

**Inquiry into the value of a justice reinvestment approach to criminal justice in
Australia**

**Legal Aid NSW submission to the
Senate Standing Committee on Legal and Constitutional Affairs**

March 2013

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW criminal law practice provides legal assistance and representation in criminal courts at each jurisdictional level throughout the State, including proceedings in the Local Court and Children's Court, committals, indictable trials and sentences, and appeals. Our specialist criminal law services include the Children's Legal Service, Prisoners' Legal Service and the Drug Court.

Legal Aid NSW welcomes the opportunity to make a submission to the Senate Standing Committee on Legal and Constitutional Affairs regarding the value of a justice reinvestment approach to criminal justice in Australia.

Should you require any further information, please contact

Introduction

Legal Aid NSW understands and appreciates that Australia is currently experiencing challenging financial times and that there is significant pressure on the federal government to maximise the results from already overstretched resources. It is well known that incarceration of individuals is financially costly to the community. Over and above this, there are other less quantifiable or recognised personal, social and economic aspects associated with crime and imprisonment.

The negative social impact to the individual, their family and their community can mean the consequences of, and stigma attached to, even a short period of imprisonment are permanent for both the person and those close to them.¹ The loss of contact with family, key support people and organisations including the Department of Human Services, employment and accommodation, even briefly, can have devastating ongoing negative effects.

A justice reinvestment approach to criminal justice could introduce a positive, regulated, framework within which interventions could be undertaken to target the causes of criminal behaviour and reduce the number of people coming into contact with the criminal justice system.

The criminal law practice of Legal Aid NSW has as its client base socially and economically disadvantaged people who come into contact with the criminal justice system. For this reason it is well placed to offer the Committee its insights into some of the reasons for the overrepresentation of disadvantaged groups within prisons. This submission will therefore address item (c) of the Inquiry terms of reference: "the over-representation of disadvantaged groups within prisons, including Aboriginal and Torres Strait Islander peoples, and people experiencing mental ill-health, cognitive disability and hearing loss."

Item (c) The over-representation of disadvantaged groups within prisons

Legal Aid NSW highest service users

Legal Aid NSW undertook a study analysing the 50 highest users of our services from July 2005 to June 2010 in order to better understand its core client base and tailor the services it provides. The study found that 80% of the group were in the 15 to 19 age range. Additionally the study found that 46% of the 50 highest volume service users had a diagnosis of mental illness and a third had a developmental disability.

The study found that a client is 80% more likely to be one of the Legal Aid NSW highest service users if he or she has engaged with one of its services before the age of 14, has experienced neglect and/or abuse or witnessed violence in the family home and has been expelled or excluded from school.

In this submission Legal Aid NSW will seek to illustrate some of the reasons for this trend, and demonstrate how, in the experience of its practitioners, criminal legislation and the operation of the justice system often work to further disadvantage the most disadvantaged, resulting in their over-representation in prisons. Because the Legal Aid NSW highest service users are predominantly children and/or people with cognitive or mental health impairments, these groups are the primary focus of the observations set out below.

¹ For elaboration see, for example, Codd, H. (2008) *In the Shadow of Prison: Families, Imprisonment and Criminal Justice*, Cullompton: Willan Publishing; Liebling, A., & Maruna, S. (Eds.)(2005). *The Effects of Imprisonment*. Cullompton:Willan Books.

Use of the criminal justice system in the absence of adequate welfare solutions

Legal Aid NSW has observed a trend by participants in the criminal justice system, such as the courts and police, to tackle broader social problems in a way that increases the likelihood that disadvantaged populations will spend time in prison, often because inadequate social supports are available. A justice reinvestment approach could increase welfare support for disadvantaged groups at the relevant stage, making this tactic unnecessary and improving outcomes for disadvantaged groups.

An example of the way the criminal justice system is inappropriately used to tackle social problems is how children are often released on bail subject to onerous conditions such as curfews, requirements to be in the company of a parent, requirements to follow the directions of a parent, and place restrictions. Because of the stringency of such conditions, the likelihood they will be breached is increased.

