

People with cognitive and mental health impairments in the criminal justice system

The Parramatta Community Justice Clinic (PCJC) has a mission statement to be a promoter of social justice by providing free legal advice to disadvantaged and vulnerable members of our community. Mental and behavioural problems are becoming more prevalent in people from socio-economically disadvantaged areas.¹ This area is of particular interest to the PCJC as the individuals which have cognitive and mental health impairments are considered to be one of the most vulnerable members of our community.

This paper will concentrate on issues effecting people with cognitive and mental health impairments in the criminal justice system, with particular regard to section 32 and s33 of the Mental Health (Criminal Procedures) Act 1990 (MHA). It will discuss how it can be developed to allow fairness and access to justice within the Local court jurisdiction. There are submissions made in regards to developing more support for this group of people in the community to help them before they enter the criminal justice system. Recommendation not to define certain mental conditions so it limits access to the use of s32 and s33 but to leave it broad. Further education of these mental conditions for the police, solicitors and Magistrates so they are able to better prepared to deal with people with a mental condition, and finally the inclusion of 'sentencing options' within Magistrates powers in regard to s32 and s33.

If we consider the number of offenders with mental illness or cognitive impairment, we really grasp the level of over-representation present in the criminal justice system. Detailed results from the New South Wales survey in 2001 indicated that the self-reported prevalence of mental disorders (psychosis, anxiety and affective disorders) during the previous 12 months was very high and significantly higher than among women in the general community, as was the prevalence of substance abuse disorders and personality disorders. The survey results indicated that 90% of women and 78% of men in New South Wales prisons had at least one of these mental disorders in the 12 months prior to interview.² These figures indicate an area that needs attention and development within our criminal justice system. We need to identify the reasons for this material level of prison population with these mental conditions and how they can be effectively dealt within our legal system.

¹ABS, *Mental health in Australia: A Snapshot, 2004-05*

²Butler, T and Allnutt, S 2003, *Mental Illness Among New South Wales Prisoners*, New South Wales Corrections Health Service, Sydney.

There are a number of factors that contribute to the high incidence of cognitive or mental health impairments among prisoners. The socio-economic factors include homelessness,³ lack of family or support, and limited education and employment opportunities.⁴ The problems begin before these individuals come in contact with the criminal justice system. There is a quote from Sir Thomas Moore's book 'Utopia' which properly characterises this issue:

"There are dreadful punishments enacted against thieves, but it were much better to make such good provisions by which every man might be put in a method how to live, and so be preserved from the fatal necessity of stealing and of dying for it."

There needs to be greater support provided to people dealing with cognitive or mental health impairments addressing the factors mentioned above. It would not be desirable to be known as a nation who first makes it thieves and then punishes them for it. An example of development in this area would be to develop a support service which can screen individuals for employment opportunities, assist them with searching for positions while teaching them that function, rehearsing for an interview and also assisting them in appropriate wardrobe choices. Many people who are disadvantaged would not necessarily have the appropriate attire in which case there are many organisations that are set up to provide these services free of charge already it would involve just by developing affiliates.

The Department of Ageing, Disabilities and Home Care (DADHC) have already in the 2005 NSW budget received funding allocation for accommodation and related support for offenders with intellectual disabilities. This started with \$2.5m in 2005-6 and then \$5.6m in 2006-7. The Government's *Stronger Together* package has now further enhanced this commitment to steadily rise to \$27.9m in 2010-11, that is accommodation/ specialist support for 200 people.⁵

This indicates the government is supporting and funding the efforts to provide support for people dealing with disabilities in the community.

The Declaration on the Rights of Disabled persons specifically provides that people with a disability must be protected against all exploitations.⁶ It also provides that, in judicial proceedings against a person with a mental condition, his or her condition, or degree of mental responsibility must be fully taken into account.⁷ These Human Rights from the UN formed the foundation to support the

³NSW Legislative Council Select Committee on Mental Health, Final report.

⁴NSWLRC Report 80

⁵ At www.dadhc.nsw.gov.au

⁶*Declaration of the Rights of Disabled Persons*, art 10

⁷*Declaration of the Rights of Disabled Persons*, art 11

effect of s32 and s33 of MHA.

