

**Submission to the ALRC Inquiry
Review of Part 1b of the Crimes Act 1914**

**Section 14 – Mental Illness and Intellectual
Disability**



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About NCOSS

The Council of Social Service of NSW (NCOSS) is an independent non-government organisation and is the peak body for the non-government human services sector in NSW. NCOSS works with its members on behalf of disadvantaged people and communities towards achieving social justice in New South Wales.

It was established in 1935 and is part of a national network of Councils of Social Service, which operate in each State and Territory and at Commonwealth level.

NCOSS membership is composed of community organisations and interested individuals. Affiliate members include local government councils, business organisations and Government agencies. Through current membership forums, NCOSS represents more than 7,000 community organisations and over 100,000 consumers and individuals.

Member organisations are diverse; including unfunded self-help groups, children's services, youth services emergency relief agencies, chronic illness and community care organisations, family support agencies, housing and homeless services, mental health, alcohol and other drug organisations, local indigenous community organisations, church groups, and a range of population-specific consumer advocacy agencies.

General

It was expressed to NCOSS during consultations that there are numerous concerns with the way that section 1B of the Commonwealth Crimes Act 1914 (the Act) has been drafted and that the section addressing the needs of people with a mental illness or an intellectual disability are very underdeveloped. It was felt that the section ineffectively addresses the complex issues of people with a mental illness or an intellectual disability in their interactions with the criminal justice system and it fails to recognise issues of dual diagnosis of both an intellectual disability and a mental illness. It was also reflected that current Commonwealth processes for dealing with federal offenders means that people with a mental illness and/or intellectual disability are treated differently for the same offence, depending on where they are apprehended. This results in some people being responded to in a far more appropriate and sensitive manner than others due to the different criminal and mental health legislation in each State and Territory.

Those consulted agreed that it is essential for there to be funding of education services to improve the skills of people within the criminal justice system who will work with people with a mental illness or an intellectual disability. This includes the courts, lawyers, other legal professionals, police and judiciary. As the Mental Health Review Tribunal state in their submission to the Legislative Council Select Committee Inquiry into mental health services in NSW (249:2002), *“legal representation for involuntary detained and treated people is a right provided for by the (NSW) Mental Health Act but is a right that currently cannot be effectively ensured. Not only is the mental health advocacy service (NSW) stretched beyond all limits but it has also had to use agents whose knowledge of mental health issues and legislation can be lacking.”* This could also be projected to legal services that assist people with an intellectual disability.

NCOSS and its members strongly recommend that people with a mental illness and/or an intellectual disability should be supported, protected and diverted from the criminal justice system.

Recommendations

1. There is appropriate funding and resources to provide training and education services to people that work within the criminal justice system, across Australia, in regards to mental illness and intellectual disability.
2. People with a mental illness and/or an intellectual disability are supported, protected and diverted from the criminal justice system into appropriate services that meet their needs.

Intellectual Disability and Mental Illness

There is a definite lack of clarity in the legislation in regards to the definitions of what is meant by a person with a mental illness or an intellectual disability. Often the legislation only refers to a person with a mental illness and determines the treatment and responsiveness of the criminal justice system to people with an intellectual disability under parameters that are inappropriate. For example, diversionary options recommended within the legislation only target people with a mental illness and may not be appropriate to people with an intellectual disability. NCOSS agrees with the ALRC 44 Sentencing Report, which states, *"In most situations the criminal justice system does not differentiate between offenders who are mentally ill and those who are intellectually disabled ... there are, in fact, important differences between the two conditions."*

Organisations consulted by NCOSS stated that the key differences are that mental illness can be treated and may be episodic whereas an intellectual disability is permanent and not treatable though support and changes can be made within society to enable the person to be integrated into the community. However it has to be recognised that some people with a mental illness may develop a psychiatric disability, which can also impact on their life skills and the way that they can participate in society. Therefore combining the needs of the two groups of people together does not address the issues that are specific to each group.

Intellectual Disability

The legislation does not provide a definition of what is meant by intellectual disability and this needs to be clarified before determining anything else. It was stated by those consulted that in fact the needs of people with an intellectual disability are not addressed by the legislation, for example there are no diversionary options. However where there is some mention of intellectual disability the options offered in regards to their treatment under this legislation are limited in their effects and/or successes. Questions were also raised about how criminal conduct that is a result of the person's disability, for example an assault, can be addressed under current commonwealth legislation.