Police also appear to have given an increased amount of attention to bail compliance checking in relation to young people. As a result, in the last ten years, the Legal Aid NSW Children's Legal Service (CLS) has witnessed a dramatic increase in the number of bail breach matters coming before the Children's Court.

One potential consequence of a young person breaching bail is that he or she will end up on remand. Another consequence is that if the young person comes into contact with the adult criminal justice system at a later stage having breached bail multiple times as a juvenile, that person is treated by the courts as a person with a lengthy criminal history which, among other things, decreases the chances of that person being granted bail in the future. This is even though the bail breach is often a result of engaging in behaviour that is not in itself criminal.

For example, Legal Aid NSW has observed a growing trend among police and the courts to include school attendance as a bail condition, especially in relation to Aboriginal young people in regional areas. Imagine that two high school students decide to truant for a day. One of them is on conditional bail that requires him to attend school; the other is not. For the same act of truancy, the consequence for the student not on bail is most likely a warning from the school or a suspension at most. For the other student the consequences could include detention and a mark on his criminal record.

The criminalisation of children's problematic behaviour in this way in adolescence has consequences for them as adults.

The CLS has found the problem of welfare-based bail conditions to be particularly acute for children who are in out-of-home care. Young people with cognitive or mental health impairments are more likely to be placed in care as a consequence of the problematic behaviour resulting from their impairment. In this context, the police and the justice system are increasingly being relied upon in lieu of adequate behaviour management, especially in relation to children with complex needs. For example, a common bail condition imposed on children in out-of-home care is the condition to "obey the directions of carer". As a result, the CLS regularly sees children who are reported to the police for breaching bail by carers and being subsequently arrested for demonstrating the type of behaviour that, if they were living in a functioning family environment, one might expect would be dealt with without police intervention.

Case example 1

Carl is twelve years old and has a cognitive impairment that means he often misbehaves and is difficult to control. As a result he lives in supported housing where those caring for him find him hard to discipline. Carl was arrested for assault and at the request of his carer, one of the conditions attached to his bail was that he eats his dinner every night. If Carl fails to do so, he breaches his bail and could be placed on remand.

Case example 2

Amir is a fourteen year-old with a mental health impairment living in supported housing. Eighteen months ago he had a clean criminal record; he now has a ten-page record. All of the offences on his record stem from carer-related incidents or for breach of subsequent bail conditions. For example, Amir has been charged with assaulting his carer on a number of occasions. All matters Amir has been charged with have been dealt with by the court under s 32 of the Mental Health (Forensic Provisions) Act 1990 (NSW) which allows for diversion from the criminal justice system.

Amir was wrongfully arrested by police for breaching his bail. In fact he was not on bail at the time. Because he was aware he was not on bail he resisted the arrest and expressed anger towards police at the station. When coming to pick him up his carer, who was also under the mistaken belief that Amir was on bail, requested that the police charge him. Amir was subsequently charged with "assault police" and "intimidate police".

In addition to problems associated with bail conditions, Legal Aid NSW solicitors often hear of care workers using occupational health and safety mandates to apply for apprehended violence orders (AVOs) against young people as a way of dealing with their behaviour. Breaches are common because young people with cognitive and mental health impairments often lack the capacity to understand the conditions attached to AVOs.

It is not only professional care workers who are resorting to the use of AVOs. Parents of young people with cognitive or mental health impairments are also using AVOs to discipline children who they cannot control, and for whom there are no supported housing options or health services to offer adequate assistance, often with a mistaken understanding of the role of the criminal justice system.

Case example 3

Jonah is a teenager with a cognitive impairment. He has a mental age of four or five and is often violent towards his parents. He lives in supported housing but regularly runs away and returns home. To stop him coming home, his parents were granted an AVO against him that included the condition that he could not come within five metres of their house. Every time he breaches that condition he commonly spends a few days on remand.

