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The rise in the use of section 136 of the Mental Health Act (1983) in England and Wales: A Viewpoint on Loughran (2018)

Abstract

This article provides a critical viewpoint on Loughran's recent work in Medicine, Science and the Law on the causes of the rise in the police's use of section 136 of the Mental Health Act 1983 (Loughran, 2018: Detention under section 136: Why is it increasing?). The rate of this rise seems significant: by 2014 it was five times more likely that a person in England would be detained in a hospital under section 136 than it was in the year 2000 and the trend has continued to the present day. This viewpoint considers the significance of the section 136 rise from the theoretical perspective of causal analysis.

Keywords: Forensic Psychiatry, Law, Police, Place of safety, Section 136, Detention

Introduction

The rise in the police's use of section 136 (s136) of the Mental Health Act 1983 (MHA) is a phenomenon much noted in health and criminal justice circles. The causality of the rise, however, has not yet been systematically analysed. For this reason, Loughran's recent article in this journal was a valuable contribution. [1] This viewpoint considers Loughran's arguments and then supplements them in a way that emphasises the theoretical issue of causal analysis. The significance of this approach is that it facilitates some clarification of what Loughran identified as the 'complex myriad of facts influencing' the s136 rise. [1]

The methodological strategy underpinning the analysis was as follows. First, the data employed by Loughran was re-analysed and then supplemented in order to bring it up to date. This involved digital searches of NHS Digital (for data related to MHA detentions) and the Home Office (HO) (for data regarding the use of police powers). Historical information on HO policy was obtained from the National Archives. Academic research on the use of s136 was derived from manual searches of this journal and through the PsychINFO, PubMed Central and SocINDEX databases.

Section 136

S136 refers to section 136 of the 1983 MHA as amended by the Policing and Crime Act 2017 (PCA). S136 is entitled '*Removal etc. of mentally disordered persons without a warrant*' and it empowers the police to remove a person from a public place where they appear 'to be suffering from a mental disorder and to be in immediate need of care and control' and take them to a 'place of safety' (POS) where a MHA assessment is performed. Its singularity lies in the fact that it is not dependent for its implementation upon medical expertise but, rather, upon the judgement of a police officer. In recent years, controversy has surrounded the use of police cells as a POS and their use has declined to be replaced by health-based places of safety (HBPOS) which are usually located within psychiatric hospitals or the emergency departments of general hospitals. The Policing and Crime Act (PCA) 2017 placed a duty upon police officers to 'consult' with a healthcare professional before detention 'if it is practicable to do so'.

The police's use of s136 has been rising in recent years. The latest HO statistics suggest that the aggregated figure for both police cells as a POS and HBPOS was over 33,000 for the year ending March 2019. [2]

Loughran's Analysis

Loughran's analysis of the s136 rise concentrated mainly on the decade between 2008 and 2018. His conclusion was that the causes of the rise were to be found in 'changing police attitudes, socio-economic factors and diminished resources amongst both the police and mental health services'. [1] During the course of the article he provided additional details.

- **'Changing police attitudes.'**

Loughran's argument was that controversies surrounding the use of police cells as a POS combined with the development of HBPOS, signified a change in the psychological attitudes of police officers. In effect, they became more likely to detain individuals on s136 knowing that they had a HBPOS to take them to rather than a police cell. The availability of HBPOS

increased after the 2007 MHA in November 2008 and now amounts to 164 sites in England. [3] What accompanied this attitude change was the notion that the ‘threshold’ or criteria used by the police to determine whether or not to use s136 – instead of, for example, making an arrest for a criminal offence – had fallen significantly so that, again, they have become more likely to implement s136. Loughran argued that these attitude changes within police officers reflected a ‘more humane option when faced with a distressed person.’^[1] He also connected these pastoral concerns to the risk of death in police custody of individuals with mental health conditions – a risk which had been highlighted for the decade 1998 to 2009 by the Independent Police Complaints Commission (IPCC). [4]

- **‘Socio-economic factors.’**

What Loughran had in mind here are population-level economic and cultural changes which have functioned to increase the use of s136 by increasing the numbers of people at risk of these short-term detentions. He specified two such changes:

- 1) a rise in the unemployment rate ‘following the financial crisis of 2008’ which correlated statistically with the s136 rise; and
- 2) a rise in problematic rates of alcohol consumption similarly correlated with the s136 rise. [1]

- **‘Diminished resources amongst both the police and mental health services.’**

By the phrase ‘diminished resources’, Loughran was referring to government spending on the National Health Service (NHS) and the police. His argument was twofold:

- 1) that police spending ‘cuts’ led to an increase in their workload which made it more likely that they would resort to the use of s136 ‘so that these situations are managed more quickly’; and

2) that ‘cuts’ to NHS mental health services have placed an ‘increasing reliance on the police to act as primary mental health services and that these [i.e. the police use of s136] are filling the gap.’^[1]

According to this interpretation, spending ‘cuts’ to NHS mental health services are one cause of the s136 rise.

These claims constitute the core of Loughran’s analysis.

Causal Analysis

The issue about what is meant by a ‘causal analysis’ should be clarified. Sociologically, this phrase refers to a level of explanation that reaches beyond that of descriptive correlation to discover the underlying *generative mechanisms* of an historical event or process. The analysis of *generative mechanisms* has three conditions attached to it:

- 1) the establishment of a historical periodisation appropriate to the phenomenon in question, followed by the identification of;
- 2) economic; and
- 3) cultural mechanisms;

which explain that phenomenon. The terminology of *generative mechanisms* is derived from the philosophy of critical realism. ^{[5] [6]} No knowledge of that philosophy is assumed in this viewpoint, but it may be useful to specify the implications of the historical, economic and cultural factors for an analysis of the s136 rise.

Historically, it is possible to differentiate between short-term and long-term generative mechanisms and, given that s136 has its origin in the MHA of 1983, what is being dealt with here is a short-term periodisation (1983 to 2018). In terms of the economic/cultural distinction, this commentary follows Bhaskar in conceptualising social reality as comprising multiple

interacting ‘levels’ in an ‘open system’ called ‘society’. [5] By the economic level what is being referred to are all the aspects of a market economy in an advanced capitalist state such as the UK; and what is being referred to as the ‘cultural level’ includes the government, the legal system and the major social institutions within that nation-state. More specifically, the economic level refers to government spending on public services, especially the NHS and the police; whilst the cultural level refers to statute law, the policy directives of regulatory agencies, and the professional attitudes associated with mental health professionals and the police. Given the historical periodisation in question, two significant economic events of the period are what Wren-Lewis referred to as the Global Financial Crisis (GFC) of 2008 and the subsequent ‘austerity’ policies pursued by the Coalition government elected in 2010. [7] Any causal analysis of the s136 rise has to identify both its economic and cultural levels within a given periodisation and the interactions between the two.

Statistics

A description of the s136 rise is a starting-point for a causal analysis and this includes a quantification of the problem in the form of statistics. The data, however, requires interpretation. Because of the existence of both police cells as a POS and HBPOS, for some of the period in question, there have been two sets of data related to criminal justice and health respectively. The police data is incomplete prior to 2012 but since then has become more reliable partly due to the co-ordinating efforts of the National Police Chiefs Council (NPCC). Data related to HBPOS, on the other hand, collected through the Health and Social Care Information Centre’s (HSCIC) KP90 collection between 1984 and 2016 and since then through the Mental Health Services Data Set (MHSDS) has generally been more robust due to its official designation as National Statistics for most of that period and its relatively stable methodology over time. [8] The best overview of the statistical trend for most of our period is that provided by the joint Department of Health (DH) and HO review of 2014. [9]

There are three points to make about this trend. First, although there are data quality issues, this is not sufficient grounds for claiming that the s136 rise is not a real phenomenon. The main evidence for this is the HBPOS data. Second, it is also clear that the upward trend has been occurring since the mid-1990s, flattened off around the millennium, but has continued upwards since at least 2001. Again, it is the HBPOS figures that identify this: the 2014 DH/HO review's calculation of statistical rates for s136 detentions per 100 000 of the population in England indicated little change in the period 1984 to 2000 followed by a period of significant increase. As the DH/HO review concluded: 'the chances of being detained under s136 in a hospital in England is now five times higher than in 2000'.^[9] Third, the trend seems to have continued until the present day. ^[2]

