



Treatment and care rather than crime and punishment:

**Submission to the NSW Law Reform Commission Inquiry -
People with cognitive and mental health impairments in the
criminal justice system**

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1. Introduction

1.1 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;
- 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 (then) 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 Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson 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.

1.2 PIAC's work on people with cognitive and mental health impairments in the criminal justice system

PIAC is concerned about the disproportionate number of people with mental illness in the State's prisons.

In 2006, PIAC represented the family of Mr Scott Simpson at the Coronial Inquest into his June 2004 death in custody whilst awaiting mental health treatment at Long Bay Prison Hospital. Mr Simpson was a forensic patient at the time of his death. Deputy State Coroner Dorelle Pinch found that Justice Health had failed to prevent the ongoing deterioration of Mr Simpson's mental health over an extended period whilst he was held in custody. Coroner Pinch also made broad recommendations about forensic patients, and the treatment of prison inmates with mental illnesses more broadly.

In 2006, PIAC established the Mental Health in Prisons Network for consumers, health professionals, lawyers and advocates to examine the issues of mental illness in NSW prisons.

In July 2007, Legal Aid NSW provided two years funding for PIAC to commence a project to develop effective responses to the unmet legal needs of people with mental illness in NSW. The Mental Health Legal

Services (MHLS) Project aims to develop and implement sustainable legal solutions for people with mental illness. Four pilot projects and two training modules have been devised, with an emphasis on prevention, early intervention and working holistically and collaboratively within a social inclusion framework. PIAC has received separate funding from the NSW Public Purpose Fund for these pilots to be implemented and evaluated over a two-year period. The NSW Attorney General officially launched the pilot projects in November 2009.

1.2.1 PIAC's previous work on non-custodial sentencing options, specifically Penalty Infringement Notices and Criminal Infringement Notices

In April 2006, The Homeless Persons' Legal Service (HPLS)¹ published its report on the NSW on-the-spot fines system, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW*.² This report was the result of collaborative research with a number of community-based legal centres and related organisations. That research drew on the day-to-day experience of those organisations working with homeless people and other people facing disadvantage, including the advice and casework of the Homeless Persons' Legal Service.

Since the launch of that report, PIAC has been working with the NSW Attorney General's Department and other key NSW government agencies to identify appropriate reforms. Many of the reforms sought were legislated in November 2008 in the *Fines (Further Amendment) Act 2008* (NSW). PIAC, through HPLS, continues to work with Government to fully implement these reforms.

On 24 October 2007, PIAC and HPLS expressed concern about the introduction of the Criminal Infringement Notices (CIN) system. In January 2009, PIAC responded to the NSW Ombudsman's review of the impact of the CIN system on Aboriginal and Torres Strait Islander Communities,³ again highlighting the disproportionate negative effect of CIN on vulnerable groups including people from an ATSI background, homeless people, people with an intellectual disability, people with a mental illness, and people from non-English speaking backgrounds.

1.2.2 HPLS Criminal Solicitor Advocate

The position of Solicitor Advocate within the Homeless Persons' Legal Service commenced in January 2008, providing a dedicated point of contact for people who are homeless or at risk of homelessness to access legal representation in minor criminal matters.

The role was established to overcome some of the barriers homeless people face accessing legal services, including: a lack of knowledge of how to navigate the legal system; the need for longer appointment times

¹ The Homeless Persons' Legal Service (HPLS) is a joint initiative of PIAC and the Public Interest Law Clearing House (PILCH). It involves direct legal service delivery and public policy research and development work, as well as capacity building for homeless people and the homelessness sector. HPLS is managed by PIAC and the direct legal services are delivered by PILCH members on a *pro bono* basis. PIAC receives core funding for HPLS from the NSW Attorney General, through the NSW Public Purpose Fund.

² Ellena Galtos and Emma Golledge, *Not Such a Fine Thing! Options for Reform of the Management of Fines in NSW* (2006) Public Interest Advocacy Centre <<http://www.piac.asn.au/publication/2006/04/not-such-fine-thing>> at 27 July 2010.

³ Julie Hourigan Ruse, *Considering the impact of CIN more broadly: Response to the NSW Ombudsman's review of the impact of Criminal Infringement Notices on Aboriginal and Torres Strait Islander Communities* (2009) Public Interest Advocacy Centre <<http://www.piac.asn.au/publication/2009/02/090130-cin-submission>> at 27 July 2010.

to obtain instructions; and the capacity to address multiple and complex inter-related legal and non-legal issues, such as mental health and addiction issues.

The Solicitor Advocate has assisted over 180 clients to date, including many for whom a diversionary program or non-conviction order is a legitimate and sensible outcome.

It is PIAC's experience, especially through the work of the Solicitor Advocate, that the reason the fines system, including CIN, generally creates greater disadvantage for members of vulnerable groups, including homeless people, than for others is because they are highly visible to enforcement officers.

1.2.3 PIAC Mental Health Legal Services Project Social Worker

The position of Social Worker within the Mental Health Legal Services project commenced in June 2009. The position is based at The Shopfront youth legal service. The purpose of the Social Worker position is to establish a dedicated point of contact for young people who are homeless or at risk of homelessness to access support to complement legal representation in minor criminal matters offered by solicitors at The Shopfront.

An essential function of the role is to provide case management and care co-ordination for Shopfront's young, homeless, mentally ill clients. Previously, Shopfront's lawyers had extremely limited capacity to negotiate essential services for their clients beyond the legal matters at hand, even though the lack of services such as housing, medical and employment support often adversely impacted upon the outcomes achieved by those clients.

Three important outcomes of the position are:

- providing tangible access to justice for people with mental illness who are in need of legal and other support services;
- identifying the systemic barriers that people with mental illness face when trying to access justice; and
- devising strategies to overcome those systemic barriers and thereby achieving positive systemic change.

1.2.4 The current inquiry and this submission

PIAC welcomes the opportunity to respond to the NSW Law Reform Commission's current inquiry into people with cognitive and mental health impairments in the criminal justice system. This submission is based on PIAC's diverse experience of working with people with mental illness and cognitive impairment through its core programs, HPLS and the Mental Health Legal Services Project. It is co-authored by Peter Dodd, Julie Hourigan Ruse and Robin Banks with input from Jamie Alford, Brenda Bailey, Sharny Chalmers, Deirdre Moor and Jeremy Rea.

PIAC looks forward to providing further input to the Commission in relation to the particular issues facing young people in the criminal justice system.

2. Principles that should drive any interaction between the criminal justice system and people with cognitive and mental health impairments

PIAC believes that law and policy reform in the criminal justice system should be driven by knowledge of and concern about the long-term persistence of the over-representation in the system of people with mental illness and/or some other form of cognitive impairment, in terms of both:

- those who are charged with criminal offences in NSW; and
- those who are serving a sentence and those who are on remand in NSW prisons.

PIAC calls upon the NSW Government to commit to drastically reduce the number of people with mental illness in prison and the number coming before the Courts on criminal charges.

The *Convention on the Rights of Persons with Disabilities* highlights that, worldwide, the majority of people with disability live in conditions of poverty. The Convention recognises the 'critical need to address the negative impact of poverty on persons with disabilities'.⁴

While in Australia the majority of all people with disability may not be living in poverty, many live on inadequate social support and are isolated and marginalised and there is a substantial minority whose lives are a continuing cycle of poverty, treatment for mental illness, homelessness and imprisonment. Breaking this cycle for the people caught in it should be a key objective of lawmakers and decision makers.

PIAC believes that changing how people caught in this cycle are dealt with by the criminal justice system should be the goal of law reform in this area.

To achieve these ends, any law reform and/or policy reform in this area should conform to the following public interest principles:

- The principle of least restriction.
- The principle that diversion and treatment should be the first response.
- The principle that mental illness and cognitive impairment should be a key factor in sentencing decisions.
- The principle that all defendants should be able to raise the defences of mental illness or intellectual impairment in all courts.
- The principle that if a person is not fit to stand trial because of mental impairment he/she should not be forced to enter a plea in any court.
- The principle that all prisoners, correctional patients and forensic patients should have access to quality health care, including proper psychiatric and psychological services.

⁴ United Nations, General Assembly, A/RES/61/106, Doc.A/61/611 13 December 2006, *Convention on the Rights of Persons with Disabilities*, opened for signature 20 March 2007, I-44910 (entered into force 3 May 2008) (the *Disability Convention*), entry into force for Australia on 16 August 2008, being the 30th day after the deposit with the UN of the document of ratification, Preamble [t].

- The principle that persons who are not convicted of an offence should not be held or treated in a correctional facility.
- The principle that every person who is charged with a criminal offence should have access to appropriate and effective legal representation.
- The principle that diversionary programs and options must be properly co-ordinated and properly resourced in order to be effective.

These principles are discussed in further detail below.

2.1 The principle of least restriction

The Principles for the protection of persons with mental illness and the improvement of mental health care (adopted by General Assembly resolution 46/119 of 17 December 1991) state:

Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others⁵

If the criminal justice system exercises a therapeutic rather than a punitive or deterrent role then the principle of least restriction should apply to all determinations by judicial office holders and members of tribunals such as the Mental Health Review Tribunal when dealing with people with cognitive and mental health impairments, including when considering diversionary options in the criminal justice system.

This means the principle should apply to:

- magistrates when dealing with applications for orders under sections 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) in the Local Courts;
- all courts when making orders in relation to people who are found unfit to stand trial in terms of whether they are to be detained or released;
- all courts when dealing with applications for bail for people with cognitive and mental health impairments, in particular when seeking assessments under section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).⁶

Diversionary options play a vital role in providing less restrictive alternatives to imprisonment and other non-custodial sentencing options.

However, PIAC believes, because of the consequences of breaching a section 32 order, that section 32 should only be used when the alternative, on a plea or finding of guilt, is a custodial sentence.

PIAC submits that there should be alternative forms of diversionary orders available in the Local Courts that are not as coercive as section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW), and that encourage voluntary treatment with case management.

⁵ GA Res 46/119 (1991).

⁶ *Mental Health (Forensic Provisions) Act 1990* (NSW) ss 32 and 33.

Section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides an opportunity for defendants to be dealt with without a conviction being recorded and allows the magistrate to divert a defendant to treatment or rehabilitation. Section 10(3)(a) specifically refers to the defendant's 'mental condition' as a factor that a court can take into account in not recording a conviction under the section. PIAC believes that section 10 could and should be used more frequently to effect diversion in less serious offences where there is no public risk of harm resulting from a discharge under the section.⁷

2.2 Diversion and treatment should be the first response

Diversion and treatment (if possible) should be the first response of the police and the judiciary to criminal suspects with mental illness and cognitive impairment, rather than punishment or penalties that attempt specific deterrence.

Put another way, PIAC does not believe that any possible rehabilitative effects of a term of imprisonment on a person with mental illness or cognitive impairment outweigh the negative effects of imprisonment on people with these conditions. A prison sentence for people with mental illness or cognitive impairment makes the difficult task of them later finding sustainable continuous employment almost impossible in 21st century labour markets. Prison has the effect of further alienating people with mental illness or cognitive impairment from the rest of society. People with cognitive impairment often do not understand why they have been imprisoned. If a person with mental illness has existing paranoia, this can be greatly heightened by imprisonment. If they have been previously traumatised, the harshness of prison life compounds the effect of their previous traumatic experience.

The climbing rates of recidivism for offenders with mental illness or cognitive impairment corroborate these concerns and indicate that imprisonment is not an effective response to the commission of criminal offences by people with mental illness or cognitive impairment.

2.3 Mental illness and cognitive impairment should be a key factor in sentencing

When a person has mental illness and/or cognitive impairment, then this should be key factor in sentencing. Even if a person is fit to stand trial, cannot enter a plea of not guilty due to mental illness or does not agree to, or is not suitable for diversionary options, if they have mental illness or cognitive impairment, then this fact should be taken into account by any court in the sentencing process. A mental illness or cognitive impairment should be taken into account, whether or not the offence has been caused by or related to, directly or indirectly, the mental illness or cognitive impairment.

