Is behind bars better?

Non-custodial sentencing holds the key

By Regan Jules-Macquet

Non-custodial sentencing (NCS) has been on the South African statute books for decades. In ch 28, s 276, the Criminal Procedure Act 51 of 1977 permits alternatives to imprisonment in the form of correctional supervision and fines and, in s 297, in the form of suspended or postponed sentences with conditions.

Prison context


It is clear that in order to effectively address the factors contributing towards crime and criminal behaviour, we must make use of other measures besides incarceration. Prison should be reserved for those offenders who cannot be dealt with in any other form and are too high risk for community-based sentencing.

New developments in sentencing

NICRO has been rendering offender re-integration services since 1910. In 2006, NICRO began rendering NCS services as an alternative to incarceration. Seven years later, the NCS service has evolved into a credible option for judicial officers.

The NCS service that NICRO, a registered non-profit organisation, offers contains mandatory behavioural change interventions, which include individual and family counselling, therapy, community service, adult and youth life-skills programmes and specialist programmes for substance addiction and domestic violence.

By May 2013, over 4 700 sentenced offenders have received NCS services from NICRO, with an 88% compliance rate. An independent impact evaluation has found that the NCS service, as rendered by NICRO, has achieved significant positive behavioural outcomes in the form...

The primary significance of this form of NCS is that it is based on the hypothesis that, in order to reduce the risk of reoffending, the offender must undergo behavioural change interventions. This form of NCS is not primarily structured as a punitive measure, but as a behavioural change intervention, which is reintegrative in nature.

The judicial officers making use of NCS are doing so because they do not believe in the reintegrative potential of fines or suspended sentences without accompanying behavioural change interventions.

Because NICRO is a donor-supported non-profit organisation, the NICRO NCS service is available only at 28 courts across South Africa. It is hoped that, in time, more corporate and governmental support will increase the availability of the service.

Eligibility

Contrary to what many legal and criminal justice practitioners believe, eligibility for reintegrative NCS is not based on the nature of the offence or whether the offender is a first-time offender. Eligibility is determined from an in-depth risk assessment that examines the risk to self, to others and of re-offending. The assessment examines both static and dynamic risk factors and identifies the criminogenic needs of the offender – the behaviour that must change to reduce the likelihood of reoffending (MA Campbell, S French and P Gendreau ‘Assessing the Utility of Risk Assessment Tools and Personality Measures in the Prediction of Violent Recidivism for Adult Offenders’ United States of America: Department of Public Safety and Emergency Preparedness www.publicsafety.gc.ca/cnt/rsrscs/pbhtms/rsk-ssmnt-tls/rsk-ssmnt-tls-eng.pdf, accessed 4-10-2013).

A standard assessment can take up to two hours, and the report can take several hours to compile. Additional data from interviews with the victim and the offender’s family or friends is also necessary. For this reason, same-day assessments are not possible.

People who commit violent offences can be eligible and first-time petty offenders can be ineligible. The most common risk factors that form part of the assessment are -

- pro-criminal associates and friends;
- a history of antisocial behaviour (not necessarily resulting in prior arrests or convictions);
- poor recreation choices;
- poor family dynamics;
- substance abuse or addiction; and
- poor work or school performance.


Non-compliance

Between January 2009 and April 2013, 550 sentenced offenders have failed to comply with their sentences. This is 12% of the total number of people serving reintegrative NCS sentences at NICRO. An offender is regarded as non-compliant by NICRO if they -

- commit another offence while in service;
- do not attend their mandatory sessions; and
- attend, but are disruptive or do not engage as required.

In the event that an offender is non-compliant for the second and third of the above reasons, the NICRO social worker will attempt to bring the offender back into service. If these efforts are unsuccessful, the social worker will submit an affidavit to the prosecutor and the matter will be taken up in court. The court will generally issue a summons or a warrant for the offender.

