Mentally Ill Offenders and the Criminal Justice System

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This Report is undertaken by students as a part of their formal assessment for the subject Clinical Legal Education at La Trobe Law, La Trobe University. This component of the course was introduced in July 2002 to encourage team-work and to enhance opportunities for students to engage in the law making process and public policy. Students determine their topics in consultation with the legal service and their lecturer after determining matters of concern arising from their case-work whilst on placement at the legal service or arising from associated problems they identify as relevant to members of the West Heidelberg community and the community more broadly.

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PART A MENTAL ILLNESS: IS JAIL THE ANSWER?

A DISCUSSION OF THE RELATIONSHIP BETWEEN MENTALLY ILL OFFENDERS AND THE VICTORIAN CRIMINAL JUSTICE SYSTEM.

CONTENTS

Executive Summary

The focus of this project is mental illness, specifically amongst alleged offenders and those in prison. The authors decided to investigate this topic due to the large percentage of prisoners in jail that have a mental disorder, often for minor offences.[1] During our clinical placement at the West Heidelberg Community Legal Service we also came across many clients with legal problems who had concurrent mental health issues. We suspect that the link between crime and mental illness is a complex one, not simply attributable to mentally ill individuals being more criminally inclined than non-mentally disordered people. This project is therefore largely motivated by a desire to understand the increasing trend of incarcerating mentally ill offenders in greater detail, and dissect it from both legal perspectives and cultural perspectives.[2] Concerned about the disproportionate numbers of mentally ill people in jail, and those involved with the criminal justice system more generally, the authors also put forward informed recommendations that may prevent these numbers from escalating and prevent the mentally ill from entering the criminal justice system in the first place.

An inherent problem with understanding the relationship between mental illness and imprisonment are the competing and contradictory definitions of mental illness found within the law and the fields of psychiatry and psychology. A historical overview of how and why competing (and sometimes mutually exclusive) definitions of 'mental illness' have evolved in the fields of medicine and the law is beyond the scope of this project, however the authors will discuss points of contemporary divergence and the ramifications this has on how mentally disordered offenders are managed in Victoria.

According to the *Mental Health Act* (VIC) 1986, s8 (1A), a mental illness is defined as a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory.

> (2) A person is not to be considered mentally ill by reason only of any one or more of the following – that the person:

[1] 60% of female prisoners and 44% of male prisoners are in jail in NSW for minor offences and are diagnosed with a mental disorder. See F Shiel, "Call for Court for Mentally Impaired," (15 March 2004), *The Age*, Melbourne.
[2] As A Brett comments, "Stigma causes significant handicap to people with mental illness [. . .] Mentally ill offenders are one of the most marginalised and stigmatised groups of people within the community." A Brett, "Psychiatry, Stigma and Courts," (2003) Vol.10, No.2, *Psychiatry, Psychology and Law*, p.283.

(a) expresses a particular political opinion or belief;

(b) expresses a particular religious opinion or belief;

(c) expresses or refuses or fails to express a particular philosophy;

(d) engages in or refuses or fails to express a particular sexual preference or sexual orientation;

(e) engages in or refuses to engage in a particular political activity;

(f) engages in or refuses or fails to engage in a particular religious activity;

(g) engages in sexual promiscuity;

(h) engages in immoral conduct or (i) illegal conduct;

(i) is intellectually disabled;

(j) takes drugs or alcohol;

(k) has an anti-social personality disorder;

(l) has a particular economic or social status or is a member of a particular cultural or racial group.

The Act has also been extended to include "mental disorder" which is however, left undefined.[3] For the purposes of this project mental illness will be used interchangeably with mental disorder, psychological illness and psychological disorder.

This Report explores problems in the mental health area. In Part One many challenges are outlined. These include the treatment of people with a dual diagnosis in the community, the shortage of beds at the Thomas Embling facility which means people often have to spend time in prison, the high rates of imprisonment of mentally ill persons and the failings in proffering sufficient early intervention and health solutions which are better options in many cases than imprisonment. Ways forward are suggested in recommendations 1-38). Finally, in Part Two of the Report the authors look at the concept of a mental health court/list and propose a model that could be adopted to promote further discussion and ideas in the area of how society deals with its most challenging and vulnerable people. Recommendations 39-67 outline a model for a Health Court/List's operation.

Methodology

The methodology used in this report consists of a literary review, a review of Victorian legislation and research that was conducted via a questionnaire sent to mental health professionals, forensic mental health services, members of the Magistracy and Judiciary, social services and legal centres. Some follow up also conducted over the telephone at the respondees request. Due to the time taken to receive ethics approval from the university and the time constraints for university assessment; of

[3] S3 Definitions, *Mental Health Act Vic 1986.*

approximately 65 questionnaires sent, we received 13 responses. While conclusive evidence cannot be drawn from the questionnaire research given the small sample, the information received has been used by the authors as a 'snapshot' of the perspectives of experts working in the fields of mental health and crime.

Key Recommendations of the Report:

1. A greater governmental priority placed on funding being allocated to mental health hospitals and community mental health services.
2. More beds for female prisoners at the Thomas Embling Forensic Hospital so waiting lists are shortened and women receive the care they require.
3. More beds at public psychiatric hospitals for women on remand.[4]
4. The Mental Health Act VIC 1986 should be amended to cater for women with BPD and PTSD so services that are available for people at arrest, in court and at sentence that are diagnosed with a "mental illness" defined under the Act are also available for women with personality disorders.
5. The primary focus of this court should be on treatment and rehabilitation in order to reduce the rate of re-offending by these individuals.
6. The Mental Health Court should be based as an extension of the Magistrates' Court and positioned within a separate courtroom.
7. A single Magistrate should reside over the court in order to provide a consistent approach across the board.
8. The Magistrate should be supported by a team of experts including a principle co-ordinator, a senior clinical advisor/psychologist, a mental health justice liaison officer and a defence lawyer, who shall all be required to work as a collaborative team.

[4] Suggestion made by a Magistrate at the Heidelberg Magistrates Court, in response to our questionnaire.

Chapter One: The Criminalisation of Mental Illness

By Kate Pickering

By now, the statistics are all to familiar:

- Almost 20% of all children and adolescents are affected by mental health problems[5]
- 25% of all young adults (aged 18 to 24) suffer from at least one mental disorder[6]
- 18% of adults suffer from mental illness[7]
- Mental disorders are the largest cause (27%) of all health-related disability in Australia[8].
- Depression is on its way to becoming one of the top illnesses (second only to cardiovascular illness) causing death and disability[9].

Considerably less available and publicised, however, is research into the reasons *behind* such high rates of mental illness. Certainly there are rumblings of discontent within the community each time a mentally ill person is shot dead by police, as a man was just last month in Brunswick. However these rumblings seldom evolve into a genuinely thorough inquiry into the adequacy of support services available to the mental health, or the way in which the criminal justice system in Victoria is responding to the mentally ill in our community. On the whole it seems that the mentally ill have been quietly placed in the proverbial 'too hard basket' - this 'basket' being, of course, our prison system. These 'asylums of the new millennium' are now brimming with the mentally ill.

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[5] Adam Graycar, *Changing Demography, Changing Crime*, Australian Institute of Criminology, 11, http://www.aic.gov.au/conferences/other/graycar_adam/1999-11-demography_slides.pdf

[6] Adam Graycar, *Changing Demography, Changing Crime*, Australian Institute of Criminology, 11, http://www.aic.gov.au/conferences/other/graycar_adam/1999-11-demography_slides.pdf

[7] Adam Graycar, *Changing Demography, Changing Crime*, Australian Institute of Criminology, 11, http://www.aic.gov.au/conferences/other/graycar_adam/1999-11-demography_slides.pdf

[8] *Mental Health of Australians*, Institute of Health and Welfare, http://www.aihw.gov.au/mentalhealth/population/index.html

[9] *Show the mentally ill open doors, not closed minds*, February 6, 2004, http://www.smh.com.au/articles/2004/02/05/1075853996803.html?from=storyrhs

Mental Illness and Imprisonment

A recent study into the health of Victorian prisoners revealed "a prevalence of all the major mental illnesses than is found in the general population"[10] - 28% of the prisoners (125 of 451) had been previously *diagnosed* with a mental illness[11]. Note that this figure does not take into account *undiagnosed* prisoners – a group most likely to be considerable in number, as this chapter will show – and therefore the actual percentage of Victorian prisoners with a mental illness is presumably quite higher than 28%. Indeed, a more revealing study undertaken by the Schizophrenia Fellowship of NSW in 2000 indicated that 60% of people admitted to NSW jails had an active mental illness[12].

While there has been little comprehensive research conducted into the over-representation of intellectually disabled people in Victorian jails. However research in NSW suggests that intellectually disabled people, whilst making up only 2-3% of the overall population, represented 12-13% of the prison population[13]. It seems unlikely that Victoria would not differ significantly from these NSW figures. Unfortunately word constraints prevent any further discussion of intellectually disabled people and the challenges they pose for the criminal justice system. However needless to say this it is an important area which requires further research and reforms of its own.

Judging from these statistics, it seems the prison system has become one of the principle vehicles for managing mental illness related criminal behaviour[14] - an 'out of sight, out of mind' solution[15]. One questionnaire respondent remarked:

> What's lacking is early intervention prevention. Many mentally ill people find they can get only help when their problems escalate to crisis-point. It's a bit like parking an ambulance at the bottom of a cliff and waiting for someone to walk over the edge, instead of putting up fences around the cliff to direct them onto safer paths and stop them from falling[16]

Without adequate support services to divert the mentally ill off onto less extreme treatment paths, many will move further and further along into criminal activity or self harm, until eventually and inevitably they fall off the precipice. All that is left then is the ambulance - that is, the criminal justice system or the emergency ward. Interestingly, Peter Norden of Jesuit Social Services notes

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[10] *Victorian Prisoner Health Study*, Department of Justice (Victoria), February 2003, http://www.justice.vic.gov.au/CA256902000FE154/Lookup/DoJ_Corrections_part_2/$file/Victorian_Prisoner_Health_Study_February_2003.pdf

[11] *Victorian Prisoner Health Study*, Department of Justice (Victoria), February 2003, http://www.justice.vic.gov.au/CA256902000FE154/Lookup/DoJ_Corrections_part_2/$file/Victorian_Prisoner_Health_Study_February_2003.pdf

[12] *Report on the criminal justice system in Australia*, Schizophrenia Fellowship of NSW Inc February 2001

[13] *People with an Intellectual Disability and the Criminal Justice System*, NSW Law Reform Commission, 1996, para2.5

[14] Peter Fitzsimmons, *The Experience of People with a Mental Illness When Dealing With Police*, http://www.bestpractice2003.qut.edu.au/Powerpoint/Peter%20Fitzsimmons.pps

[15] Peter Norden, *Restorative Justice: A New Vision for Criminal Justice*, Jesuit Social Services, 2002, 2, http://www.jss.org.au/research/documents/restorativejusticeapr04_001.pdf

[16] Questionaire response from legal professional - 25th May, 2004

that Australia has always had a 'punitive past' and a tendency to treat imprisonment as a 'simple solution to many of the complex social problems confronting our society today... such as mental illness'[17].

One issue which highlights the complexity of dealing with the mentally ill is that often they will not seek treatment, believe they do not need treatment or refuse to take medication. This can provide many challenges in delivering mental health services but some of these issues can be a product of the mental illness itself.

The Criminalisation of Mental Illness

People with a mental illness are more likely to exhibit the kind of behavior that will bring them into conflict with the law. Illegal acts such as disorderly conduct, criminal trespass, disturbing the peace, public intoxication and assault are often a by-product of the mental illness[18], and can indirectly discrimination against the mentally ill – in effect making mental illness a crime.

Studies also show that many of the crimes committed by mentally ill people are economic crimes to obtain money for subsistence[19]. This fact belies a deeper, more complex problem – that often mentally ill people come from low socio-economic backgrounds and thus fall into other high crime-risk groups such as:

- Low income or reliance upon government assistance --

  Research conducted by Jesuit Social Services in 1999 revealed that fourteen of Victoria's poorest postcodes accounted for one quarter of the State's prison population[20]

[17] Peter Norden, *Restorative Justice: A New Vision for Criminal Justice*, Jesuit Social Services, 2002, 2, http://www.jss.org.au/research/documents/restorativejusticeapr04_001.pdf
[18] *Mentally Ill Offenders and the Criminal Justice System - The Sentencing Project*, Washington Sentencing Project, January 2002, http://www.soros.org/initiatives/justice/articles_publications/publications/mi_offenders_20020101/mentallyill.pdf
[19] *Mentally Ill Offenders and the Criminal Justice System – The Sentencing Project*, Washington Sentencing Project, January 2002, http://www.soros.org/initiatives/justice/articles_publications/publications/mi_offenders_20020101/mentallyill.pdf
[20] Tony Vinson, *Unequal in life: the distribution of social disadvantage in Victoria and New South Wales*, Jesuit Social Services: The Ignatius Centre for Social Policy and Research, August 1999

- Homelessness –

  In NSW it was found that 75% of homeless people had a mental illness[21], and studies in Washington reveal that prisoners with a mental illnesses are twice as likely to have been homeless prior to their arrest[22]

- Unemployment –

  The same study in Washington found that 40% of all prisoners were unemployed at the time of their arrest[23]

- Substance abuse –

  Almost 60% of the Washington prisoners with a mental illness reported drug usage in the month before their arrest"[24]

- Poor education –

  The Jesuit Social Services research indicates that people with lower levels of education experience poorer mental health, and that there may be some correlation between poor education and crime[25]

In her article 'Mental Illness and the Criminal Justice System', Susan Henderson remarks;

> Health is a social issue. Its causes are not restricted to individual physiology but are ecological, social and political. And just as the determinants of health exist outside the realm of the individual, so too should its treatment. The growing recognition of these causal factors should encourage us to adopt an appropriate balance of health and social interventions[26]

She notes that often such interventions are overlooked "in favour of tangible and demonstrable interventions" because they can seem "remote from the task at hand"[27]. In no way does this report intend to undermine the importance of social interventions by focusing on reforms specific to mental health care. Therefore the author proposes the following recommendations over and above the reforms suggested in the following section.

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[21] Long Road to Recovery: A Social Justice Statement on Mental Health , St Vincent de Pauls, July 2001, 12, http://www.vinnies.org.au/files/NSWACT.NSW.Long%20Road%20to%20recovery.PDF

[22] *Mentally Ill Offenders and the Criminal Justice System – The Sentencing Project*, Washington Sentencing Project, January 2002, http://www.soros.org/initiatives/justice/articles_publications/publications/mi_offenders_20020101/mentallyill.pdf

[23] *Mentally Ill Offenders and the Criminal Justice System – The Sentencing Project*, Washington Sentencing Project, January 2002, http://www.soros.org/initiatives/justice/articles_publications/publications/mi_offenders_20020101/mentallyill.pdf

[24] *Mentally Ill Offenders and the Criminal Justice System – The Sentencing Project*, Washington Sentencing Project, January 2002, http://www.soros.org/initiatives/justice/articles_publications/publications/mi_offenders_20020101/mentallyill.pdf

[25] *Long Road to Recovery: A Social Justice Statement on Mental Health* , St Vincent de Pauls, July 2001, 12, http://www.vinnies.org.au/files/NSWACT.NSW.Long%20Road%20to%20recovery.PDF

[26] Susan Henderson, *Mental Illness and the Criminal Justice System*, Mental Health Co-ordinating Council, May 2003, http://www.mhcc.org.au/projects/Criminal_Justice/

[27] In a lecture called '*Does Australia have a law and order problem*?' on 21st May 2002, D Weatherburn stated the more "prosaic options for crime control… don't excite the media, or the general public, because they aren't simple or dramatic, and they don't involve locking someone up we can all easily recognise as criminal… Good crime control policy is about finding solutions to crime problems that are cost-effective and don't produce unintended consequences worse than the crime problem we set out to solve.'

Recommendation 1:

- Remove crimes such as disorderly conduct, disturbing the peace and public intoxication which indirectly discriminate against the mentally ill and the disadvantaged within the community
- Increase funding to social and economic programs which ameliorate the effects of poverty
- Increase funding to housing support services for the mentally ill
- Improve the quality and quantity of supported accommodation (particularly long-term housing) for the mentally ill
- Further develop aggressive outreach programs to homeless mentally ill people[28]

[28] *Mentally Ill Offenders and the Criminal Justice System – The Sentencing Project*, Washington Sentencing Project, January 2002, http://www.soros.org/initiatives/justice/articles_publications/publications/mi_offenders_20020101/mentallyill.pdf

Mental Illness Services

Tragically deinstitutionalisation, while supposed to uphold the rights of the mentally ill and comply with the UN Convention requirement of least restrictive treatment, has often resulted in further abuses of and discrimination against mentally ill people. A recent survey in Australia revealed that increased rates of inmates with schizophrenia since deinstitutionalisation paralleled by increased rates of imprisonment across the general population[29]. Now, instead of being locked up in asylums, it seems mentally ill people get to go to jail.