There should be greater use, by all courts, when dealing with people with cognitive impairments, of provisions such as section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) which specifically allows a conviction not to be recorded, taking into account a defendant's 'health and mental condition'.

Courts that are sentencing people who are diagnosed with mental illness or cognitive impairment to a term of imprisonment (as well as exercising their discretion to refuse bail under the *Bail Act 1978*) (NSW) should

⁷ PIAC notes, however, that further work needs to be done to ensure that orders under section 10 are not later treated as a criminal record for other legislative purposes as is currently the case in a number of legislative instruments in NSW. One example of this is that section 10 orders are treated as a conviction for the purposes of section 17 of the *Legal Profession Act 2004* (NSW).

also have the power to make an order to prescribe the conditions those persons experience in custody, including the power to order that the person have access to psychiatric or psychological assessment and treatment and/or counselling while in custody.

2.4 Mental illness and cognitive impairment should be a key factor in the exercise of police discretion

When a suspect has mental illness and cognitive impairment, then this should be a key factor in the discretion exercised by the police on whether or not to prosecute.

This principle not only recognises the need to address over-representation of people with mental illness and cognitive impairments in the criminal justice system, it also reflects the need to recognise that subjecting many people with cognitive impairments to the processes of the criminal justice system is counterproductive.

Weighing the diminished efficacy of principles of specific deterrence applying to people with cognitive impairment against the trauma and humiliation that people with mental illness experience in the criminal justice system, promoting greater use of discretion not to prosecute is arguably very much in the public interest.

Greater use of discretion could be complemented by informal and voluntary diversion/referral of suspected offenders to sources of community treatment and/or care.

2.5 All defendants should be able to raise the defences of mental illness and intellectual impairment in all courts

No person should be convicted of a serious criminal offence unless the prosecution proves beyond a reasonable doubt his or her intent to commit the offence (or gross recklessness). It follows as a principle that all defendants should be able to raise the defences of mental illness or intellectual impairment in all courts.

The consequence of a finding of mental illness as a defence to a serious criminal offence should be discharge if the need to protect the physical safety of others is not established or proven. If there is a proven risk of safety to others in discharge, then persons who have been found not guilty due to mental illness should be treated in the least restrictive environment available, given the degree of risk of harm, in a therapeutic rather than correctional environment. This may mean a very limited number of people dealt with by Local Courts becoming forensic patients.

This is not intended to in any way negate the discretion of courts to divert defendants to treatment or rehabilitation. The exercise of diversionary options should never, however, prevent a person pleading not guilty, and putting the prosecution to its proof, if the person is fit to enter a plea. Conversely, agreeing to a diversionary option should never, for a defendant, imply or infer either guilt of an offence, or that the prosecution's case is proven or established.

2.6 If a person is not fit to stand trial through mental impairment he/she should not be forced to enter a plea in any court

No person should be forced to defend or enter a plea to a criminal charge if they did not have the mental capacity to understand the nature of a criminal trial/hearing or understand the offence with which they are charged. It follows that, if a person is not fit to stand trial because of mental impairment, they should not be forced to enter a plea in any court.

Many serious criminal matters today are heard in Local Courts despite the level of seriousness. In principle, if a person is not fit to answer a criminal charge, then they should not be forced to plead, regardless of their election or the prosecution's election to have the matter dealt with in the Local Court. Diversionary options such as sections 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) do not require the entering of a plea. These are clearly options already available to magistrates in the Local Court.

There may also be people who cannot be dealt with under section 32 or section 33 (they may not consent to treatment under section 32 or they may not come under the *Mental Health Act 2007* (NSW) definition of mentally ill person for the purposes of section 33). The law should either provide that they are discharged or that the principle of least restriction is applied so that they are only placed in a therapeutic environment where they can voluntarily or involuntarily receive treatment if the need to protect the physical safety of others is established by the weight of evidence. This should definitely not be in a custodial setting.

2.7 All NSW prisoners, correctional patients and forensic patients should have access to quality health care, including proper psychiatric and psychological services.

All NSW prisoners, correctional patients and forensic patients should have access to quality health care, including proper psychiatric and psychological services. They should have the same health care rights as others living in the community (and be able to exercise these rights) including the right to a second opinion and to be able to exercise the right to informed consent to taking medicines and receiving treatment. If these rights are to be abrogated in any way, such as by orders for involuntary treatment because of mental illness, then prisoners, correctional patients and forensic patients should have the same rights as other members of the community in this situation. The health care rights set out in the Australian Charter of Healthcare Rights, agreed by the Australian Health Ministers in July 2008 should be recognised and respected for all prisoners, correctional patients and forensic patients.⁸

PIAC accepts that some people with cognitive impairment or mental illness may need to be placed in a restrictive environment, if the restriction of their freedom is absolutely necessary to protect the safety of others. This should not mean that, apart from the restriction of their freedom of movement, they should be subjected to a reduction of their basic human rights as a form of punishment or as a feature of the environment. If they have their liberty removed because of mental illness, they then should receive the best quality of care to treat their mental illness and all other human rights should be respected, protected and fulfilled. This means, for example, that their privacy should be respected, they should be permitted to participate to the greatest extent possible in the social and cultural life of the community, they should be assisted to participate in education, sport, and other activities, they should have access to meaningful work,

⁸ Australian Charter of Healthcare Rights, <<http://www.health.gov.au/internet/safety/publishing.nsf/Content/PriorityProgram-01>> at 28 July 2010.

etc. Australia is not a third world country, and has the capacity to afford people in custody this level of care and protection of rights.

2.8 Persons who are not convicted of a crime or an offence should not be held or treated in a correctional setting

The principle that persons who are not convicted of an offence should not be held or treated in a correctional setting reflects Australia's obligations under article 10(2)(a) of the *International Covenant on Civil and Political Rights*:

Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;⁹

This principle should apply to forensic patients in NSW who are now, unfortunately, often still held in custodial rather than therapeutic setting. Other Australian states' laws reflect this principle. NSW laws should do the same.

2.9 Every person who is charged with a criminal offence should have access to appropriate legal representation

Every person who is charged with a criminal offence in NSW should have access to legal representation, and those who are particularly disadvantaged in our society such as Aboriginal and Torres Strait Islander people, people with disability (including mental illness and cognitive impairment) and people who are homeless, should have access to effective legal representation at no cost.

People who are diagnosed with a mental illness or a cognitive impairment, and people in custody, should be entitled to free legal representation that is tailored to meet their special needs, at all stages of the criminal justice system process. The establishment of the HPLS Solicitor Advocate was necessary to ensure that people who are homeless who have complex needs get effective legal representation in the criminal justice system. It is such responsive developments that need to be considered and expanded upon to ensure that all those who face specific disadvantage in the criminal justice system get effective representation.

2.10 Diversionary programs and options are only effective if properly co-ordinated and properly resourced.

PIAC supports the extension of the diversionary options available in NSW. This support is however conditional on the adequate resourcing of the community services that inevitably must form the core service providers of such programs, as well as the adequate resourcing of organisations and authorities that provide the reports and assessments to the Courts that are necessary so that Courts can make appropriately informed decisions.

There must be resources provided either to community organisations or to appropriate government agencies to properly co-ordinate diversionary programs, and if necessary, provide assistance to the

⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993), art 10 [2(a)].

individuals involved through case management. Otherwise it could be said that people with severe cognitive impairment or acute mental illness that are put on such programs, are set up to fail.

Recommendation

That the NSW Law Reform Commission propose that the following public interest principles should underpin policy and law reform in relation to people with cognitive and mental health impairments in the criminal justice system:

- 1. The principle of least restriction should apply to all determinations by judicial office holders and members of tribunals such as the Mental Health Review Tribunal when dealing with people with cognitive and mental health impairments, including when considering diversionary options in the criminal justice system.*
- 2. The principle that diversion and treatment should be the first response of the police and the judiciary to criminal suspects with mental illness and cognitive impairment, not punishment or penalties that attempt specific deterrence.*
- 3. The principle that mental illness and cognitive impairment should be the key factor in sentencing decisions.*
- 4. The principle that mental illness and cognitive impairment should be a key factor in the discretion exercised by the police whether or not to prosecute.*
- 5. The principle that no person should be convicted of a serious criminal offence unless the prosecution proves beyond a reasonable doubt his or her intent to commit the offence (or gross recklessness).*
- 6. The principle that all defendants should be able to raise the defences of mental illness or intellectual impairment in all courts.*
- 7. The principle that all NSW prisoners, correctional patients and forensic patients should have access to quality health care, including proper psychiatric and psychological services.*
- 8. The principle that all persons who are not convicted of an offence should not be held or treated in a correctional setting.*
- 9. The principle that every person who is charged with a criminal offence should have access to appropriate and effective legal representation*
- 10. The principle that diversionary programs and options must be properly co-ordinated and properly resourced in order to be effective .*

3. **Comments in response to Consultation Paper 5: an overview**

The overview provides an extremely useful excursus of the history of the interaction of the criminal justice system and mental illness, intellectual disability and cognitive impairment and accurately notes that much of our forensic mental health legislation today is underpinned by the philosophy developed through that history: 'embodying the often competing notions of fairness, justice, risk, responsibility, dangerousness, and indefinite confinement'.¹⁰ This strong correlation to historic notions of mental illness and capacity, responsibility and punishment, fear and protection continues despite significant developments in understanding of mental illness, intellectual disability and cognitive impairments and almost universal acknowledgment of fundamental human rights.

Unfortunately, our current law continues to fail to treat people with mental illness, intellectual disability or cognitive impairments as rights bearers in the criminal justice system and forensic system. The suspension of rights when dealing with people with mental illness, intellectual disability or cognitive impairments sadly is far too reminiscent of past failings. It shows that criminal law, mental health law and the criminal justice system have failed to be sufficiently informed by what has been learnt about these conditions, continuing to treat people with these conditions as 'other', thereby making it somehow acceptable to impose long-term deprivation of liberty and suspension of rights simply for having a medical or physiological condition.

This current review is an opportunity to take a very fresh look at this situation, a look focused centrally on a human rights approach. Such an approach would characterise people with mental illness as people with disability and particular medical and social support needs, and would seek to ensure that those needs are effectively and appropriately met in supportive, respectful, community settings to the greatest extent possible. Such an approach would characterise people with intellectual disability or cognitive impairments as people with disability that affects their capacity to form intention and, as such, as unable to be held guilty of criminal offences. The response would be again to provide much greater access to community-based support to assist people with intellectual disability or cognitive impairments to be active and respected members of their communities with appropriate support, education and training to ensure that, to the greatest extent possible, they can develop their understanding and sense of responsibility.

For neither group does the current approach provide any beneficial outcomes. Indeed, as is outlined in further detail later in this submission, there is strong evidence that the current approach causes significant harm to people with mental illness, intellectual disability or cognitive impairment and perpetuates serious injustice on these people. In addition, the development and application of the defence of insanity in criminal law and reporting of mental illness in relation to criminal justice matters had the effect of heightening community fears of people with mental illness (and probably also intellectual disability or cognitive impairment due to the lack of community understanding of the differences between these characteristics).¹¹ While there is strong evidence that people with diagnosed mental illnesses are no more

¹⁰ NSW Law Reform Commission, *Consultation Paper 5: People with cognitive and mental health impairments in the criminal justice system: an overview* (2010) [1.11].

¹¹ A Dare, J Pirkis, R W Blood, B Rankin, S Williamson, P Burgess & D Jolley, *The media monitoring project: Changes in reporting of suicide and mental health* (2007).

dangerous to others in the community than the broader population, fear of people with mental illness remains prevalent¹² and continues to influence outcomes in the criminal justice system.

3.1 Definitions

Consultation Paper 5 considers at length some of the definitional complexities surrounding mental illness, cognitive impairment and intellectual disability. It should be noted that definitions of disability are many and varied and often are framed contextually. That is, the definition is developed to respond to a particular government or legislative purpose and that purpose has a significant impact on the definition. For example, the definition of disability for the purposes of anti-discrimination laws in Australia is extremely broad and inclusive.¹³ This is appropriate as the purpose of the law is to prohibit discriminatory treatment based on disability. It is not enough to simply have a disability as defined in such legislation in order to get the benefit of the protection. One must also be able to show that the discriminatory treatment was linked to that disability. In this way, the legislation targets prejudicial conduct and an inclusive definition ensures that any prejudice based on disability can be addressed.