There are multiple issues facing people with an intellectual disability and the criminal justice system is not set up to address their needs. In 2004 New Zealand was in the process of enacting legislation that will provide a different way of 'managing' offenders with an intellectual disability, including consideration of competence for trial and what happens if someone is unfit to be tried. There is also recent work within NSW that could be used to formulate an appropriate legislative response for federal offenders. The *"Intellectual Disability Rights Service and NSW Council on Intellectual Disability have produced a framework report, which addresses the overrepresentation of those with an intellectual disability in the criminal justice system."*

The report makes 117 recommendations focusing on the development of a framework for the provision of appropriate community services for people with intellectual disabilities who are in contact or at risk of contact with the criminal or juvenile justice system.” (Legislative Council Select Committee inquiry into mental health services in NSW, 196:2002)

Mental Illness

The use of broad definitions for symptoms is far more useful than trying to identify specific illnesses, though it was agreed that in some ways it is difficult to determine a specific definition for mental illness or a person that is mentally ill or mentally disordered. However there was positive support for the definitions utilised within the NSW Mental Health Act (1990) as they covered everything from a one off experience of mental illness to ongoing chronic conditions.

NCOSS and the organisations consulted discussed the issue of the appropriateness of using either a civil law or criminal law test of mental illness. It was felt that the NSW criminal law test is more closely related to the impacts of harm to self and others and is similar to the NSW Mental Health Act (1990), therefore making the criminal law test a more appropriate option.

Two key issues that are not addressed in this legislation are those of dual diagnosis, either mental illness and intellectual disability or mental illness and substance dependency. The interactions between the two issues mean that the needs of the person experiencing them are more complex. Therefore the responsiveness of the criminal justice system to dual diagnosis needs to be clearly identified and defined. For example only responding to the mental illness means that the issues created by the substance dependency remain unaddressed and may result in further criminal behaviour. Issues of mental illness and substance dependency are prevalent throughout the criminal justice system as shown in the Legislative Council Select Committee inquiry into mental health service in NSW (168:2002), *“NSW Health stated that, depending on the population sample, 30 – 80% of people with a mental illness have a co-existing substance use disorder. A recent study of inpatients with an early episode of psychosis conducted in Queensland ... found that 70% of young people admitted also had a current substance use disorder”*

Recommendations

3. Definitions of Intellectual Disability and Mental Illness are clearly stated within the Act.
4. The Commonwealth will consider the proposed New Zealand legislation and the Framework Report identified above, as well as any international best practice models, in determining how the needs of a person with an intellectual disability will be addressed when they come into contact with the criminal justice system.
5. The Commonwealth will utilise appropriate mental health legislation, based on best practice from across the States and Territories, and internationally, in determining how the needs of a person with a mental illness will be addressed when they come into contact with the criminal justice system.
6. The criminal law test of mental illness is the more appropriate and less restrictive method of identifying if a person has a mental illness and should be utilised in determining whether or not an accused person has a mental illness.

7. The Act should separately identify how people with an intellectual disability or mental illness are treated under the Act. For example, different diversionary options.
8. Consideration should be given to expanding definitions to include the issues of the different types of dual diagnosis and how people with a dual diagnosis are to be supported and responded to under the Act when they come into contact with the criminal justice system.

Detention

During consultations it was agreed that people with an intellectual disability or a mental illness need to be diverted from custody into the community and that there needs to be appropriate services to support them. Issues of re- institutionalisation are a big problem/concern within the community and if someone is detained this means that they are not getting access to the services that they need. Therefore, there needs to be intensive community based services and accommodation options available that are specifically designed to meet the different needs of these two groups of people. A good example is the Victorian forensic model, which could be adapted to suit people with an intellectual disability.

If detention is to occur then there must be appropriate and accessible services within the prison system for people with an intellectual disability and mental illness.

Fitness to be Tried

NCOSS and those consulted agree that if a person is determined as unfit to be tried then they should be diverted into an appropriate community based service and not held in custody. A person with a mental illness is someone who is ill and therefore should be treated as such, though it was acknowledged by those consulted that there may need to be some measure taken against risk. Of particular concern is the possibility of the person still being detained for a period up to the maximum amount of time that they could have been held if convicted of the offence. As it states in the ALRC Issues Paper on intellectual Disability and mental Illness (5:2005), *“this can mean that a person dealt with under 20BC may spend more time in detention than if they had been found guilty and sentenced because he or she does not get the benefit of non-custodial options, a non-parole period less than the head sentence, or a guilty plea sentence discount.”* This means that the person is treated less fairly than those without an intellectual disability or mental illness and therefore he or she is being punished for having a condition that they cannot control. It is also in direct opposition to a number of UN Principles such as the United Nations' Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.