Professor of psychiatry Ian Hickie from *Beyondblue* writes:

> Research clearly indicates that the most effective protection for [mentally ill] people arises through earlier access to better treatment delivered in non-custodial environments by psychologists, psychiatrists and family doctors[30]

In spite of this, the Governments (as mental health is a combined State and Commonwealth responsibility) continue to overlook preventative programs and instead pour money into crisis-control[31], and consequently the mental health service sector is suffering.

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[29] P.E Mullen, P. Burgess & C Wallace, '*Community care and criminal offending in schizophrenia*', 2000, 614

[30] Ian Hickie. *Show the mentally ill open doors, not closed minds*, February 6, 2004, http://www.smh.com.au/articles/2004/02/05/1075853996803.html?from=storyrhs

[31] In *VCOSS calls on parties for alternatives to prison dollars*, Victorian Council of Social Services. 21 August 2002: Between the years of 2000 and 2001, the Victorian government spent $188.364 million on Victorian prisons compared to $69.528 million on mental health.

Community Mental Health Services

Case Study:

Mrs O has never before been engaged with a mental health treatment service or diagnosed as having a mental illness. However she has a long history with the criminal justice and prison system in Victoria, and has numerous prior convictions. Upon being charged with serious Drive Under the Influence (DUI) and Unlicensed Driving charges, she seeks advice from West Heidelberg Community Legal Service. She is interviewed by a student solicitor with no previous experience with mental illness or counselling. As the student solicitor takes down Mrs O's details and history, he perceives there may be some deep-seeded psychiatric issues and refers Mrs O to a community mental health service for assessment. A mental health worker eventually diagnoses Mrs O as having long standing mental health issues and an overseas background of experiencing violence and torture – all of which the procedures within the criminal justice system designed to identify mental illness have failed to detect. Mrs O receives treatment and makes significant progress. When it comes time for Mrs O to face her charges in court, the Legal Service asks the mental health worker to appear in court to testify to Mrs O's mental illness, her recent progress, and to advocate for an alternate order to imprisonment such as a Hospital Order. The mental health worker cannot attend court because he is 'too busy'[32]. Fortunately however, a psychiatric report has been obtained through funding by Victoria Legal Aid. In this case the woman received a suspended sentence and was linked into ongoing mental health support by the legal service and health centre.

As this case study illustrates, and our questionnaire responses confirm, community mental health services are:

- Face difficulty engaging all the mentally ill in our community in treatment and support services
- Are not engaging all people with mental health support issues in the community
- Due to high levels of demand are notalways able to provide quality service to the mentally ill

[32] Case Study from West Heidelberg Community Legal Centre

Engaging the Mentally Ill:

Several of the questionnaire respondents remarked that the mentally ill are often "not well engaged with treatment services". Indeed, in 1997 the National Survey of Mental Health and Well Being[33] found that 62% of people with a mental illness have never accessed health services and were either receiving no assistance or depending upon informal sources of support. Similarly, Professor Hickie's article reports that only half of the people who experience depression in our community now present for medical care

> Many of these people report that the main reason is stigma. They still fear being labelled as "mad" or "deranged" and being held against their will in a psychiatric institution[34].

Mental Health Service outreach programs designed to educate the community about mental illness, reduce stigmatisation, and win the trust of people with a mental illness may result in more people accesses the services available. However Mental Health Services are already overloaded and struggling to provide a quality service to their current customers and therefore increased funding is essential.

Recommendation 2:

- Increase funding to Mental Health Services so they can run more educational programs to reduce stigma associated with mental illness
- More outreach programs designed to win the trust of mentally ill people and engage them with services

[33] *National Survey of Mental Health and Well Being*, Australian Bureau of Statistics, 1997
[34] Ian Hickie, *Show the mentally ill open doors, not closed minds*, February 6, 2004, http://www.smh.com.au/articles/2004/02/05/1075853996803.html?from=storyrhs

Turning Away the Mentally Ill:

Many questionnaire respondents expressed a concern that mentally ill people are being turned away from mental health services because they also suffer from substance abuse. In Victoria, this is a major issue as:

- Around 64 per cent of psychiatric in-patients have a current or previous drug abuse problem[35]
- Around 75 per cent of people with alcohol and substance abuse problems have a mental illness[36]
- About 90 per cent of males with schizophrenia have a substance abuse problem[37]

Research suggests that people with concurrent mental illness and substance abuse disorders respond well to integrated dual diagnosis treatment. However the traditional division between mental illness and substance abuse treatments, coupled a general reluctance on the part of both service sectors to treat patients with complex dual treatment needs, has resulted in fragmented and inadequate service delivery to people with a dual diagnosis. Recently, Victoria has seen the advent of a number of dual diagnosis treatments centres, however these are centres are under-funded and still in short supply.

Recommendation 3:

- Establish more dual diagnosis treatment centers specifically in high risk areas eg JSS Report
- Increase funding to existing dual diagnosis treatment services
- Increase procedural efficiency in referrals to dual diagnosis services from single treatment services
- Single treatment services to be further educated and trained in the treatment of people with a dual diagnosis

[35] *Dual Diagnosis*, Better Health Channel, http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Dual_diagnosis?OpenDocument
[36] *Dual Diagnosis*, Better Health Channel, http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Dual_diagnosis?OpenDocument
[37] *Dual Diagnosis*, Better Health Channel, http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Dual_diagnosis?OpenDocument

The Quality of Mental Health Services:

Case Study:

Mr L has a mental illness. He experiences memory loss and social paralysis. He is linked into a community mental health service and has a mental health worker. Mr L is charged with a serious crime and released on bail. Due to behaviour associated with his mental illness, he breaches his bail conditions and a warrant is issued for his arrest. He seeks advise from a solicitor at West Heidelberg Community Legal Centre. The solicitor subsequently speaks with the police informant, he suggested that to avoid arrest, Mr L report to the police station in order to have new bail conditions granted - Mr L must convince the police he is deserving of revised bail condition, or he will be arrested on the spot. Mr L's solicitor asks Mr L's mental health worker to accompany him to the station and advocate on his behalf, as Mr L is irrational, inarticulate and easily confused. The mental health worker refuses to come because she has 'too much work'[38].

As this case study suggests, mental health services in Victoria are under-resourced,under-staffed, and have high case loads.

Recommendation 4:

- Establish more community mental health services
- Increase funding to existing community mental health services for more staff
- Reduce patient/client ratios

[38] Case Study from West Heidelberg Community Legal Service

Case Study:

Mr R has an escalating mental condition. He reports to his local hospital, informing them that he has a lethal weapon in his car and is afraid he may hurt someone. He is told by hospital staff that that 'at least he has insight into his problem' and therefore he will be okay. Mr R then turns to the police for help, and they charge him with the minor offence of possession of a weapon[39].

Under the Mental Health Act, admission centres must only admit patients if they are suicidal or homicidal. Therefore mentally ill people are often turned away because they are 'not sick enough'. Without proper treatment it is inevitable that some mentally ill people will deteriorate and eventually *become* suicidal or homicidal[40] - then of course, the next stop is the criminal justice system or emergency ward. And while word constraints prevent this report from examining in any real detail the nature of the hospital crisis in Victoria, it can be assumed that when hospitals are severely under-funded and under-staffed, there will be serious consequences for the mentally ill, as Mr R's case study illustrates. Indeed, nearly all the questionnaire respondents expressed *grave* concerns at the shortage of psychiatric beds.

Recommendation 5:

Increase funding to Victorian hospitals so that more forensic beds can be available to people suffering from mentally ill. The Commonwealth and State government should focus on improving the situation of the mentally ill instead of using funding arguments as a political football in the discussion.

- Re-evaluate the Mental Health Act provisions which allow for admission centres to refuse admission to the mentally ill who are not suicidal or homicidal
- Improve hospital assessment procedures so as to better identify and diagnose mental illness in admitted patients.

[39] Questionnaire Response May 2004

[40] *Long Road to Recovery: A Social Justice Statement on Mental Health* , St Vincent de Paul, July 2001, 12, http://www.vinnies.org.au/files/NSWACT.NSW.Long%20Road%20to%20recovery.PDF

Victoria's Criminal Justice System

In the absence of adequate services and facilities, Australian police are increasingly being relied upon for crisis management of the mentally ill. Ian Ball of the NSW Wales Police explains the difficulty;

> We have so limited a resource available to us but we have to do something with these people... Where do we take people? Where do we put people? How do we care for them in some real way so that they are not out in the streets? The reality is that people are getting charged with criminal offences where really we should be applying another section to take the opportunity to deal with psychiatric illness[41]

Victorian Police report similar problems and a lack (rural and regional areas) of community and mental health services (particularly dual diagnosis treatment services), difficulties in securing hospital admissions due a shortage of hospital beds, strict referral and diagnosis criteria[42] all combine to necessitate 'arrest by default'[43].

This situation is untenable. As one questionnaire respondent asked; "where is the 'just' in the criminal justice system' when people are going to jail for having a mental illness"[44]. The mental health support service sector requires urgent and significant reform. Another respondent summed it up perfectly; "more money, more resources, more beds, more staff".

The Mental Health Commission Association has recently stated:

> It is recognised that mental health reform is difficult - requiring years rather than months to occur - but the current inadequate pace of reform condemns disadvantaged and ill members of our community to more years of abuse, neglect and poor mental and physical health. It puts at great risk the well being of Australian families who will require mental health care services for the first time in future years[45].

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[41] Ian Ball, The Inquiry into Mental Health, Select Committee on Mental Health, 2002
[42] Susan Henderson, *Mental Illness and the Criminal Justice System*, Mental Health Co-ordinating Council, May 2003, http://www.mhcc.org.au/projects/Criminal_Justice/
[43] S Davis, Assessing the 'criminalisation' of the mentally ill in Canada, Canadian Journal of Psychiatry, 1992, 37, October, 533
[44] Response to questionnaire by a anonymous respondent, 2 June 2004
[45] Fact Sheet - Mental Health Reform - http://www.mhca.com.au/Public/FactSheets/MentalHealthReform.html

Recommendation 6:

- Increase funding to and develop community level interventions and community support initiatives[46].
- Further research and community education into current service crisis to the mentally ill Increase funding to community mental health services so they can be available and accessible to mentally ill people, and therefore reduce the likelihood that these people will come in contact with police and the criminal justice system[47]

[46] Mentally Ill Offenders and the Criminal Justice System - The Sentencing Project, January 2002, Washington: The Sentencing Project http://www.soros.org/initiatives/justice/articles_publications/publications/mi_offenders_20020101/mentallyill.pdf
[47] Mentally Ill Offenders and the Criminal Justice System – The Sentencing Project, January 2002, Washington: The Sentencing Project http://www.soros.org/initiatives/justice/articles_publications/publications/mi_offenders_20020101/mentallyill.pdf

Chapter Two: Mentally Ill Offenders in the Victorian Court System

By David Farrugia

Prologue

This chapter will focus on how mentally ill offenders are dealt with by the Victorian Court System. Specific issues relating to the stages of arrest, court and sentencing will be discussed and possible reforms to the system will be suggested.

Introduction

The prevalence of mentally ill offenders in the nation's prisons is an issue which demands further consideration from the legislature and the courts alike. Under s. 8 (1A) of the *Mental Health Act 1986 (Vic)*, a person is defined as mentally ill if they have a mental illness, 'being a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory'.

In the United States, it is estimated that 283,000 mentally ill offenders are incarcerated in the nation's prisons[48]. Many offenders are caught in a 'vicious cycle' of homelessness and drug abuse which keeps returning them to jail[49].

In Victoria, there are multiple issues which affect the well being of mentally ill offenders who deal with the court system. The most crucial of these issues are firstly, the identification of mental illness in offenders and secondly, a lack of appropriate funding to deal effectively with mentally ill offenders and keep them out of prison. These issues will be addressed throughout the chapter.

Arrest

For the first time offender, arrest is their entry into the court system. The offender is usually apprehended by police and taken back to the station for a formal interview. Debate has often

[48] Nami Maine, *Report on the current status of services for persons with mental illness in Maine's jails and prisons*, 23 March, 2004, http://nic.nami.org/jailreport.html

[49] Bryan Robson, *Justice for mentally ill group wants to end vicious circle that keeps returning mentally ill to jail*, 5 June, 2004, http://http360.edgc.ru4.com/smartserve

centred around the manner in which mentally ill offenders, violent offenders in particular, are apprehended and how well they understand their rights.

Police are now better trained on how to deal with mentally ill offenders[50]. Following public outrage over multiple fatal police shootings involving mentally ill offenders in 1994, a taskforce was established to implement procedures and training for police in identifying and apprehending mentally ill offenders[51].

The identification of mental illness in an offender becomes problematic when their symptoms are less obvious. This is illustrated by the plight of a client of the West Heidelberg Community Legal Service who we will refer to as Mr X. Mr X's representative attended the legal service seeking assistance in relation to numerous PERIN Court fines. The student lawyer involved had multiple telephone conversations with the Mr X however it was not until the student viewed the client's medical report that he became aware of the fact that Mr X had a brain acquired injury. A method by which identification by police of offenders who suffer from mental illness is essential to ensure that these offenders understand and are able to exercise their rights.

Crisis-assessment (CAT) teams are available to assess offenders in cells and at crime scenes at the request of police[52]. There is also the Independent Third Person (ITP) program established by the Office of the Public Advocate[53]. The role of an ITP is to assist people with a cognitive disability or a mental illness during an interview or when making a formal statement to police[54]. Police assess the need for an ITP through their own experience, observations of the person and general questioning; the accused, their friend or relative, or another person may also call for the presence of an ITP[55]. Once again, the issue with the use of CAT's and ITP's is one of identification. When the use of these valuable resources is left to police discretion, there will always be offenders who 'fall through the cracks'[56] (see recommendation one).

Another paramount issue at this stage of the court system is how well mentally ill offenders understand their rights. Section 464 of the *Crimes Act 1958 (Vic)* governs the cautioning and reading of rights to offenders generally, by police. However, neither the section nor the Act for that matter contains any provisions relating to the rights of mentally ill offenders. This was a key

[50] Questionnaire Response, 2 June, 2004
[51] Victor Perton, *Rights issues involving the Victoria Police*, 6 June, 2004, http://home.vicnet.net.au
[52] Questionnaire Response, 2 June, 2004
[53] Office of the Public Advocate - *The Independent Third Person Program*, 4 June, 2004, http://www.publicadvocate.vic.gov.au
[54] *Ibid*
[55] *Ibid*
[56] Questionnaire Response, 2 June, 2004

consideration in *R v Warrell (1993) 1 VR 671* where it was held that mentally ill offenders must be treated fairly. It was held further that if a mentally ill offender does not fully understand his or her rights then any confessions or admissions which follow may be inadmissible at the Judge's discretion.

Leaving such a critical issue to be governed by a vague common law principle may not be enough(fairness). It is probable that a precise legislative enactment detailing police procedures and the rights of mentally ill offenders would generate more certainty and reduce the possibility of such offenders not understanding their rights (see recommendation two).

Court

Formal settings and strict rules of evidence can make a court room a very daunting place for any offender, let alone an offender with a mental illness. Particularly in relation to summary offences, the issues facing mentally ill offenders in court are primarily, identification of their illness and an inability to understand court processes.

Offenders charged with serious indictable offences tried in the higher Courts will have some kind of legal representation. With the full attention of their private, legal-aid or pro bono lawyer, it is less likely that an offender's mental illness will go unnoticed. In stark contrast, offenders charged with less serious summary offences will often be represented by a duty lawyer or self-represent should they wish to contest the charge[57]. The real danger in these instances is that the court will not be able to identify the offender's mental illness and thus deal with the offender effectively.

There are several services available to the courts in relation to mentally ill offenders. The court's 'erratic' use of the services at hand is what ultimately limits their effectiveness[58]. Services available to the court include mental health liaison workers who can perform an in-court assessment of the offender and inform the court of suitable services[59]. There are also disability services officials and psychiatric nurses who can provide information relating to the assessment of offenders and provide referrals[60]. Forensicare reports can also be provided at the request of the court or the offender's legal representative[61].

