

REDFERN LEGAL CENTRE

Your ref:

Our ref:

12 November 2003

The Director
Standing Committee on Social Issues
Parliament House
Macquarie Street
SYDNEY 2000

Dear Director,

Re: Inquiry into the Inebriates Act 1912

Thank you for the opportunity to contribute to the above inquiry.

Redfern Legal Centre considers the issues relating to treatment and care of persons with substance dependence to be of great importance and some urgency.

There are many issues that could be considered under the inquiry's terms of reference. Unfortunately time and resource constraints have limited our contribution to some extent.

The comments in the enclosed submission are based on our experience. We hope they are helpful and trust they will be considered seriously.

Yours sincerely,
REDFERN LEGAL CENTRE



Helen Campbell
Director

encl

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Inquiry into the Inebriates Act 1912

NSW Legislative Council Standing
Committee on Social Issues

Submission by Redfern Legal Centre

12 November 2003

The Inebriates Act 1912 (the Act) refers to persons who habitually use intoxicating liquor or intoxicating or narcotic drugs to excess. For the purpose of this submission by Redfern Legal Centre (RLC) we use the expression “person with substance dependence” to refer to a person alcohol and/or drug dependence.

Terms of Reference

We have mainly addressed point 2 of the Terms of Reference, which concerns the appropriateness and effectiveness of the Act in dealing with persons with severe substance dependence who have not committed an offence and with those who have committed an offence. However, our comments may also be relevant in part to points 1, 3, 5, or 6.

1. Illness or Crime?

Redfern Legal Centre (RLC) seriously questions the value of attempting to deal with substance dependence in the criminal system.

It is in the first instance a health issue and a social issue. While these issues are not adequately addressed criminal consequences will continue to arise.

1.1 Continuing effects of substance dependence

RLC strongly supports the concept of adults being held responsible for their own behaviour. However, in our experience there are many factors that can affect a person's options and their capacity to make reasonable decisions.

There is a point where persons with substance dependence may have their legal capacity compromised.

This principle is already recognised in NSW law in the case of a person who is actually intoxicated at a given moment. For example, s428 of the Crimes Act 1900 states that, in an offence an element of which is an intention to cause a specific result, evidence of intoxication by alcohol or drugs may be taken into account in deciding whether that intention was present. Many offences have this element. For example, entering a dwelling house, breaking into a house with intent to commit a serious indictable offence.

Similarly, there are circumstances where a person who is intoxicated at the time they enter into a contract may be able to have that contract set aside.

Our view is that a person with substance dependence has been severely affected and continues to be severely affected by the substance.¹ This is the case whether or not they are experiencing immediate effects from a recent dose.

In fact the severe effects of the substance on a person who has developed dependence may be long-term, or even permanent, and this requires greater acknowledgment under the criminal law than presently exists.

1.2 Certain groups most at risk

Substance dependence is currently a significant factor in many cases dealt with in the criminal system. The Corrections Health Service states that, of approximately 16,000 people received into custody each year in NSW, 80% have committed drug related crimes. Of these people, 60% have a history of injecting drug use.²

Approximately 170 persons are jailed each year in NSW for possession and use of illegal substances.³ In addition many cases of assault, theft or robbery of a person, or break and enter offences may be related to substance dependence.

Certain groups tend to be more at risk of contact with the criminal system as a result of substance dependence. In general it appears that those most at risk of conviction for offences related to substance dependence are those on low incomes.

They are less likely to have access to support services that may prevent their dependence becoming severe. They are also less likely to have the ability to fund their dependence through legal means.

¹ Compare with the definition in s3 Intoxicated Persons Act 1979 of an intoxicated person as "a person who appears to be seriously affected by alcohol or another drug or a combination of drugs."

² Corrections Health Service

³ Australian Bureau of Statistics

As an example, we note the disproportionate number of Aboriginal people in prison and in treatment programs for substance dependence.

We recognise that substance dependence is a significant problem in many countries, and certainly not just in NSW. In our view prohibiting certain drugs has created more problems than it has solved. A more enlightened policy, which did not have the effect of forcing many of the more vulnerable sections of the community into the criminal justice system, would be preferable.

