

Sentencing Contradictions: Mental Illness and the Criminal Justice System

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It is a disturbing fact that people with a mental illness are over-represented in the criminal justice system. A 2012 study found that 38 per cent of Australian prison entrants had been told they have a mental health disorder.¹ The numbers are even worse for young people, with a 2011 report finding that 87 per cent of young people in custody in NSW had a psychological disorder.² Research also consistently identifies a strong relationship between homelessness and mental illness. Research exploring the pathways of people with mental and cognitive impairment into prison indicates that those people with disability, in particular those with complex needs, are significantly more likely to have experienced homelessness than those without disability.³ The question for policy-makers is how best to manage the complex needs of people with a mental illness within the framework of the criminal justice system and reduce the likelihood of re-offending by addressing the causes of crime.

In late 2013, the Public Interest Advocacy Centre (PIAC) released a discussion paper, *Sentencing Contradictions*, that uses case studies from its Homeless Persons' Legal Service (HPLS) project to illustrate some of the benefits and problems with alternative diversionary sentencing initiatives available in New South Wales (NSW), as well as detailing some of the other 'best practice' programs available in Australian states and internationally.

In particular, the paper examines 'justice reinvestment' and 'problem-solving justice' approaches that move funds away from more expensive, end-of-process crime control options, such as incarceration, towards programs that target the causes of crime. Such 'justice investment' programs have the

capacity to address underlying causes of offending and provide alternatives to criminalisation and incarceration for people with mental illness or homelessness.

Problem-solving Justice in NSW

'Problem-solving justice' requires redirection of public resources away from custodial responses to criminal offending, instead directing such resources to effective services and support options, including housing, job training, education and treatment. It has the potential to address underlying factors that may contribute to offending and re-offending. The informal, flexible and interventionist features of these programs mean that they are better able to involve and support people with complex needs in the legal process. The overall aim is to reduce recidivism through early intervention and the provision of targeted support.

In NSW there are a number of existing programs that incorporate various elements of problem-solving justice. These include:

Section 32 orders under the Mental Health (Forensic Provisions) Act 1990 (NSW)

A section 32 order under the *Mental Health (Forensic Provisions) Act 1990 (NSW)* (MHFPA) is an application made to the court to have charges against a client dismissed without conviction on the basis of their mental illness or cognitive disability, and in some cases to have the client diverted into community mental health treatment.⁴

HPLS Case Study

P is a 39 year old female with an intellectual disability receiving a Centrelink disability support pension.

At the time of her arrest, P and her husband were undergoing grief counselling following the death of their child. P was suffering from depression and post-traumatic stress disorder. P and her husband were charged with behaving in an offensive manner in a public place, after an altercation in a shop in the same street as their counselling service.

The HPLS Solicitor Advocate made an application pursuant to s 32 Mental Health (Forensic Provisions) Act to have the charge against P dismissed on the basis of her mental health conditions. The charge against her was dismissed.

As this case study demonstrates, a section 32 application is a useful provision to enable diversion of people with mental illness or intellectual disabilities out of the criminal justice system. However, despite a high proportion of people with mental illness in the criminal justice system, the evidence suggests that the section 32 process is underused. The reasons for this include:

- The Magistrate of a Local Court has complete discretion to determine what is the most appropriate means of dealing with an offender who comes within the meaning of sections 32
- Lawyers and magistrates often have difficulty determining the category of the clients' mental illness and obtaining evidence of it
- Magistrates are often unwilling to agree to a section 32 application where the defendant has mental illness that also have comorbid intellectual disabilities or alcohol and drug addictions
- Magistrates are often unwilling to grant a section 32 order as the period of supervision is only six months, and in most cases this is insufficient to facilitate therapeutic

or clinical change in the subjects' wellbeing and does not enable more long-term support and treatment plans.

Community Treatment Orders

Section 33(1A) of the MHFPA also allows a magistrate to make a Community Treatment Order (CTO) in accordance with the *Mental Health Act* for a person to undertake a compulsory care program authorised by a mental health facility. CTOs are similar to section 32 orders, except that breach of a CTO can result in mandatory admission to a mental health facility. A CTO can be made for up to 12 months.

Though theoretically, diverting people with mental illness into treatment is commendable in a problem-solving justice model, CTOs have been criticised for failing to reduce levels of hospitalisation in patients, and the fact that they rely heavily on medication to treat patients, rather than psychosocial therapy or counseling.

Police Diversion

Section 22 of the *Mental Health Act* is an early diversionary provision which permits police to refer people who appear to be mentally ill or disturbed to a mental health facility rather than remanding them in custody. They are permitted to do so when the person has committed an offence, attempted to kill themselves or is a danger to others.