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[57] Fitzroy Legal Service, *The Law Handbook - Your practical guide to the law in Victoria*, 2004 Ed, Aprint, Victoria, p. 26-27
[58] Questionnaire Response, 2 June, 2004
[59] *Ibid*
[60] *Ibid*
[61] *Ibid*

This state of affairs in not dissimilar to the situation with police and the use of CAT's and ITP's, ultimately the court has discretion as to whether or not to call on the services at its disposal. Once again, when such important matters are left to discretion, there will inevitably be mentally ill offenders who 'fall through the cracks' (see recommendation three).

The law has adjusted over time to accommodate for mentally ill offenders in relation to more serious offences. The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* was based on the decision in *R v Judge Martin; Ex parte Attorney-General (1997) VR 339*[62]. In that case it was held that 'an accused person cannot be put to his or her trial if, at the time of arraignment before the court he or she is, by reason of a mental disorder, unable to plead to the charge'[63].

This leads us to consider the defence of insanity often raised in serious criminal charges such as murder[64]. The test established in *R v M'Naghten (1843) 4 St Tr (ns) 847* still applies today in Victoria and NSW[65]. To establish a defence on the grounds of insanity, it must be clearly proven that: at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know, that he did not know what he was doing was wrong[66].

A NSW study into the defence of insanity generated several key recommendations. The study recommended that when a person was found not guilty on the grounds of insanity they should be put in immediate detention (presumably in an approved medical treatment centre) to treat their condition rather than simply being found not guilty and released[67]. Whilst the focus of this project is to keep mentally ill offenders out of jail, an important aspect of this premise is the treatment of mentally ill offenders to ensure that they don't re-offend. Simply releasing an offender who has been found not guilty on the grounds of insanity does not meet this end. On these grounds we support this recommendation from the NSW study (see recommendations). It is noted that in June 2004 a County Court judge expressed concern when the person found not guilty on the basis of a mental impairment of the Monash university shootings had to be placed in the Melbourne Assessment Prison as there were no beds at the Thomas Embling Centre

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[62] L Waller & CR Williams, *Criminal Law – Text and Cases*, 9th Ed, Butterworths, Australia, 2001, p. 809-812
[63] *Ibid*
[64] Lawlink NSW, *The defence of mental illness*, 4 June, 2004, http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R80CHP6
[65] *Ibid*
[66] *Ibid*
[67] *Ibid*

Mentally ill offenders also have difficulty understanding court processes. The courts are, by nature, a fact-finding body. As such there are strict rules relating to conduct and the admissibility of evidence. Mentally ill offenders, especially those of diminished intellect, are simply unable to function in such a formal and strenuous environment.

In response to these concerns, a common suggestion has been the implementation of a Mental Health Court. Such a court has been set up in South Australia to apply the principles of 'therapeutic jurisprudence'[68]. The aim is to address the health issues which lead to criminal behaviour rather than simply making a finding of guilty or not guilt[69]. Public Advocate Julian Gardner has stated that therapeutic courts (such as a Mental Health Court) are not a cure-all, but should definitely be considered by the Bracks government[70] (see recommendations). This option is discussed in detail in Part two of this Report.

Note that Part B of this project is dedicated solely to a proposed Mental Health Court in Victoria and should be consulted for a more detailed analysis of the matter.

Sentencing

The issue of sentencing lies at the heart of the focus of this Report: is jail really the answer for mentally ill offenders? Research has shown that prisons are often inappropriately used as a means of managing offenders with a disability and, once inside, those offenders are regularly the targets of assault, exploitation, extortion and sexual abuse[71]. It has also been found that prison conditions are particularly detrimental to inmates affected by a mental illness or mental disorder[72]. A further issue has been identified in the lack of support services for mentally ill patients released from prison which has often led to these people re-offending[73]. (See Chapter One of this Report) These findings support the conclusion that prison is not the answer for mentally ill offenders. But what are the alternatives?

One participant in our research offered the following explanation, '...reforms provide a window dressing for inadequate funding...we don't need to reform the system so much as fund it properly and that means more beds and more treatment options'[74]. The issue of funding is paramount to

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[68] Damien Carrick, *Mental health and the law*, 5 March, 2004, http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s259679.htm
[69] *Ibid*
[70] Fergus Shiel, *Call for court for mentally impaired*, The Age, 15 March, 2004, p. 7
[71] *Ibid*
[72] Brian Burdekin, *National inquiry into the human rights of people with mental illness*, 7 April, 2004. http://www.hreoc.gov.au/disability_rights/speeches/mhi93.htm
[73] *Ibid*
[74] Questionnaire Response, 2 June, 2004

making alternatives to jail available. The system does provide alternatives to jail but these alternatives are plagued by a distinct lack of resources.

There are primary alternatives to jail which the court may impose. The most basic order is a diversion order under Victoria's Criminal Justice Diversion Program[75]. The charges in a given case are adjourned whilst a diversion is undertaken. Once the diversion is completed, the charges are dropped. Diversion orders are often implemented in cases which involve drug / alcohol abuse and the diversion is often by way of a treatment program. According to the program manager of community development and counselling services at the Banyule Community Health Service, the instances of 'dual diagnosis', mentally ill offenders with a drug / alcohol disorder, are highly common. It follows that diversion orders are highly appropriate, particularly for the first time offender.

For the more serious or repeat offender, there are a number of alternatives available under both the *Mental Health Act 1986 (Vic)* and the *Sentencing Act 1991 (Vic)*. These alternatives include hospital orders, restricted community treatment orders, hospital security orders and orders for the transfer of patients.

Hospital orders can be made under s. 93(1) of the *Sentencing Act 1991 (Vic)*. Where a person has been found guilty of an offence and the court is satisfied that the person is mentally ill and can be treated in an approved mental health service, the court can order that the person be admitted and detained as an involuntary patient. A mentally ill offender may be detained as an involuntary patient to prevent a deterioration in the person's physical or mental condition or for the protection of members of the public under s. 8(1) of the *Mental Health Act 1986 (Vic)*.

Restricted community treatment orders can be ordered under s. 15A of the *Mental Health Act 1986 (Vic)*. Where an offender has been placed on a hospital order under s. 93(1) of the *Sentencing Act 1991 (Vic)*, he may then be placed on a restricted community treatment order with the consent of the chief psychiatrist. A restricted community treatment order requires the offender to attend a psychiatrist at regular intervals. The benefit of such an order is that the offender is not kept as a detainee.

Hospital security orders, much like hospital orders, can be ordered under s. 93(1) of the *Sentencing Act 1991 (Vic)*. Under hospital security orders, the offender is detained in an approved mental health service as a security patient rather than an involuntary patient. Under s. 93(2) of the

[75] *Ibid*

Sentencing Act 1991 (Vic), an offender cannot be detained as a security patient unless, but for the mental illness of the person, the court would have ordered a term of imprisonment.

It is also of note that the secretary to the Department of Justice may, through a hospital order, transfer a person who is lawfully imprisoned but appears to be mentally ill under s. 16 of the *Mental Health Act 1986 (Vic)*.

The courts do have multiple alternatives to jail for mentally ill offenders at their disposal. It is clear however that these resources are 'desperately under resourced'[76]. To illustrate this point, consider the Thomas Embling Hospital, an inpatient service provided by Forensicare. Thomas Embling is one of few establishments in Victoria seen as an 'approved mental health service', yet it has just 100 beds, approximately 15 beds in each of its programs ranging from acute care to continuing care[77]. If we accept that approximately 20% of Victorian prisoners have a mental illness, this is a glaring illustration of the lack of resources facing those who provide care and treatment to the mentally ill. If there are no beds for the courts to send mentally ill offenders to, these offenders will end up in prison.

Whilst it is easy enough to say that the government must commit increased funding to correct the situation, the reality is that other areas such as general health and education are also competing for funds and may be seen as more important than beds for the mentally ill. It has been suggested that at the very least, the government needs to 'increase funding for mental health services to achieve a fairer divide between overall health funding and mental health funding'[78] (see recommendations).

Leaving the issue of funding, there has also been a call for changes to s. 93 of the *Sentencing Act 1991 (Vic)*. A discussion paper by the Mental Health Branch of the Department of Human Services has suggested several specific changes to the section[79]. The key proposals are as follows[80]:

a) permit the court to make an order for involuntary community treatment without requiring the person to be admitted to an inpatient service
b) give courts greater guidance concerning the matters to be considered prior to making orders
c) clarify the criteria under which orders should be made and revoked
d) clarify the issues concerning granting of parole from an inpatient mental health service

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[76] Questionnaire Response, 2 June, 2004
[77] Thomas Embling Hospital, *Inpatient Services*, 8 June 2004, http://www.forensicare.vic.gov.au/website.nsf/web/InpatientServices.html
[78] Questionnaire Response, 2 June, 2004
[79] Mental Health Branch, Department of Human Services Discussion Paper, Treatment and care of mentally ill offenders pursuant to Part 5 of the Sentencing Act 1991 and Part 3-4 of the Mental Health Act 1986, December 2003, Melbourne, Victoria
[80] *Ibid*

Citing the distinct lack of beds discussed above, allowing the court to make an involuntary community treatment order (restricted community treatment order) without having to first be admitted to an inpatient service (under a hospital order) deserves discussion but it is acknowledged that these proposals are themselves problematic.

The other proposals would also be beneficial as they would eliminate some uncertainty relating to s. 93 of the *Sentencing Act 1991 (Vic)* and allow the approved mental health services to establish more effective working procedures (see recommendations).

Conclusion

The prevalence of mentally ill offenders in Victoria's jails is clearly an issue for the Victorian government and the Courts. There are a multitude of issues which affect the well-being of mentally ill offenders as they progress through the court system: from arrest / interview to trial to sentencing.

The aim of this chapter has been to focus on how mentally ill offenders are dealt with by the court system and suggest possible reforms. The recommendations which follow were formulated to be realistic and achievable.

They seek to address the primary issues which face mentally ill offenders, firstly, difficulties with the identification of an offender's mental illness and, secondly, a distinct lack of funding which has seen these offenders end up in jail where the preferable alternative was treatment in an approved mental health service.

Recommendations

Recommendation 7

The introduction of a more careful screening for all offenders before police questioning can commence. Removing police discretion in relation to the subsequent use of CAT's and ITP's will prevent mentally ill offenders from falling through the cracks.

Recommendation 8

The enactment of legislation detailing police procedures and the rights of mentally ill offenders when dealing with police, thus codifying the vague common law principle of fairness established in *R v Warrell (1993) 1 VR 671.*

Recommendation 9

The enactment of legislation requiring that the courts call upon their Mental Health Liaison Worker or Forensicare reports when trying an offender identified as having a mental illness in recommendation one.

Recommendation 10

The enactment of legislation which commits all offenders found not guilty of an offence on the grounds of insanity to a period of detention in an approved mental health service to treat their medical condition.

Recommendation 11

The establishment of a mental health court to deal with all summary offences committed by offenders with a mental illness as identified in recommendation one (refer to Part B of project).

Recommendation 12

The increase of funding for mental health services to achieve a fairer divide between overall health funding and mental health funding. This will result in more beds being available to mentally ill offenders in need of treatment and less of these offenders having to endure a jail term.

Recommendation 13

The addressing of shortages of beds for persons deemed not guilty by reason of mental impairment

Chapter Three: The Mentally Ill and Imprisonment

By Benjamin Egan

Prologue

This chapter seeks to explore the relationship between those affected by mental illness and imprisonment. Focus will be given to the effects of imprisonment on mentally prisoners, the services that are available to these prisoners whilst in jail, and those available after they are released back into the community.

Introduction

Mental Illness is a growing problem facing not only citizens of Australia but the world at large. "Mental Illness is an umbrella term that refers to many different illnesses that affect the mind"[81] Research has shown that around one in five Australians will experience some form of mental illness at some stage in their lives, ranging from mild, moderate or severe conditions. In particular there is a growing trend that a high percentage of those currently within the criminal justice systems of Australia, are suffering from a form of mental illness. "People with severe mental illness are more likely to be convicted of misdemeanours than their mentally healthy counterparts, and are incarcerated for longer periods of time."[82]

Link between Mental Illness and Incarceration

The criminal justice system has experienced substantial growth in incarcerations in recent years. In August 2001, Victorian Jails housed 2,858 inmates yet as of 3 July 2003 that figure had climbed to 3,793.[83] With these figures showing no signs of abating, now more than ever it is imperative that the Victoria criminal justice system reviews its policy and program developments within health, community and corrective services to ensure that it has an increased focus on providing improved forensic mental health services.

Studies have shown that "the relationship between mental disorder and crime is a fundamental one to be explored, to identify causes and effect and to develop appropriate policies and services

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[81] Department of Human Services, Forensic Mental Health (2001), Better Health Channel <http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/p> at 19 May 2004

[82] Lamberti, J.S., Weisman, R.L., Schwarzkopf, S.B., Price, N., Ashton, R.M., Trompeter, J. 'The mentally ill in jails and prisons: towards an integrated model of prevention' (2001) p64

[83] Richard Dalla -Riva, 'Portables Just Don't Stack Up to Overcrowded Jails' (2003) <www.richarddalla-riva.com/press_releases/cor-archieved.html> at 28 July 2003

accordingly."[84] A study of 500 psychiatric patients found only a 4 % lifetime crime prevalence, indicating that there is "no inherent link between mental illness and crime", yet there remains a "strong causal link between mental illness and incarceration"[85] A study conducted in 2003 found that "lifetime arrest rates for people with a mental illness range from 42-50%"[86].

A study conducted by a Mental Health Organisation listed the following as being reasons why, people with mental illnesses are over represented in jails:

- The lack of resources allocated to support the closing of psychiatric institutions, which lead to high risk factors for offending, such as homelessness, unemployment and poverty
- The courts magistrate or judge having limited options, even though many people in custody with a mental illness are charged only with summary offences or relatively minor crimes
- Inadequate funding of community mental health services and an absence of designated facilities within the justice system lead to judges recommendations for treatment not being implemented
- A zero tolerance approach to drug crimes automatically brings people with dual diagnosis within the criminal justice system[87]

Dual Diagnosis

A review which took place in 1993, examined the clinical associations between mental illness and crime. The study sought to discover the existence of another variable or variables that may have an association with both mental illness and imprisonment other than crime. It was found that "people with a mental illness are at a higher than average risk of offending, not because of mental illness per se, but because of the higher than average prevalence of substance abuse in this population."[88] A later study conducted in 2001 of people with a mental illness in prison showed that "86% of the sample had a history of substance abuse and 76% had an active substance abuse on arrest."[89] Strikingly, two thirds of the sample's crimes were related to their substance use, usually non-violent. These rates of substance abuse disorder far exceed those for people within the general

[84] Henderson, A.S. 'An Introduction to Social Psychiatry", New York: Oxford University Press (1988) p122
[85] Gunn, J., 'Psychiatric Aspects of Imprisonment, London: Academic Press (1978)
[86] Mental Health Co-ordinating Council (MHCC) (2000) Fact Sheet 7: 'Mental Health Issues and Substance Abuse' <http://www.mhcc.org/factsheet/factsheet7.htm> at 19 May 2004

[87] Mental Health Co-ordinating Council (MHCC) (2000) Fact Sheet 7: 'Mental Health Issues and Substance Abuse' <http://www.mhcc.org/factsheet/factsheet7.htm> at 19 May 2004
[88] Hodgins, S. (ed) 'Mental Disorder and Crime, London, Sage (1993)
[89] Munetz, M.R., Grande, T.P., Chambers, M.R., 'The incarceration of individuals with severe mental disorders', Community Mental Health Journal, 37(4): pp361-371

population; "for schizophrenics, a form of psychotic illness, the odds of substance abuse are 4.6 times higher than those in the general population not suffering from the mental illness."[90]

More often than not, mental illness and substance abuse go hand in hand. "Fragmentation of mental health services and the accompanying risk factors of mental illness - poverty, poor education, unemployment, poor social skills and family support"[91], often lead the mentally ill to situations of increased exposure to psychoactive substances. Further evidence suggests that "among people with severe mental illness, substance abuse correlates with increased rates of violence and suicide, homelessness, criminality, imprisonment, and increased rates of relapse and hospitalisation."[92] Factored together, it creates a vicious cycle that is hard to escape. Given that the effects of mental illness often lead those affected towards substance abuse, without the requisite treatment at an early stage, criminality appears to be a mere formality.

Multiply disabled, people with a dual diagnosis are perhaps the most problematic of all mentally ill people given that reports show that "there is a reduction in the effectiveness of medication, heightened sides effects of medication, increased behavioural problems and potential reduction in the accuracy of diagnoses."[93] This presents perhaps the greatest challenge to the criminal justice system and correction facilities, due to the segmented nature of the current services and the implications of dual diagnosed peoples' illness for receptiveness to treatment.