2. Alternatives to prison

RLC's experience strongly suggests that it is important to provide alternatives to prison for persons whose offences are related to substance dependence.

We note the notorious availability of illegal drugs within the prison system,⁴ and the fact that for many individuals substance dependence begins or worsens while they are in prison.

For a person with substance dependence who has not committed an offence, we consider it important that treatment and support services are made significantly more accessible than they currently are, and without any need for courts or criminal penalties.

It is our opinion that more accessible services, provided they are culturally appropriate and offered in conjunction with services addressing related issues, may help significantly reduce the incidence of severe drug dependence and hence drug-related offences.

Such services may also provide much-needed respite for family and friends who in many cases are effectively acting in the position of carer. These people commonly face a multitude of difficulties, and their rights must also be considered. Without outside support

⁴ "The government's own figures released today show there are almost 2,500 positive drug tests in NSW prisons a year," according to Opposition Justice spokesman Andrew Humpherson, quoted in the Sydney Morning Herald 28.10:2003.

services it is not uncommon for them to reach a breaking point and become unable to offer further assistance.

The loss of this support can be critical for a person with substance dependence, and increase the likelihood of their dependence becoming more severe. This in turn can lead to more serious health problems and/or becoming homeless and/or becoming the victim or perpetrator of a criminal offence.

3. Appropriateness of compulsory treatment

Many offences are committed by persons with substance dependence primarily as a result of their substance dependence. For example, an offence committed by a person of limited financial means in order to fund their substance use.

Jailing people for such offences has so far proved largely ineffective, both as rehabilitation and as deterrence to others. Often enough it does not even deter the same offender from re-offending.

The right of people in the community to be protected requires the issue of substance dependence in general to be addressed in a serious and comprehensive manner.

When a person has committed an offence primarily as a result of their substance dependence, a scheme requiring compulsory assessment and treatment may be preferable to a prison term.

2.1 Offence committed

This alternative could be offered to an offender in cases where the offence is related to the substance dependence, either because the person was intoxicated at the time or because the offence was committed primarily as a result of a person's substance dependence.

Depending on the offence committed, it may be appropriate to defer sentencing until treatment is under way, and to then take rehabilitation progress into account in determining what further sentence if any to impose.

2.2 Protection of others

Similarly, where a family member or friend is concerned that there is a significant risk of a violent offence occurring, it may be helpful to have a mechanism where the person must be assessed and possibly treated.

However this might better be restricted to situations such as referred to in section 10(b) Mental Health Act 1990, referring to when a person is 'mentally disordered'. This states that a person (whether or not suffering from mental illness) is a mentally disordered person if the person's behaviour for the time is so irrational as to justify a reasonable conclusion that temporary care, treatment or control of the person is necessary for the protection of others from serious physical harm.

2.3 Protecting the person with substance dependence

Note that in relation to a person with substance dependence, RLC considers that, where no offence has been committed and no other person is in danger, compulsory treatment may be an infringement of human rights.⁵

Part 2 of the Act, which gives power to make compulsory orders affecting persons simply because they habitually use substances "to excess," is inappropriate.

2.4 Human rights

Any compulsory treatment should include support and must respect the person's human rights.

It is our view that forced rehabilitation is unlikely to work without a comprehensive program that is culturally appropriate and also addresses related issues, including homelessness and mental illness.

Effective long-term solutions, not just prisons, are necessary for the peace and safety of the community.

⁵ Compare with Mental Health Act 1990 where orders can also be made for "the person's own protection" (section 10(a)).

4. Redfern Legal Centre's experience

4.1 Persons with substance dependence as victims of crime

RLC provides services to people regardless of whether or not they have drug or alcohol dependence.

It is our experience that persons with severe substance dependence are very likely to be victims of crime.

It is not uncommon for clients of RLC to present a range of issues. Substance dependence is commonly combined with homelessness or inadequate housing and/or health issues including mental health.

4.2 Problems accessing existing services

RLC clients who are persons with substance dependence often seek assistance as victims of crime. These clients require linking with support services in the same way that other victims of crime do.