One of the key problems with section 22 diversions is that they do not give police the capacity to monitor those who are referred in the long term. Ongoing supervision and the ultimate outcome of treatment are left to the discretion of the hospital, which often refuses to admit the patient altogether. In those cases, there are no avenues available to assist the offender and they may be released into the community or charged with an offence by police, who see no other option for the protection of the public.

HPLS Case study

FM has substance abuse issues and underlying mental health issues. FM often has suicidal ideation, particularly when intoxicated. When she is unwell, she frequently contacts

police and police transport her to a mental health facility under section 22 of the Mental Health Act 2007 (NSW). Often, she is not admitted by the mental health facility and is immediately released back into the community. FM does not receive ongoing mental health treatment. Subsequently, FM has been charged by police for nuisance due to contacting police so often when she is unwell and the charges are currently listed in court.

CREDIT Program

Court Referral of Eligible Defendants into Treatment (CREDIT) is a court-based intervention program involving either voluntary or court-ordered participation by NSW adult defendants. CREDIT assists defendants appearing in local courts to engage in education, treatment or rehabilitation programs, by linking the defendant to a range of services (including accommodation, financial counselling, mental health support, domestic violence support, education, training, drug treatment, etc), thereby creating the capacity to address a broad range of issues that could be impacting on offending and re-offending. The program is also sufficiently flexible to vary the intensity of the services response in relation to the defendant's needs and risk of re-offending.

However, the CREDIT program currently operates at only two Local Courts in NSW — Burwood and Tamworth, and is also restricted to adults. It is also of relatively short duration (around six months), resulting in some clients, particularly those with substance abuse problems, exiting the program before they are ready.

HPLS Case study

KM was charged with theft and use of credit cards. She had a lengthy history of drug abuse, mental illness and a lengthy criminal record for theft and fraud, and had previously served terms of imprisonment.

Subsequent to the offence, KM had commenced a stable relationship and had made serious attempts to get off drugs. At the time of pleading guilty, it was clear that KM faced the real prospect of a further term of imprisonment. Given the change in

her circumstances and her attitude, KM was referred to the CREDIT program. A program was developed for KM to obtain financial and drug counseling together with referral to self-development programs.

If KM successfully completes the program it is likely that an alternative to full-time custody may be imposed.

Life on Track Case Management Service

In June 2013, the NSW Attorney General announced a new case management service aimed at reducing adult reoffending by linking adult offenders assessed as being at risk of reoffending, with support services that may assist in addressing the underlying causes of offending. The 'Life on Track' program is based on the CREDIT program, and seeks to address issues that contribute to criminal behaviour such as drug and alcohol dependency, mental illness and financial problems.

The focus of 'Life on Track' is early intervention, with the aim of making an assessment of risk as to reoffending, and then appropriate referral to relevant support services, as soon as possible after a person has been charged. In the first 12 months, the program worked with approximately 600 defendants, with participants being drawn from Bankstown, Sutherland, Kogarah local courts in Sydney, and Lismore, Ballina, Casino and Kyogle local courts in northern NSW.

Other examples of problem-solving justice initiatives for people experiencing homelessness with a mental illness

There are a range of the Australian and international examples of justice reinvestment and problem-solving justice initiatives that have had significant positive effects on the communities in which they have been implemented. They are explored in detail in PIAC's discussion paper.

They include:

Community Court Initiatives

Community courts are neighbourhood focussed problem-solving courts that evolved from the United States that are to make community-based treatment orders to



Artwork courtesy of Homeless Persons' Legal Clinic, Brisbane

deal with drug or alcohol dependency.

Homeless Specific Courts in Australia

Ensuring that the particular needs of people experiencing homelessness are taken into consideration when they come in contact with the criminal justice system, the overarching aim of these courts is to administer a range of more suitable diversionary strategies and alternative sentencing options.

Mental Health Courts

The aim of these courts is to address the personal, psychological and medical factors and broader social factors that have led to the commission of a crime by a person with a mental illness.

Court Integrated Services Program (Victoria, Australia)

CISP operates in three venues and provides short-term assistance with health and social needs with the aim of reducing the likelihood of reoffending.

Problem-solving justice initiatives can be a particularly effective way of responding to criminal offending for people who are homeless or experience mental illness. They encourage those who would otherwise be at high risk of reoffending to become positive actors in the social and economic life of our society, thereby making communities safer. However, at the heart of these initiatives is the need to adequately resource the community services needed to support the relevant therapeutic programs, including housing services, drug and alcohol services, welfare services, education and training, and employment services.

A copy of the report *Sentencing contradictions — Difficulties faced by people living with mental illness in contact with the criminal justice system*, is available on the PIAC website: www.piac.asn.au/publication/2013/10/sentencing-contradictions

Endnotes

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