People with dual disorders face many clinical barriers which prevent them from having access, assessment and best practice treatment from the services and programs that do exist. A 2001 study noted some of the issues for the treatment of the dual diagnosed. The concerns were characterised by limited services and inflexible eligibility criteria but included:

- Both Mental health services and alcohol and drug services present exclusive models of care, seeing themselves as operating independently
- Each service group knows little about the role and practices of the other
- Mental health services and alcohol and drug services are designed to treat single disorders

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[90] Dixon, L., 'Dual Diagnosis of substance abuse in schizophrenia: prevalence and impact on outcomes', Schizophrenia Research (1999), pS94

[91] Drake, R.E. and Mueser, K.T., 'Psychosocial approaches to dual diagnosis'(2000), Schizophrenia Bulletin,26(1), p106

[92] Jeffery, D., Ley, A., Bennun, I., McLaren, S., 'Delphi survey of opinion on interventions, service principles and service organisation for severe mental illness and substance use problems', Journal of Mental Health, (2000), p1

[93] Mental Health Co-ordinating Council (MHCC) (2000) Fact Sheet 7: 'Mental Health Issues and Substance Abuse' <http://www.mhcc.org/factsheet/factsheet7.htm> at 19 May 2004

- GP's and medical professionals have little understanding of, training or expertise in treating and managing dual disorders
- Information exchange mechanisms between services are extremely poor
- Assessment tools to full explore physical, mental and substance use issues are inconsistent, incomprehensive and infrequent.[94]

Even where treatment services are accessed, substance use may result in social or psychological problems. Diagnosis and treatment of dual disorders are often extremely complicated and both are clinically difficult given that "psychoactive substances often exacerbate the symptoms of mental illness and, indeed, can mimic almost any psychiatric symptom."[95] Combined with incarceration, a dual disorder may often go untreated as the current prisons in Victoria often lack the requisite specialised services need to detect both illnesses.

Effect of Imprisonment on Mentally Ill Prisoners

In many cases, mental illness can be effectively treated. Many people are able to recover fully, when and if early diagnosis and treatment occurs. "A mental illness is like many physical illnesses which require on-going treatment, but which can be managed so that the individual can participate in everyday life."[96] In some cases mental illness can come and go in people's lives. Some people suffering from a mental illness have only one episode and completely recover. For others, it recurs throughout their lives and requires on-going treatment. Whilst affected by a mental illness, without the appropriate treatment, many people do suffer a great deal. Mentally ill people can often be frightened and disturbed by their illness and "stress may trigger some mental illnesses or may prolong episodes."[97] Disturbingly "once the mentally ill are within the criminal justice system, their condition may deteriorate as a result of inadequate treatment and because the circumstances of life behind bars are likely to exacerbate their condition."[98] The correctional culture and the physical realities of prisons are rarely conducive to therapy. The trauma of prison life may result in the worsening of a mental illness, due to their separation from their usual support systems, and also due to the hostility in jails. The overcrowding that is distinctive of prisons today often leads to "greater levels of violence, a lack of privacy, excessive noise, and other stressful conditions that are hard on

[94] Welch, and Mooney, 'Managing services that manage people with a coexisting mental health and substance use disorder', Australasian Psychiatry, (2001), p345
[95] Drake, R.E., Osher, F.C., Bartels, S.J, 'The dually diagnosed', In Breakey, William R (ed.) Integrated Mental Health Services: modern community psychiatry, New York: Oxford University Press, (1996), p344
[96] Victoria's Mental Health Services, Mental Illness: The Facts (2004)
<www.health.vic.gov.au/mentalhealth/illnesses/facts.htm> at 19 May 2004
[97] Victoria's Mental Health Services, Mental Illness: The Facts (2004)
<www.health.vic.gov.au/mentalhealth/illnesses/facts.htm> at 19 May 2004
[98] Mentally Ill Offenders and the Criminal Justice System - The Sentencing Project, (2002)
<http://www.soros.org/initiatives/justice/articels_publications/publications/mi_offenders>

everyone but particularly those subject to emotional and psychiatric problems."[99] These factors make the treatment of mental illness and problematic drug use very difficult.

The use of 'Dry' cells to prevent suicide can further traumatise the prisoner and exacerbate their illness. This approach often "results in increased rates of suicide and self harm attempts and inmates with mental illness becoming victims of violence."[100] While placing potentially suicidal prisoners in 'Dry' cells; (stripped of furniture, clear of hanging points and under constant inspection by prison staff), may be a low cost, effective suicide prevention strategy, it would no doubt remain "unacceptable to a mental health professional concerned with the state of mind and long term mental health of their patient."[101] A respondent to a recent survey of health professionals also stated that prisons "cause psychiatric problems to deteriorate and mentally ill offenders are often better off being treated than looked up in terms of addressing their risk to the community."[102] The act of locking someone up doesn't treat them for their depression or psychosis. Few, if any, people affected by a mental illness thrive in institutionalisation.

Unfortunately, jail is often one of the few places that mentally ill people who have been unable to be adequately treated by mental health services, due to itinerancy, evasion, or ongoing drug abuse, can finally be properly assessed and treated. "Prison is stressful and exacerbates the mental illness. Lack of rehabilitation leads to greater negative symptoms and psycho-social deficits"[103] It could be questioned whether imprisonment is the most effective method of treatment for offenders with a mental illness. A respondent to a recent survey of health professionals suggested that "mentally ill offenders should be able to serve their incarceration time in a hospital facility such as the *Thomas Embling Hospital.*"[104]

The Mental Health Status of Prison Populations (Aus)		
	Female Prisoners	***Male Prisoners***
Have attempted Suicide	39%	21%
On Psychiatric Medication	23%	12%

[99] Mentally Ill Offenders and the Criminal Justice System - The Sentencing Project, (2002) <http://www.soros.org/initiatives/justice/articels_publications/publications/mi_offenders>
[100] Mental Health Co-ordinating Council: 'Mental Health Issues and Substance Abuse' <www.mhcc.org.au/factsheets/factsheet1_Criminal_justice.htm> at 19 May 2004
[101] Bell, D., 'Ethical Issues in the Prevention of Suicide, Australian and New Zealand Journals of Psychiatry, (1999)
[102] Response to questionnaire by a mental health profession, 2 June 2004
[103] Washington, M., The Virginian-Pilot: 'Mentally Ill have Options in Norfolk's New Court', December 29, 2003
[104] Response to questionnaire by a mental health profession, 2 June 2004

Prior admissions to psychiatric / mental health units	73%	–
Have a pre-imprisonment psychiatric diagnosis	26%	12%
Have been in contact with mental health services in the 12 months prior to incarceration	50%+	30%
Have been assessed for emotional and psychological problems	–	33%
60% of admissions to prison have an active mental illness. In 2002, it was found that 85% of inmates received into correctional centres and 70% of sentenced inmates had a psychotic, mood, anxiety, substance use or personality disorder or combination of these disorders.[105]		

Many mentally disordered defendants have been arrested for summary offence or minor crimes. "Of the total prison population in NSW, 60% of female and 44% of male prisoners convicted for a minor crime were diagnosed with a mental disorder, including psychosis, anxiety and affective disorder"[106] Prison diversion programs have been proposed as a means of "providing more quality mental health services to people with a mental illness"[107] thereby overcoming the questionable justice of incarcerating people with a mental illness who have committed only minor offences. In many instances when mentally ill offenders leave jail or prison, if no appropriate arrangements are made for treatment and services on the outside, "they are likely to return to the lifestyle and disruptive behaviour that brought them into the system in the first place and the cycle will be repeated."[108] Whist the statistics do apply to NSW similar proportions may exist in the Victorian correctional system would exist. The case study below clearly demonstrates the lack of formal pre-release training and the crucial need for policy review and possible law reform for mentally ill prisoners.

Case Study:

'He was a country boy, he had mental illness, and he got caught in a small country town, doing a lot of crime and everything and was put into Long Bay. He'd been in there two and a half years and

[105] Mental Health Co-ordinating Council: 'Mental Health Issues and Substance Abuse' <www.mhcc.org.au/factsheets/factsheet1_Criminal_justice.htm> at 19 May 2004
[106] NSW Corrections Health Service (2002) Inmate Health Survey. NSW Health Department publication
[107] Greenberg, D. and Nielson, B. 'Court diversion in NSW for people with mental health problems and disorders', NSW Public Health Bulletin, 13(7) July 2002; NSW Health; (2002) State Health Publication PH020116
[108] Mentally Ill Offenders and the Criminal Justice System - The Sentencing Project, (2002) <http://www.soros.org/initiatives/justice/articels_publications/publications/mi_offenders>

when it came time for his release, they just let him out. They didn't help him with his money, with his social security; they didn't find him anywhere to go. They just let him out and he didn't know anything about Sydney. So he ended up in the lane; he doesn't talk to anybody, he's not on medication because they've let him out of jail without any medication. So he just sits there until somebody finally says "mate, what're you doing?" He's quite disjointed by that time because he's been on no medication. So we find out he's been in Long Bay, we get him to the clinic, we get his records sent. He's back in jail now too...' Hostel Worker, 'Department of Lost Voices', Radio Eye, ABC Radio National, Saturday 19 October 2002

Mental Health Services in Prison

It has already been shown that prisons are inundated with large numbers of mentally disordered and intellectually disabled men and women. "The provision of mental health services to these people is a challenge."[109] The transferring of acutely ill prisoners who require inpatient psychiatric care from prison to hospital is only part of the problem faced by the current correctional system. "The greater task is the provision of treatment within the prisons to those who on the outside would be candidates for outpatient and community care."[110] The use of the compulsory powers of mental health legislation to compel prisoners to accept treatment has rightly been outlawed in most Australian jurisdictions, given "the ease with which powers of compulsory treatment can, and have been, misused in prison environments."[111] While the lack of such compulsory powers is necessary to protect basic human rights, it means that mental health treatment must be by consent, possibly to an even greater extent than in the outside community. Herein the problem lies. Mental disorders and intellectual limitations may be viewed by correctional staff and prisoners alike as a sign of vulnerability. "Those who do seek mental health treatment are at risk of being seen by staff as attempting to evade the rigours of prison, and by fellow prisoners as weak and unacceptably alien."[112] The stigma attached to those with a mental illness, clearly highlights the need to address discrimination and to educate those within the correction facilities so as to overcome the attitudes based on misconceptions.

Following a change to Victoria's Mental Health Act, *Forensicare* was established as a dedicated statutory agency for the provision of forensic mental health services. In addition to its services role,

[109] Metzner, J.L., 'Guidelines for psychiatric services in prisons', Criminal Behaviour and Mental Health, (1993)
[110] Mullen, P.E., Burgess, P., Wallace, C., Palmer, S., Ruschena, D., 'Community Care and Criminal Offending in Schizophrenia, The Lancet, (2000)
[111] Mullen, P.E., Burgess, P., Wallace, C., Palmer, S., Ruschena, D., 'Community Care and Criminal Offending in Schizophrenia, The Lancet, (2000)
[112] Mullen, P.E., Burgess, P., Wallace, C., Palmer, S., Ruschena, D., 'Community Care and Criminal Offending in Schizophrenia, The Lancet, (2000)

Forensicare has also developed a research emphasis that attracts international attention for its work in both understanding and treating people with mental disorders and criminal behaviour. Forensicare receives referrals from the courts, general mental health services, police prisons and justice agencies. Its clients include:

- Prisoners with serious mental illness requiring secure inpatient hospital treatment
- Alleged offenders detained as being unfit to plead or not plead guilty by virtue of mental impairment
- Prisoners with mental illness requiring specialist psychiatric assessment and/or treatment in prison
- Offenders or alleged offenders with a serious mental illness ordered by courts to be detained as a psychiatric inpatient in a secure forensic facility
- Selected high-risk offenders referred by releasing authorities
- People with serious mental health illness in mainstream mental health services who are a danger to their carers or the community (Forensicare, 2002)

The delivery of mental health services in prisons is a "demanding and challenging field, due in part to the high throughput of prisoners. In addition, prisoners frequently come from social groups that are disadvantaged in the community in terms of health and mental health care."[113] Forensicare provides specialist mental care to prisoners at the Melbourne Assessment Prison and other prisons managed by the public correctional provider, CORE - the Public Correctional Enterprise

Melbourne Assessment Prison - Forensicare provides a 24 hours a day, seven-days a week mental health service at the Melbourne Assessment Prison which incorporates; a reception assessment, acute assessment unit, outpatient services and an after hours crisis intervention service.

While noting that Melbourne Assessment Prison is not the only Victorian prison providing specialised services for prisoners suffering from mental illness, it provides a feasible law reform model which all prisons should categorically incorporate into their current operations.

Reception Assessment - All newly received prisoners to the Melbourne Assessment Prison are medically assessed by a medical professional. If the relevant prisoner is thought to suffer from a

[113] Forensicare, The Victorian Government, Prison Mental Health Service, <http://www.forensicare.vic.gov.au/website.nsf> at 6 May 2004

mental disorder or it is believed that they would be at risk within the prison, the medical staff refer prisoners to a mental health nurse for further assessment.

Prisoners are automatically referred to the mental health nurse for assessment on reception if they:

- Have an identified history of mental illness
- Have a demonstrated history of suicidal behaviour or intent in the past two years
- Express suicidal ideation or recent self harm behaviour
- Are aged seventeen years or younger
- Have attracted a significant amount of media attention
- Have been imprisoned solely on charges which relate to domestic violence and/ or are brought under the Family Law Act or which relate to a breach of an intervention order
- Have been referred by the medical practitioner or assessment staff[114]

Acute Assessment Unit - The Acute Assessment Unit is a 15-bed short stay assessment unit for male prisoners thought to be mentally ill and or at risk. Referrals are made from the Reception Assessment Program and other male prisons in Victoria (both public and privately), although prisoner participation in the assessment and treatment within the unit is voluntary. The unit is employs multi-disciplinary staff who provide mentally ill prisoners with psychiatric assessments, therapies, interventions and support.

Referrals to the unit generally consist of:

- Acutely disturbed/suicidal prisoners who need close observation
- Prisoners who are thought to suffer from a psychiatric illness and who need assessment and early treatment
- Prisoners requiring psychiatric assessment for releasing authorities or acute placement in the mental health or prison system[115]

It must be noted that while the Acute Assessment Unit is able to provide an appropriate environment for the early treatment of mentally ill offenders, the unit does not provide long-term care and treatment. For mentally ill prisoners requiring extended treatment, some prisoners are transferred to the *Thomas Embling Hospital*, while others are placed within the prison system. Furthermore, the Unit only has 15 beds available, even for mentally ill prisoners requiring a short

[114] Forensicare, The Victorian Government, Prison Mental Health Service, <http://www.forensicare.vic.gov.au/website.nsf> at 6 May 2004
[115] Forensicare, The Victorian Government, Prison Mental Health Service, <http://www.forensicare.vic.gov.au/website.nsf> at 6 May 2004

stay assessment. One respondent to a survey stated that "the Acute Assessment Unit at the Melbourne Assessment Prison was not well structured for acute treatment due to its lack of beds."[116] The obvious solution to this shortage is an increase in funding and resources, so that the unit may adequately provide treatment for the 31% of prisoners suffering from a mental illness.

Outpatient Services - A review and monitoring service is provided by psychiatric nursing and medical staff, generally for prisoners identified during the reception process as requiring outpatient assistance.

Once again, although this service is in existence, its operation if flawed by the lack of available beds currently within the correctional system in Victoria. Mentally ill prisoners requiring extended treatment are transferred to the *Thomas Embling Hospital*, while others are placed within the prison system. This shows a clear lack of resources, in that prisons do not facilitate services for extended treatment of mentally ill inmates.

After Hours Crisis Intervention - Psychiatric nurses, supported by an on call medical officer and psychiatrist, provide a seven-day-a-week after hour's crisis intervention service throughout the prison. This service assists prison staff in the management of difficult situations and behavioural problems thought to warrant further assessment and psychiatric attention.

Thomas Embling Hospital - The Thomas Embling Hospital is a 100-bed secure hospital, primarily for patients from the criminal justice system who are in need of psychiatric assessment and or treatment. Although undeniably a secure facility, care has been taken to minimise the impact that the security has on patient care and treatment.

