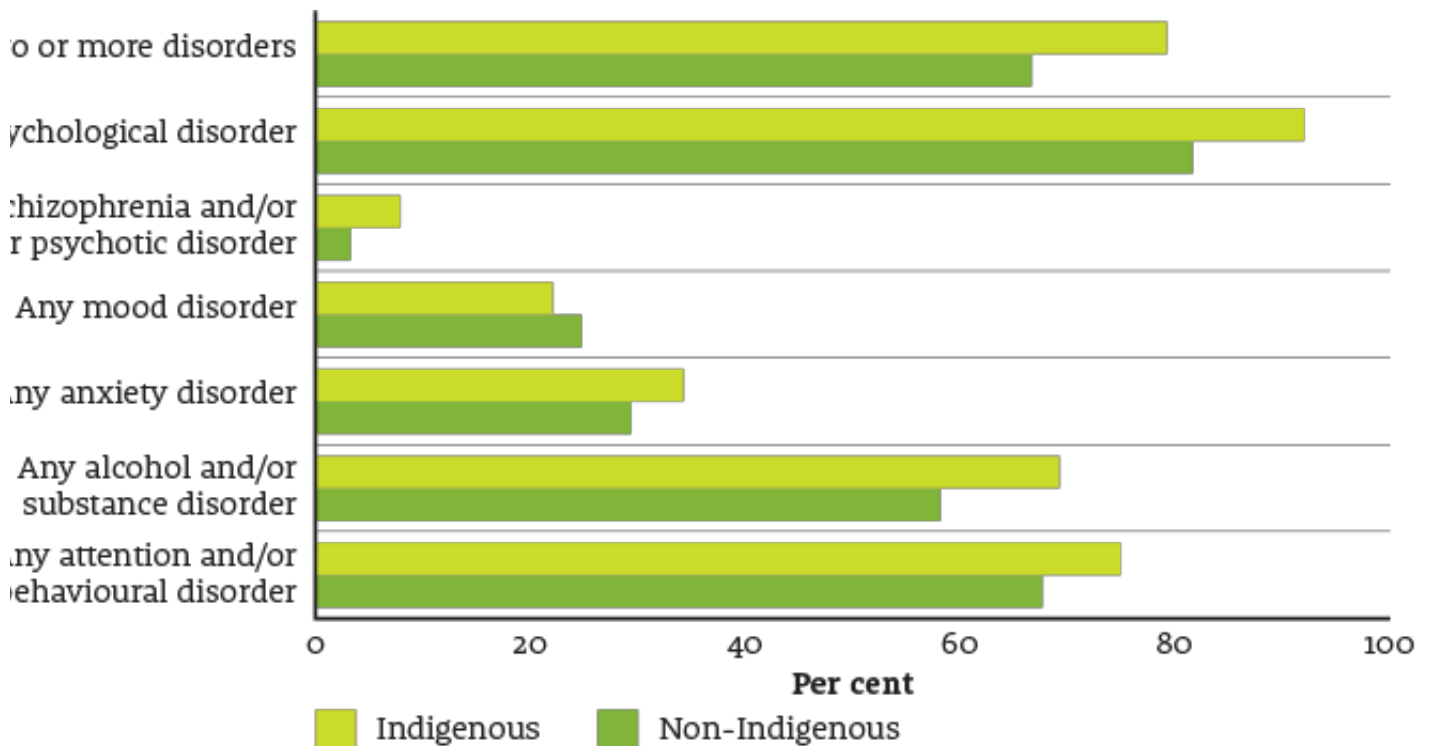
■ Ever been told they have a mental health disorder
■ Never been told they have a mental health disorder

AIHW. Analysis of 2012 Prison Health Census Survey (Unpublished)

for these young people and what will be effective.



