



**NSW Law Reform Commission –
Encouraging appropriate early guilty pleas:
Models for discussion**

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Table of contents

Introduction 2

- The Public Interest Advocacy Centre2
- The Homeless Persons’ Legal Service.....2

Issues to be addressed in this submission..... 3

- Homelessness, mental illness and drug/alcohol addiction3
- Reduced incentive to plead guilty due to lack of intermediate sentencing options.....4
- Early provision of evidentiary material.....8

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from Trade and Investment, Regional Infrastructure and Services NSW for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

The Homeless Persons' Legal Service

The Homeless Persons' Legal Service (HPLS) is a project of PIAC. HPLS provides free legal advice and ongoing representation to people who are homeless or at risk of homelessness. It operates ten clinics on a roster basis at welfare agencies in the greater Sydney area. These agencies provide direct services, such as food and accommodation, to people in housing crisis. The clinics are co-ordinated by HPLS and staffed by lawyers acting pro bono. Since 2004, HPLS has provided free legal advice and representation to almost 8,000 people who are homeless or at risk of homelessness. During 2012-13, HPLS assisted 1,354 clients.

Since 2008, PIAC has employed a Solicitor Advocate to provide legal representation for people who are homeless and charged with relatively minor criminal offences. The role was developed to overcome some of the barriers homeless people face accessing criminal advice and representation, including: a lack of knowledge regarding how to navigate the legal system; rushed appointments leaving little time to obtain instructions; and, lack of capacity to address multiple and complex interrelated legal and non-legal problems.

Issues to be addressed in this submission

PIAC welcomes the opportunity to comment on the NSW Law Reform Commission's *Consultation Paper 15 – Encouraging appropriate early guilty pleas*. This submission is informed by the casework of HPLS, and specifically the casework of the Solicitor Advocate.

The two main areas identified through HPLS casework, which warrant attention in order to encourage appropriate early pleas, are the needs for:

- additional intermediate sentencing options for homeless people with mental illness or drug/alcohol dependency, so as to provide incentive for early guilty pleas; and
- the police and prosecution to provide all evidentiary material to be considered by the first court hearing date, to enable the accused to make an informed decision whether to plead guilty.

Homelessness, mental illness and drug/alcohol addiction

In its 2003 study into the legal needs of homeless people in NSW, the Law and Justice Foundation of NSW reported that mental health, alcohol and drug issues, dual diagnosis and other complex needs are prevalent among the homeless population, particularly those who are entrenched in homelessness.¹ In their 1998 study of 210 homeless people in emergency hostels in inner Sydney, Hodder, Tesson and Buhrich reported that 75 per cent of their sample had either mental health problems, drug use disorder or alcohol disorder. Forty-eight per cent of the sample had a drug use disorder and 55 per cent reported an alcohol disorder.²

A 2003 study involving 403 homeless young people aged 12-20 in Melbourne found that 26 per cent of those surveyed reported a level of psychological distress indicative of a psychiatric disorder.³ Most recently, in their study of 4,291 homeless people in Melbourne, released in 2011, Johnson and Chamberlain found that 31 per cent of their sample had a mental illness (not including any form of alcohol or drug disorder).⁴

The prevalence of mental illness and drug/alcohol disorder among homeless people interacting with the criminal justice system is reflected in the casework of the HPLS Solicitor Advocate. Since commencing in 2008, the Solicitor Advocate has provided court representation to 362 individual clients in 554 matters. From January 2010 to December 2012, the HPLS Solicitor Advocate provided court representation to 241 individual clients facing criminal charges. Of these:

- 48 per cent disclosed that they had a mental illness;
- 63 per cent disclosed that they had drug or alcohol dependency;
- 41 per cent disclosed that they had both a mental illness and drug/alcohol dependency;
- 72 per cent had either a mental illness or drug/alcohol dependency;

¹ Suzie Forell, Emily McCarron and Louis Schetzer (2005), *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of NSW, 124.

² T Hodder, M Tesson and N Buhrich, *Down and Out in Sydney: Prevalence of Mental Disorders, Disability and Health Service Use Among Homeless People in Inner Sydney*, Sydney City Mission (1998) 19-25.

³ B Rossiter, S Mallett, P Myers, and D Rosenthal (2003) *Living Well? Homeless Young People in Melbourne*, Melbourne, Australian Research Centre in Sex, Health and Society, 17.

