Curbing the “revolving door” phenomenon with mentally impaired offenders: Applying a therapeutic jurisprudence lens

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Criminalisation of mentally impaired offenders

• ABS Statistics 2009: Number of adults in Australian prisons has increased 6% (1,700 prisoners) in the previous year ending 30 June 2009.

• Over-representation of mentally ill offenders in the prison system.

• Approx. 28% of Victorian prisoners have a mental illness with 1/2 of those also having substance abuse issues (AG’s Justice Statement 2, 2008).

• Mental illness is a risk factor for multiple episodes of incarceration (Baillargeon, Binswanger, Penn, Williams & Murray, 2009).
The “revolving door” phenomenon

“*The results are painfully clear … many defendants with mental illness churn through the criminal justice system again and again going through a ‘revolving door’ from street to court to cell and back again without ever receiving the support and structure they need.*”

(Denckla & Berman, 2002, p.4)
Therapeutic jurisprudence: adopting a remedial perspective

• Traditional adversarial model versus therapeutic jurisprudence approach.

• Defining therapeutic jurisprudence:
  “Therapeutic jurisprudence is a legal construct which advances the court’s role as an active therapeutic agent in the recovery process” (Judge Lerner-Wren, 2000).

• Promoting the wellbeing of offenders: adopting more integrative and holistic approaches to treatment.
Barriers to participating in the criminal justice system

• *Legal Needs of People with a Mental Illness Project* conducted by Law & Justice Foundation of NSW, 2006, identified a number of barriers:
  – stress
  – cognitive impairment
  – problems with time management
  – communication problems
  – features of the courtroom environment
  – features of alternative dispute resolution (ADR)
  – a lack of legal representation
  – a perceived lack of credibility
  – failure to identify a person’s mental illness

(Karras, McCarron, Gray & Ardasinski, 2006).
Barriers to participating in the criminal justice system (continued)

• Hence, research findings suggest that there is a need to address existing barriers in the criminal justice system and facilitate procedural justice for mentally impaired offenders.

• In particular:
  – there is a pressing need to improve equitable access and participation in the legal process; and
  – to provide a more flexible and responsive service delivery which caters to the specific needs of mentally impaired offenders.
Mental health courts: implementing therapeutic jurisprudence theory into practice

• Research findings suggest mental health courts represent an innovative approach to addressing the needs of mentally impaired offenders.

• Key characteristics of mental health courts are:
  – early identification and intervention
  – non adversarial approach
  – judicial monitoring and supervision
  – team collaboration
  – linkage to treatment
  – non coercive approach

(Bartels, 2009; Boothroyd et al, 2003; Denckla & Berman, 2002; Petrilà et al, 2001; Zammit, 2004)
Recent developments: ARC List

- The implementation of the Assessment and Referral Court List (ARC) of the Magistrates’ Court in Victoria is a timely and innovative initiative.
  - The *Magistrates’ Court Amendment (Assessment and Referral Court List) Act 2010* was assented to on 30/3/10. It provides for the establishment and operation of the ARC List of the Magistrates’ Court.
  - The AG, Mr Hulls, noted that the ARC List has the potential to end the ‘revolving door’ experience of defendants with mental health impairment or disability issues and increase the prospects of reform and re-integration by diverting these defendants away from the criminal justice system.
  (Attorney General of Victoria, Press Release, 2010)
Main features of the Mental Health Court (ARC List)

- The ARC List recently commenced its operation (on 21/4/10). It is scheduled to sit once a week in a 3 year pilot program funded by the State Government, and estimated to hear 300 cases per year.

- Pursuant to *Magistrates’ Court Amendment (Assessment and Referral Court List) Act 2010*, the main features of the ARC List are:
  - the ARC has jurisdiction in criminal proceedings that are referred to the List by the Court (s.4S);
  - no jurisdiction to hear charges involving violent offences, serious violent offences or sexual offences as defined by s.6B(1) *Sentencing Act 1991* (s.4S(2)).
Main features of the Mental Health Court (ARC List) (continued)

– The Court can only refer a matter to the List if:
  – the defendant *meets the eligibility criteria*; and
  – the defendant *consents* to having the matter heard by the List.
    (s.4T)

– The defendant must meet the following eligibility criteria:
  – diagnostic criteria; and
  – functional criteria; and
  – needs criteria.
    (as specified by ss.4T(2), (3) & (4) respectively)
Main features of the Mental Health Court (ARC List) (continued)

• Notable elements of the ARC List are:
  – the Court must exercise its jurisdiction with minimal formality and technicality (s.4U(3));
  – the Court may, before taking a formal plea from a defendant, seek an adjournment for a clinical assessment of the defendant to:
    – identify the defendant’s needs based on the need criteria (as set out in s.4T); and
    – prepare an Individual Support Plan (ISP) for the defendant (s.4V).
Main features of the Mental Health Court (ARC List) (continued)

• Notable elements of the ARC List are:
  – the Court must fix a return date for the consideration of the proposed ISP and may adjourn proceedings for a period not exceeding 12 months to enable the defendant to be assessed and complete his/her ISP;
  – the Court has power to convene at any time, in order to receive reports on a defendant’s progress and compliance with his/her ISP (s.4U(2)(a));
  – if a defendant at any stage decides to plead not guilty, the matter must be transferred to the mainstream Magistrates’ Court for a contested hearing.
Main features of the Mental Health Court (ARC List) (continued)

• Notable elements of the ARC List are:
  – the Court is required to take into account the extent to which the defendant complied with or participated in the ISP plan when sentencing the defendant, but not to take into account the defendant’s failure to comply with the ISP plan, when sentencing the defendant (s.4Y);
  – the Court has the power to discharge the defendant without any finding of guilt.
Some concerns for treatment providers

• Minimising coercion and maximising procedural fairness
• Facilitating access to treatment
• Encouraging the use of evidence based practice
Evaluating court outcomes

• Defining success - no standardised definition.

• Court outcomes for participants may be assessed by examining:
  – improved mental health functioning
  – reduced recidivism rates
  – increased linkages to treatment
  – enhanced public safety (Almquist & Dodd, 2009)
The Next Chapter …

• As noted in AG’s Justice Statement 2, 2008 - The Next Chapter, it is incumbent on us:
  – “to take the learnings from programs and pilot projects and develop an integrated and comprehensive model for providing services throughout Victoria for defendants whose offending is associated with acute disadvantage and marginalisation” (p.31).
References


References


• *Magistrates’ Court Amendment (Assessment and Referral Court List) Act 2010* (Victoria).


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