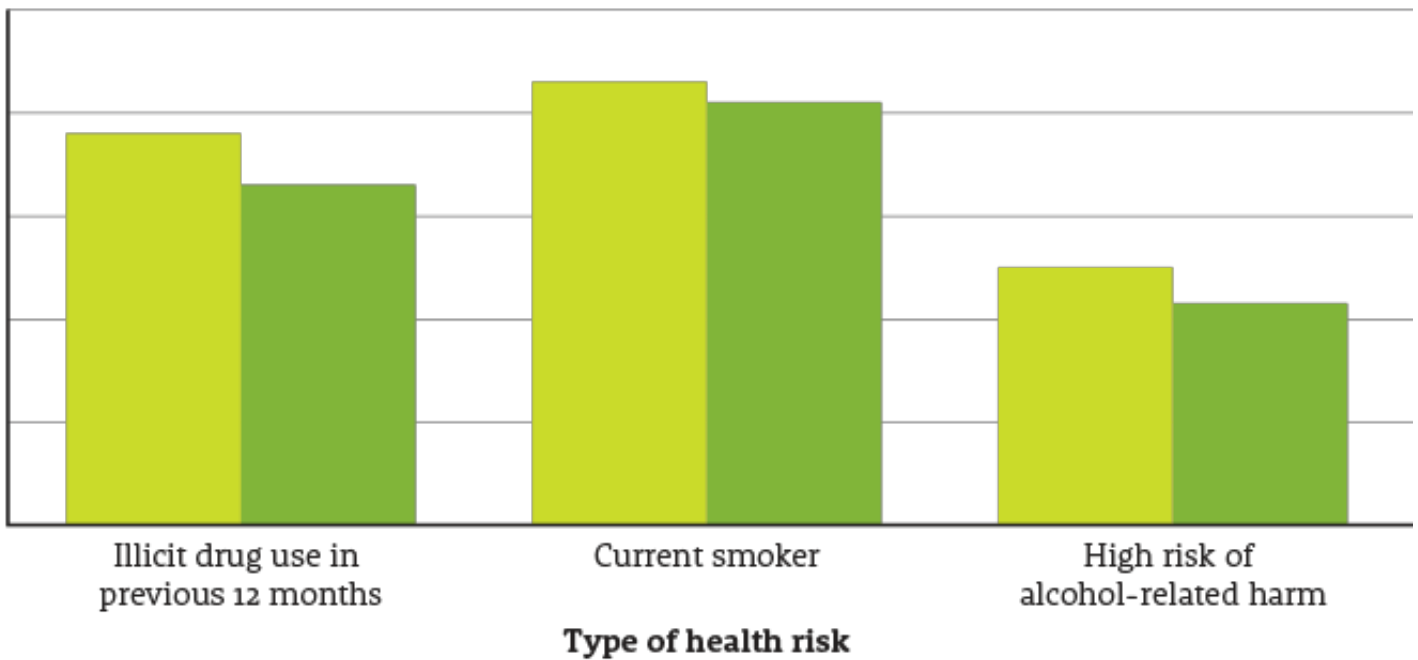
Figure 13: Mental health history of prison entrants by drug use, smoking status, and risk of alcohol-related harm



2009 NSW Young People in Custody Health Survey

Support after contact with the criminal justice system

The capacity for people who have been in prison to take up the opportunities for a contributing life is reliant upon having their mental health assessed and a mental health plan implemented while they are in prison. It is known that the first two weeks after release pose the highest risk of suicide, relapse into drug abuse, overdose or re-offending.²²⁸ We need to know what services are best practice and the extent to which these are adopted and implemented to avert these risks. Equally, we need to know what barriers need to be broken to get good practice in place on the ground.



- Ever been told they have a mental health disorder
- Never been told they have a mental health disorder

AIHW. Analysis of 2012 Prison Health Census Survey (Unpublished)



Where the Commission is looking for continuous improvement

It is of the utmost importance to have a criminal justice system that gives justice to people with mental illness. Underlying this principle is the need to have a strong evidence base upon which to plan and deliver services, interventions and supports.

This means:

Providing options and support for young people with emerging mental health difficulties to divert them from the courts and prison system.

It is estimated that the younger the age of first contact with the justice system (between the ages of 10 and 14 years), the greater the chance of coming before a court again, and receiving a prison sentence as an adult offender.²⁴⁰ For young people at risk of developing mental illness and who come into contact with the criminal justice system, support and diversion could change that potential pattern.

"... young offenders pose[s] unique challenges. They engage in risky behaviours, have significant primary health needs and present with a range of mental health issues and complex behavioural and social concerns, including their offending behaviour."²⁴¹

Providing support to adults in the prison and justice system to ensure protection of their health and legal human rights.