⁴ G Johnson and C Chamberlain (2011) 'Are the Homeless Mentally Ill?', *Australian Journal of Social Issues*, Autumn 2011, 35.

- 46 per cent disclosed that they have previously been in prison.

Reduced incentive to plead guilty due to lack of intermediate sentencing options

The Law and Justice Foundation of NSW observed that the range of symptoms experienced by people with a mental illness or addictions may impair a person's capacity to identify legal issues, obtain legal assistance, and to comprehend verbal and written information provided.⁵ These symptoms may also impair their ability to be assessed as suitable for intermediate sentencing options. Current sentencing options are often not appropriate for offenders who have mental illness, serious drug dependency or other disabilities. The three types of rehabilitative orders available in lieu of imprisonment are:

- community service order;
- intensive correction order; and
- home detention order.

These orders are often not appropriate for people who have mental illness, drug/alcohol dependency or other chronic disability, as the onerous requirements of these respective dispositions often mean that such people are incapable of complying with the terms of the order. Moreover, using these dispositions in the sentencing of offenders with such characteristics may be 'setting them up to fail'.⁶ For these offenders, where the circumstances of the breaches involved should not warrant a term of imprisonment, there are significant sentencing dilemmas presented for judicial officers.

Under s 86 of *Crimes (Sentencing Procedure) Act 1999* (NSW), a community service order may not be made unless the following conditions are met:

- the offender is assessed as being suitable for community service work;
- such an order is appropriate in the circumstances; and
- suitable arrangements exist in the area in which the offender resides for the offender to perform community service work.

Under s 67 of the Act, an intensive corrections order may not be made unless: (a) the offender is assessed as being suitable for serving a sentence by way of intensive correction in the community; and (b) such an order is appropriate in the circumstances.

The *Home Detention Act 1996* (NSW) allows some people who are sentenced to imprisonment of 18 months or less to serve their sentences by way of home detention. Offenders on home detention are electronically monitored, visited by supervising officers, and are tested frequently for drugs and alcohol. From the perspective of the state, it is a less expensive sentencing option than imprisonment and seeks to divert from prison those offenders who do not constitute a threat to public safety or whose crimes do not merit the harshest of sanctions. However, home detention is currently not a sentencing option for people experiencing homelessness, given their lack of stable or suitable accommodation. For many people experiencing homelessness, the difficulties in accessing private rental accommodation has forced them to be dependent on the public

⁵ Above n 1, 124.

⁶ Jelena Popovic (2006) 'Meaningless vs Meaningful Sentences: Sentencing the Unsentenceable', *Sentencing Principles, Perspectives and Possibilities*, February 2006, 7-8.

housing system, where they may be forced to wait up to 10 years to obtain stable public housing accommodation.

HPLS Case Study 1 demonstrates the need for an expansion of diversionary programs and sentencing options. It also highlights the considerable difference in available sentencing options for a person who is fortunate enough to obtain public housing.

HPLS Case Study 1

DL is a homeless man with a history of drug disorder. He had been in rehabilitation prior to receiving a suspended sentence for resisting arrest. He was subsequently charged with possessing a prohibited drug, resisting arrest and possessing goods in custody. If convicted, he would be in breach of his suspended sentence. He was living in crisis accommodation at the time the charges were laid and his previous record meant he would probably get a prison sentence. Without a home, DL would be ineligible for home detention.

Just days before his court appearance, DL secured an offer of public housing. That enabled him to be assessed for home detention and the court made orders that he serve his sentence accordingly. If such housing had not been made available to DL, the Magistrate would have had little option but to sentence him to a period of full-time custody.

In the experience of HPLS, offenders who have mental illness or drug/alcohol disorders are usually considered to be unsuitable for a community service order or an intensive corrections order. As a result, a suspended sentence or a term of full-time custody are the only sentencing options available to a significant proportion of homeless offenders who have mental illness or drug/alcohol disorders.

HPLS Case Studies 2, 3 and 4 illustrate that, for offenders who are homeless and who have a history of drug/alcohol abuse or mental illness, intermediate sentencing options such as community service orders, and in one case, even options such as a s 9 good behaviour bond, are not available in practice. This means that a more serious sentencing option, such as a suspended sentence or custodial sentence, is more likely. This, in turn, reduces the incentive for an offender to plead guilty, and secure a sentencing discount.