There are gaps in the data, however, mostly related to the absent statistics where the POS was a police cell. In 2008 the IPCC estimated that in 2005-2006 11 517 individuals were so detained under s136 in England and Wales. ^[10] Exact figures with full coverage of all 43 police forces and the British Transport Police are not available before that time and the most recent HO data noted above indicate that that figure had reduced down to 136 by March 2019. ^[2] Clearly, the last decade has seen a reduction in the use of police cells as a POS and a rise in the use of HBPOS but the question of whether the benchmark 2005-2006 figure of 11 517 for police cells signified a trend that was at its high-point, falling, or in a steady state is, as the 2014 DH/HO review remarked 'very problematic'. ^[9] The other problematic issue, indicated again by the HO data, is the apparent fall by 2 per cent of all s136 detentions in England Wales for 2016-2017, a fall echoed in the MHSDS, and the fact that the latter dataset seems to have experienced quality issues since the transfer from the KP90 collection. ^[11] These issues require a separate analysis.

The fact that the upward HBPOS trend began in 2001 is a problem for Loughran's analysis. Loughran framed his contribution in terms of the s136 rise 'particularly over the past 10 years'

and his main arguments fitted that periodisation well. His narrative seems compelling: the severity of the 2008 GFC is well documented as are the negative effects of the post-2010 austerity policies across a range of health indicators. [12] However, whilst the GFC explains much that occurred in its aftermath, it could not logically explain the s136 rise beginning in 2001. If we return to the theoretical framework noted above, it is possible that Loughran was prioritising the economic over the cultural factors involved in the s136 rise. He was also adopting a limited historical periodization (2008 to 2018). But if we take the periodisation back to the start of the s136 rise (2001), his analysis requires supplementation. This is because for a causal analysis of the s136 rise, the cultural factors may be as significant as the economic ones.

Cultural Factors

If the s136 rise began in 2001, it is possible to see why one causal factor was not an economic crisis. In fact, during Tony Blair's first two administrations the economy performed well: as Kitson and Wilkinson summarised it in 2007, 'under New Labour the UK economy has grown continually, inflation has been low and stable and unemployment has fallen.' [13] Moreover, this period also saw significant increases in NHS spending on mental health services. Beginning with the National Service Framework (NSF) for Mental Health in 1999, New Labour established a plan for the delivery of community care which was backed by substantial resources. [14] These plans were controversial because they combined investment in such services as crisis resolution and assertive outreach teams with increasing levels of compulsion as manifested by the introduction of Community Treatment Orders (CTOs) in the 2007 MHA. Yet, even critical observers of New Labour policy acknowledged that the investment of these years was significant. [15] [16] It was also during these years that the s136 rise began to occur. This financial investment only came to end in 2011 in the aftermath of the GFC and the Coalition's austerity policy.

The trajectory is similar for the police workforce. Numbers rose steadily throughout the 2000s, peaking at just under 250 000 in 2010 since when – again in the aftermath of the GFC and austerity – they have reduced to 200 000. [17] So, again, the s136 rise emerged alongside a rise, not a reduction, in resources.

What these trends suggest is that Loughran’s argument about ‘diminished resources’ works well if a periodisation has already been established which began with the GFC (2008) and then austerity (2010). But once the periodisation is taken back to 2001, an additional generative mechanism is required. This could be a cultural rather than an economic mechanism and, given that a singular feature of s136 is that depends upon the judgement of police officers, it is possibly located in Loughran’s ‘changing police attitudes’ – only now occurring at an earlier point in time than he posited.

Methodologically, there are at least two types of evidence relevant to this hypothesis. The first is a documentary analysis of criminal justice policy and the reports of regulatory agencies. The second is qualitative research with police officers.