Working with a non-governmental service provider

It is sometimes difficult for private legal practitioners to understand the workings of NGOs such as NICRO. Some legal practitioners attempt to secure NCS for their client by approaching NICRO directly. These attempts are unsuccessful, since it is not NICRO’s decision as to whether an offender is given NCS or not; only the judicial officer passes sentence. NICRO’s role is in conducting the assessment and making recommendations to the court based on the assessment outcomes. The social worker’s input is conducted in terms of ch 28, s 274 of the Criminal Procedure Act (evidence on sentence).

NICRO’s NCS referrals come directly from either the prosecutor or the judicial officer. Attempts by private legal practitioners to secure assessment bookings directly from NICRO simply complicate the process. All court referrals take precedence over other referrals because the court referrals have set dates by which they must be submitted.

If private legal practitioners wish to explore NCS for their clients, they would be advised to raise the matter in trial at the sentencing stage and request that their clients be sent for assessment. This request then forms part of the court record and the process is overseen by the judicial officer. By acceding to the request, the judicial officer has also indicated a willingness to consider such an assessment.

Clash of paradigms

Challenges have also been experienced with some judicial and legal practitioners not respecting the professional independence of social workers. This has led to social workers complaining of feeling pressured by legal practitioners to rush an assessment or to arrive at a desired recommendation. This is most likely caused by the adversarial nature of our criminal justice system coming in conflict with the therapeutic nature of social work practice. Legal practition-
ers may be accustomed to arguing quite aggressively for a particular outcome; whereas social workers are required to approach work with offenders within a therapeutic paradigm.

NCS can be expected to yield positive results only if the evidence-based principles (EBP) are adhered to. This includes conducting thorough individualised assessments, assessing offender risk not based on the offence but based on the offender's static and dynamic risk factors, as well as criminogenic needs and responsivity issues. Reserving longer and more intensive interventions for higher risk offenders is also part of EBP. Focusing on changing pro-criminal values, attitudes and beliefs through interventions is most likely to produce positive outcomes. High levels of pro-criminal cognition can render a person too high risk for NCS, even though the offender is not necessarily violent. Graded sanctions should exist, combined with aftercare and support (see Domurad and Carey op cit for more detail on evidence-based practice).

The way the South African criminal justice system functions frequently means that there is conflict between the above paradigm of EBP versus the adversarial nature of the trial as well as in the manner in which the client’s interests are managed by the legal practitioner. It is possible for the legal practitioner to push for a particular judicial outcome that is not necessarily in the client's best behavioural interest, for example paying a fine versus undergoing a behavioural intervention.

It has been noted that administrative pressure to finalise cases quickly renders many judicial officers unwilling to postpone sentencing in order to obtain an assessment (Griggs op cit). It is easier to sentence an offender to a suspended or postponed sentence with no conditions other than not committing a similar offence within a specified timeframe. This is unfortunate, because there are few behavioural outcomes that are associated with these types of suspended sentences. According to EBP, in order to change pro-criminal behaviour, the criminogenic needs of the offender must receive attention (Campbell (op cit)). In many cases where the offender has pro-criminal cognition, receiving such a suspended or postponed sentence can strengthen the belief of 'I got away with it.'

Evidence emerging in the assessment

In the more than 4 700 NCS cases that NICRO has worked with, it has occurred only once that material information emerged in the presentence assessment that did not emerge in trial. This case is still sub judice, so only a very general description is provided.

The accused was charged with an offence, to which she pleaded guilty. On the basis of her plea, she was found guilty. During the presentence assessment, she recanted her plea and stated that she was coerced into signing the plea statement, which she claimed was written and submitted without her knowledge. When confronted by her legal practitioner, she told her lawyer that she had lied to the social workers (probation and NICRO). When asked by the social workers which statement was true, she did not retract her denial of the offence.

Based on the above events, both the legal practitioner and the magistrate recused themselves. The case is now underway as a trial de novo.

Conclusion

NCS containing behavioural change interventions has much to offer the South African criminal justice system. Prison is not suitable for lower risk offenders, and viable alternatives do exist. If sentencing is to play a more constructive role in reducing crime in South Africa, we need to look at punishment and sentencing in a different way.