By contrast, disability services legislation across Australia tends to define disability much more narrowly. The purpose of such legislation is to create and control programs of funding for disability services and, as such, a narrower definition serves the purpose of providing constraints on and targeting of government expenditure.

This somewhat fluid nature of the definition of disability is relevant to the question posed by the Commission. In order to determine whether or not a particular definition is appropriate it is necessary to consider the purpose of that definition. The Commission suggests a definition of 'mental impairment' as including 'a mental illness, cognitive impairment, or personality disorder, however and whenever caused, whether congenital or acquired'.¹⁴ It goes on to suggest that:

A definition along these lines would only be for the purpose of establishing the threshold criteria for identifying those defendants whose mental impairment may warrant special consideration during sentencing, or would act as a qualifying period for diversion, or for consideration of unfitness, or of the defences of mental illness or substantial impairment.¹⁵

This is a wide range of purposes and does not seem to get to the underlying issue of why people with mental impairment continue to be dealt with as offenders as a matter of course.

That said, the proposed definition is likely to reduce the current confusion and proliferation of terms across legislation relevant to the criminal justice system.

PIAC is concerned, however, that the definition proposed would need to include some explanation as to the extent of the meaning of 'cognitive impairment' to ensure that it is understood to include intellectual disability, learning disorders, dementia and brain injury. The inclusion of the words 'however and whenever caused, whether congenital or acquired' are of critical importance.

¹² B G Link, J C Phelan, M Bresnahan, A Stueve and B A Pescosolido, 'Public conceptions of mental illness: labels, causes, dangerousness, and social distance' (1999) 89(9) *Am J Public Health* 1329–33.

¹³ See, for example, *Disability Discrimination Act 1992* (Cth) s 4.

¹⁴ NSW Law Reform Commission, above n 10 [4.45].

¹⁵ *Ibid* [4.46].

Recommendation in response to Issues 5.1 and 5.2

That the NSW Law Reform Commission propose an inclusive definition of 'mental impairment' for the purposes of the Mental Health (Forensic Provisions) Act 1990 (NSW) in the following terms: 'mental impairment' includes mental illness, cognitive impairment (including but not limited to intellectual disability, learning disorder, dementia or brain injury), or personality disorder, however and whenever caused, whether congenital or acquired'.

In relation to the use of 'mental illness' in Part 4 of the *Mental Health (Forensic Provisions) Act 1990* (NSW), the Commission has usefully identified the confusion that arises from using the same term with two different meanings in two different statutory instruments. This confusion can and should be removed through replacing the term 'mental illness' in Part 4 with the term 'mental impairment'.

Recommendation in response to Issue 5.3

That the NSW Law Reform Commission propose the replacement of the term 'mental illness' from Part 4 of the Mental Health (Forensic Provisions) Act 1990 (NSW) with the term 'mental impairment'.

PIAC agrees that the term 'mental condition' is 'so vague as to be meaningless',¹⁶ and that the term 'developmentally disabled' is unhelpful in the absence of any shared understanding of its scope and meaning. Both can usefully be removed and replaced with 'mental impairment'.

In respect of the current use of the terms 'developmentally disabled' and 'mental condition' in respect of diversion under section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW), the substitution of 'mental impairment' would still mean that one of the qualifying conditions for diversion would be the presence of a 'mental impairment for which treatment is available in a mental health facility', but it would need to be made clear that diversion is also available for people with mental impairments where such treatment is not appropriate or available.

Recommendation in response to Issue 5.4 and 5.5

That the NSW Law Reform Commission propose the replacement of the terms 'mental condition' and 'developmentally disabled' in the Mental Health (Forensic Provisions) Act 1990 (NSW) with the term 'mental impairment' and ensure that the diversionary powers in section 32 of that Act are available where a person has a 'mental impairment, including but not limited to mental impairments for which treatment is available in a mental health facility'. Further consideration should be given to ensuring that the qualifying condition is sufficiently broad as to be enabling of diversion wherever possible.

While the responses above to Issues 5.1 to 5.5 are supportive of changes to the various terms used and the inclusion of a definition of 'mental impairment' should serve an important threshold purpose, PIAC urges the Commission to consider further how such a definition could potentially be used to divert people with mental impairment out of the criminal justice system before any charges are laid. To deal with people with mental impairment in the criminal justice system perpetuates the failure to acknowledge the impact of mental impairment on agency.

In the final section of the Consultation Paper 5, the Commission considers the issue of assessment reports and the current powers to order such reports. PIAC agrees with the Commission's view that it would be

¹⁶ Ibid [4.52].

useful to have a broader power vested in the courts to order an assessment at any stage during the proceedings and that such a power should require an assessment by an independent practitioner or practitioners with relevant expertise

In relation to the question of whether or not such assessments should go beyond assessing whether or not a person has a mental impairment and, if so, of what nature, extent and effect, while there may be circumstances where something more is needed, PIAC is of the view that the provision of a report to the court on suggested or available treatment services or treatment plans is better done as a separate process after the initial independent assessment takes place, if and when a diversion becomes appropriate. Courts should always consider whether the person before them should simply be released back to the community and the provision in the initial assessment of treatment services or plans could influence the courts to use diversionary options where this is not appropriate.

On the final question asked, PIAC is of the view that reports should be limited to an assessment and should be used for the sole purpose of informing the court of whether or not the person has a mental impairment.

Recommendation in response to Issue 5.6

That the NSW Law Reform Commission propose an amendment to the Mental Health (Forensic Provisions) Act 1990 (NSW) to provide for a general power of the court to order an assessment of an alleged offender at any stage during proceedings. Such an assessment should be conducted by an independent practitioner or practitioners with relevant expertise and the power should include the power to seek further assessment if the original practitioner identifies the possible existence of a condition outside the expertise of that practitioner. Such an assessment report should be limited to an assessment of whether or not the person has a 'mental impairment', and the nature, scope and effect of that impairment. The assessments should be used for the purpose of informing the court of whether or not the alleged offender has a mental impairment and of informing any other practitioner of this finding if and when they are engaged to provide a report on treatment options, services or plans.

4. Comments in response to Consultation Paper 6: criminal responsibility and consequence

PIAC's responses to the issues in the consultation paper are informed by the principles set out in part 2 of this submission.

PIAC will make particular mention of the following issues:

- 6.7-8 Determining a defendant's fitness to be tried
- 6.11 Fitness to plead in Local Courts
- 6.20 Possible replacement of the defence of mental illness
- 6.21 Cognitive impairment as a defence
- 6.55 The kind of 'harm' relevant
- 6.58 The presumption in favour of detention
- 6.72 Powers of local Court
- 6.73 Powers of Local court
- 6.90 The exclusion of detention of forensic patients in correctional centres
- 6.92 Compulsory Treatment of Forensic Patients
- 6.99 Expanding the use of the principle of least restriction

In this part of the submission, PIAC makes separate specific comments about the issues raised in Chapter 8 Sentencing: principles and options.

4.1 Issues 6.7 and 6.8: Determining a defendant's fitness to be tried

PIAC supports the streamlined procedure suggested by the NSW Law Reform Commission on pages 17–18 of Consultation Paper 6.

PIAC strongly supports the proposition on page 16 that '[f]itness is a legal concept, not a medical diagnosis, and has legal, not clinical implications'. Therefore PIAC does not support any enhancement of the role of the Mental Health Review Tribunal with regard to fitness to be tried issues.

4.2 Issue 6.11: Fitness to plead in Local Courts

PIAC bases its comments on the principle that no person should be convicted of a serious criminal offence unless the prosecution proves beyond a reasonable doubt his or her intent to commit the offence (or gross recklessness). It follows that all defendants should be able to raise the defences of mental illness or intellectual impairment in all courts.

Applying this principle, it follows that there should be some legislative changes that allows the questions of fitness to be raised in the Local Courts.

There is no reason why magistrates sitting alone could not determine fitness questions on an interlocutory basis after hearing evidence from expert witnesses and persons familiar with the history and circumstances of the defendant.

There is also no reason why, if determining that someone is unfit, they could not be discharged with no conditions; discharged and dealt with under section 32 of the *Mental Health (Forensic Procedures) Act 1990* (NSW), or dealt with under section 33 of that Act.

The exception to dealing with fitness matters in the Local Court is situations where there are serious and real risks to members of the community if the defendant is not held in a secure environment. In relation to some offences, the magistrate still has power to refer matters to the District Court. This power could be enhanced so that magistrates are given a general power to commit a person to the District Court if there is a finding of unfitness to plead together with a finding, on the balance of possibilities, that the continued freedom of the defendant represents a serious risk of serious harm to one or more members of the community. The current forensic provisions for indictable offences then could come into operation.

It is PIAC's view that the number of defendants in that category would be very small indeed. The vast majority of those found unfit to plead could be safely discharged or dealt with under sections 32 or 33 of the *Mental Health (Forensic Procedures) Act 1990* (NSW).

Recommendation

That the NSW Law Reform Commission propose that magistrates sitting alone be able to determine fitness to be tried unless there are serious and real risks to members of the community if the defendant is not held in a secure environment.

4.3 Issue 6.20: Possible replacement of the defence of mental illness/diversionary options in superior courts

PIAC does not support the abolition of the defence of mental illness because of the principle set out in part 2 of this submission that no person should be convicted of a serious criminal offence unless the prosecution proves beyond a reasonable doubt his or her intent to commit the offence (or gross recklessness). It follows as a principle that all defendants should be able to raise the defences of mental illness or intellectual impairment in all courts.

However, PIAC has also stated that one of the relevant principles in considering reforms is that diversion and treatment (if possible) should be the first response of the police and the judiciary to criminal suspects with mental illness or cognitive impairment, rather than punishment or penalties that attempt specific deterrence.

Therefore PIAC does not oppose, and would support the use of diversionary options by superior courts, with several provisos.

The first is that if there is use of a diversionary option then there should be no conviction recorded.

The second is that if the diversionary option has a provision for breach and recall, similar to section 32 of the *Mental Health (Forensic Procedures) Act 1990* (NSW), then this class of diversionary provision should only be used if a custodial sentence would be likely in all the circumstances if there were a plea or finding of guilt. PIAC notes that the vast majority of matters that are dealt with by the District and Supreme Court are matters where a custodial sentence would be under consideration by the judicial officer.

If a person fails to comply with a diversionary order, they should then have the right to rely on a defence of not guilty due to mental illness. They should also, if they plead guilty to the original offence, be dealt with taking into account the mitigating and aggravating factors set out in the *Crimes (Sentencing Procedure) Act 1999* (NSW), including the circumstances of their mental illness and the relationship of the illness to the offence. They should not be punished or receive any extra penalty because they have breached a diversionary order.

PIAC believes that diversionary options could be used in the superior courts both as an alternative to the more protracted and complex fitness process and, in some circumstances, as an alternative to a custodial sentence in cases that could be considered to be less serious but still indictable matters.

PIAC sees great advantage in the use of options akin to section 32 of the *Mental Health (Forensic Procedures) Act 1990* (NSW) in cases where there is no public safety issue or options akin to section 33 of the *Mental Health (Forensic Procedures) Act 1990* (NSW) where the defendant fits the definition of 'mentally ill person' in the *Mental Health Act 2007* (NSW) and where there may be short-term, limited public safety concerns.

A clear advantage of the use of these options is that the accused person is given an opportunity to receive treatment in a timely manner, without the additional trauma of a trial, fitness hearing or protracted sentencing process.

PIAC is particularly supportive of options similar to what used to be called 'Griffith Bonds' where criminal proceedings are adjourned while the defendant undergoes treatment or rehabilitation. Bail conditions can be used in these circumstances to partially enforce compliance, but onerous bail conditions that a person with mental illness or cognitive impairment may find difficult to comply with would be counter productive and should be discouraged. A breach of bail on a person's record not only may lead to a criminal record in itself, but may also mean that in the future the person may have difficulty getting bail if they reoffend.

Recommendation

That the NSW Law Reform Commission propose the use of diversionary options by superior courts.