Given that patients generally consist of people detained by virtue of mental impairment, remanded and sentenced prisoners with serious mental illness in need or inpatient treatment, "there is sometimes limited capacity to provide short-term admissions for patients from the general mental health system who are assessed as requiring specialised services from forensic mental health."[117] Once mentally ill patients are released back into the community, even those assessed as requiring specialised services may find it difficult to gain short-term treatment. Whilst currently lacking the appropriate resources, secure facilities such as the Thomas Embling Hospital remain a realistic alternative for housing mentally ill offenders for the duration of their incarceration time.

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[116] Response to Questionnaire June 2004
[117] Forensicare, The Victorian Government, Prison Mental Health Service, <http://www.forensicare.vic.gov.au/website.nsf> at 6 May 2004

"Separation and seclusion are all to often the response of correctional systems to troublesome prisoners, irrespective of whether those difficulties stem from bloody mindedness, distress, mental disorder or even suicidal and self damaging behaviours."[118] Mental illness is it punishable or is it best served by medical intervention?

Release from Jail Services for Mentally Ill Prisoners

In Victoria there is little evidence of a "systematic, planned approach to transitional support services such as housing. Instead specific initiatives are formulated and implemented locally without any cohesion or broader framework"[119] This is highlighted in a report conducted in 2001 which noted that there was no procedure for most prisoners who are released to freedom, other than for parolees. "That is, no one in the correctional system is responsible for assisting prisoners with their housing"[120] A system of note that could be implemented by the Victorian correctional system is that which currently operates in Western Australia. An emphasis is placed on the provision of appropriate care according to the individuals needs, both within the prison and hospital settings as well as in the community. The 30-bed Frankston Centre provides inpatient care and treatment for patients transferred from prison and those not guilty by reason of insanity or unfitness to plead. Furthermore, "offenders with a mental illness nearing the end of their sentence are transferred from prison to hospital under a discharge program that sees their follow-up within the community planned and put into place before their release."[121]

The current system in Victoria is clearly not operating as effectively as some successful forensic psychiatric services around the world. A comprehensive forensic psychiatric service is required in the current Victorian system that includes ongoing support on release through community forensic services. There is little provision of rehabilitation for re-entry into the community. Few release plans are developed with prisoners for their accommodation, employment, welfare or continuing treatment after release although in recent times the Victorian government has increased post release services these are still not enough. In model programs that exist such as the New York State's

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[118] Mullen, P.E., Burgess, P., Wallace, C., Palmer, S., Ruschena, D., 'Community Care and Criminal Offending in Schizophrenia, The Lancet, (2000)

[119] Report on Pre and Post-Release Housing Services for Prisoners in NSW <http://www.communityhousing.org.au/training%20&%20resourcing/Publications/Reports_Fed/full%20reports/prisoners%20report.pdf>

[120] Victorian Homelessness Strategy (VHS) Outcomes Paper on Representatives of Prison Providers and Sentence management, (2001)

[121] Mental Health Co-ordinating Council: 'Mental Health Issues and Substance Abuse' <www.mhcc.org.au/factsheets/factsheet1_Criminal_justice.htm> at 19 May 2004

Project Link, "case advocates link clients to existing health and welfare services, expert practioners to provide mobile treatment, and residential rehabilitation for dually diagnosed individuals"[122]

The symptoms of a mental disorder will often compromise even a person living in the general community, ability to cope with the basic requirements of everyday life. "An Australian Institute of Health and Welfare's report showed that 5% of people seeking crisis accommodation had been in institutional care directly before their housing crisis."[123] Whilst programs offering services such as advocacy, transport and living assistance do exist to those suffering from mental illness in Victoria, they tend to occur in response to a crisis. Moreover they are ill designed and equipped with the necessary resources to provide the continued care and assistance that many mentally ill sufferers require.

The Community Forensic Mental Health Service - is responsible for the provision of Forensicare's community programs. They operate in conjunction with a number of organisations dealing with high risk individuals. The programs are designed to receive refers from the police, court, parole board, Thomas Embling Hospital, Melbourne Assessment Prison, mainstream mental health services, private psychiatrists and general practitioners.

Services are provided to the following high risk groups:

- Offenders and potential offenders with severe mental illness (including forensic patients or non custodial supervisions orders or extended leave, under the Crimes (Mental Impairment and Unfit to be Tried) Act).
- Selected high-risk offenders (including offenders with severe behavioural disorders who present a risk to the community which is considered high)[124]

Although it seemingly provides mental treatment for those in the general community, the community programs are subject to waiting lists for non-urgent referrals. In supporting the system itself, increased funding and resources would enable urgent and non-urgent referrals of those suffering from mental disorders and behavioural problems to gain access to immediate health services.

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[122]Lamberti, J.S., Weisman, R.L., Schwarzkopf, S.B., Price, N., Ashton, R.M., Trompeter, J. 'The mentally ill in jails and prisons: towards an integrated model of prevention' (2001) p64

[123] Mental Health Co-ordinating Council: 'Mental Health Issues and Substance Abuse' <www.mhcc.org.au/factsheets/factsheet1_Criminal_justice.htm> at 19 May 2004

[124] Forensicare, The Victorian Government, Prison Mental Health Service, <http://www.forensicare.vic.gov.au/website.nsf> at 6 May 2004

Recommendations

Recommendation 14

Following the example of Melbourne Assessment Prison, all prisons should have an assessment and acute intervention service which enables prisoners with mental health concerns to be seen at any time during their sentence. In an ideal world, prisoners should be able to self refer, to be referred by custodial staff, to be referred by general health staff, or to be seen following representations by relatives, friends, or fellow prisoners.

Recommendation 15

Many prisoners are not adequately trained in pre-lease programs, meaning that they are of increased risk of re-entry into the poverty cycle or criminal activity. Proper and ongoing support is required for theses people including accommodation, employment, welfare or continuing treatment after release.

Recommendation 16

Addressing the attached discrimination and educating those within the correction facilities so as to overcome the attitudes of mental illness based on misconceptions.

Recommendation 17

Combining mental health services and alcohol and drug services currently designed to treat the effects of their according singular disorder. Therein each service group would combine their knowledge and practices so as to treat the problematic area of dual disorders.

Chapter Four: Mentally Ill Female Offenders
By Daniela Brueckner

> [. . .] the Australian concept of justice should not include visiting cruel and unusual punishment on the sick. The rest of the community who contract serious illness are treated by health professionals in a hospital setting. Why should those whose illness throws them into a world of unreality be denied medical treatment and left to the tender loving care of prison warders and hardened criminals.[125]

Introduction: The Relationship Between Mental Illness and Female Incarceration

The Australian Bureau of Statistics states that the crime rate in Victoria is 23.6% below the national average for the last calendar year.[126] Despite this decrease in crime, the number of female prisoners has grown 84% over the last five years[127] and is the most rapidly growing segment of the prison population, with Indigenous women being significantly overrepresented in custody. In response, the 2004-2005 Victorian Budget has allocated an additional $19.7 million to address this increase in female prisoners.[128] It is argued that this growth is the result of an increase in the number of women sentenced to a short term of imprisonment who have no prior imprisonment history, as well as an increase in the use of remand – particularly for women with complex mental heath and drug treatment needs.[129]

Even though women only make up a small percentage of the total prison population, research indicates that female prisoners throughout Australia have experienced more severe and complex psychological trauma than male prisoners, and this is expressed in higher rates of psychological illness.[130] In a study conducted at the maximum security Dame Phyllis Frost Centre DPFC), Deer Park between 1997-98, it was found that women are twice as likely to believe they have psychological problems, five times more likely to report an eating disorder, twice as likely to have attempted self harm and 1.8 times more likely to have attempted suicide than their male

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[125] Justice Frank Walker, *Mental Health and the Criminal Justice System: A seminar given at the Institute of Criminology*. (Sept 2002), ABC Radio National. http:www.abc.net.au/rn/arts/radioeye/crime/essay.htm
[126] *The Herald Sun*, May 26, 2004.
[127] Extract from the *2004-2005 Victorian Budget*.http:www.justice.gov.au
[128] Ibid. Comparatively the Australian Bureau of Statistics indicates that between 1993-2003 the female prisoner population has actually increased by 110%, contrasted with a 45% increase in the male prisoner population. http:www.abs.gov.au/Ausstats/abs@nsf/e8ae5488b598839cca25682000131612/8d5 at page 3.
[129] Extract from the *2004-2005 Victorian Budget*. http:www.justice.vic.gov.au.
[130] L Sorbello, L Eccleston, T Ward and R Jones, "Treatment Needs of Female Offenders: A Review" (2002) Vol.37, No.3 *Australian Psychologist* 198-204, at 198. See also M Byrne and K Howells, "The Psychological Needs of Women Prisoners: Implications for Rehabilitation and Management," (2002) Vol9, No.1, *Psychiatry, Psychology and Law*, p.35.

counterparts.[131] Further, Thomas and Pollard found that the women interviewed were twice as likely to report emotional abuse (including domestic violence) and four times more likely than men to report sexual abuse in childhood. As a result, women in prison report higher levels of psychological dysfunction than men.[132] Yet surprisingly, studies suggest that a lower priority is placed on rehabilitation services tailored specifically to women's needs.[133] Since women constitute a small percentage of the prison population, there is a risk of their being overlooked in the provision of gender specific treatment programs and services.[134]

The author's aim with this chapter is to analyse the relationship between mental illness and incarceration, to ask the questions: Why are women with a mental illness over represented in jail and what factors give rise to such high rates of imprisonment of mentally disordered women? Secondly the author will outline the mental health profile of alleged offenders and discuss the problems women with a mental illness face at arrest and in court, and thirdly, put forward possible reforms to the current system.

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[131] A Thomas and J Pollard, "Substance Abuse, Trauma and Coping: A Report on Women Prisoners at the Dame Phyllis Frost Centre for Women" (2001). Unpublished report by Caraniche Pty Ltd, Melbourne Australia. http:www.caraniche.com.au/Prison/Women/SubstanceAbuse.pdf at p.19.
In this study Thomas and Pollard found that 80% of the women at the Dame Phyllis Frost Centre for women manifested both significant trauma symptoms and self difficulties ie- personality disturbance. "Trauma Symptoms" as developed by J Briere include Anxious Arousal (symptoms of anxiety · especially those associated with post-traumatic hyper-arousal), Depression (includes both feelings of sadness and depressive cognitive distortions such as hopelessness), Anger/Irritability, Intrusive Experiences (such as flashbacks and nightmares associated with post-traumatic stress disorder), Defensive Avoidance (such as pushing painful memories away and avoiding stimuli reminiscent of trauma), Dissociation (measures dissociative symptoms such as depersonalization and psychic numbing – not feeling emotion), Sexual Concerns (includes sexual distress), Dysfunctional sexual behaviours (includes harmful sexual behaviour), Impaired Self-Reference (identity confusion – includes feelings of emptiness), Tension Reduction Behaviour (includes self-mutilation, angry outbursts and suicide threats) at p.24-5.
Similarly, a study conducted by Debbie Kilroy in 1999 in Southeast Queensland prisons, from 100 questionnaires that were finalized, it was found that 95% of women experienced abuse prior to imprisonment, 98% have experienced physical abuse, 89% sexual abuse, 70% emotional abuse and 16% ritual abuse. The majority of women experienced this abuse during childhood, 37% before the age of 5. As a result psychological illness amongst this group was disproportionately high. See D Kilroy, "When will you see the real us? Women in Prison," (Oct-Nov 2000). Paper presented at the Women in Corrections: Staff and Clients Conference, Australian Institute of Criminology, Adelaide, SA. http:www.aic.gov.au/conferences/womencorrections/kilroy.pdf
Also NSW statistics indicate that 73% of female prisoners have had a prior admission to psychiatric/mental health units, and 50% have been in contact with mental health services in the 12 months prior to incarceration. See Fact Sheet 1, *Criminal Justice and Mental Health* at: http:www.mhcc.org.au/factsheets/factsheet1_Criminal_justice.htm.
Similarly, in the UK 6 women killed themselves at HM Styall in 2003. Anne Owers, chief inspector of prisons also comments that women were more likely to self-harm in prison [. . .] with a large proportion hurting themselves in the first month of their sentence. "Take mentally ill out of jails," (20 January 2004), BBC News.

[132] A Thomas and J Pollard, "Substance Abuse, Trauma and Coping: A report on women prisoners at the Dame Phyllis Frost Centre for Women," (2001). Unpublished report by Caraniche Pty Ltd Melbourne, Australia, at p.19-20. http:www.caraniche.com.au/Prison/Women/SubstanceAbuse.pdf.

[133] L Sorbello, L Eccleston, T Ward and R Jones, "Treatment Needs of Female Offenders: A Review," (2002), Vol.37, No.3, *Australian Psychologist*, p.198.

[134] P Armytage (Commissioner, Office of Correctional services, Department of Justice, Vic), "Women in Corrections: Getting the Balance Right" (Oct-Nov 2000), Paper presented at the Women in Corrections: Staff and Clients Conference Australian Institute of Criminology, Adelaide, SA. See http:www.aic.gov.au/conferences/womencorrections/armytage.html. See also B Shaw, "The Management of Female Offenders: Achieving Strategic Change," (Oct-Nov 2000), paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, SA. See http:www.aic.gov.au/conferences/womencorrections/shawb.html

Why are Women with a Mental Illness Over Represented in Victorian Jails?

Because the proportion of women in jail with a mental illness is so high, does it necessarily follow that mentally disordered women are more likely to perform criminal acts than "sane" individuals? Or is the relationship between mental illness and incarceration more complex both legally and sociologically? Crime and mental illness can both be thought of as forms of 'deviance.' Deviance from the laws of 'nature' and society[135], are conceptualized by massculture as forms of "abnormality." Mental illness is often correlated with crime through stereotypes found in television, film and popular fiction that portray "psychokillers," sociopaths, dangerous schizophrenics and individuals with frequently shifting personae - Dr Jekyll and Mr Hyde. However, Henderson comments that people with a mental illness are more likely to cause themselves harm than they are to harm others. Further Henderson's research indicates that there is no inherent link between mental illness and crime, but a strong causal link between mental illness and incarceration.[136] So what factors explain the over representation of women with a mental illness in Victoria's prisons? A number of possible reasons are as follows:

- Between 2000-01, $188.364 million was spent on prisons in Victoria compared with $69.528 million on mental health.[137] The closure of many psychiatric institutions, a chronic shortage of beds in public mental health facilities and the inadequate funding of community mental health services contribute to the accelerating trend of incarcerating women with a mental illness.[138]

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[135] M Foucault, "About the Concept of the Dangerous Individual," in J Faubion (Ed), *Power – the essential works 3,* Allen Lane: Penguin Press, London, 1994, 176-200.