HPLS Case Study 2

SJ was charged with theft of two laptop computers. He had a long criminal record and a history of drug abuse. Given his drug history, he was not considered suitable for a community service order. His prior offending was such that he could not get a s 9 good behaviour bond. Therefore, the only alternative was to place him on a s 12 suspended sentence.

HPLS Case Study 3

DT was charged with theft from person. The client had a long history of offending and drug abuse. His drug abuse meant that DT was not considered suitable for a community service order, nor was he eligible for a good behaviour bond, given his criminal history. He was thus given a 12-month suspended sentence.

HPLS Case Study 4

PB was charged with assault occasioning actual bodily harm and armed with intent to commit an indictable offence. The matter commenced as an application under s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) due to the client having a documented history of

mental health problems. However, the Magistrate refused the application on the basis of the seriousness of the offences and the fact that the monitoring period of 6 months under the Act was not sufficient. Due to the client's mental health problems and drug use, he was not eligible for a community service order.

The Magistrate therefore placed him on a four-month s 12 bond (suspended sentence) for the armed with intent charge, and a two-year s 9 bond for the assault occasioning actual bodily harm.

Intermediate sentencing options may also not be available to those offenders who have a physical disability or chronic illness/condition. Where disadvantage is compounded, such as because the individual is homeless, chronic health conditions and a history of drug abuse, as in HPLS Case Study 5, often the only sentencing options are either full-time custody or a suspended sentence. Faced with such serious consequences of a finding of guilt, a defendant has little incentive to plead guilty in order to obtain a sentencing discount.

HPLS Case Study 5

AL was a homeless man with a long history of drug offences, most of which were fairly minor. He appeared before the Local Court on a further drug charge; however, this charge resulted in his breaching two good behaviour bonds.

Due to his homelessness, an arthritic condition where he had to use a walking stick, and drug use, he was not eligible for community service and the Magistrate would not impose further section 9 bonds. The only available option, other than full time custody, was a suspended sentence.

In the absence of adequate intermediate sentencing options for homeless people, people with a history of mental illness, drug and/or alcohol abuse and people with physical disability or chronic health problems, the prospect of serious sentencing outcomes such as suspended sentences or full-time custodial sentences, reduces the incentive for such individuals to consider pleading guilty in order to obtain a sentencing discount.

PIAC submits that additional intermediate sentencing orders should be made available for people who are homeless, have a mental illness or have drug/alcohol dependency. Such orders need to have considerable flexibility as to the amount of supervision and treatment, with any special conditions being optional for the judicial officer to impose, so that the order can be appropriately tailored to the individual. Moreover, such orders need to be adapted to the capabilities and needs of offenders, and should be cognisant of the difficulties confronted by homeless people to attend appointments for such reasons as lack of money for public transport, lack of possessions and records that could serve as reminders of appointments and instability in accommodation arrangements.

PIAC submits that intermediate sentencing options need to have a greater emphasis on therapeutic and remedial outcomes, and to be more flexible and tailored to the particular needs of the offender, particularly those who are homeless, have a mental illness or a history of alcohol or drug dependency.

According to the Deputy Chief Magistrate of Victoria, for some offenders with alcohol or drug dependency, treatment or assistance may still be required but a deferral of sentencing is not appropriate. Sentencing dispositions with a mandated treatment for a short time, but not necessitating a return to court or any undertaking of good behaviour may be more appropriate in some circumstances. Such dispositions would facilitate addressing the needs of the offender without being punitive.⁷

An example of an effective treatment program is the Magistrates Early Referral into Treatment (MERIT) Program, which operates as a diversionary program in Local Courts. HPLS strongly supports the MERIT program and a number of HPLS clients have successfully completed the program. The target client group is adult offenders with illicit drug use problems, who are motivated to undertake drug treatment as part of their bail conditions. The MERIT Program allows a person to focus on treating their drug problem in isolation from their legal matters.

HPLS Case Study 6

MT is a married man with three children. He became homeless after losing his full-time job because of a 10-year heroin addiction. He was facing charges of larceny for property worth approximately \$30,000. The client had made a number of previous attempts to access the MERIT Program without success. The Pre-Sentencing Report in the matter was not helpful in regard to alternatives to a custodial sentence because of his heroin use. MT was sentenced to 10 months' imprisonment with a non-parole period of four months. The matter went to the District Court on appeal.