4.4 Issue: 6.21: Cognitive impairment as a defence

PIAC reiterates the principle that no person should be convicted of a serious criminal offence unless the prosecution proves beyond a reasonable doubt his or her intent to commit the offence (or gross recklessness). It follows as a principle that all defendants should be able to raise the defences of mental illness and intellectual impairment in all courts.

As noted in Consultation Paper 6 at page 57, PIAC has previously advocated for a separate defence of intellectual impairment in criminal matters.

PIAC does not believe that intellectual impairment should be included as part of the mental illness defence. Conceptually, intellectual impairment is not an illness, condition or disorder. The outcome of a finding of intellectual disability as a defence should be different to a finding of mental illness as a defence. The main reason for this is that intellectual disability is not an illness and therefore cannot be 'treated'. This is not to say that diversionary programs could and should not be devised to assist a person with intellectual disability with life skills and improved community relationships, etc.

This is also not to advocate that a defence of intellectual disability would replace the need to determine fitness to stand trial.

Consistent with other recommendations in this submission, PIAC does not believe that the outcome of a finding of not guilty because of intellectual impairment should result in either the person being held in a correctional setting or held as a forensic patient unless there is a serious risk of serious harm to the community.

PIAC would support the establishment of a small residential unit for people with intellectual disability to house the very small number of persons that would find themselves in the latter category. This unit should not be part of or contingent to forensic or correctional facilities that house and treat people who have a mental illness.

Recommendation

That the NSW Law Reform Commission propose a separate defence of intellectual impairment in criminal matters.

4.5 Issue 6.55: The kind of 'harm' relevant

PIAC does not believe that where the only threat posed by a person is to him or herself, there is not sufficient and appropriate basis for a court to order a person's detention.

If a person is a risk of harm to themselves and has a condition that seriously impairs, either temporarily or permanently, their mental functioning, then they are a mentally ill person under section 34 of the *Mental Health Act 2007* (NSW). This means they can be made an involuntary patient under the Act. They should be held preferably in a psychiatric facility in the community rather than a specific forensic unit such as the Forensic Hospital at Long Bay. The Mental Health Review Tribunal can then determine when they can be discharged (perhaps on a community treatment order) from the community facility.

This is consistent with the principle of least restriction cited above. PIAC concurs with the Supreme Court of Canada, cited at page 159 of Consultation Paper 6 that 'absent a conviction, public safety (should be) the only basis for the exercise of the criminal law power'.

4.6 Issue 6.58: The presumption in favour of detention

PIAC does not support the retention of any presumption of detention that could be said to apply in forensic matters. PIAC supports the proposition that the principle of least restriction should apply to all determinations by judicial officers and members of tribunals such as the Mental Health Review Tribunal when dealing with people with cognitive and/or mental health impairments.

PIAC submits that the principle of least restriction is not consistent with the current section 39 of the *Mental Health (Forensic Provisions) Act 1990* (NSW), and that section 39 should be amended, codifying the principle of least restriction. In other words, those seeking to have a forensic patient kept in a form of detention should have to satisfy the Tribunal that the patient is a serious risk to public safety.

Under the heading below 'The exclusion of detention of forensic patients in correctional centres', the arguments as to why forensic patients should not be held or receive treatment in a correctional setting are

provided. These arguments equally apply to why least restrictive options should be ordered if available and appropriate, as against more restrictive options such as detention and compulsory treatment.

The argument for least restriction is therefore based on utilitarian arguments (more restriction is counterproductive to effective treatment) and human rights arguments (a person's liberty should only be taken away in exceptional circumstances, according to well defined legal principles).

Recommendation

That the NSW Law Reform Commission propose that section 39 of the Mental Health (Forensic Provisions) Act 1990 (NSW) be amended, codifying the principle of least restriction.

4.7 Issue 6.60: Participation of victims and carers - legal representation of all parties

PIAC is of the view that, subject to the principles of procedural fairness, the Tribunal should be able to receive relevant evidence from wherever it considers appropriate on questions of least restriction and issues of public risk. This might include evidence from victims and carers. The forensic patient should also have, in these circumstances, the right to legal representation, and the right to cross-examine any witness and to call any evidence to support their position.

PIAC is concerned not so much as to whether the Tribunal can call evidence of victims, the police, carers and health professionals but that in the past there have been concerns raised by people with mental illness that the evidence of such witnesses has been given much greater weight than evidence presented by patients, including forensic patients, and without the evidence of the other parties being properly tested. While not wanting the Mental Health Review Tribunal to be as formal and intimidating as superior courts can potentially be, forensic patients should go away from the Mental Health Review Tribunal believing that they have been heard, their views taken into account and that the evidence presented by health professionals, police and victims has been subjected to appropriate scrutiny and given appropriate weight.

Access to competent legal advice and representation, free if the person has limited means or assets, is essential to the achievement of these goals. There is a strong argument that victims (and carers if they are at risk of harm) should also be able to access legal advice and representation on the same terms. However, the fact that the person with mental illness may, as a result of the Tribunal's deliberation, be subject to ongoing restrictions on their liberty or other human rights means that their need for legal representation must be paramount. The Tribunal should always listen to the contributions of carers, but PIAC does not see a similar argument for free legal representation for carers, particularly if they are not at risk of harm.

PIAC does not support the introduction of victim impact statements in forensic matters. Victim impact statements are part of the sentencing process, where the effect of a crime, proven before a court, is relevant to the sentencing process. Forensic patients have not been convicted of a crime and are not before the Mental Health Review Tribunal to be punished or sentenced. PIAC submits that risk of harm matters should be the primary concern in forensic matters before the Mental Health Review Tribunal. Victims of alleged crimes could give relevant evidence on risk of harm issues in relation to the circumstances of themselves and those close to them if a forensic patient is released. They are, however, not experts about risk of harm in a general sense as might be a treating health professional. Legal representation in relation to the small number of matters where risk of harm to particular persons is an issue, would be of more value to victim's rights, than a right of all victims to present unmediated, and perhaps prejudicial, victim impact statements.

PIAC submits that principle that everyone who is charged with a criminal offence should have access to appropriate legal representation should be the paramount consideration in relation to legal representation because of the potential for defendants to lose their liberty in criminal matters. This principle should extend to any person who faces a loss of liberty or reduced rights or freedoms as a result of any court or tribunal process.

Legal practices that provide services to people with mental illness or intellectual disability should have staff with the necessary skills and experience to effectively communicate with and represent their clients. They should, ideally, have a range of staff with a range of skills, including not only lawyers but also social workers and other workers skilled in dealing with disadvantaged people.

PIAC refers the NSW Law Reform Commission to the Law and Justice Foundation of NSW report *On the Edge of Justice: The legal needs of people with a mental illness in NSW*, which identified lack of legal representation as one of the many barriers to people with mental illness effectively participating in legal proceedings.¹⁷

PIAC submits that a range of legal representation should be funded to ensure effective legal representation of people with cognitive disability in criminal matters. Legal Aid NSW will clearly continue to represent the largest number of people from disadvantaged backgrounds in the criminal courts. However, funding should also be provided to specialist legal centres such as the Intellectual Disability Rights Service, the Homeless Persons' Legal Service and the Mental Health Legal Services Project to provide legal representation and related supports tailored to people in particular circumstances and/or with particular disability.

Recommendation

That the NSW Law Reform Commission propose that, subject to the principles of procedural fairness, the Mental Health Review Tribunal be able to receive relevant evidence from wherever it considers appropriate on questions of least restriction and issues of public risk and that the forensic patient have the right to legal representation, and the right to cross-examine any witness and to call any evidence to support their position.

4.8 Issues 6.72 and 6.73: Powers of the Local Court

PIAC has stated above in part 2 of the submission the principle that no person should be forced to defend or plea to a criminal charge, if they did not have the mental capacity to understand the nature of a criminal trial/hearing or understand for what they are charged. It follows that if a person is not fit to stand trial because of mental impairment they should not be forced to enter a plea in any court.

This means the Local Court should have powers to deal with both fitness and pleas of not guilty due to mental illness.

The Local Court already has the power to divert, without a finding of guilt, under section 32 and section 33 of the *Mental Health (Forensic Procedures) Act 1990* (NSW). This in itself should be sufficient to deal with the vast majority of the matters where there is a finding that a person is not fit to stand trial.

¹⁷ Maria Karras, Emily McCarron, Abigail Gray & Sam Ardasinski, *On the Edge of Justice: The legal needs of people with a mental illness in NSW* (2006) Law and Justice Foundation of NSW
<http://www.lawfoundation.net.au/ljf/app/&id=CB05FD97AAF2458CCA25718E00014293> at 10 August 2010.

Because the Local Courts deal with less serious offences, then issues of public safety are less likely to arise in Local Court matters. Because the definition of mental illness in *the Mental Health Act 2007* (NSW) requires a mental condition that might lead to risk of harm to both self and others, matters where there was a degree of risk of harm to others can be dealt with under section 33 of the *Mental Health (Forensic Procedures) Act 1990* (NSW).

There may be a need to legislate for the rare event where someone is not fit to plead to a charge in the Local Court, and a section 33 referral, with a consequent order of involuntary treatment in hospital is not deemed sufficient to protect the safety of the public or particular members of the public. In this circumstance, the magistrate, on finding a person not fit to plead, could be empowered to refer the matter to be dealt with as an indictable offence. If necessary, an *ex officio* indictment could be issued by the Director of Public Prosecutions. PIAC would be satisfied that the accused's rights were protected in such a case if there was mandatory involvement of Legal Aid NSW and/or the Public Defenders Office at all stages of the process.

If a person were found not guilty of a criminal offence in a Local Court because of mental illness, then PIAC would expect the person to be discharged as is the case when any other defendant is found not guilty. Public risk concerns can be dealt with under the *Mental Health Act 2007* (NSW). If there are more serious public risk concerns, then, given the less serious nature of offences dealt with in the Local Court, it would be highly unlikely that there would be justification, on the facts relating to the offence alone, for protective detention outside the safeguards set out in the *Mental Health Act 2007* (NSW).

Recommendation

That the NSW Law Reform Commission propose that Local Court have powers to deal with both fitness and pleas of not guilty due to mental illness.

4.9 Issue 6.90: The exclusion of detention of forensic patients in correctional centres

PIAC has stated above in part 2 the principle that persons who are not convicted of a crime or an offence should not be held or treated in a correctional setting.

Forensic patients have not been convicted of a criminal offence. There is no justification because of punishment, deterrence or rehabilitation for them to be treated or housed in a correctional setting.

If they require treatment because of a mental illness, then PIAC does not know of any research, study or theory that suggests that treating a person in a correctional environment enhances the possibility of their recovery from mental illness.

Forensic patients being placed with convicted prisoners is a historical anomaly: a throw back to a period where 'lunatics' were considered to be dangerous and kept in highly secure and inhuman environments called 'asylums'.

There are also strong clinical and therapeutic reasons why people with mental illness should not be treated or housed in a correctional setting. Professor Paul Mullen, the (then) Clinical Director of the Victorian Institute of Forensic Mental Health said in evidence to the Senate Select Committee on Mental Health:

There is always a problem with providing mental health care within the context of a prison. The culture of prisons inevitably is a culture of observation and control. The culture of therapy for mental disorder is a culture—or should be—of communication and enablement of people to begin to stretch their capacities and begin to move. You see it very clearly when you come across suicide risk. The response of a prison to suicide risk is to restrict the possibilities of suicide. At the grossest end, you put people in a plastic bubble, take all their clothes away and watch them. That does prevent suicide but it also, in my view, produces enormous destruction to the psychological and human aspects of that individual, and it is not the way to go. So whenever you are trying to provide mental health care to severely distressed and disabled people within a prison, you are running up against a clash of cultures, the result of which can lead to abuse.¹⁸

Professor Mullen had earlier provided further reasons why prisons and treatment of mental illness are often incompatible, in a 2001 paper for the Criminology Research Council.