The Commission is pleased that the Australian Human Rights Commission is currently investigating this area. We understand their study-to-date has identified case examples of discrimination in the courts, police and prison systems; where a person's liberty may be taken away, not because of a criminal conviction, but due to their mental health status.²³⁶

The human rights of people with mental illness warrant a fair, consistent and reliable approach in the criminal justice systems across the country. Consistency of legislation and practice in the criminal law would make for a good start.

Each state has a different Mental Health Act with different approaches. The new Mental Health Act of Tasmania which is to take force from 1 January 2014, is of great interest. This Act will change the emphasis from risk to self and others, to assessment of a person's capacity. It will have one treatment order regardless of setting and more regular review points by the tribunal. The person and their family will be involved throughout the process.

Better transition and follow-up arrangements for people with a mental illness in custody, prison and forensic facilities upon release or discharge.

People living with a mental illness who commit a serious offence are subject to legal processes under the forensic and justice systems. The rights of individuals who are unfit to plead due to mental illness need to be balanced against the needs of the community.

How ever, access to mental health treatment, and opportunities for rehabilitation and recovery need to be available. The Commission has heard from services, that successful re-integration needs a staged approach, and currently options for supporting a person through transition back into the wider community are lacking.

The Commission looks to the forensic and prison services and local mental health teams to work together more strongly to provide support through discharge and transitions, to optimise a person's re-connection with the community and reduce risk of a relapse of poor mental health or offending.

Improvements in awareness of legal rights and justice processes.

Australian states and territories need to develop a comprehensive community education campaign to increase awareness of legal rights, court processes and legal assistance and support by people with a mental health issue and their families and support people. This education should be delivered in mental health, community and education settings, in the criminal justice system, and police service.

This is essential to guarantee that people will be treated within their rights.

This approach is based upon one that was developed from the "Inquiry into access to and interaction with the justice system by people with an Intellectual Disability and their families and carer."²⁴² It aligns with both the perspective of equivalence of access – that all people, irrespective of their health or disability, should be treated equal to that of others in the community, and with human rights provisions that a person should be made aware of their rights in order for them to be able to make informed choices in exercising them.²³⁹

There is a need to reform and reinvest current resources into interventions that work:

- Support for court diversion of people with mental health difficulties from the criminal justice system into community mental health services and custodial transitional services to support people leaving custody.
- We need initiatives that provide people with mental health difficulties, upon their release from prison, with ongoing care and support in the community that address the things that concern them most in life and support them to be successful in re-establishing their lives – such as accommodation, education and employment opportunities.

Reducing the over-representation of people in prison with mental illness.

It is clear that the prevalence of mental illness is strikingly higher among prisoners than in the general population. Only if we see the improvements we have outlined above will we be able to reduce the over-representation of people with mental health difficulties in prison.

This must be a priority.

Unless it does, 'Australian society [will be] diminished by the increasing use of prison to address multi-layered social difficulties'.²⁴³

We cannot continue with the present situation, where prisons have become our new mental health institutions.

We need to have all our jurisdictions to adopt more consistent legal provisions so that people with a mental illness are equitably treated throughout our nation; we see the high levels of mental health and co-existing physical health problems among the prison population and the high priority to provide the right physical health and mental health treatment and support they require, and we consider that diversion is essential to supporting the individual to bring justice to people living with mental health difficulties to reduce the consequences of living with a mental illness upon themselves and the wider community.

We recognise that a health-based response is needed for people who commit a crime because of their mental illness and that treatment in a specialist forensic mental health system is important, as are supports for people with a mental illness when they leave a prison or forensic facility and start to re-establish their life in the community.

This is what a just system would look like.

The NSW Consumer Advisory Group's view of what a justice system should look like:

"When you are exiting prison, you receive transitional support, including access to clinical care, accommodation, education and employment opportunities. You are linked in with services in the community so that, if you choose to, you can access ongoing support suited to your situation. Because there are supports that help you adjust to life in the community, you feel positive and optimistic about being in the community. These supports help stop the 'revolving door' effect."²³³

[Back to top ^](#)

- [Spotlight issue >](#)
- [< Stories and perspectives](#)