The Local Courts have been given special diversion powers aimed specifically at defendants with a cognitive impairment or mental illness which have not been given to District or Supreme Courts by way of s32 and s33 of MHA. Section 32 and s33 allow Magistrates to be able to dismiss cases unconditionally or with conditions.

Section 33 deals within specific situations and diversionary orders are made only for the defendants who have certain mental illnesses. Section 32 has a broader scope where it can consider defendants with mental illnesses, intellectual disabilities and mental conditions for a diversionary order. However whether these provisions actually get exercised is a different matter. The numbers of defendants that are able to be granted a diversion under s32 is very small in direct correlation with the amount of cases are heard.⁸ There will be submissions further in this paper which may assist in raising the number of diversion orders sought and granted.

The consultation papers have questioned the issue of what should the defining term be that will incorporate the area of cognitive, mentally impaired, mentally ill, mental condition, or developmentally disabled individuals. After reviewing the material on this issue, it is submitted that to some extent it is irrelevant what term is, what is important is the meaning of the term that is the essence to recognising the relevant applicant. It is not submitted what the definition should be but precedent has provided us with a good basis with M'Naghten framework:

*“at the time of committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act, or did not know that the act was wrong”*⁹

Along with the accepted supporting material in diagnosing mental illness worldwide¹⁰ 'The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*¹¹ and the 'International Classification of diseases'.¹² This should be sufficient reference for Magistrates

⁸Consultation Paper 7 states in the period of 2004-2006, there was a total of 480,000 criminal matters finalised in the Local Court. In the same period there was a total of 2,711 orders made under s32 as per Judicial Commission report.

⁹M'Naghten's case (1845) 10 C & F 200

¹⁰Mentioned in Consultation Paper 5

¹¹ The American Psychiatric Association's, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, 2000)

¹²*International Statistical Classification of Diseases and related health problems* (10th ed, 2007) endorsed by the World Health Organisation

when they are determining a case that is concerned about mental conditions.

Many requests have been put forward to the NSW Law Review Commission to have particular conditions listed so the Magistrate will know exactly who falls within the catchment of s32 and s33. In this particular provision it is submitted that it would be more appropriate if the legislation does not attempt to create a list of satisfactory conditions but allows the Magistrates to assess on a case-by-case basis. The mental health area is too great to attempt to minimise, in doing so we would risk the likelihood of deserving applicants being denied this option. The ramification of over-regulating is that it restricts discretion. In this area it would be preferable to leave discretion at a broad level.

There have been suggestions that there needs to be greater education provided in this area for the authorities that come in contact with people dealing with cognitive and mental health impairments so they are properly equipped to recognise, evaluate, and take the appropriate action.¹³

If we breakdown the process of an individual entering our criminal justice system, they typically would deal with the following bodies in this sequence;

1. Police with the initial contact when a charge is placed,
2. Solicitors which would take instructions and give instructions to client, and
3. Magistrate who will decide the persons culpability and punishment for crime if required.

Although all the above bodies have training and education on dealing with mentally impaired people, it is limited training. The NSW Police training is primarily for the purpose of how to diffuse a hostile situation with mentally ill offenders.

It is submitted that training and education be developed for the above mentioned groups to further their knowledge on what factors affect these individuals and the effective approaches in communicating with them.

For example for all three bodies it would be suggested that they are given training firstly from a psychological perspective of what mental impairments are and how individuals deal with them. For the Police there should be training available on interrogation or interview tactics that would be effective with certain individuals dealing with mental conditions, also a session on body language, tone and language which would be appropriate in these situations.

For Solicitors training would be required to ensure they are able to communicate with their client where the client understands the instructions. Also recognising where a client may not be able to

¹³Enabling Justice Report, 38.

effectively communicate instructions to their solicitor, so then to arrange a guardian who is fit to instruct solicitor on behalf of client.

Finally, the Magistrates need to be trained in the application of s32 and 33 so it is used at a greater level than it is today. They need to receive training from a psychological perspective so they are better able to understand the issues surrounding people with cognitive and mental health impairments and be able to find appropriate methods of punishments if required.