[136] S Henderson, "Mental Illness and the Criminal Justice System" (May 2003), *Mental Health Co-ordinating Council,* Unpublished Report. http:www.mhcc.org.au/projects/criminal_justice/actiology.html#relationship1

[137] "VCOSS calls on parties for alternatives to prison dollars," (21 Aug 2002), *Victorian Council of Social Services*, p.1. See: http:www.vcoss.org.au/media/aug_22.pdf

[138] Of all the questionnaires received that were sent out to mental health professionals, members of the Magistracy, VCOSS and other bodies, they all commented on the absence of resources. One stated that there are "too few beds, not enough money, too few staff and too few mental health services equipt to dealing with forensic patients", Response to Questionnaire May 2004
See also Fact sheet 1, *Criminal Justice and Mental Health* at
http:www.mhcc.org.au/factsheets/factsheet1_criminal_justice.htm
See also "Mental Health and the Criminal Justice System," (2002) Fact sheet 9, *Beyond Bars: alternatives to custody*, p.2. http:www.ncoss.org.au/beyond_bars/downloads/menta_health.doc where it was stated that: "The public mental health system is so stretched in terms of its own resources, that it can be reluctant to take on the complicated issues of a mentally ill person arrested for criminal behaviour. This can lead to situations whereby a judge recommends that the person with a mental illness be treated by a health service, only to find the same person appearing the following week, having been denied the relevant treatment."
Also, in a state budget submission for 2004-05 put forward by VCOSS (Victorian Council of Social Services) it was argued that the overrepresentation of women with mental illnesses in prisons is a key indicator of the chronic shortage

- Compounding this, is the lack of alternative sentencing options for women with a mental illness who engage in criminal behaviour. There is alsostringent criteria that must be met before jail diversion programs are implemented and alternative sentencing orders are made.[139] Commenting on the diversion scheme operative in NSW, when a defendant is diverted from jail into a psychiatric hospital, Justice Frank Walker notes that District Court judges are frequently dismayed to learn that a person has been released back into the community, either because of a shortage of beds, a general reluctance of public psychiatric hospitals to look after forensic patients and a lack of community based accommodation for forensic patients.[140]

- Up to 80% of women who enter the prison system in Victoria have a history of drug dependence.[141] In other Victorian research, *all* women aged under 24 identified drug use as relevant to their being imprisoned.[142] Thomas and Pollard found in their study of women at the DPPC, that 94% of the women reported using drugs for non medical purposes.[143] These statistics coupled with the high percentage of women in jail with a mental illness means that almost all have a dual diagnosis of mental illness and drug addiction. The treatment of women with a dual diagnosis is problematic to say the least, as most programs dealing with addictions do not accept mentally ill patients, and programs dealing with mental illness are unable to treat addictions.[144] Thus dual diagnosis also seems to be a key contributor to the

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of beds in public mental health services and critical shortage of mental health services and services for women with an intellectual disability. http:www.vcoss.org.au/media/aug_22.pdf

[139] "Your Rights: Mental Illness and the Criminal Justice System in Victoria," (July 2002), Mental Health Legal Centre, p.38

[140] Justice F Walker, "Mental Health and the Criminal Justice System: A seminar given at the institute of criminology" (Sept 2002), Radio National. See: http:www.abc.net.au/rn/arts/radioeye/crimc/essay.htm Justice Walker comments: "The reality is that NSW jails have replaced the Asylums of the 1950's as the place of care for some 4000 citizens of this state suffering mental illness."
See also "Police, Forensic Patients and Prisons: Background to the Mental Health Inquiry Recommendations", (May 30 2003), Mental Health Co-ordinating Council, at http:www.mhcc.org.au/seminar/Police_Forensic.html

[141] K Martyres, Untitled Report, (2004), Women's Correctional Policy Team, Office of the Corrections Services Commissioner, p.1. See http:www.parity.infoxchange.net.au/group/noticeboard/items/20041227010b.shtml

[142] "The Health and wellbeing of women in prison: issues impacting on health and wellbeing," (2003) Issue 8, *Focus on Women*, Commonwealth Office of the status of women, ACT, p.2. http:www.osw.dpmc.gov.au/focus_on_women.cfm

[143] A Thomas and J Pollard, "Substance Abuse, Trauma and Coping: A Report on women prisoners at the Dame Phyllis Frost Centre for Women," (2001), Unpublished report for Caraniche Pty Ltd, Vic. See http:www.caraniche.com.au/Prison/Women/SubstanceAbuse.pdf .
Moreover L Sorbello, L Eccleston, T Ward and R Jones state that Victoria's female prison statistics report the highest use of illicit and licit drugs of all Victorian prisons during the 1999-2000 period, where licit drugs are usually psychotropic medications, especially benzodiazepines typically used for anxiety and symptoms of hyper arousal. See P Armytage, " Women in Corrections: Getting the Balance Right" (Oct-Nov 2000), Paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, SA, at p.11, where benzodiazepine use is the highest of any maximum security prison in Victoria. See also "Treatment Needs of Female Offenders: A Review," (2002) Vol 37, No. 3, *Australian Psychologist*, 198-204 at 202.

[144] Justice F Walker, Mental Health and the Criminal Justice System: A seminar given at the institute of criminology," (Sept 2002), Radio National. See: http:www.abc.nat.au/rn/arts/radioeye/crimc/essay.htm Also as Susan Henderson

conviction of women with a mental illness as there is a very high proportion of women for whom drug use, coupled with the symptomology of their mental illness directly or indirectly contributes to their offending.[145]

- The high levels of unemployment and low levels of education amongst female prisoners. In Victoria 80% of women in prison had been unemployed upon imprisonment and only 1 in 5 had completed secondary schooling, with Aboriginal women being the most disadvantaged group.[146]

On the whole, research indicates that female prisoners with a mental illness have come from backgrounds of extreme social and economic disadvantage. Poverty, homelessness, low levels of literacy and substance abuse coupled with histories of domestic violence, backgrounds of childhood sexual and physical abuse are all moderating factors on which the link between mental illness and female incarceration depend.

Mental Health Profile of Women in Prison

Women in prison have experienced an inordinately high incidence of child and adult trauma. As a result, various mental disorders often emerge, most of which warrant a psychiatric diagnosis.[147] This is not to suggest that all women who experience trauma develop mental health problems. Sometimes they do not. But clinical research demonstrates that invariably trauma-induced mental illness does emerge as what can be termed a "normal" response to "abnormal" life experiences. Child and adult sexual, physical and psychological abuse has profound emotional consequences.[148]

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comments: "The last twenty years has seen a heightened recognition of the particular complexities of dual diagnosis and a corresponding improvement in treatment systems. [. . .] But while the evidence base has strengthened enormously over the past two decades, practice has not. Despite increasing awareness of dual diagnosis, there exists no structural nor clinical framework by which strategies to address people with dual diagnosis can be carried out." S Henderson, "Mental Illness and the Criminal Justice System," (May 2003), Mental Health Co-ordinating Council, Unpublished Report. See http:www.mhcc.org.au/Projects/criminal_justice/moderating.html

[145] A Allegritti, "Women ways to organize and maintain effective networks pilot programs," (July-August 2000) Paper presented at the Conference Reducing Criminality: Partnerships and Best Practice convened by the Australian Institute of Criminology, WA. See: http:www.aic.gov.au/conferences/criminality/allegre.pdf See also Helen Barnacle's interview, former inmate, on *Australian Story* 2000, ABC as she illustrates the causal link between her abusive relationships, her heroin use and her incarceration.

[146] "The Health and Wellbeing of Women in Prison: issues impacting on health and wellbeing," (2003) Issue 8, *Focus on Women,* Commonwealth Office of the Status of Women, ACT, 1-12, at7. See: http:www.osw.dpmc.gov.au/focus_on_women.cfm

[147] A Thomas and J Pollard, "Substance Abuse, Trauma and Coping: A Report on women prisoners at the Dame Phyllis Frost Centre for Women," (June 2001), Caraniche Pty Ltd, p.36. http:www.caraniche.com.au/Prison/Women/SubstanceAbuse.pdf

[148] See generally R Horn and S Warner (Ed) "Positive Directions for Women in Secure Environments" (2000) No.2, *Issues in Forensic Psychology* p.6-58.

The most common mental illnesses experienced by women in prison are chronic Post Traumatic Stress Disorder (PTSD), usually coupled with what is known as Borderline Personality Disorder (BPD).[149] 64% of the women at the Dame Phyllis Frost Centre, between 1997-1998 had both symptoms of chronic PTSD and BPD[150], 15% had PTSD alone and 1% had BPD without PTSD. Only 20% of women had neither trauma nor self difficulties.

Symptoms

PTSD includes symptoms of depression, anxiety, intrusive experiences (flashbacks, painful memories), dissociation (emotional numbing) and generally significant levels of distress.[151] The main characteristics defining BPD are largely interchangeable with the negative effects of sexual abuse which include difficulty managing emotions, an inability to tolerate distress, chronic identity disturbances (ie- poor sense of self, low self esteem), interpersonal dysregulation and recurrent suicidal ideation and self-harm.[152] Alongside these symptoms women develop a myriad of coping strategies which include self-medication/self-soothing via drugs and alcohol and self-harm.[153] When viewed alongside the manifestation of PTSD and BPD in survivors of child and adult abuse, the high rates of substance abuse and concurrent criminogenic behaviours amongst female prisoners can be better understood.

Self harm and suicide

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[149] Both diagnoses usually exist together when child abuse has occurred. L Sorbello, L Eccleston, T Ward and R Jones, "Treatment Needs of Female Offenders" (Nov 2002) Vol 37, No.3 *Australian Psychologist* p.200. P Armytage, "Women in Corrections: Getting the Balance Right" (Oct-Nov 2000) Paper presented at the Women in Corrections: Staff and Clients Conference convened by the Australian Institute of Criminology, Adelaide, SA, p.7. http:www.aic.gov.au/conferences/womencorrections/armytage.html
A Thomas and J Pollard, "Substance Abuse, Trauma and Coping: A Report on women prisoners at the Dame Phyllis Frost Centre for Women," (June 2001), Caraniche Pty Ltd, p. 24-30. http:www.caraniche.com.au/Prison/Women?SubstanceAbuse.pdf
Research coming out of the UK also indicates that PTSD and BPD are the most common mental illnesses suffered by women in UK prisons, see generally R Horn and S Warner (Ed), "Positive directions for Women in Secure Environments" (2000) No.2, *Issues in Forensic Psychology*. Also T Maden, *Women, Prisons and Psychiatry: Mental disorder Behind Bars*, London UK:Butterworth-Heineman, 1996.

[150] Briere as quoted in A Thomas and J Pollard, "Substance Abuse, Trauma and Coping: A Report on Women at the Dame Phyllis Frost Centre for Women," (June 2001), Caraniche Pty Ltd, states that: 'a person with both trauma and self disturbance indicators would be most likely to present as a complex trauma victim: chronically distressed, overwhelmed by intrusive symptoms, and potentially more likely to act out painful internal states by virtue of lessor self-resources' at p.27.

[151] A Thomas and J Pollard, "Substance Abuse, Trauma and Coping," (June 2001), Caraniche Pty Ltd, p.32. http:www.caraniche.com.au/Prison/Women/SubstanceAbuse.pdf See especially the definitions for Post traumatic Stress Disorder and Borderline Personality disorder in the *Desk Reference to the Diagnostic Criteria from DSM-IV-TR*, (2000), American Psychiatric Association: Washington, at p. 218 and 292 respectively.

[152] M Linehan, *Cognitive Behavioural Treatment of Borderline Personality Disorder*, New York: Guilford Press, 1993.

[153] L Sorbello, LEccleston, T Ward and R Jones, "Treatment Needs of Female Offenders: A Review," (Nov 2002), Vol 37, No.3, *Australian Psychologist*, p.199.

The rates of self reported suicide and self-harm amongst female prisoners in Victoria is high. Thomas and Pollard in their study at the DPPC found that 10% of women reported self-harm behaviour in childhood, 29% in adolescence and 24% in adulthood. 10% attempted suicide in childhood, 35% in adolescence and 33% in adulthood.[154] Moreover, a particular problem with diagnoses of PTSD and BPD is that it is very difficult to tell at face value if someone is suffering from PTSD and BPD. Typically, an individual doesn't seem 'mad', and presents as 'normal,' until they suicide. Diagnoses require particular sensitivity to warning signs, such as self-harm (that may often be concealed), emotional instability, mood swings, general distress, anger and 'acting out.' Yet these symptoms may only be noticed after the establishment of an ongoing, trusting relationship with a woman suffering from chronic PTSD and BPD. A good indicator of PTSD or BPD is a history of sexual abuse, yet obviously women will be reticent to disclose personal details like this in order to make a diagnosis, particularly where a relationship of trust has not been established, for example to police, the court, prison staff or mental health workers with whom women have only had limited contact with.

Detecting Mental Illness

At Arrest

Because of the difficulty in detecting PTSD and BPD, these illnesses may not be picked up on at arrest, and an independent third person (ITP) may not be called upon to assist women during an interview or when making a formal statement to police.[155] At present it is up to police to determine whether a person has a mental illness and whether an ITP should be called upon, by relying on 'experience,' observations of the person, general questioning and 'suspicion.'[156] If police are not "suspicious' about a woman's mental state they may not request a police doctor (forensic physician) to formally assess their mental health.[157] (See the discussion in Chapter 2 of this Report)

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[154] A Thomas and J Pollard, "Substance Abuse, Trauma and Coping," (June 2001), Caraniche Pty Ltd p.16 http:www.caraniche.com.au/Prison/Women/SubstanceAbuse.pdf

[155] The role of an independent third person at arrest is to facilitate communication, assist the person to understand their rights and support the person throughout the process. An ITP is independent of police and the investigation. See "The Independent Third Person Program," Office of the Public Advocate, p.2 at http:www.publicadvocate.../~06E7A429AF2522CACA256ACCC0007153E?OpenDocum

[156] A psychiatrist at the Acute Assessment Unit and Melbourne Assessment Prison also comments in relation to question 6 of our questionnaire that police suspicion is the only way it is established that an alleged offender has a mental illness. He states that there doesn't seem to be anything in place that is systematic to determine whether a person has a mental illness at arrest. Brochure

[157] "Your Rights: Mental Illness and the Criminal Justice System in Victoria," (July 2002), Mental Health Legal Centre, p.15.

Clearly this presents a lot of problems as police are not qualified (formally) to determine what a woman's mental state is and whether she requires the assistance of an ITP or an assessment by a forensic physician. This system is woefully inadequate, as, without proper psychiatric screening at arrest, it is left up to police (who can only rely on cultural, mainstream indicators of what constitutes 'mental illness') to assess women.[158] This could severely affect the outcome of a woman's arrest and has broad implications for the way in which women are formally recognised as having a mental disorder, how they enter the criminal justice system, whether they receive treatment and whether they are exculpated from criminal responsibility. Women may be seriously disadvantaged in their dealings with police. They may experience difficulties understanding their legal rights due to a reaction to police ie- being submissive to people in a position of authority (which is more than likely for women who have experienced child abuse), they may have an increased susceptibility to suggestive questioning, and may have difficulty in maintaining concentration for extended periods due to dissociation as a reaction to the stress of arrest (which would be particularly evident in women suffering from PTSD and BPD).[159]

Another problem is that female offenders may not even know they are suffering from a psychiatric illness. They may not understand why they behave in ways that are symptomatic of PTSD and BPD, and, given the backgrounds of social disadvantage that many female offenders come from, they may have never been in contact with health services let alone mental health services. Moreover, if a woman does not know that she has a mental illness, she may not be able to alert her lawyer to her condition if it has not been picked up by police. Further, if refused bail, and women are deemed mentally unwell, remandees may be transferred to the Thomas Embling Psychiatric hospital, however if mental illness is not detected at arrest, women will be remanded in custody.[160]

Court Liaison Service, Sentencing and Jail Diversion Programs

The Court Liaison Service provides psychiatric assessment and advice for people with a mental illness and women are referred to the service by Magistrates, the police and lawyers.[161] This service

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[158] As P O'Neal comments, "A member of the police force is not required for the purposes of s8(1) of the Mental Health Act VIC 1986 to exercise any clinical judgment as to whether a person is mentally ill *but may exercise the powers conferred by this section if, having regard to the behaviour and appearance of the person,* the person appears to the member of the police force to be mentally ill. S10(1A)" (my emphasis). "The Meaning of Mental Illness within the Victorian Mental Health Act: the problem of definition," (June 2003), *Australian Social Work,* p.4.

[159] "The Independent Third Person Program," Office of the Public Advocate, p.1. See http:www.publicadvocate

[160] "Your Rights: Mental Illness and the Criminal Justice System in Victoria," (July 2002), Mental Health Legal Centre, p.29

[161] Op cit, p.35.

however, may not be utilised by women suffering from BPD and PTSD if the illnesses have not been picked up by police, the magistrate or brought to their lawyers attention.[162] Consequently, a psychiatrist may not be asked to write a report, and in the worst case scenario the court will not be able to take a woman's mental illness into account when deciding what sentencing order to make.[163] If not detected at the point of sentence, women suffering from a mental illness may slip through the cracks and end up in prison. Moreover, women may also find themselves ineligible for the jail diversion program where offenders are diverted from prison into psychiatric hospitals (via Assessment Orders, Diagnosis Assessment and treatment Orders, Hospital Orders[164] and Hospital Security Orders)[165] as an involuntary patient if found guilty. Even with a psychiatrists report, a problem the court diversion program poses for female offenders with PTSD and BPD is that it is only available to people who have a mental illness as defined under the Mental Health Act VIC 1986.[166] Personality disorders – particularly BPD and PTSD do not fall under the definition of mental illness.[167] Given the likelihood of self-mutilation and suicide amongst women with chronic PTSD and BPD, it is surprising that these disorders are excluded from the definition of 'mental illness' under the Act. The seriousness of these disorders is gravely underestimated at law and their exclusion indicates that legal conceptions of mental illness need to catch up with the nuanced and complex understandings coming out of the fields of contemporary psychiatry and psychology.[168] As

[162] Forensicare was established as a statutory agency for the provision of mental health services and provides psychiatric assessment of people with a suspected mental illness when referred by a magistrate. S Henderson, "Mental Illness and the criminal justice system: The Search for Best Practice," (May 2003), Mental Health Co-ordinating Council at p.1 http:www.mhcc.org.au/Criminal_Justice/search.html

[163] Orders may include Community Based Orders which may stipulate that the offender undergo psychiatric treatment, and treatment for drugs and/or alcohol. If the offender is under 25 years of age the court may defer sentence for up to six months and order that an offender attend an Area Mental Health Service to obtain treatment for mental illness and/or drug and alcohol dependencies so as to deal with factors contributing to criminal offending. Brochure

[164] *Sentencing Act* 1991 (including amendments as of 19 May 2004), Part 5 – Hospital Orders.