While on bail for the larceny offence, MT was apprehended and charged with goods in custody. HPLS liaised with the MERIT Program and this time MT was assessed as suitable. He committed to completing the MERIT Program and received a glowing report at the conclusion of treatment. As a consequence, the presiding judge placed him on a suspended sentence for the larceny offence. With respect to the goods in custody charges, MT received a positive Pre-Sentence Report because of his participation in the MERIT Program and was ordered to complete a period of community service and pay a fine.

Without the MERIT Program, MT would have received a custodial sentence for both offences, he would not have received treatment for his heroin addiction and his downward spiral into chronic homelessness would likely have continued on his release from custody. Access to the MERIT Program meant that he was able to address his drug addiction and face a future where he could realistically seek employment and rebuild ties with his children.

HPLS Case Study 7

NT was firstly charged with stealing a number of LCD screens. He was sentenced in the Local Court to 10 months' imprisonment. He appealed to the District Court on the ground of severity. Prior to appeal, he commenced the MERIT Program.

He had not completed the program when his matter came on for appeal but the Judge imposed a suspended sentence instead of full-time custody. Prior to the appeal, he committed further offences (being possession of jewellery which he tried to pawn). After the appeal on the previous charges, he completed the MERIT Program.

⁷

Ibid 25.

When these matters came before the Magistrate, she ordered a Pre-Sentence Report from Probation and Parole. Due to the fact that NT had completed the MERIT Program, he was found to be eligible for a community service order and was sentenced to community service.

This case indicates that, if the client can show that he is dealing with his drug habit, then a community service order may be applied.

It is unfortunate that assessment for entry to the MERIT Program is restricted only to adults with drug use problems. In addition, the MERIT Program has restricted geographic areas of availability.

Early provision of evidentiary material

In the experience of the HPLS Solicitor Advocate, one common obstruction to making an appropriate early guilty plea, is the inability to adequately advise a defendant facing criminal charges, due to the lack of sufficient detail surrounding the charges, and the evidence to be adduced by the prosecution. Early provision of such details would facilitate plea negotiation with the prosecution and informed legal advice to the defendant in relation to the appropriateness of pleading guilty at the earliest opportunity.

In addition, where defendants are facing charges of assault or offensive behaviour in a public place, and there is CCTV footage of the incident, early provision of CCTV footage would assist in appropriately advising the defendant at an earlier stage and thereby facilitate early resolution of the charges through an appropriate early guilty plea. This is particularly the case where the defendant has difficulty recollecting the incident, due to the defendant being drug affected, intoxicated, or experiencing a mental illness episode at the time of the offence.

HPLS Case Study 7

KS was charged with assault on a security guard at a methadone clinic. The client pleaded not guilty on the basis of self-defence. There was CCTV footage in the possession of the prosecution but it was not shown until the hearing. Prior to the hearing, after being shown CCTV footage, which clearly showed that the client was the aggressor, the client pleaded guilty.

CCTV footage was provided with the brief of evidence but at that stage the client had pleaded not guilty. The matter could have been resolved at an earlier mention hearing had the CCTV footage been available earlier.

HPLS Case Study 8

DL was charged with resist arrest, not obey move on direction and offensive language. He was also charged with assault police and escape lawful custody. The assault charge was reliant on the evidence of the officer who alleged he was punched by DL.

None of the other officers who provided statements corroborated the assault. However, this evidence was not available until the date of the full hearing. At the hearing, the Police withdrew the assault and escape lawful custody charge and DL pleaded guilty to the lesser charges, of which he was clearly guilty. This outcome could have been achieved at an earlier mention had the witnesses statements been available at that time.

In addition, where defendants are facing criminal charges in relation to possession and supply of drugs, and there is a requirement for a chemical analysis to ascertain the exact quantities involved, the delay in obtaining the results of that analysis can significantly delay the resolution of the charges by way of negotiation and an appropriately early guilty plea.

HPLS Case Study 9

MG was charged with possess and supply of a small quantity of a drug of dependence. The police arranged for the substances to be chemically analysed to determine the exact quantities involved. The results of the analysis were not available for two months, resulting in missed opportunities to resolve the matter at two mention hearings.

When the results of the analysis were available, it became apparent that the actual quantity of illicit drugs involved was miniscule. At this point, the prosecution withdrew the charge of Supply drug of dependy, and the defendant pleaded guilty to possession.