Mental health facilities within prison often succumb to the dominant correctional culture, which overwhelms the smaller and inherently less assertive, mental health cultures. Mental health units within prisons have to struggle to sustain a therapeutic environment, but in practice prison based psychiatric units remain a necessity. Correctional managers all too often regard good mental health services as those, which are responsive to their needs rather than those of the prisoner patient. Health professionals have to place the treatment needs of their patients first. Mental health professionals should not become accomplices to inflicting harm by declaring individuals fit for punishment. The convenience and budgets of prison administrations should not take precedence over appropriate therapeutic responses (eg if newer antipsychotics are indicated on the basis of efficacy and less side effects they should be provided as they would be in the community). Placing potentially suicidal prisoners in isolation cells stripped of furniture, clear of hanging points and subject to the constant gaze of prison staff may be a cheap and, in the very short term, effective suicide prevention strategy, but should remain unacceptable to a mental health professional concerned with the state of mind and long term mental health of their patient.¹⁹

Currently section 76C and section 77C of the *Mental Health (Forensic Provisions) Act 1990* (NSW) gives the Corrective Services Commissioner effective power to override directions from courts and the Mental Health Review Tribunal as to where forensic patients can be located in the prison system. It is anomalous and completely inappropriate that the Mental Health Review Tribunal has the power to unconditionally discharge a forensic patient but cannot make binding orders about how forensic patients should be treated.

PIAC submits that the *Mental Health (Forensic Procedures) Act 1990* (NSW) should be amended to ensure that forensic patients are not held in a correctional setting. This should effectively negate the power of the Corrective Services Commissioner to override orders of courts and the Mental Health Review Tribunal setting the parameters for the treatment and detention of forensic patients. The Director General of Health or Justice Health should also not have power to override an order by a court or the Mental Health Review

¹⁸ Evidence to Senate Select Committee on Mental Health, Parliament of Australia, Canberra, 6 July 2005, 49 (Paul Mullen).

¹⁹ Paul E Mullen, *Mental Health and Criminal Justice: A Review of the relationship between mental disorders and offending behaviours and on the management of mental abnormal offenders in the health and criminal justice services* (2001) [36–37] Criminology Research Council
<<http://www.crimnologyresearchcouncil.gov.au/reports/mullen.html>> at 6 July 2010.

Tribunal about the care and treatment of forensic patients. If there is any dispute about the overlap of clinical decision-making by Justice Health or an area health service, and an order of a court or the Mental Health Review Tribunal, the matter should be returned to the Mental Health Review Tribunal for resolution.

4.10 Issue 6.92: Compulsory Treatment of Forensic Patients

PIAC has stated above in part 2 the principle that all NSW prisoners, correctional patients and forensic patients should have access to quality health care, including proper psychiatric and psychological services. They should have the same healthcare rights as other citizens (and be able to exercise these rights) including the right to a second opinion and the right to be able to exercise the right to informed consent to taking medicines and receiving treatment.

If these rights are to be abrogated in any way, such as by orders for involuntary treatment because of mental illness, then prisoners, correctional patients and forensic patients should have the same rights as other members of the community in this situation.

The 2008 amendments to the *Mental Health Act 2007* (NSW) gave the Mental Health Review Tribunal the power to make Community Treatment Orders (CTOs) for forensic patients. At page 206 of Consultation Paper 6, the point is made that the previously existing powers that the Tribunal exercised would be sufficient to make an order in similar terms to a CTO.

PIAC believes it is misleading to place a person on a CTO, which is designed to be a less restrictive order than a civil commitment order under the *Mental Health Act 2007* (NSW), when they are clearly not in the community. The breach provisions in the *Mental Health Act 2007* (NSW) are clearly inappropriate for a forensic patient who is in any form of protective detention.

Professor Paul Mullen said in his 2001 paper on mental health and the criminal justice system

The use of the compulsory powers of mental health legislation to compel prisoners to accept treatment is outlawed in most Australian jurisdictions. There are very good reasons for this given the ease with which powers of compulsory treatment can, and have been, misused in prison environments. The lack of such powers means that within the essentially coercive environment of a prison mental health treatment has to be by consent to an even greater extent than in the outside community. Whilst approving this reality it necessitates in the management of prisoners even more skill and time to ensure treatment compliance. The danger is ever present in prisons that health professionals will succumb to pressures to provide inappropriate medications, or appropriate medications in inappropriate dosages, to prisoners seeking oblivion, or on the behest of staff pursuing the goal of a passive prisoner. Over prescribing in prisons, particularly women's prisons, can be a problem, and certainly attracts considerable adverse public comment, however, under medicating is probably more common, particularly in the treatment of affective disorders.²⁰

There is certainly considerable evidence that in the past there has been overmedication of women prisoners in particular in NSW. In a 1992 Institute of Criminology study it was reported that:

²⁰ Ibid 35.

According to many respondents [women prisoners] anti-depressants or tranquillisers such as Largactil and Tryptynol are especially common and according to some, are given in such high doses that hallucinations occur.²¹

There is not power in the *Mental Health Act 2007* (NSW) for the use of force in relation to treatment of involuntary patients and a clear prohibition on the use of force in administration of medication under a CTO.²²

There is nothing in the common law or statute that takes away a forensic patient's general right of exercising informed consent with regard to medication and treatment.

The reality is that in a correctional environment, and in an environment of protective detention as found, for example, in the Long Bay Forensic Hospital, all patients, forensic or otherwise, have no choice but to accept or reject the treatment or medicine prescribed for them by Justice Health or visiting medical practitioners. There is no practical opportunity for a forensic patient or a correctional patient to obtain a second opinion. Even if they were able to arrange a medical practitioner to visit them in prison, because Medicare benefits (including bulk billing) are not available to serving prisoners, the cost would be prohibitive to the vast majority of prisoners. Even if they did get an alternative opinion, and alternative treatment prescribed, like all public treatment, there is no obligation on Justice Health to follow advice from outside health practitioners.

To say that NSW forensic patients have any real opportunity to exercise the right to informed consent flies in the face of reality. As pointed out on page 208 of Consultation Paper 6, this is directly in contradiction of Principle 7 of the *National Statement of Principles for Forensic Mental Health*. This principle recognises:

The right of all clients to respect for individual human worth, dignity and privacy is not waived by any circumstance, regardless of an individual's history of offending or their status as a forensic mental health client or a prisoner. The capacity or right to consent is not forfeited as a result of a history of offending or status as a prisoner...

It goes on to state:

Mental health treatment should always be provided only with the explicit informed consent of the client except in circumstances where the client is unable to give informed consent by virtue of their mental illness or intellectual impairment. In this circumstance, treatment should only be provided with the consent mechanisms outlined in the relevant jurisdictions' substitute decision making legislation and/or Mental Health Act.'

PIAC submits that the *Mental Health (Forensic Procedures) Act 1990* (NSW) should clearly state that prisoners should have the right to exercise informed consent with regard to all medical treatment unless they do not have the mental capacity as determined by the Guardianship Tribunal to consent to particular medical procedures or administration of medication.

²¹ Patricia Easteal, *Women and Crime: Imprisonment Issues* (1997) 6.

²² *Mental Health Act 2007* (NSW) s 57(3).

Recommendation

That the NSW Law Reform Commission propose that the Mental Health (Forensic Procedures) Act 1990 (NSW) clearly state that prisoners should have the right to exercise informed consent with regard to all medical treatment unless they do not have the mental capacity as determined by the Guardianship Tribunal to consent to particular medical procedures or administration of medication.

4.11 Issue 6.99: Expanding the use of the principle of least restriction

PIAC has stated in part 2 above the principle that every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others. This principle is based on *The principles for the protection of persons with mental illness and the improvement of mental health care*, adopted by UN General Assembly resolution 46/119 of 17 December 1991.

PIAC submits that the principle of least restriction should apply to all decision-making, including judicial decision making under the *Mental Health (Forensic Provisions) Act 1990* (NSW).

4.12 Chapter 8 Sentencing: Principles and options

Anecdotal evidence suggests that many more people with cognitive and/or mental health impairment in the criminal justice system are dealt with by the sentencing process rather than by diversion or forensic processes.

This is likely to continue to be the situation, even if there is a greater emphasis on diversionary options, for the following reasons:

- A reluctance of both defendants and their lawyers, in serious criminal matters, to embark on a course which will lead to the defendant becoming a forensic patient, because of the indeterminate nature of detention under forensic provisions.
- The relatively indeterminate nature of Local Court diversionary options.
- The ongoing stigma that attaches to admitting to having mental illness and its consequent effect, particularly in the employment and workplace context.

For these reasons, it is vitally important that mental illness and other cognitive impairments are recognised in sentencing outcomes from all courts exercising a criminal jurisdiction.

4.12.1 Issue 6.105: Sentencing principles

Applying the Hemsley principles in NSW²³, courts have historically recognised mental illness and cognitive impairment as a factor in sentencing.

PIAC submits, however, that legislative recognition of these principles will lead to both more certainty and more consistency on the side of these principles being applied when the circumstances of the offence or simply the personal circumstances of the defendant involve mental illness or cognitive impairment.

²³ See *R v Hemsley* (2004) NSWCAA 228.

Therefore, in relation to Issue 6.105, PIAC submits that the *Crimes (Sentencing Procedure) Act 1999* (NSW) should contain a general statement directing the court's attention to the special considerations that arise when sentencing an offender with cognitive and/or mental impairments.

The statement should be framed in terms that the courts must take account of these factors in sentencing, when these issues rise out of the factual circumstances of the case, or when raised by the defendant and/or their legal representative or by the prosecution.

4.12.2 Proposed exception to the Hemsley Principles

An aggravating factor in the Hemsley principles is 'special deterrence' because of 'the level of danger which the offender presents to the community'.

PIAC is of the view that if a defendant has a severe mental illness or cognitive impairment, and the continuation of that mental illness or impairment produces symptoms, that, in whole or in part makes the defendant being at liberty a risk to the community, then the court should consider an order similar to section 33 of the *Mental Health (Forensic Procedures) Act 1990* (NSW), or make a 'hospital security order' (see below in response to Issue 6.107).

Extending a custodial sentence for the purpose of 'special deterrence' is inappropriate if there is an option to sentence a defendant to be kept in a secure therapeutic environment that fulfils the public interest in protecting the public, while providing treatment and care.

Section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) sets out the purposes of sentencing in NSW. They are:

- (a) to ensure that the offender is adequately punished for the offence,
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,
- (c) to protect the community from the offender,
- (d) to promote the rehabilitation of the offender,
- (e) to make the offender accountable for his or her actions,
- (f) to denounce the conduct of the offender,
- (g) to recognise the harm done to the victim of the crime and the community.

PIAC submits that punishment is not a relevant purpose of sentencing if the offence was directly or indirectly caused by the defendant's mental illness. General deterrence is certainly not as significant a factor in sentencing if mental illness was a factor in the offence. It is almost universally acknowledged that imprisonment decreases, rather than enhances, the chances of a defendant with mental illness successfully undergoing rehabilitation. If a purpose of sentencing is to make an offender more accountable for his or her actions, and an offender has mental illness then the offender is only likely to have insight into his or her actions, and therefore be accountable, after successful treatment.

PIAC submits that the deprivation of liberty itself is sufficient in sentencing offenders who have a mental illness or mental impairment. There are other ways of recognising the harm done to victims and the community generally than excessively punishing someone with a mental illness or intellectual impairment. The greater harm to the community would result if people with mental illness were to be released untreated, or having their mental illness made worse because of the harsh prison environment, therefore being more likely to reoffend.

PIAC submits that section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended to include a purpose of sentencing: to ensure the appropriate treatment of persons with mental illness or cognitive impairment who are convicted of criminal offences, whilst at the same time protecting the public in situations where there is a proven serious risk if the offender was not in a secure setting.

4.12.3 Issue 6.107 Pre-sentence reports

PIAC supports the principle that, in general, pre-sentence reports (PSRs) should be ordered by the courts when issues of mental illness and cognitive impairment are raised and relevant to the sentencing process.

However, PIAC would be concerned that if a PSR is mandatory for a less serious offence and the defendant, possibly because of homelessness, is unable to obtain bail. In this circumstance the defendant is likely to spend more time in custody while the PSR is being prepared than they could ever be expected to spend if they were sentenced after a 'quick plea'.