There have been some suggestions in the consultation papers to give the NSW police greater capacity to decide whether diversion is appropriate to be applied by them¹⁴. This can be a tricky area to regulate and monitor and it can lead to a lack of uniformity. It would be most appropriate if decision making remains in judicial bodies hands and not delegated. Separation of powers is necessary for many very important reasons and in this instance it's primary reason would be to uphold the integrity of maintaining a fair and just legal system and the decision making in such a sensitive issue which requires special skills to assess not to be delegated to anyone less than a specialist in this area such as the mental health review tribunal and alike.

The current implications of s32 and s33 do not allow for much movement for Magistrates to identify an alternative form of punishment for people that have a cognitive or mental impairment. It appears they can either hospitalise the defendant or exercise diversion.¹⁵ If the defendant is granted diversion the negative of this action is that the ramifications of an offence is not realised by the offender if they are simply 'let off'. The other risks to this action is the likelihood of re-offending and the defendant developing a history of offences which can affect how they are treated in the criminal justice system the next time they are faced with charges.

Our punishment to our offenders need to be in balance with the level of offence committed. If a person has diminished understanding of what they have done we need to have provisions available to be able to effectively deal with them and ensure the problem is not to continue. For this reason the two options given in s32 and s33 do not appear to be sufficient. Magistrates need to have options available to them so they can deal with offenders of this nature, not only so they can realise their actions have ramifications but also to limit the chance of them re-offending. Community service orders can be a productive way these offenders can learn from their punishment.

For example if a person with a mental impairment is found defacing public property, an alternative

¹⁴Consultation Paper 7

¹⁵Consultation paper 7

to the above mentioned treatment of offender would be to have the defendant clean public property for a number of days so they face a punishment and learn from the experience.

For this option to be available there needs to be some form of assessment service available and question of fitness to be assessed. Currently question of fitness is dealt primarily in the District or Supreme Court cases where the courts can request the defendant to have some form of psychiatric assessment performed.¹⁶ It appears that in the Local Court or Children's Court the question of fitness is not addressed and if an assessment is required it can only be done in two ways. One where any of the court officers can refer the defendant to State-wide Community and court liaison Service where they conduct a mental health screen.¹⁷ The second is the exercise of s33 and use of diversion for mentally ill person, where the court can order defendant to be sent to a hospital for an assessment. For this reason it is submitted that the Local and Children's Court's powers be extended to be able to make assessment orders and not restricted to 'mentally ill' persons but extended to encompass any person who appears to have a mental health impairment. Many other states already have the power to order defendant to have a psychiatric or psychological assessment conducted, the results of which are submitted to the court.¹⁸ This will allow a more accurate form of screening for deserving applicants to the exercise of s32 and s33, and will also give the Magistrate the information that would be necessary in assessing an individual's situation and deciding an appropriate punishment if required.

It is recognised that assessment orders will significantly raise the costs of the proceedings. However the counter argument to that would be if this form of assessment can divert a person from being imprisoned and perhaps have them contributing to the community through community orders, this then results in reduction of costs for the maintenance of that individual in a correctional facility. Considering the current high rate of prison population with a mental conditions this could ultimately make a significant difference.

Conclusion

This particular area of law reform is like a multi-layered artichoke, just as you think you are making progress you realise you have only just scraped the surface. As our knowledge of this area of mental health grows and more conditions and their effects are realised, the greater the requirement for

¹⁶*Mental Health (Forensic Provisions) Act 1990* (NSW), s10

¹⁷Consultation paper 5

¹⁸*Crimes Act 1900* (ACT) s315A(1)(b); *Criminal Law Consolidation Act 1935* (SA) s269K(1); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (VIC) s11(1)(b); *Criminal Justice (Mental Impairment) Act 1999* (TAS) s11(1); *Criminal code Act 1983* (NT) s43P(3).

flexibility in our legislation for their treatment is needed. This is the reason we need to resist the temptation of limiting the powers of our Magistrates so they are able to make appropriate decisions regarding the cases involving mental conditions. We also need to compliment the wide discretion with greater education on 'people with mental conditions' for the police, solicitors and magistrates. With further awareness and development in this area hopefully greater number of people who enter the criminal justice system with a cognitive or mental health impairment will have the use of s32 and s33 available to them and if the submissions are implemented then sentencing options which may be more beneficial than imprisonment.

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