Application of Conditions

In discussing the imposition of conditions on someone who has been determined as unfit to be tried it was commented that consideration should be given as to what the conditions are and whether or not they are appropriate, based on the charges made against the person and the severity of the threat or harm. Conditions could be considered where there is a history of offending however a first time offender should not have any conditions imposed on them, placing them on par with other first time offenders who are acquitted of the crime they are accused of. Mitigating circumstances would need to be taken into consideration and some discretion would need to be allowed as not every circumstance

could be addressed under the Act. However it was also argued that a person has not been found guilty of the crime therefore it is inappropriate to apply conditions.

Other concerns were raised as to the capacity of someone with a mental illness or an intellectual disability in being able to understand and meet the conditions imposed on them as a result of their illness or disability. It was considered that there is an argument for diminished responsibility and imposing conditions, without the appropriate support and assistance, would be setting the person up for failure and returning to the criminal justice system.

Review of Detention

While it is argued in the ALRC issues paper under the Model Mental Impairment Unfitness to be Tried (Criminal Procedure) Bill 1995 that more regular reviews may cause distress to the person with a mental illness or an intellectual disability, NCOSS strongly advocates against this view and supports the comments of the organisations consulted that it would be far more distressing if the person had to wait 12 months to be reviewed. Regular six monthly reviews would provide the person held in detention something to work toward and knowledge that their situation is not being ignored.

Role of the Attorney General's Department

In principle 1 of the UN Principles, Point 4 it states "*There shall be no discrimination on the grounds of mental illness, "Discrimination" means any distinction, exclusion or preference that has the effect of nullifying or impairing equal enjoyment of rights*". Maintenance of the current process of Executive Discretion contravenes this principle in that no other person within the criminal justice system faces a similar process of approval when they are to be released. This is also applicable to people with an intellectual disability.

NCOSS and the organisations consulted agree that the Attorney General is not qualified to judge a person's readiness for release and decisions made by the Attorney General could become a political process based on whim rather than an open and transparent decision. In the consultation paper on the NSW Mental Health Act, it is commented that in regards to the process of executive discretion in NSW that "*In addition, practically every review of this issue since 1990 has recommended that the executive discretion be removed.*"

However there are no expert bodies set up at a national level to fulfil a role similar to the NSW Mental Health Review Tribunal and there are no bodies established to review the needs of people with an intellectual disability within the criminal justice system. A solution to this would be to establish a National Tribunal to review federal offenders with both an intellectual disability or a mental illness and that expertise could be drawn from current Mental Health Review Tribunals and Guardianship Boards.

Recommendations

9. People with an intellectual disability or a mental illness are diverted into appropriately funded and resourced community based services rather than held in custody.
10. If detention is considered an option then appropriate and accessible services need to be established within the prison system, to support and assist people with an intellectual disability or a mental illness.

11. Where a person is determined as unfit to be tried they should be immediately referred to appropriate community based services and no period of detention should be imposed.
12. Further careful consideration needs to be given in regards to the imposition of conditions on people who are determined as unfit to be tried.
13. Review of the detention of a person with a mental illness or an intellectual disability should be conducted, at a maximum, every six months.
14. The Attorney General's Department is not the appropriate body to review people detained under 20BC of the Act and an appropriate independent national tribunal should be established to fulfill this role.

Acquittal

Please see the above comments under "Fitness to be Tried" and "Application of Conditions", these are just as relevant if the person is acquitted or found unfit to be tried.

Summary Disposition

In regards to summary disposition it was simply commented that it is inherently unfair that depending on what jurisdiction you are under determines how you are treated.

Sentencing

It is more appropriate and less costly to divert people with a mental illness or intellectual disability into a suitable service than to place them in gaol. However the Commonwealth Government would have to further invest appropriate levels of funding and resources into increasing these services. It is important that people with a mental illness or intellectual disability are not placed into the prison system as they are especially vulnerable to assault and being offended against by others. This results in the person being forced into 'safe custody' and therefore isolation, which has further negative impacts on their mental health. An example of a possible method of diversion could be based on the NSW Court Liaison Service, where forensic psychiatrists and nurses' work with magistrates, lawyers and police to assess people suspected of having a mental illness and divert them to mental health services or hospitals or community settings. After one year of operation 800 people were screened in NSW of which 64% had a serious mental illness and 50% of these were diverted into community or inpatient mental health services.