Case example 4

John is a 16 year old who was living with his mother and father. He was diagnosed with ADHD and intellectual limitations, however, does not have an intellectual disability.

Aspergers has also been queried but not substantiated by any professionals. Formal testing has not been completed for autism. His paediatrician believes that John suffers from a mood disorder. However, when he was referred to the Adolescent Mental Health Team psychiatrists within the service found no evidence of mental illness.

John was attending a standard high school four days a week and on the other day a behavioural school, until he was suspended from school for behavioural issues. John has a tendency to be violent towards his parents. John was charged with common assault and breaching an AVO that his parents had been granted against him. The court made an order for a treatment plan under s 32 of the Mental Health (Forensic Provisions) Act 1990 (NSW). The treatment plan was that:

- *John return to school once the suspension ended*
- *John and his family engage in therapeutic and behavioural intervention with a social worker at the Mental Health Adolescent Team*
- *John continue to take his prescribed medication, and*
- *John visit his pediatrician for regular reviews.*

At court, John was discharged officially into the care of the social worker. Not long after the s 32 order was made, John began to breach the terms of the order. He was running away from home, failing to attend school and failing to honour appointments with the Mental Health Adolescent Health Team.

John's mother phoned Legal Aid NSW seeking assistance from Legal Aid NSW to report to the court that John had breached his s 32 order. The request appeared to stem from her view that the criminal justice system was the only means left for her to get appropriate assistance for her son. She expressed concern that he could not be compelled to comply with the treatment. Legal Aid NSW solicitors explained to her that, given that John is a Legal Aid NSW client, it was inappropriate for Legal Aid NSW to report his breaches to the court, and that it was not the role of the criminal justice system to provide therapeutic assistance to John.

Legal Aid NSW also regularly sees clients ending up in custody because of a lack of alternative accommodation options. The lack of appropriate accommodation available for Aboriginal young people when awaiting sentencing is a particular problem in rural and remote areas where there are fewer accommodation options and treatment services.

Case example 5

Derek is a 17 year-old Legal Aid NSW client who is a regular user of the Legal Aid NSW Children's Legal Service. He is from an unstable family background. Derek has some mental health problems but is not sick enough to be scheduled. Many of his past offences have been dealt with by way of s 32 of the Mental Health (Forensic Provisions) Act 1990 (NSW).

Recently Derek breached his bail conditions and was remanded in custody. His mother refused to let him return home. Because of his mental health problems he is unable to be placed in youth refuge accommodation. For this reason, even though he is likely to receive a s 32 order in relation to the offence, the court refused bail due to the lack of accommodation options.

Lack of cultural awareness in the criminal justice system

In its August 2009 report "Why are Indigenous Imprisonment Rates Rising?", the New South Wales Bureau of Crime Statistics and Research found that one quarter of the increase in the indigenous imprisonment rate in New South Wales between 2001 and 2008 was the result of a greater proportion of indigenous offenders being refused bail and an increase in the time spent on remand.

Legal Aid NSW has observed that stringent bail conditions can have a big impact on Aboriginal people because there is often inadequate consideration by the bail authority of community ties and kinship systems. Non-association orders can be especially problematic for Aboriginal people, regularly leading to breaches that escalate a person's involvement in the criminal justice system.

Concluding remarks

Legal Aid NSW acknowledges that imprisonment is a valid and necessary option within the sentencing regime. However, it supports the diversion of resources from imprisonment to investment in social supports that can help reduce crime and the number of people entering the prison system.

This modification in approach and purpose would result in a financial advantage to the community but, more importantly, it would bring with it a significant social and humanitarian benefit.

Legal Aid NSW is grateful for the opportunity to provide these comments and would be prepared to provide further comment if this would be of assistance to the inquiry. Legal Aid NSW would also welcome the opportunity to participate in the piloting of any justice reinvestment policies and programs.