In terms of the documentary analysis, relevant official sources did not appear until a HO circular of 2008 and during the course of the following decade included reports and inquiries instigated by the IPCC, the Royal College of Psychiatrists (RCP), the Metropolitan Police, Her Majesty’s Inspectorate of Constabulary (HMIC), and the Care Quality Commission (CQC).^[18]

^[10] ^[19] ^[20] ^[21] ^[22] These publications dealt with two problems: risks attached to the use of police cells as a POS and the difficulties of inter-agency working between mental health professionals and the police. One of their overarching themes, however, was summed up in the Adebowale report: ‘mental health’, it stated, ‘is part of the core business of policing’. ^[20] This statement is surprising only if it is assumed that policing is solely a matter of law enforcement. If it were the case that the Adebowale report actually reflected the attitudes of police officers then it could perhaps constitute a cultural mechanism which contributed to the s136 rise. Turning, then, to

qualitative research with police officers, there would seem to be some evidence that the Adebowale statement was reflected in practice. Of relevance here is Bendelow's research in Sussex. [23] [24] [25] In contrast to the idea that policing is solely about law enforcement, Bendelow et al found that officers took seriously a pastoral concern with public protection, especially in cases of threatened suicide and/or self-harm – expressions of mental distress which recent studies have found to predominate amongst s136 detainees.[26] [27] [23] [24] [25] Other recent research into police attitudes, notably that of Thomas and Forrester-Jones, lends some support to Bendelow's 'pastoral' perspective by suggesting that it interacts with a 'risk-averse culture' within the police that itself contributed to the s136 rise. [28] The hypothesis here is that as mental health issues became increasingly a part of the police's 'core business', so an awareness of suicide risk and pastoral concerns combined together to increase the use of s136 and the removal of the detainee to the increasingly available HBPOS rather than to a police cell.

The evidence above is suggestive but not conclusive. Its main limitation is that it is based on a small number of studies and cannot be decisively traced back as far as 2001. The documentary analysis cannot really be said to begin until 2008, whilst Bendelow's research, published from 2014 onwards was geographically limited to one English county and disclosed police attitudes dating from, at the earliest, 2006. It is possible that Bendelow's interviewees were reporting experiences that extended further back in time; and it is equally possible that documents such as the Adebowale report emphasised a pastoral perspective that already existed, even though the report itself was future-directed. However, it would require further research into police culture from the millennium onwards to confirm that this particular cultural mechanism was a primary cause of the s136 rise. However, the fact that the rise itself should be dated from 2001 does require some supplementation of Loughran's analysis.

Economic Factors

Loughran was stronger in his analysis from the GFC onwards. His narrative seems compelling because, although the s136 rise began in 2001 and had doubled by 2008, it trebled between 2008 and the present. This period also coincided with a capital investment programme in the provision of HBPOS – an economic factor which interacted with the cultural factor of changing police attitudes to contribute to the s136 rise. [29] It is likely, though, that the GFC and austerity were significant factors in the perpetuation of the rise. They probably constituted an economic causal mechanism. Yet Loughran’s account of them requires supplementation.

It probably should be accepted along with Loughran that austerity ‘cuts’ to mental health services increased the police’s use of s136 by reducing the amount of services available to deal with mental health crises in the community. Thanks to the journalism of McNicoll, the scale of the ‘cuts’ can be estimated and it is clear that some of these fell on crisis services and assertive outreach teams at the same time as there was an increase in referrals to such services. [30] Additional evidence here is contained in NHS Digital’s Mental Health Bulletins of the period. [31]

Loughran may also have a point about the interaction of cultural with economic factors in the form of alcohol misuse and unemployment – but here, again, further research is needed to turn his correlations into a causal analysis. It is known, for example, that economic recessions have a complex effect upon drinking; whilst abstinence seems to increase, so does binge drinking and these factors also interact with employment status in complex ways.[32] On the other hand, statistical trends of adult drinking behaviour, as evidenced in the *Health Survey for England*, have indicated a long-term downward trend.[33] Similarly, whilst the GFC increased unemployment in its immediate aftermath, this has to be set in the context of increasing labour market participation rising from a low point of 65.9 per cent of the working-age population in 1978 to a historical high of 75.6 per cent in 2018.[34] Research that has focussed specifically on the interaction of alcohol and s136, in particular that of Zisman and O’Brien, suggests that in