[165] "Your Rights: Mental Illness and the Criminal Justice System in Victoria," (July 2002), Mental Health Legal Centre, p.51-55.

[166] *Mental Health Act 1986*, s8 – A person is mentally ill if he or she has a mental illness, being a medical condition that is characterized by a significant disturbance of thought, mood, perception or memory.
2 questionnaire responses noted that this was a particular problem for mentally ill female offenders as their illnesses are nor recognized as 'mental illnesses' at law and therefore often go untreated. A legal officer with the Mental Health Review Board comments, "Many female offenders suffer from mental illnesses that are not yet acknowledged as being a 'mental illness.'"

[167] K Harper (Ed), *The Law Handbook 2004: Your Practical Guide to the Law in Victoria*, (2004), Fitzroy Legal Service, Victoria, p.614. See also "Your Rights: Mental Illness and the Criminal Justice System in Victoria," (July 2002), Mental Health Legal Centre, p.51.

[168] In the Diagnostic Statistical Manual (American Psychiatric Association) over 300 mental illnesses are listed, specifically including PTSD and BPD. Yet, as Sam Warner argues, psychiatric models tend to only address the management of symptoms – generally through the use of psychotropic medications, and, in doing so obscure the importance of addressing underlying needs. She argues: "Whilst it is important to address symptomatic behaviours (eg – criminal activity, self-harming behaviour and/or psychosis) unless these behaviours are understood in the context of women's lives, women will not be helped to change." Warner advocates that past sexual or physical abuse needs to be revisited and worked through in order for syptomatic (including criminal) behaviours to be reduced.

Paul O'Neal comments, "The status of mental health law is far more fluid and is determined by an interplay of several factors, only one of which is legislation."[169]

Issues Faced by Women with a Mental Illness in Prison and Post Release

Thomas and Pollard comment that since the majority of women in prison have significant symptoms of unresolved trauma as well as a poor sense of self, the challenge for prison is to avoid becoming another layer of trauma in the women's lives, and to provide women with an opportunity to begin the process of developing the skills they require to lead fulfilling lives.[170] James Ogloff comments:

> Upon entering jail, the inmate has lost control over most aspects of his or her life. In addition to the obvious restriction of contact with the outside world, the inmate is not even able to control such basic aspects of the surrounding environment such as light intensity, heat or noise levels. At this point in time the inmate also has very limited control over the course of events and outcome of his or her life.[171]

Thus the prison environment can replicate and/or trigger the feelings of powerlessness felt in childhood, by placing women in vulnerable situations which potentially exacerbate symptoms (including suicide and chronic self harm) of trauma-induced mental illness.[172] There is evidence that women's psychiatric needs do not dissipate during their incarceration and may indeed worsen.[173]

Relationship with prison staff

In interviews conducted by Barbara Shaw of community correction staff, Queensland, staff were asked to write down one word which described female offenders. Some of the responses were:

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[169] P O'Neal, The Meaning of Mental Illness within the Victorian Mental Health Act: the problem of definition" (June 2003) Vol.56, Issue 2, *Australian Social Work*, p.1

[170] A Thomas and J Pollard, "Substance Abuse, Trauma and Coping," (June 2001), Caraniche Pty Ltd p.36. http:www.caraniche.com.au/Prison/Women/SubstanceAbuse.pdf

[171] J Ogloff, "Identifying and Accomodating the Needs of Mentally Ill People in Gaola and Prisons," (2002) Vol 9, No.1, *Psychiatry, Psychology and Law*, p.1-33, at p.3.

[172] 3 interviewees said that the prison environment can often exacerbate the symptomology of an offenders mental illness, due to increased stress and the violence of the prison subculture.

[173] M Byrne and K Howell, "The Psychological Needs of Women Prisoners: Implications for Rehabilitation and Management," (2002), Vol. 9, No.1, *Psychiatry, Psychology and Law*, p.35.

- hard to read
- pathological liars
- manipulative
- aggressive
- conniving
- cunning[174]

In response Shaw asks, "[. . .] how can we change the correctional system so that female offenders are not seen as *problematic*, but as having needs which require an appropriate response."[175] The author argues that perhaps negative behaviours need to be understood in the context of mental illness so that they are not perceived as stemming from simply being a 'bad' person, thus evoking negative reactions from staff, but from a manifestation, or playing out of the particular mental illness. Care must be taken not to target such behaviours in isolation from antecedents which precipitated them – specifically childhood victimisation.[176] It seems that the relationship between staff and prisoners is at the heart of the whole prison system and is crucial to attempting to make prison a safer environment. Debbie Kilroy who runs a support program for prisoners called *Sisters Inside*, asked women in southeast Queensland prisons for their responses to prison life, some of their comments were:

- We are treated like animals not humans. And we are treated different from white prisoners.
- In new prison, arseholes need more professionalism; officers need to learn manners and treat us like adults not kindy children and not to yell at us.
- Put in jail for punishment, not to serve screws
- Bunch of Hitlers.
- I'm sick of the centre taking away everything you enjoy – them trying to break our spirit.
- Most people in here are racist, this makes me angry and hurt.[177]

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[174] B Shaw, "The management of Female Offenders: Achieving Strategic Change," (Oct-Nov 2000), Paper presented at the Women in Corrections: Staff and Clients Conference convened by the Australian Institute of Criminology, p.1. http:www.aic.gov.au/conferences/womencorrections/shawb.html

[175] ibid

[176] M Byrne and K Howells, "The Psychological Needs of Women Prisoners: Implications for Rehabilitation and Management," (2002), Vol.9, No.1, *Psychiatry, Psychology and Law*, at p.37.

[177] D Kilroy, "When will you see the real us? Women in Prison," (Oct-Nov 2000), Paper presented at the Women in Corrections: Staff and Clients Conference convened by the Australian Institute of Criminology, p5-6. http:www.aic.gov.au/conferences/womencorrections/kilroy.html

It seems at best the relationship between prison staff and prisoners is a difficult and complex one. It is important to treat prisoners with care, humanity, understanding, dignity, sensitivity, and as *grown women* - not as 'bad' children, which only works to infantalize and condescend female prisoners, thus heightening feelings of powerlessness reminiscent of childhood abuse. As P Armytage suggests:

> The capacity to respond to expressions of emotion, open communication with offenders, and a less authoritarian manner have been cited as important features in the management of female prisoners [. . .] however, meeting the emotional needs of women as well as managing the increasing violence within the female prisoner population is a complex and potentially contradictory task.[178]

Sexual Abuse by Prison Staff

Another major problem is the incidence of alleged sexual abuse perpetuated by prison staff against female prisoners. In August 2003 two prison guards at the Dame Phyllis Frost Centre for Women were sacked over allegations of sexual assaulting an inmate who was a certified psychiatric patient in a special management unit at the centre.[179] Again in October 2003 a Victorian prison officer was charged with raping a mentally ill female inmate. Because of her mental state she was to be transferred to the Thomas Embling Forensic Hospital, but because of a shortage of beds she was moved to the management unit at Deer Park where she was sexually assaulted. DNA tests confirm that the alleged offender is the father.[180] The threat of violence from other prisoners as well as prison staff only perpetuates the cycles of abuse many women have found themselves in. Prison, like their childhood homes and adult homes is an unsafe environment.[181]

Chronically ill prisoners

The Thomas Embling Hospital staffed by psychiatric nurses, psychiatrists and psychologists, offers a women's care program which consists of 10 beds that provide patients with psychiatric care when

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[178] P Armytage, "Women in Corrections: Getting the Balance Right," (Oct-Nov 2000), Paper presented at the Women in Corrections: Staff and Clients Conference convened by the Australian Institute of Criminology, Adelaide, SA, p.10.
[179] M Butler, *Herald Sun,* Aug 21 2003.
[180] K Lapthorne, *Herald Sun,* Oct 25, 2003.
[181] Tear gas has also been used three times on women prisoners in three years, and the prison has been locked down 74 times since its conception in 1996.

female prisoners are acutely ill – usually at risk of suicide.[182] However this service always has long waiting lists so many women go untreated when chronically self-harming or 'acting out.'[183] Since both the DPPC and Tarrengower minimum security prison do not have an acute assessment unit equivalent to the acute assessment unit operative at the Melbourne Assessment Prison for men, nor do they have a prison hospital,[184] chronically ill female prisoners often find themselves with nowhere they can go for intense psychiatric care even though female prisoners have the highest incidence of psychological illness. At the moment, ill prisoners at DPPC go to a management unit or a 'dry cell' which is staffed by a scarce number of trained professional and untrained prison staff. While there, there seems to be a concomitant risk of sexual assault by prison guards as mentioned earlier

Overcrowding

Another problem women with mental illnesses in Victorian prisons face are major problems with overcrowding.[185] In 2000, the DPPC, built for 135 prisoners housed 161 prisoners,[186] which resulted in triple bunking inside cells. Overcrowding creates an environment that is incredibly stressful. Overcrowding can make women feel as if they have no privacy, creates additional tensions between prisoners which may escalate to violent outbursts, and places strain on the provision of mental health services which means that a lot of women miss out on adequate care.[187]

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[182] Victorian Institute of Forensic Mental Health, "Substance Abuse in Australian Communities," Submission to House of Representatives Standing Committee on Family and Community Affairs, p.4.

[183] In response to our questionnaires, a Magistrate at the Heidelberg Magistrates Court and the Co-ordinator of the Mental Health Legal Centre both comment on the shortage of beds for women at the Thomas Embling Forensic Psychiatric hospital.

[184] P Armytage, "Women in Corrections: Getting the balance right," (Oct-Nov 2000) Paper presented at the Women in Corrections: Staff and Clients Conference convened by the Australian Institute of Criminology, p.4 http:www.aic.gov.au/conferences/womencorrections/armytage.html . A psychiatrist interviewed from the Acute Assessment Unit at the Melbourne Assessment Prison that the psychiatric services at the maximum security Dame Phyllis Frost Centre for women are "woefully inadequate" and that an acute service needs to be established similar to the one in operation at MAP for male prisoners.

[185] G Baggio, "Deer Park Women's Prison Operator considering Legal Challenge to Government," AM – ABC local radio. http:www.abc.net.au/am/s195379.htm

[186] P Astudillo, "Australia: Private prisons to remain in Victoria despite government takeover of women's jail," (Oct 2000), *World Socialist Web*. http:www.wsws.org/articles/2000/oct2000/pris-o13.shtml

[187] P Armytage, "Women in Corrections: Getting the Balance Right," (Oct-Nov 2000), Paper presented at the Women in Correction: Staff and Clients Conference convened by the Australian Institute of Criminology, Adelaide, SA, at p.4. http:www.aic.gov.au/conferences/womencorrections/armytage.html.

Female Prisoners and Children

Approximately 75% of women who enter prisons in Victoria have dependent children, and for most women prison entails separation from their children. Children are able to stay with their mothers in prison up to school age, when it is deemed to be in the best interest of the child.[188] But for many, the welfare of their children remains a constant source of anxiety during imprisonment and a further cause of depression because of the forced separation from their children after school age.[189] Feelings of guilt and shame around being "bad mothers" due to being in prison and because of substance abuse may also arise, impacting negatively on self-esteem. Ex-prisoner Helen Barnacle comments that her enforced separation from her three year old daughter led her to use heroin again and instigated feelings of chronic suicidality.[190] Also given the dysfunctional (mainly domestically violent) backgrounds of many women, an additional anxiety that faces women is a fear that their children may be exposed to a similar, abusive background that characterised their own upbringings.[191]

Post Release

One ex-prisoner comments:

> It's so hard to get out in the real world and cope especially when you are expected to just walk out of jail and just get on with your life. You have not dealt with any of your problems (that) got you there in the first place.[192]

In Victoria, between 1987 and 1997, 93 women died shortly after release from prison.[193] In an analysis of 62 of these deaths, only two of the women died of natural causes. 41 women died as a direct result of drug overdoses, and four from complications arising from drug use. Most of these

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[188] Ibid.
[189] Op cit, p.12.
[190] *Australian Story*, ABC, 2000.
[191] L Sorbello, L Eccleston, T Ward and R Jones, "Treatment Needs of Female Offenders: A Review," (Nov 2002), Vol.37, No.3, *Australian Psychologist*, p.201.
[192] L Heinrich, "Somebody's Daughter," *Warnambool Standard*, Saturday 3 June 2000. Another ex-prisoner comments: From a situation of imposed infantile dependence, rules and regulations covering every aspect of your life; what time you get up, how to make your bed, what time you eat breakfast, what time you're allowed out to exercise, being locked in your cell – a person is then let out and expected to cope immediately. "Women and Imprisonment: Submission to the Social Devewlopment Committee into Community Violence," (1988), Fitzroy Legal Service, p.36.
[193] S Cook and S Davies, "Dying Outside: Women, Parole and Post-release Mortality," (Oct 1999), Second Australian Conference of Parole Boards and Offender Review Boards, p.1

deaths occurred less than three months after release from prison.[194] Clearly the months immediately following the release from prison are a time when women are at a very high risk of suicide and recidivism due to substance abuse. A lack of knowledge about what community mental health services are available, what services are available for emergency accommodation, what services exist for drug and alcohol problems, what employment services are available and a lack of knowledge on how to deal with Centrelink can be extremely overwhelming and heighten feelings of hopelessness and desperation.

Recommendations

18. A greater governmental priority placed on funding being allocated to mental health hospitals and community mental health services.
19. More beds for female prisoners at the Thomas Embling Forensic Hospital so waiting lists are shortened and women receive the care they require.
20. More beds at public psychiatric hospitals for women on remand.[195]
21. The Mental Health Act VIC 1986 should be amended to cater for women with BPD and PTSD so services that are available for people at arrest, in court and at sentence that are diagnosed with a "mental illness" defined under the Act are also available for women with personality disorders.
22. The establishment of an Acute Assessment Unit at DPPC which can also be accessed by female inmates from Tarrengower prison, similar to the Acute Assessment Unit operational at the Melbourne Assessment prison for men.
23. More funding for services that look after women with a dual diagnosis both in and out of prison.
24. More funding to Forensicare so there are more psychiatrists and psychologists per head of the female prison population that can offer individual counselling.[196]
25. Treatment programs inside prison need to be gender specific since women exhibit different needs to male offenders, and women's crimes are committed in different circumstances to men's – it is not simply a question of women in prison receiving equal treatment to men.

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[194] "The Health and Wellbeing of Women in Prison: Issues Impacting on Health and Wellbeing," (2003), Issue 8, *Focus on Women* ,Commonwealth Office of the Status of Women Department of the Prime Minister and Cabinet, ACT, p.8. http:www.osw.dpmc.gov.au/focus_on_women.cfm

[195] Suggestion made by a Magistrate at the Heidelberg Magistrates Court, in response to our questionnaire.

[196] The most common criticism of programs in women's prisons is the shortage of individual counselling, and there is a perception that individual counselling is relatively inaccessible. See: "Tarrengower Opus Project Prisoner Survey Feedback Report," (July 2001), p.7. http:www.caraniche.com.au/Prison/WomenSurveyreport.pdf

26. Treatment programs for female prisoners need to recognise the fact that women are not a homogenous group, programs need to consider the different needs of lesbian women, Indigenous women, women with an intellectual disability and women from non-english speaking backgrounds.
27. Rehabilitation programs inside prisons should not only be about ameliorating criminogenic behaviours, but should also target the antecedent child and adult abuse, family dysfunction, neglect and other trauma that contribute directly and/or indirectly to criminal behaviours and potential recidivism.[197]
28. Similarly, drug and alcohol programs need to target the underlying causes (usually child abuse) that may contribute to substance abuse so women are able to gain an informed insight into these behaviours, thus potentially curbing criminogenic impulses.[198]
29. Anti bullying strategies should be implemented at DPPC and Tarrengower.[199]
30. Anger management programs should be compulsory for all female inmates.
31. The provision of services and programs that enable women to be more connected with their children, to strengthen mother child relations while in prison.[200]
32. Prison treatment programs need to specifically work on the symptomatology of PTSD and BPD. Mental Health professionals need to be employed who specialise in PTSD and BPD and possess an in depth understanding of how these illnesses manifest and their underlying causes.
33. Corrections staff should be required to do intensive training to learn how to manage and communicate effectively with sufferers of PTSD and BPD, and to understand that negative or anti-social behaviours may more often than not be the illness playing itself out, rather than stemming from the individual as a 'bad' person.