4.12.4 Issue 6.107 Court orders as to how sentences should be carried out

PIAC is strongly in favour of the courts having power to make orders as to how sentences of imprisonment are carried out, in particular, orders that a defendant serves his or her sentence in a therapeutic rather than a custodial setting.

PIAC would support legislation in NSW similar in terms to section 99A of the *Sentencing Act 1991* (Vic) to enable courts to make 'hospital security orders' in these circumstances.

However, the one caveat that PIAC would place on such a recommendation is that the NSW Government commits the additional funding necessary to properly carry out such a significant change.

At the moment, NSW has the Forensic Hospital physically located at Long Bay, but outside the prison system, and the Long Bay Prison Hospital. There are also forensic patients at Morisset Hospital and plans to use part of Bloomfield Hospital at Orange for this purpose. The Long Bay Prison Hospital is not only fully utilised but also cannot be seen as separate from the correctional system. If the suggestion, made in Consultation Paper 6, that forensic patients should not be held in a correctional setting is adopted (and PIAC strongly endorses this proposition), then the question must be asked whether beds at the Forensic Hospital as well as Morisset and Bloomfield can meet the demand to care and treat all NSW forensic patients.

Further, and as a consequence, PIAC gravely doubts that these hospitals could meet the additional burden of adding additional patients sentenced by courts outside the current forensic framework. The options then would be to further utilise existing public psychiatric facilities, thereby reducing the supply of mental health beds for other consumers in NSW, or establishing a new secure hospital or hospitals to supplement the Forensic Hospital at Long Bay. PIAC cannot support the former proposition, given the fact that the supply of existing public mental health beds in NSW does not go anyway near meeting the current demand for such beds.

Realistically, apart from the establishment costs set out above, it must be recognised that the recurrent costs of keeping someone in a correctional setting is less than the costs of caring, treating and housing someone in a therapeutic setting in hospital. The benefits of diversionary options are more long term, and are benefits to the community as a whole rather than as savings that can be quantified in a government budget. These are the benefits to the community that are achieved by breaking the cycle of re-offending for many people in our community who have mental impairments and become defendants in the criminal justice system

However, if the NSW Governments accept these arguments, it must be on the basis that there must be an initial significant growth in outlays and an acceptance of a short- to medium-term increase in recurrent costs. If however, corners are cut and there is not sufficient funds allocated to properly care for and treat people with cognitive disabilities who have had contact with the criminal justice system, either as part of the forensic process, or through diversionary options, or as defendants sentenced to a therapeutic rather than correctional setting, then there will not be the long-term gains such as the reduction of recidivism. Public support for such programs will consequently be diminished, not strengthened.

PIAC also notes the provisions in Victoria that allow a court to make a Residential Treatment Order as a sentencing option if an offender has an intellectual disability. This order can operate for up to five years and requires the person to live in a residential facility and receive treatment. The treatment must be set out in a treatment plan that is approved by a senior practitioner²⁴. PIAC submits that the courts should also have this sentencing option in NSW. This again would be with the caveat that appropriate funding is provided so that an acceptable level of care is always provided to people under such an order.

Recommendation

That the NSW Law Reform Commission propose that section 3A of the Crimes (Sentencing Procedure) Act 1999 (NSW) be amended to include a purpose of sentencing: to ensure the appropriate treatment of persons with mental illness or cognitive impairment who are convicted of criminal offences, whilst at the same time protecting the public in situations where there is a proven serious risk if the offender was not in a secure setting.

That the NSW Law Reform Commission propose that courts have the power to make orders as to how sentences of imprisonment are carried out, in particular, orders that a defendant serves his or her sentence in a therapeutic rather than a custodial setting.

That the NSW Law Reform Commission recommend that appropriate funding be provided so that an acceptable level of care is always provided to people under such an order

²⁴ See *Disability Act 2006* (Vic) s 152; *Sentencing Act 1991* (Vic) s 80(2)(b).

5. Comments in response to Consultation Paper 7: diversion

PIAC has set out in part 2 of this submission the principles that should drive the interaction between the criminal justice system and people with cognitive and mental impairments. These include the principle of least restriction and for diversion and treatment (if possible) to be the first response of the police and the judiciary to criminal suspects with mental illness and cognitive impairment, not punishment or penalties that attempt specific deterrence.

These principles have guided PIAC's response to Consultation Paper 7.

PIAC supports the retention of sections 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW). However, this submission will raise some significant concerns about the current application of these sections.

PIAC is concerned that sections 32 and 33 remain underutilised. Anecdotal evidence has been provided to PIAC that suggests that some magistrates routinely refuse to exercise their discretion under these sections.

PIAC submits not only that diversion under sections 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) should be utilised more, but also that the range of alternative options should be expanded to include a more extensive matrix of diversionary programs.

The available diversionary programs should be tailored to respond to the needs of particular groups, such as Aboriginal and Torres Strait Islander people and women. In particular, there are strong arguments to fund diversion programs for women who have a mental illness or a cognitive disability and find themselves in the criminal justice system. PIAC also submits that the Magistrates Early Referral Into Treatment Program (MERIT) is a good model for diversionary options that work, and calls for an extension of the program to include treatment for people with addictions other than alcoholism.

Finally, PIAC is strongly of the view that diversion through the use of existing discretions should be expanded and encouraged by agencies such as the Police and the Director of Public Prosecutions (the DPP) when dealing with people with a mental illness or a developmental disability.

5.1 General concerns about the operation of section 32 and section 33

PIAC supports the continuing use of sections 32 and 33 as part of the diversionary options available to all courts in NSW.

PIAC strongly supports that the principle of least restriction should apply to dealing with persons who have a mental illness or a developmental disability who are defendants in the criminal justice system.

PIAC submits that section 32 (1) (b) of the *Mental Health (Forensic Provisions) Act 1990* (NSW) should be amended to include the principle of least restriction.

PIAC believes that, because of the judicial interpretation of the words 'appropriate' in that section, there has been a limitation of the use of section 32 in the Local Courts. If the section required the court to apply the

least restrictive principle when dealing with defendants coming under section 32 (1) (a), rather than the test of 'appropriateness', then more matters would be diverted through section 32 (except in cases where public safety dictated that a more restrictive option such as imprisonment or a suspended sentence with strict conditions, was necessary in the circumstances).

Authorities such as *Confos v the DPP NSW (2004) NSWSC* hold that in determining appropriateness to make an order under section 32, the court must look at the seriousness of the offence. Here seriousness appears to refer to more than the actual risk of harm that would eventuate if the defendant were not dealt with under criminal law rather than a diversionary option. If the principle of least restriction were to apply to section 33, the test would not focus on punishment or deterrence, as it operates at present, but on a presumption of the appropriateness of using a diversionary option for defendants with cognitive impairment unless there is actual risk to others in the community (or perhaps to themselves) if a less restrictive option was put in place.

There would still be a discretion for the judiciary to exercise, but in cases where there is no actual risk of harm in the defendant receiving treatment in the community, then imposing a custodial sentence on a person with a significant cognitive disability when alternative treatment and/or care is available, would clearly be not choosing the least restrictive option.

The way that the Courts apply an 'appropriateness test' to section 32 and thereby limit its scope is illustrated by the following HPLS case study:

Case Study: Sean

Sean is diagnosed as having chronic schizophrenia and is also an alcoholic. Sean was charged under section 17(1) *Child Protection (Offender Registration) Act 2000* (NSW) with failing to report a change of address to Police. He was sentenced on 28 November 2003 for aggravated indecent assault. Due to his mental state, he received a non-parole period of only 9 months, however because of the nature of the offence he was placed on the Offender Register.

Under the Registration he was required to do the following:

1. Report registrable information (eg name, address etc) to Police each year pursuant to section 10 (1) of the Act.
2. Report any change of address within 14 days after change occurs (section 11).
3. The notification has to be made to the Police Station in the area the person resides.

In the present case, Sean was released and commenced living at Matthew Talbot Hostel in February 2004. He commenced reporting to Kings Cross Police Station.

In late 2008 he moved to Surry Hills and he notified Kings Cross Police of his move and they sent his file to Surry Hills Police. In February 2009 Sean moved back to the lane outside of Matthew Talbot. He did not notify Surry Hills Police of the move back within the time allowed. In the meantime, Surry Hills Police tried to contact him. In April 2009 Sean attended Kings Cross to advise of the change. On 12 May 2009 he was arrested and charged.

The matter was listed for a section 32 *Mental Health (Forensic Provisions) Act 1990* (NSW) application and information was obtained from Justice Health, Rozelle Hospital, Caritas and a psychiatrist. The psychiatrist

outlined a diagnosis of chronic schizophrenia, advised that Sean was medication compliant and outlined a brief plan, which consisted of him receiving his depot injections at the Matthew Talbot Clinic.

The matter came to Court in August 2009 for hearing of the Application.

The Court found that:

1. Sean had a mental condition for the purposes of the act and comes with 32 (1)(a).
2. There is a plan and his compliance provides some confidence in continuing with the plan, however
3. It is not appropriate for the matter to be dealt with under the section; because the Act upon which charge is based is regulatory in nature and is there to protect the Public and is in place to ensure persons are known. There is a need to ensure that persons such as SC will comply with their obligations and the Court was not satisfied these objectives would be met by diversion and dismissal. The application was therefore refused.

Section 32(3)(c) of the *Mental Health (Forensic Provisions) Act 1990* (NSW) states: 'The Magistrate may make an order dismissing the charge and discharge the defendant: unconditionally'. At the moment, and because of *DPP v Albon 2000 NSWSC 896*, unconditional discharges are very rare. PIAC believes that in many less serious matters, courts should unconditionally discharge a defendant under section 32 if they are satisfied that the defendant is receiving ongoing treatment or an effective form of care for their mental illness or cognitive disability.

Again a shift from the broad discretion based on 'appropriateness' to a legislative 'least restrictive alternative test' should mean that many defendants with cognitive disabilities coming before the courts on less serious offences could be unconditionally discharged under this principle.

PIAC has several other concerns about the current operation of section 32. They are illustrated below by several case studies. These concerns are not necessarily able to be remedied by law reform. Solutions will be better found in changes in practice, by both the courts and the agencies serving the courts, and in the provision by government of sustainable funding for the agencies that provide the diversionary services.

PIAC's concerns are:

- that the process to request and produce treatment plans or psychiatric reports is often complex and too lengthy (This is illustrated by Sharon's case and Steven's case below.)
- that because of the delay in co-ordinating information about the defendant and the time taken to draft treatment plans, defendants, often because of their symptoms of mental illness, continue to re-offend. (This is illustrated by Sandra's case below, although Sandra eventually was subject to an order under section 33 rather than section 32)

Case Study: Sharon

Sharon's case illustrates the complex and lengthy process needed to produce a treatment plan that will satisfy the magistrate. Although Sharon's diagnosis led the magistrate to conclude that it was appropriate to deal with her charges under section 32, his concern regarding the adequacy of the treatment plan led to the Homeless Persons' Legal Service having to take a very active role in the preparation of the plan.

HPLS first met with Sharon in the cells of Central Local Court, following a referral from an HPLS clinic. She was 39 years old and had been diagnosed as suffering from schizophrenia. She had also been a heroin

addict for around 10 years during her twenties, although this had been brought under control through the methadone programme. Due to her incarceration while her matters were heard, Sharon was at significant risk of losing her Housing NSW tenancy.

Sharon was in custody because she had breached an Apprehended Personal Violence Order put in place following Sharon's unprovoked attack on a neighbour, leading to a charge of assault occasioning actual bodily harm. HPLS learnt that in the days following her arrest Sharon had also been charged with assaulting a police officer and a corrective services officer.

As HPLS worked towards having the charges dismissed under section 32 it attended Central Local Court on six occasions, and met with Sharon at Silverwater Women's Correctional Centre on at least three occasions. Five weeks after the assault, the matter was set down for a section 32 application, although there were further adjournments due to the time needed for the preparation of the Justice Health psychiatric report.