There is a possibility that Hospital orders could be an alternate option to gaol but this would only work where there are links between the mental health and criminal justice systems and where these opportunities are available. For example in rural and remote areas they may not be suitable mental health services near by. Concerns were also raised into the duration and monitoring of a hospital order and the impact on consumers, and staff, or having a mix of people on compulsory and non-compulsory treatment. There would also need to be provisions for early discharge for good behaviour as available in gaol.

In England guardianship orders can be used for the sentencing of people with an intellectual disability. Consideration could be given to this within Australia, with regards to who the person would be placed under – the Guardianship Board or a Guardian – and the resulting need to expand the role of the Board.

It was strongly agreed at the consultation that time already spent in detention should be counted in the same way as it is for those without mental illness and intellectual disability.

Pre Sentence Reports

Pre Sentence Reports should be formalised in order to provide an understanding of the impact of the illness or disability on the person to the court. This would also enable the judge to make appropriate determinations in regards to access to appropriate services within gaol and in the community. NCOSS agrees with the comment in the ALRC 44 Sentencing report that, *“There should be greater use made of pre-sentence reports, particularly for first offenders, because a court will often fail to recognise the presence of an illness or disability, particularly where the offender pleaded guilty.”*

Recommendations

15. People with an intellectual disability or a mental illness are diverted into appropriately funded and resourced community based services rather than held in custody.
16. A system similar to that of the NSW Court Liaison Program, which is applicable to both people with an intellectual disability or mental illness, is established and legislated within the Act.
17. While Hospital orders could be an option, careful consideration would have to be given to the processes of monitoring and reviewing the person, the impact of having a mix of people on compulsory and non-compulsory treatment and providing similar early discharge processes that are available within the prison system.
18. Guardianship orders could be an option for people with an intellectual disability, again processes of determining who, where and how the person will be detained, as well as reviews of the role of the Guardianship Board would need to be considered.
19. Pre-Sentence Reports should be legislated as a requirement under the Act.

Rehabilitation

The main barrier to people with a mental illness or intellectual disability accessing services in the prison system is the issue of a large portion of them being placed on protective orders, due to their vulnerability to assault from other prisoners. They cannot be taken off protection to go into main prison population to participate in activities and so continue to be seen as a threat and uncooperative by the authorities as they haven't participated in programs. Those that are within the main prison population may still not be able to access programs as they are considered to difficult by corrective services staff as the person may need assistance and support to participate in the program. It was commented during the consultation that if the person with a mental illness or intellectual disability were in the community it is more likely that they will be given support to access programs but when you are in gaol you are on your own.

Recommendation

20. Appropriate and accessible programs are established within the prison system targeting people with a mental illness, or who develop a mental illness while in gaol, and people with an intellectual disability.

A Federal or State Responsibility?

A comprehensive Federal law could act as an incentive to the States to improve their laws in regards to the treatment of people with a mental illness and intellectual disability who come into contact with the criminal justice system. At the moment it is like six different countries and offenders that commit the same offence are treated differently based on where they are. It was commented during consultations that the National Mental Health Strategy already sets the precedence for doing this. However the Commonwealth government needs to take responsibility for providing funding to the States to enable them to bring their systems to a comparable level and it should also take responsibility for the provision of services to federal offenders in each State and Territory. If the Commonwealth Government is expecting states to handle federal offenders then the costs should be paid by the Commonwealth government.

Conclusion

There needs to be a better division within the Act for how people with a mental illness or intellectual disability are dealt with under the Act. As stated at the start of this submission NCOSS and its members strongly advocate for a system in which people with a mental illness or intellectual disability are diverted from the criminal justice system into appropriate community based services. There are numerous concerns with the Commonwealth Crimes Act and how it relates to people with an intellectual disability or mental illness and the Commonwealth could take a lead role in developing a model Act that could act as an incentive for States to improve their legislation.

Organisations Consulted

NSW Association for Mental Health
Community Restorative Centre NSW
Criminal Justice Support Network (Intellectual Disability Rights Service)
Intellectual Disability Rights Service

References:

ALRC 44 Sentencing – *Mentally Ill and Intellectually Disabled Offenders*.

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Henderson S. *Mental Illness and the Criminal Justice System*, Mental Health Coordinating Council (May 2003).

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