However they face a variety of significant barriers to accessing these services. They also have problems accessing services in general and enforcing their legal rights.

Persons with substance dependence are less likely to be believed by people in authority. As with people with a mental illness, it is common for their credibility to be discounted.

A recent example is a resident of a licensed boarding house who called the police alleging another resident had sexually assaulted her. Police officers attending the house were told by the house manager that nothing happened and that 'she imagines things'. The accused resident denied committing the attack, so the police officers left and the investigation went no further. This is despite the fact that women with mental illness and/or an intellectual disability, which can result from substance dependence, are very often victims of sexual assault. One of the attending police officers was quite young. He was later apologetic in admitting he hadn't considered the fact that even though the woman at times experienced delusions, she may well have been telling the truth about the assault.

Other difficulties commonly faced by people with substance dependence include an inability to participate in legal processes. This can impact negatively on the most basic of needs.

For example, problems with homelessness or memory loss can cause a tendency to lose documents. This can have many ramifications, including denial of Legal Aid assistance based on inability to prove low income.

It is also more difficult to receive Centrelink payments if you do not have a fixed address. Some people feel so overwhelmed at completing Centrelink documents that they do not do it, and consequently go without payments. Other people may succeed in being approved for payments, but then be breached for failing to respond to correspondence or for a variety of other reasons. They then have their payments terminated.

4.2 Dual diagnosis problems

Under existing policy guidelines the fact that many people with severe substance dependence are actually people with a mental illness presents significant barriers to their accessing health and social support services.

These include people with a pre-existing mental illness who have habitually self-medicated with alcohol, adding to their problems.

It is common for health services to refuse assistance to people who present with a mental illness, and mental health services to refuse assistance to people with substance dependence. Those with the most severe problems are sometimes banned from using services, including emergency services for the homeless.

RLC strongly suggests that this is a problem falling within the terms of reference of this inquiry, and one that requires urgent action.

Note that our experience is that this situation persists. This is despite the Intoxicated Persons Amendment Act 2000 and the Protocol between the Department of Community Services, the Police Service and NSW Health for provision of services to homeless people who are affected or addicted to alcohol and/or other drugs.

Problems accessing existing services are highly significant because they contribute to substance dependence problems becoming severe. This increases the chances of a person ending up in the criminal system, either as an offender or a victim of crime.

The difficulties for people with substance dependence are many and varied. One client of RLC who is homeless and has substance dependence has been unable to receive housing assistance because he has a dog. However, precisely because he is homeless, his dog has been important to him for added security and companionship on the streets. To this point he has declined an offer of housing through the Department of Housing because that would mean abandoning the animal that has been his only loyal companion and protector.

5. Existing legal strategies

RLC supports the strategies implemented to date designed to divert persons with substance dependence out of the criminal justice system and instead provide an opportunity for treatment. These strategies include the Drug Court at Parramatta, the Youth Drug Court and the Magistrates Early Referral into Treatment Scheme.

The rationale is to help offenders overcome their drug dependence and end their associated criminal behaviour. We note that offenders charged with offences of a violent or sexual nature are not eligible.

RLC is concerned that treatments be appropriate to the offender. Not every person will necessarily benefit by any one method of treatment.

In particular we consider that treatment programs ought to be culturally appropriate. We note again in this regard the high proportion of Aboriginals both in the prison system and in treatment programs.

RLC notes with some concern the announcement by the Premier on 28 October 2003 to trial a Drug Prison in which repeat drug offenders would be locked up and undergo intensive treatment that will demand total abstinence, with not even substitutes like methadone generally available.

The cruelty and pain potentially inflicted on a person by forcing them to go "cold turkey" raises human rights issues. There may also be serious questions about the effectiveness of such treatments in rehabilitating persons with substance dependence.

We note that this strategy appears contrary to the policy of NSW Health. The Corrections Health Service states its longer-term goals are to identify a treatment program to suit the **needs of the individual** and to facilitate **continuity of care** on both admission into and release from the correctional system. It includes a methadone maintenance program in its treatment of inmates with substance dependence.⁶

6. Evaluation of treatments

Ongoing evaluation of treatments is essential. RLC considers that treatments in general should be directed at the person and their surrounding issues which may have contributed to the substance dependence, and not directed at the dependence in isolation. The treatment should involve an attempt to answer the question, "Why?"