The report revealed that shortly before the assault on her neighbour, the police had taken Sharon to a psychiatric unit, following allegations of a separate assault. While she was in this unit her antipsychotic medication was changed. Despite Sharon telling staff that the new medication was not as effective, no further change to her medication was made.

She was discharged from the psychiatric unit about two days before the assault on her neighbour. She was given no medication to take with her, although she was given an appointment with a community mental health provider. Sharon said she had not taken any medication until she was arrested for the assault, but she admitted to having taken methamphetamine around the time of the assault.

To prepare for the section 32 application, HPLS wrote to three mental health services seeking Sharon's records. As part of this process, HPLS had to negotiate for waiver of the fees usually associated with provision of these records. These records were essential to any section 32 application because they provided evidence of Sharon's mental illness and showed that her actions must be understood in the context of a psychotic relapse during a period of medication changeover. At the request of HPLS, the community mental health provider and a welfare agency prepared a detailed chart outlining a plan with various functions being undertaken by a number of providers.

Meanwhile, Sharon had requested that she be moved to a Housing NSW unit in a different area so as to avoid coming into contact with the victim of the assault. Sharon's proposed new address brought her within the catchment area of a different community mental health provider and this needed to be reflected in the treatment plan, thus adding a layer of complexity to its development.

On the date set for the section 32 application this material was submitted to the magistrate, who conceded that Sharon had a diagnosis which was captured by section 32 and that it was appropriate for the court to use the section in Sharon's case. However, the magistrate was not satisfied that there was a single, coherent plan relating to Sharon's mental health treatment, making it very clear that Sharon would not be released unless he was sure that Sharon would not re-offend.

HPLS proceeded to write to the proposed new community mental health provider, outlining in some detail exactly what was required of the treatment plan, while emphasising that HPLS was not itself presuming to enter upon the creation of such a plan requiring relevant expertise. A case conference at

Silverwater Women's Correctional Centre was held just a few days prior to the final court date to review the treatment plan. The resulting treatment plan was prepared under the auspices of six separate support services.

The magistrate had also made it very clear that he required evidence of a specific residential address for Sharon. To this end HPLS wrote to Housing NSW, asking that it waive agency protocol in relation to disclosure of its tenant's address.

On 5 June 2009, some three and a half months after Sharon was placed in custody, the magistrate exercised his discretion under section 32 and dismissed the charges against her on condition that she comply with the treatment plan prepared. In the event that Sharon breached the treatment plan, the community mental health provider was to report this to the Court, and the original charges would be dealt with according to law.

Case Study: Sandra

Sandra's case highlights the challenges faced by legal representatives when the client is chronically unwell, leading to the commission of further offences while existing matters are before the court.

Sandra was on bail and facing two charges of assault and a charge of breach Apprehended Violence Order when HPLS first met with her. Prior to the charges, Sandra had been couch-surfing for several months with different friends. However, conflict quickly arose and became physical, leading to the charges. During the previous six years, Sandra had been admitted to hospital on many occasions, following drug-induced psychoses, and episodes of depression and anxiety. She had also spent time in custody, and had been admitted and then discharged from a drug rehabilitation service, resulting in Sandra having nowhere to live. While Sandra was on bail she resided at various hostels.

Sandra instructed HPLS that a section 32 or section 33 application be made on her behalf, a decision both vindicated and made more difficult by the continuing deterioration in Sandra's mental state as HPLS attended fifteen court dates over the next year. Sandra was admitted to hospital as an involuntary patient on two occasions, resulting in a non-appearance at court. She continued to commit offences, leading to further charges of shoplifting, assault, and destroy or damage property. As a consequence, HPLS needed to attend a number of different courts to seek adjournments to the Downing Centre, so that all the charges could be heard together under the one section 33 application (the most appropriate way to deal with the charges according to advice from a clinical forensic psychologist).

Obtaining Sandra's medical records and reports constituted a further challenge. HPLS wrote to five different medical providers requesting these records. Although these letters included the usual request to waive fees, in most instances HPLS needed to send follow-up letters in this regard. In one instance, there was a delay of three months in the provision of an important set of records due to disagreements between HPLS and the service over whether HPLS should pay the fees before or after the service released records. This led to HPLS being under considerable time pressure in its preparation of the section 33 application.

Fourteen months after Sandra was charged with the original set of offences, the magistrate at Downing Centre Local Court made an order under section 33 in relation to a total of 19 charges. He made a community treatment order requiring Sandra to attend her local community mental health provider and accept medication as prescribed by her treating psychiatrist.

Case Study: Steven

Steven's case is an example of the difficulty faced by HPLS in securing a timely psychiatric report for a section 32 application. When HPLS first met 43-year-old Steven, he was out on police bail. He had been observed by police urinating in public while extremely intoxicated and had been charged with wilful and obscene exposure and behave in an offensive manner in a public place. His on-going mental health problems combined with the new criminal charges had placed considerable pressure on his ability to maintain his tenancy.

Steven had a long history of drug and alcohol abuse. Some 13 years before the offence he was diagnosed with a moderate to severe depressive illness, with an intermittent major depressive illness. The onset of this illness dated back to his mid-teens following revelation that he had been sexually abused from the age of 13 until 16 years. There followed numerous admissions to a range of different hospitals and a suicide attempt. He was prescribed medication for his depression.

Steven instructed HPLS to make an application under section 32. HPLS wrote to five mental health services requesting photocopies of Steven's medical records. With some of these services, negotiation over waiver of fees took several weeks.

HPLS spent a considerable period of time trying to find a psychiatrist who was available to assess Steven and prepare a treatment plan. After unsuccessful approaches to a community mental health provider and a private practitioner, an appointment was secured with another private practitioner three days before the date set for hearing of the section 32 application. The report was received by HPLS on the morning of the hearing.

The magistrate granted the application and dismissed the charges on condition that Steven see his psychiatrist, abide by all his directions and obey directions in regard to medication and counselling.

Recommendation

That the NSW Law Reform Commission propose that section 32 (1) (b) of the Mental Health (Forensic Provisions) Act 1990 (NSW) should be amended to include the principle of least restriction, enabling a shift from discretion based on 'appropriateness' to a legislative 'least restrictive alternative test'.

- that the process to request and produce treatment plans or psychiatric reports is often complex and too lengthy (This is illustrated by Sharon's case and Steven's case below.)

That the NSW Law Reform Commission recommend an appropriate increase in resources available for the production of treatment plans or psychiatric reports.

5.2 Responses to issues in the discussion paper about section 32

5.2.1 Issues 7.9 and 7.10 Definitions

PIAC supports specific terms being defined if the purpose and result is simple interpretation that promotes consistent and fair application by police and the court.

PIAC believes that the reference to 'developmental disability' in section 32(1)(a)(i) of the *Mental Health (Forensic Provisions) Act 1990* (NSW) should be accompanied by a definition under the Act. However, any definition should not be narrow and/or exhaustive. Any definition would need to be broad enough to capture new categories of conditions, or conditions unintentionally overlooked by legislative drafters. As it currently applies, PIAC regularly experiences frustration that a person is excluded from the diversionary

benefits of section 32 because they have either had an intellectual/developmental disability from a young age but have not evidence of diagnosis, or have sustained a brain injury after attaining 18 years of age.

PIAC proposes that section 32(1) (a) should state

that the defendant is (or was at the time of the alleged commission of the offence to which the proceedings relate):

- I. A person with a mental illness as defined in the *Mental Health Act 2007*, but not a person who is a mentally ill person as defined in that Act; or
- II. A person with any other mental impairment or disorder, including developmental disability, drug and alcohol dependence and addiction and personality disorders, for which there is treatment available in the community.

Treatment should be broadly defined in the Act to include programs relevant to a person with a developmental disability, for example, educational and vocational training courses or literacy and life skills programs.

Recommendation

That the NSW Law Reform Commission propose that that section 32(1) (a) of the Mental Health (Forensic Provisions) Act 1990 (NSW) should state

that the defendant is (or was at the time of the alleged commission of the offence to which the proceedings relate):

- I. A person with a mental illness as defined in the Mental Health Act 2007, but not a person who is a mentally ill person as defined in that Act; or*
- II. A person with any other mental impairment or disorder, including developmental disability, drug and alcohol dependence and addiction and personality disorders, for which there is treatment available in the community.*

5.2.2 Issue 7.18 Direct and causal connection

PIAC cautions against magistrates relying on a direct causal connection between the alleged offence and a person's mental illness, mental condition or developmental disability in determining whether or not to divert an alleged offender.

A practical reason for this position is that quite often the only factual situation before a court is the written version on the police fact sheet and the defendant's version of events leading to their arrest. Therefore the question of whether the offence is related to or caused by the defendant's mental illness is often unclear.

There are very good therapeutic reasons why a person who has a mental illness or a cognitive disability should not be given a prison sentence, regardless of whether there is a connection between the offence and the cognitive disability. The principle of least restriction is based on the assumption that treatment has more chance of success if delivered in a less restrictive setting.

Even if a prison sentence is not in prospect, the rationale behind diversion is to prevent further offending behaviour. When someone has a cognitive disability this is more likely to be achieved through diversionary

options than through imposing a criminal penalty, which is less likely to achieve the goal of specific deterrence because of the nature of the disability itself.

5.2.3 Issue 7.33 Mandating Reports

Whilst it is not unnatural for the court to inquire as to the qualifications and capacity of services implementing a treatment plan, PIAC is strongly opposed to making it a requirement of section 32(3) of the *Mental Health (Forensic Provisions) Act 1990* (NSW) that the court consider the person or agency that is to implement the proposed order and whether or not that person or agency has the capacity to do so. In PIAC's experience, agencies and medical practitioners readily indicate whether they are willing to implement a treatment plan, especially where cost is in issue.

5.2.4 Issue 7.26 Duration of Orders

The question of setting maximum time limits for the duration of a final order under section 32 is a difficult one. Currently, section 32(2) allows flexibility with respect to the duration of orders. PIAC submits that this situation should continue.

Transience of clients, particularly where the client is experiencing homelessness, is a major obstacle to agencies implementing orders of longer than six months duration. The need to locate alternate or substitute agencies can be extremely difficult because of geographical location, the capacity of services to accept new clients, and a lack of funding and resources.

5.2.5 Issue 7.27 Which court or tribunal deals with breaches of section 32 orders

PIAC does not support the Mental Health Review Tribunal (the Tribunal) being vested with the power to consider breaches of section 32 orders, and to vary orders, made under section 32(3) of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

Defendants who come under section 32 are by definition, not mentally ill, so why would the Mental Health Review Tribunal be involved in their sentencing? The Tribunal, which has members that are psychiatrists and community representatives, has no expertise in dealing with criminal matters and operates outside the rules of evidence. If the power to transfer power to deal with breaches were to be transferred to the Tribunal, it would remove the safeguards afforded to accused persons under the criminal law and the laws of evidence.

A further concern about this proposition is that whilst legal aid is generally available to defendants in criminal matters, subject to the usual means and assets tests, there is no guarantee that legal aid will be available to defendants who breach section 32 orders, if the breach was heard in the Tribunal.

PIAC does have concerns, however, about the involvement of Probation and Parole in breaches of section 32 orders. The relationship between client and mental health worker becomes untenable if the mental health worker becomes identified more as an agent of Probation and Parole. They should not be seen as a potential jailer rather as a source of support and guidance.

Recommendation

That the NSW Law Reform Commission not propose that the Mental Health Review Tribunal be vested with the power to consider breaches of section 32 orders, and to vary orders, made under section 32(3) of the Mental Health (Forensic Provisions) Act 1990 (NSW).

5.3 Responses to issues in the Discussion Paper about section 33

5.3.1 Issues 37, 38 and 39

PIAC supports the retention of section 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) and sees the section as adequate and working effectively.

PIAC supports the retention of section 33 because it gives a court the option of diversion in situations where the defendant may be at risk of harm to themselves or others. Without this option, Courts would be likely to either refuse bail or impose a custodial sentence to ensure that a defendant did not self-harm and to protect other members of the public.

PIAC, however, has additional concerns regarding the operation of section 33. PIAC is concerned that clients are often released by a hospital without the relevant referral back to the court through the police, resulting in the client being in breach of bail through no fault of their own. Alternatively, if the client remains an involuntary patient at the time of their next appearance in court, they rely on transport and escort staff being available to take them to court.