some urban localities the proportion of intoxicated individuals as a sub-set of all s136 detentions has grown, compared to the estimates provided by Borschmann et al in 2010, but their London-based data is not necessarily generalizable.^{[26] [35]} More research is required into these factors apropos s136 and this would need to include the issue of substance misuse more widely and the behavioural effects of new psychoactive substances (NPS), nitrous oxide, and drugs related to lifestyle factors such as ‘clubbing’ . Where substance abuse and s136 are concerned there is a need for future analysis which provides a national perspective on the characteristics of detainees and is able to synthesise information emanating from the household survey data of the *Crime Survey for England and Wales* (CSEW) and the treatment and hospital data from Public Health England and NHS Digital. ^{[36] [37] [38]}. Such synthesising work would also need to consider the interaction of substance abuse with the risk of suicide and self-harm, issues considered in more detail in the penultimate section below. In terms of Loughran’s analysis, however, what may be provisionally stated is that the combination of unemployment and problem-drinking probably contributed to the s136 in the years immediately following the GFC.

However, a significant omission in Loughran’s analysis of economic mechanisms concerns the effect of the GFC on suicidal and self-harming behaviour. Concerning non-fatal self-harm, longitudinal evidence is available from the Multi-Centre Study on Self-Harm (MCSSH) in England. Hawton et al, in particular, have shown how rates of self-harm increased after the GFC and that this was correlated not only with unemployment but also with fears of debt and redundancy. ^[39] Yet, despite the large sample sizes available to the MCSSH, Hawton et al’s findings should be interpreted with caution: they were geographically limited and gender-specific and related to rises in rates of self-harm only in the immediate aftermath of the GFC (2008 to 2010). Increased rates of self-harm, though, probably did contribute to the s136 rise in those years. Self-harm may also be relevant for a longer term causal analysis of the s136 rise

in the aftermath of the GFC and austerity in two ways. First, because several studies have indicated that a significant reason for the police's use of s136 occurs when the detainee is at risk of self-harm and/or suicide, including the already cited work of Thomas and Forrester-Jones; and, second, because Bendelow's research emphasised how the decision-making of police officers was influenced by their non-medical classifications of mental distress. [24] [25] [28] 'Detentions were coded as "Suicidal", Bendelow et al observed, 'if the records had stated the person was detained because of concerns that they intended to end their life, had taken an overdose etc.' [24] This is significant for what Loughran called the 'threshold' problem: over time police attitudes have reduced the threshold which needs to be met for s136 to be implemented and this reduction seems to be related to their increasing awareness of suicidal and self-harming behaviour. This point is also connected to the increasing pastoral concerns of the police and the tendency of officers to regard mental health issues, to paraphrase Adebowale again, as part of their 'core business.' [20] It is also likely that the police's pastoral concerns, as noted above, are influenced by their increasing perception of 'risk', as developed in the specific case of s136 in the work of Thomas and Forrester-Jones. [28] One significant development relating to 'risk' is the emergence of 'street-triage' teams in some localities. Street-triage combines mental health nurses and police officers with the intention of providing effective responses to mental health crises in public places. [40] [41] These teams actualise the 2017 PCA's injunction to police officers to 'consult with a healthcare professional' before implementation of s136 and some recent research has suggested that this may reduce the number of such detentions perhaps through modification of the police's assessment of risk. This self-harm/suicide aspect of the s136 rise is an apt example of how economic mechanisms (the GFC and austerity) and cultural mechanisms (police attitudes) may have interacted to perpetuate the s136 rise.

Conclusion

More research is needed to provide a comprehensive account of the causes of the s136 rise. However, supplementing Loughran's analysis with this viewpoint suggests the following provisional conclusions.

1. The s136 rise as it relates to HBPOS began in 2001 and one cause was probably the cultural mechanism of changing police attitudes which culminated in the Adebowale claim that mental health issues are part of the 'core business of policing.' More research into police culture of the late 1990s-early 2000s is required, however, to further substantiate this claim and identify the causes of the police's increasingly pastoral and risk-related concerns.
2. The GFC and then austerity were probably the economic mechanism which perpetuated this rise. In simple terms, the GFC may have caused more distressed behaviour (for example, risks of self-harm) in public places and austerity 'cuts' reduced the capacity for mental health services to deal with these crises. Police intervention by means of s136 was one way these crises were dealt with. More research is required, however, to specify the complex correlations and generative mechanisms related to unemployment, substance misuse, suicidality, self-harm and, more generally, austerity, in perpetuating the s136 rise.

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