In many cases it may be appropriate to provide broader support for the person with substance dependence, such as opportunities for education and training, assistance with housing, employment or mental health issues, and programs to enhance self-esteem.

The treatments should be culturally appropriate and the emphasis should be on rehabilitation with a view to avoiding future offences, not on punishment.

7. Aboriginals in treatment

RLC note that certain groups may be particularly affected by compulsory treatment strategies.

In particular, Aboriginal people make up 8% of all those currently being treated for alcohol or drug abuse in Australia, despite comprising only about 2% of the

⁶ Corrections Health Service, <http://www.chs.health.nsw.gov.au/>

population.⁷ Aboriginal people are also imprisoned at a far greater rate than the rest of the population.

Not every person convicted or in prison is actually guilty. There is some evidence that there may be a disproportionate number of innocent Aboriginals in custody. Particularly for young women, a significant number plead guilty even when they are not guilty because they are under the impression they may "get a better deal".⁸

This could be a reflection on the availability or quality of their legal advice, or due to their own mistrust of authority. In some cases it may be because, relative to being homeless on the street, prison has some advantages.

It is likely the trend of over-representation of Aboriginals will continue in any future compulsory treatment programs. Provision should be made to acknowledge Aboriginal preferred methods and to provide support in related issues.

8. Discrimination

In relation to Anti-Discrimination laws, we note our disagreement with changes to the NSW law making it lawful to discriminate against people with substance dependence. We note the federal government is also planning similar legislation.

RLC strongly suggests that discrimination against persons with substance dependence may be an infringement of human rights and is contrary to the principle of equal opportunity.

We consider the changes inappropriate and likely to encourage prejudice and unfair treatment and also add to misconceptions within the broader community that a person with substance dependence must necessarily be unreliable and/or incapable of competently performing their employment duties.

⁷ *Alcohol and Other Drug Treatment Services National Minimum Data Set (AODTS-NMDS)*, figures for 2000-2001 from the Australian Institute for Health and Welfare (AIHW), Australia's national agency for health and welfare statistics and information. <http://www.aihw.gov.au/drugs>

⁸ "Indigenous Women and Imprisonment: Issues in Corrections and Post-Release", Public Seminar presented by the Institute of Criminology, University of Sydney, 3 November 2003

9. Recent reports

We refer also to the recent reports *Street Drinking in Surry Hills*⁹, *Homelessness and Access to Justice*¹⁰, and *Living on the Outside*¹¹. RLC's experience through our legal casework in the South Sydney area is consistent with the information in these reports concerning the connection between substance dependence and poverty and homelessness, and with difficulties commonly faced by persons with substance dependence in accessing services.

⁹ *Street Drinking in Surry Hills*, Surry Hills Community Drug Action Team, submission to NSW Alcohol Summit, August 2003

¹⁰ *Homelessness and Access to Justice*, Philip Lynch, Public Interest Law Clearing House, Melbourne, submission to Senate Inquiry into Legal Aid and Access to Justice, August 2003

¹¹ *Living on the Outside*, Homelessness, Marginal and Affordable Housing Committee, report to South Sydney Council, August 2002

10. Recommendations

1. Law and policy should be changed so persons with substance dependence are diverted away from the criminal justice system. Existing law and policy still in effect target people on low incomes.
2. For persons with substance dependence that have not committed an offence, treatment and support services should be significantly more accessible than they currently are, and should not be compulsory.
3. There is a need for greater access to support services designed for persons with substance dependence and a mental illness. Some of the people with the most serious problems currently have greatest difficulty accessing support services.
4. For persons with substance dependence that have committed an offence related to the substance dependence, the alternative of compulsory treatment that respects human rights is preferable to prison.
5. Treatments should be culturally appropriate and must address related issues that may have contributed to the person's dependence, including employment, housing and mental health. If the conditions under which the dependence arose are not addressed, dependence may be more likely to recur.
6. Discrimination against a person with substance dependence should not be lawful.