The remedy to these issues is better education and training programs for both senior and junior hospital staff on the criminal justice system generally, and on section 33 in particular.

5.4 Other issues raised in the Discussion Paper

5.4.1 Issue 7.4 Proposed extension of police power

PIAC does not support giving the police power to take a person with a cognitive impairment against their will or without their express consent, to a hospital and/or 'an appropriate social service'.

Such a provision would have no practical effect because, as soon as that person was taken to the hospital/appropriate social service, they could not lawfully be forced to stay at that facility or be forced to receive treatment. PIAC definitely does not support any further extension of the NSW law that facilitates compulsory treatment and detention of adults without their consent (or the consent of any alternative decision maker).

This does not mean that PIAC would in any way object to police, using their discretionary powers, taking a person to a hospital/social service with the consent of the person concerned or their lawful alternative decision maker, as an alternative to charging the person with a criminal offence or in other circumstances. PIAC would clearly support, consistent with the principles set out earlier in the submission, this course of action being taken by the police.

PIAC does not know of any existing law or regulation that would prevent the police exercising their discretion in this way.

5.4.2 Issues 7.1, 7.2 and 7.5 Cautions and Police and DPP discretion

5.4.2.1 The police power to issue warnings and cautions

PIAC supports the police being encouraged to exercise their discretion not to charge persons they suspect of committing an offence when the person has a mental illness or cognitive impairment.

PIAC recognises that a more formal system of cautions could play an important role in keeping people with mental illness and/or cognitive impairment out of prison, but submits that a caution should not be used where the police would previously have dealt with the matter informally.

An example where this has been shown to be effective is the use of cautions under *the Fines Act 1996* (NSW). PIAC and HPLS have been strong advocates for the use by enforcement officers of informal warnings and formal cautions in appropriate circumstances as opposed to the issue of a penalty infringement notice or a criminal infringement notice.

As part of the ongoing fines reform process in New South Wales, HPLS was invited by the NSW Attorney General's Department to participate in a working group of government agencies and non-government organisations to draft Cautions Guidelines under the *Fines Act 1996* (NSW). These Guidelines provide assistance to enforcement agencies (except NSW Police) when dealing with people who are homeless, or have a mental illness, intellectual disability or cognitive impairment. The Guidelines recognise that, for certain categories of people who are highly visible and particularly vulnerable, a caution is a more appropriate mechanism for dealing with a minor offence rather than issuing a penalty notice and, almost inevitably, introducing the person to the criminal justice system.

The Guidelines place strong emphasis on cautions only being used where Police could otherwise have taken action for an alleged offence, such as by way of arrest, fine, or issuing a court attendance notice. The Guidelines also enforce the principle that a caution should not be used where the Police would previously have dealt with the matter informally. The Guidelines do not interfere with this discretion and deliberately do not broaden the net of the criminal justice system. If it is later determined that a caution was not the most appropriate outcome, further action can be taken.

5.4.2.2 The decision to charge or prosecute

PIAC submits that existing practices and policies of the Police and Director of Public Prosecutions (DPP) do not give enough emphasis to the importance of diverting people with a mental illness or cognitive impairment away from the criminal justice system when exercising the discretion to prosecute or charge an alleged offender.

In PIAC and HPLS's experience, people are being charged even where it is clear from the police facts, custody record and criminal record that they have a history of mental illness or at least are exhibiting symptoms sufficient for it to be noted in the records following arrest.

With respect to cognitive impairment, the issue is less existing practices and policies and more the result of overburdened services and the lack of dedicated services to which the police or DPP can refer an alleged offender.

PIAC submits stronger guidelines for the Police and DPP to encourage them to consider a person's mental illness or cognitive impairment in deciding whether or not to charge or prosecute an alleged offender.

Recommendation

That the NSW Law Reform Commission propose stronger guidelines for the Police and DPP to encourage them to consider a person's mental illness or cognitive impairment in deciding whether or not to charge or prosecute an alleged offender.

5.4.3 Issue 7.3 Education, training and support for police

HPLS has assisted a number of government agencies, including RailCorp and Centrelink, to develop and deliver training modules to enforcement officers and staff on working with people who are homeless or have a mental illness. Similar training on recognising behaviour and symptoms could be extended to NSW Police.

PIAC believes that all Police officers should receive high-level training on mental illness and cognitive impairment as part of their core qualification. Police officers need skills beyond responding to crisis situations such as recognising symptoms of mental illness and cognitive impairment in order to utilise the legislative discretion available to them.

It is PIAC's opinion that it would be ideal to have a mental health liaison officer (trained as a psychiatric nurse or equivalent) available on duty at all custody stations. This could be trialled initially in the large stations in Sydney, Newcastle and Wollongong. This officer would assume responsibility for making the decision to divert an alleged offender away from the criminal justice system on the grounds of mental illness or cognitive impairment.

Recommendation

That the NSW Law Reform Commission propose that all Police officers receive high-level training on mental illness and cognitive impairment as part of their core qualification and that a mental health liaison officer be available on duty at all custody stations.

5.4.4 Issues 7.6 and 7.7 Bail

The only question to be considered on the question of bail should be the question of whether the defendant is likely to attend a court to answer the charge. Bail should not be part of punishment or sentencing. Bail can however be used in conjunction with diversionary options to avoid sending people with a mental illness, or cognitive impairment to a correctional setting, either on sentence or on remand.

PIAC supports the use of 'Griffiths bonds' or orders under s11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) as part of the system of diversionary options and notes that Section 36A of the *Bail Act 1978* (NSW) gives courts the power to impose additional bail conditions for persons subject to such orders.

It is often more difficult for a person with a mental illness or cognitive impairment to comply with the conditions of bail once granted, such as conditions on residence, reporting, etc. A person's capacity to understand the conditions of bail, and the consequences of breach of those conditions, may be affected by their mental illness or cognitive impairment. PIAC is concerned that if too specific bail conditions are imposed, persons with mental illness or cognitive impairments may, simply by not completing a recommended treatment regime, not only be brought back to the court on a warrant for breach of bail, but also, as a consequence, face a charge under the Bail Act.

Further, there is sometimes conflict in the bail conditions making it difficult for a person to comply with bail conditions plus comply with obligations imposed by Centrelink and job service provider obligations, community treatment orders, drug and alcohol treatment programs, etc

PIAC submits that there should be a provision in the *Bail Act 1978* (NSW) that the person or court granting bail should take into account

- The cognitive capacity of the person on bail conditions to understand those conditions and their cognitive capacity to remember and carry out conditions imposed on their bail.
- Other legal obligations that the person on bail might be required to carry out that might affect their capacity to comply with bail conditions.

Recommendation

That the NSW Law Reform Commission propose that there should be a provision in the Bail Act 1978 (NSW) that the person or court granting bail should take into account:

- *The cognitive capacity of the person on bail conditions to understand those conditions and their cognitive capacity to remember and carry out conditions imposed on their bail.*
- *Other legal obligations that the person on bail might be required to carry out that might affect their capacity to comply with bail conditions.*

5.5 Recommendations regarding Diversion

5.5.1 Diversion for Women

PIAC notes the rising rates of imprisonment of women in NSW and is concerned that:

- Statistics generated by the NSW Department of Corrective Services Corporate Research, Evaluation and Statistics Branch state that 37.3% of female offenders serve sentences less than three months while 62.9% serve sentences less than six months.
- Shorter sentences affect the capacity of the correctional system to implement effective programs and services to work with inmates to reduce levels of recidivism and assist them to reintegrate effectively into their community.

PIAC, in accordance with the principle set out in part 2, submits that correctional facilities are not an appropriate environment for the rehabilitation and treatment of women with a mental illness or cognitive impairment. In addition, short custodial terms have significantly disruptive impacts not only on the women themselves, but also on their families, particularly where the woman (as is often the case) is the primary carer for either her own children or for other family members.

There is a serious lack of community-based diversionary programs that are suitable and accessible for women offenders, and this impacts on the options available to magistrates when determining sentence or exercising their discretion under section 32.

Recommendation

That the NSW Law Reform Commission propose that priority be given to the establishment and maintenance of effective and adequately funded diversionary options suitable for women offenders to reduce the incidence of imprisonment of women.

5.5.2 Diversion of Aboriginal and Islander people with a mental illness or a cognitive impairment

Aboriginal and Torres Strait Islander people are grossly overrepresented in NSW prisons. The Australian Human Rights Commission in 2008 presented a report, *Preventing Crime and Promoting rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues*.

The findings of the report and the literature reviewed in the report are generally applicable to all indigenous people with cognitive impairments who come into contact with the criminal justice system.

The findings were:

- We don't know exactly how many Indigenous young people either at risk or involved with the criminal justice system have a cognitive disability or mental health issue. However, the best evidence so far suggests that they are 4 to 5 times more likely to have a cognitive disability than the general population.
- Indigenous conception of cognitive disability and mental illness are different from Western definitions and depend more on relationships with others and cultural explanations.
- Disability issues are always secondary to cultural identity. This means that many Indigenous people are very uncomfortable with mainstream disability and mental health services and substantial changes must be made to ensure accessibility.
- The high incidence of mental illness and cognitive disability in Indigenous young people relates to the social determinants of health, including social, economic and cultural factors.
- The education system is failing all Indigenous young people. This is especially the case for Indigenous young people with cognitive disabilities or mental health problems. There are also young people being incorrectly diagnosed and placed in special education when in fact, they do not have a cognitive disability.
- There are a range of explanations for the over representation of young people with cognitive disabilities and mental health problems in the criminal justice system. These relate to school failure, susceptibility of involvement with the criminal justice system, differential treatment in the criminal justice system (including a lack of services), that these young people are simply more likely to get caught and that they face significant socio-demographic disadvantage.
- Substance use is an intervening factor in the offending of many Indigenous young people with cognitive disabilities or mental health problems but can also be the cause of the actual disability or mental illness as well.
- There are no specific early intervention or diversion programs that target Indigenous young people with cognitive disabilities and/or mental health problems but there are promising crime prevention initiatives which are flexible enough to deal with the complexity of needs presented by these young people.²⁵

²⁵ Tom Calma, *Preventing Crime and Promoting rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008) Australian Human Rights Commission 37-38
<http://www.hreoc.gov.au/social_justice/publications/preventing_crime/part2.html> at 9 August 2010.

PIAC submits that there should be adequately funded diversionary options in NSW for indigenous people with cognitive disabilities available to police before and the courts after a person becomes a defendant in the criminal justice system. These options should be tailored to indigenous needs including cultural needs, and must have a high degree of indigenous 'ownership' to work effectively.

Recommendation

That the NSW Law Reform Commission propose that priority be given to the establishment and maintenance of effective and adequately funded diversionary options suitable indigenous people with cognitive disabilities. These options should be tailored to indigenous needs including cultural needs, and must have a high degree of indigenous ownership.

5.5.3 Proposed extension of Magistrates Early Referral into Treatment

PIAC supports the Magistrates Early Referral into Treatment (MERIT) Program.

MERIT is a diversionary program based in local courts. 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.

It is unfortunate that assessment for entry to the MERIT program is restricted only to adults with drug use problems. For young people, a limited number of places for diversionary treatment of offenders is available through the Youth Drug and Alcohol Court. Unlike the MERIT program, it is available to young offenders with a drug or alcohol problem. Both the MERIT program and the Youth Drug and Alcohol Court have restricted geographic areas of availability.

A number of Homeless Persons Legal Service (HPLS) clients have successfully completed the MERIT program.

Case study: Joe

Joe, a married man with three children, had become homeless after losing his full-time job because of a 10-year heroin addiction. He was facing charges for larceny for property worth approximately \$30,000. Joe 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. Joe was sentenced to ten 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, Joe was apprehended and charged with goods in custody. HPLS liaised with MERIT and this time Joe was assessed as suitable. Joe 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, Joe 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 Joe certainly 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.

Recommendation

PIAC recommends consideration should be given to extending the Magistrates Early Referral into Treatment Program to include treatment for people with other addictive problems, including alcohol problems or gambling problems.