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[197] While the crimes women commit are often a reaction to negative life events and backgrounds of severe economic and social disadvantage it is important not to 'psychiatrise' women and think that in uncovering and working through underlying traumas, criminal behaviour will magically cease.

[198] As L Sorbello, L Eccleston, T Ward and R Jones comment: " [. . .] the range of traumas may trigger, complicate or maintain drug use and criminality for female offenders. Traditional drug treatment programs that primarily address drug use to prevent relapse and recidivism, or address drug use and criminality separately, are unlikely to adequately meet women's needs." "Treatment Needs of Female Offenders: A Review," (Nov 2002), Vol. 37, No.3 *Australian Psychologist*, p.202.

[199] See P Armytage, "Women in Corrections: Getting the Balance Right," (Oct-Nov 2000), Paper presented at the Women in Corrections: Staff and Clients Conference, Adelaide, SA, p.8
http:www.aic.gov.au/conferences/womencorrections/armytage.html

[200] Victoria is the only state which operates a formal residential visits program, the purpose of which is to:

(i) Support and maintain a prisoner's close relationship with their child
(ii) Support and maintain a prisoner's longstanding relationship with their partner and/or adult family members.

See P Armytage, "Women in Corrections: Getting the Balance Right," (Oct-Nov 2000), Paper presented at the Women in Corrections: Staff and Clients Conference, SA, p.13.

34. Corrections staff should treat female prisoners with dignity and respect at all times, even when behaviour is offensive and potentially violent and evokes negative reactions from prison staff.[201]

35. A forensic physician or staff that are trained in psychology or related fields should be employed fulltime by police to assess alleged offenders for mental illness at every arrest, so that it is not up to police to judge whether individuals have a suspected mental illness.

36. Few treatment programs exist that target the complex needs of sufferers of PTSD and BPD. At present Marsha Linehan's Dialectical Behavioural Therapy (DBT)[202] is the only treatment program has been successfully trialed worldwide.[203] The DBT model should be implemented at both DPPC and Tarrengower. The model specifies a hierarchy of treatment targets from most to least important and are:

- Reducing suicidal and other life threatening behaviours
- Reducing therapy interfering behaviours
- Reducing substance abuse
- Increasing skilful coping behaviours
- Reducing post-traumatic stress responses
- Addressing Offending Behaviour
- Enhancing self-respect
- Increasing self-esteem[204]

37. Managing the transition from prison to the community should be a major policy focus for corrective services in Victoria. Pre-release programs should target prisoner needs in areas such as access to community health services, access to community mental health services and outreach workers, access to community support groups for parenting and drug and alcohol problems, housing, financial counselling/management, social skills, vocational skills – computer skills, job interview skills, resume writing, and opportunities in prison to learn a trade.

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[201] As one ex-prisoner comments: "Violence is a part of prison culture: however, I believe the approach by prison management and prison officers toward women held in prisons certainly plays a major role in whether that violence escalates and becomes an ongoing part of that culture. The education of prison officers [. . .] toward understanding the reality of these women's emotional and physical histories and their level of wellbeing is an integral part of changes that need to occur in order for the women to gain insight into their own behaviours and beliefs so they can modify or change them." Op cit p.10.

[202] M Linehan, *Skills Training manual for treating Borderline Personality Disorder*, New York: Guildford Press, 1993. See also J Kroll, *PTSD/Borderlines in Therapy* Norton Press: New York, 1993 and J Paris, *Borderline Personality Disorder: Etiology and Treatment* ,American Psychiatric Press: Washington DC, 1993.

[203] L Sorbello, L Eccleston, T Ward and R Jones, "Treatment Needs of Female Offenders: A Review," (Nov 2002), Vol.37, No. 3, *Australian Psychologist*, p.200.

[204] A Thomas and J Pollard, "Substance Abuse, Trauma and Coping," (June 2001), Caraniche Pty Ltd, p.36. http:www.caraniche.com.au/Prison/Women/SubstanceAbuse.pdf

38. Women need to be individually case managed (preferably daily or weekly) after release from prison for a lengthy period – perhaps between six months to one year post-release, to assist women reintegrate into the community, and to prevent suicide and recidivism.[205]

Conclusion

Clearly the major challenge facing mental health workers, members of the magistracy and the judiciary, policy makers and concerned community members is to move beyond a list of recommendations and implement an action plan. The author hopes this chapter has clearly delineated the myriad of problems mentally ill women have when dealing with the criminal justice system, and will stimulate discussion and eventual reform. Prison should be the sentence of last resort for women with a mental illness.

[205] In SA a program called the Women's Accomodation Support Service has been implemented which provides accommodation upon release and refers women to appropriate services in the community. A similar program should be implemented in Victoria. See L Sorbello, L Eccleston, T Ward and R Jones, " Treatment Needs of Female Offenders: A Review, "(Nov 2002), Vol.37, No.2 *Australian Psychologist,* p.202.

PART B
JUSTICE FOR THOSE WITH A MENTAL IMPAIRMENT - A SPECIALISED COURT

CONTENTS

Introductory Summary of Part 2

The de-institutionalisation over the years of people with a mental impairment has lead to a large increase in the prevalence of those with a mental illness or intellectual disability within the wider community. As a result, we have seen these individuals become a lot more active and independent, which in turn has lead to a rise in their involvement within the criminal justice system.

It is recognised that the current laws and processes within Victoria do not provide the adequate support, services or outcomes for those suffering from a mental impairment, and that an alternative method is needed in order to improve the treatment of these individuals within the law.

This report looks at the idea of a Mental Health Court which focuses largely on support, education and treatment, rather than punishment. The court actively aims to acknowledge the needs of these offenders and to make positive changes to their lives in an attempt to reduce their rate of re-offending.

This report consists of the following:

- Chapter One focuses on the predominance of the mentally ill and intellectually impaired within the community and particularly within the criminal justice system
- Chapter Two examines the aims and procedures of specialist courts, paying particular attention to specialist courts currently established within Victoria
- Chapter Three makes recommendations as to how the Mental Health Court should operate in Victoria, outlining the arrangement and procedures of the court.

This is followed by recommendations as to how the legal system can be improved in order to provide better access to justice for those suffering from a mental impairment.

Methodology

This report is based largely on the use of literary reports, court observations and questionnaires. A literary review was undertaken in order to analyse the research on those with a mental impairment, the current legislation in relation to this area and the procedures and success of Mental Health Courts established within other jurisdictions. Particular attention was focused on those courts

currently established in South Australia, the United States and the Mental Health List, as proposed by the Deputy Chief Magistrate, for guidance and ideas. Research was also obtained through observations of the other specialist courts within Victoria, including the Koori Court and the Drug Court.

The questionnaire (see Appendix A) was forwarded to various legal and mental health professionals including magistrates, counsellors, parliamentary bodies and mental health organisations. Unfortunately, while over 40 questionnaires were distributed only a limited amount of responses were received. These responses were therefore used simply to obtain some insight into the perspectives of those within the mental health and law fields and who regularly deal with individuals with mental impairments.

Chapter Five

Is there a need for a special court for the mentally impaired in Victoria?

By Clare Agostinelli

This chapter examines mental impairment in Australia and the prevalence and effect of mental impairment in the criminal justice system. International human rights laws relating to the mentally impaired are considered. Finally the benefits and disadvantages of having a mental health court are discussed and it is argued that a mental health court is needed in order to effect justice for the mentally impaired.

MENTAL IMPAIRMENT AND THE CRIMINAL JUSTICE SYSTEM

This section briefly considers the effect of being a mentally impaired offender in the criminal justice system, particularly in the Victorian Magistrates' Court.

What is a mental impairment?

The *Mental Health Act 1986* defines mental illness as a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory. [206] This Act recognises that not all mentally ill people have been diagnosed with a recognisable mental illness.[207] It does this by stating that the person 'appears to be mentally ill'.[208] Indicia list when a person is not to be considered mentally ill. [209] A person is not considered to be mentally ill if they have an intellectual disability.[210] Therefore there is an express statutory statement distinguishing between a mental illness and an intellectual disability; although, the courts have recognised that there can be overlap between the two. [211] An intellectual disability is defined in the *Intellectually Disabled Persons' Services Act 1986 s 3,* as when the person has a significantly below average intelligence, and has significant deficits in adaptive behaviour, which means that they have difficulties with every day life skills.[212] Both these aspects must exist before the person turns 18.[213]

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[206] *The Mental Health Act 1986 (Vic)* S8 (1A)
[207] *The Mental Health Act 1986 (Vic)* S8 (1)
[208] *The Mental Health Act 1986 (Vic)* S8 (1)(a)
[209] *The Mental Health Act 1986 (Vic)* S8 (2)
[210] *The Mental Health Act 1986 (Vic)* S8 (2)(j)
[211] *Re the Appeal of FEF* (1989) 1 MHRBD (Vic) 268 at 270
[212] 'Intellectual disability – some questions and answers' (2004) State Government of Victoria, Department of Human Services, <http://hnb.dhs.vic.gov.au/ds/disabilitysite.nsf/pages/pub_intellect> 8 June 2004
[213] *Intellectually Disabled Persons' Services Act 1986 (Vic) s3*

For the purpose of this report we use the phrase 'mental impairment' to refer to people with a serious mental illness and/or an intellectual disability. We use the term serious mental illness to refer to those who have a 'psychotic' form of mental illness.[214] This includes schizophrenia, bipolar disorder, severe depression and some anxiety disorders. [215] Intellectual disabilities have the same definition as that used in the *Intellectually Disabled Persons' Services Act 1986* (section 3).

Statistics

One in five Australians will experience a mental illness. [216] Of these 3% suffer from a psychotic disorder. A further 3% of Australians have an intellectual disability. [217] Therefore for the purpose of this report, in Victoria the number of people who have a mental impairment is almost 300,000.

How are intellectually impaired people discriminated by our justice system?

It can be argued that de-institutionalisation of the mentally impaired in the absence of adequate community backup and resources to support them has resulted in them consisting of a greater part of the general community and hence the criminal justice system.[218] The community has reacted in a number of ways to the presence of mentally impaired people in the community and community attitudes have an affect on the treatment of mentally impaired people in our justice system. For example, taking the view that mentally impaired people are the same as everyone else may result in giving a confession undue weight. Instead consideration should be given to the fact that mentally impaired people normally agree to anything said by those in authority, even if they do not believe it. [219] This kind of treatment disadvantages those affected by a mental impairment. On the other hand, treating all mentally impaired people as being unfit to be tried by courts denies them their justice can result in unjustified, lengthy periods of imprisonment.[220]

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[214] 'Mental Illness Prevalence' (2003) State Government of Victoria and SANE Australia, <http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Mental_illness_prevalence?OpenDocument> 8 June 2004

[215] Mental Illness Prevalence' (2003) State Government of Victoria and SANE Australia, <http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Mental_illness_prevalence?OpenDocument> 8 June 2004

[216] Mental Illness Prevalence' (2003) State Government of Victoria and SANE Australia, <http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Mental_illness_prevalence?OpenDocument> 8 June 2004

[217] 'Questions & Answers' (2004) NSW Council for Intellectual Disabilities, <www.nswcid.org.au/publications/fs/qanda.html> 8 June 2004

[218] Alfred Allan (2003) 'Mental Health Law: A Therapeutic Jurisprudence Analysis' 20(2) *Law in Context* 24:27

[219] Mark Findlay, Stephen Odgers, Stanley Yeo, *Australian Criminal Justice2nd ed.* Oxford University Press 1999, England, page 323

[220] Mark Findlay, Stephen Odgers, Stanley Yeo, *Australian Criminal Justice 2nd ed.* Oxford University Press 1999, England, page 320

The criminal justice system prides itself on providing equality before the law. However, in practice this is largely an idea of formal equality and does not result in effectual equality or equality of outcome. Without affirmative action for people with a mental illness they can be denied this equality and access to basic human rights.

A recent study in the NSW Local Courts found that one in three defendants have a 'significant intellectual deficit'. [221] Further while 2-3% of the NSW population has a mental disability, 12-13% of the prison population of that state are mentally disabled.[222] The study also found that intellectually disabled people are given longer terms of imprisonment and are more likely to re-offend. [223]

A Victorian Prisoner Health Study conducted by the Department of Justice early last year found that 40% of those interviewed reported having received support, counselling or treatment for a mental health problem from a psychologist or counsellor and about half had been assessed for emotional problems. [224]

Another study by Jones & Coombes 1990 in Perth, found that 20% of people sentenced or remanded in custody had a mental impairment. [225]

Characteristics of intellectually impaired people make them more vulnerable to the system. For example, intellectually disabled people are overly impressed with authority. They tend to agree with whatever authoritative people say in order to hide their disability or to please others. [226]

Intellectually impaired people may have difficulty understanding basic legal concepts. For example the caution 'you have the right to remain silent' may be confused with the more common use of the

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[221] New South Wales Law Reform Commission Research Report 4 *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local* Courts, Sydney, 1993 cited in Mark Findlay, Stephen Odgers, Stanley Yeo, *Australian Criminal Justice 2nd ed.* Oxford University Press 1999, England, page 325

[222] New South Wales Law Reform Commission Research Report 4 *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local* Courts, Sydney, 1993 cited in Mark Findlay, Stephen Odgers, Stanley Yeo, *Australian Criminal Justice 2nd ed.* Oxford University Press 1999, England, page 320-321

[223] New South Wales Law Reform Commission Research Report 4 *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local* Courts, Sydney, 1993 cited in Mark Findlay, Stephen Odgers, Stanley Yeo, *Australian Criminal Justice 2nd ed.* Oxford University Press 1999, England, page 320-321

[224] Department of Justice Government of Victoria, *Victorian Prisoner Health Study* (2003) Deloitte Consulting Victoria page 28

[225] Michael Burvill, (2003) 'The management of mentally impaired offenders within the South Australian criminal justice system' 26 *International Journal of Law and Psychiatry* 13:13

[226] Mark Findlay, Stephen Odgers, Stanley Yeo, *Australian Criminal Justice* 2nd ed. Oxford University Press 1999, England, page 322

word 'right' as in right and left, or right and wrong. Also confusion may occur when someone tells them that they don't have to answer any questions but then proceed to question them.[227]

Despite what people think, having an intellectual disability does not make the person more dangerous or violent.[228] Stereotypes of people with intellectual disabilities being unpredictable and dangerous still exist. One newspaper headline stated, '*Killer on day trips: Insane man unguarded*'.[229] In actual fact, intellectually disabled people are no more likely to commit criminal offences than non-intellectually disabled people.[230]

The aim of the criminal justice system is to punish offenders. Jail is a deterrent for many, however imprisonment often does not have the desired effect on mentally impaired people.[231] Many intellectually disabled people do not remember having committed the offence and do not understand the consequences of their criminal actions.[232] Despite this, studies have shown that intellectually disabled offenders are more likely to receive jail sentences than the rest of the population.[233] Also the sentences are usually for a longer period of time.[234]

In the Victorian Magistrates' Court, attempts have been made to make the system fairer. These are indicated below and discussed further in Part B, chapter 2 and 3.

Mental impairment defence

In the criminal justice system there is a defence to the commission of a crime called the 'mental impairment defence'. The effect and use of the mental impairment defence. Section 5 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997,* states that the mental impairment defence is available in the Magistrates' court for summary offences or indictable offences that are triable

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[227] Jeff Goldhar, (1989) 'People with intellectual disabilities and the criminal justice system', 63(9) *Law Institute Journal* 856:856

[228] Mark Findlay, Stephen Odgers, Stanley Yeo, *Australian Criminal Justice2nd ed.* Oxford University Press 1999, England, page 322

[229] *The West Australian* 1 December 2001

[230] Jenny Bright, (1989) 'Intellectual Disability and the criminal justice system: new developments', 63(10) *Law Institute Journal* 933

[231] Mark Findlay, Stephen Odgers, Stanley Yeo, *Australian Criminal Justice* 2nd ed. Oxford University Press 1999, England, page 327

[232]Mark Findlay, Stephen Odgers, Stanley Yeo, *Australian Criminal Justice* 2nd ed. Oxford University Press 1999, England, page 327

[233] S Bright, 'Intellectual Disability and the Criminal Justice System: New Developments'. (1989) 63 *Law Institute* Journal page 933 cited in Mark Findlay, Stephen Odgers, Stanley Yeo, *Australian Criminal Justice 2nd ed.* Oxford University Press 1999, England, page321

[234] S Bright, 'Intellectual Disability and the Criminal Justice System: New Developments'. (1989) 63 *Law Institute* Journal page 933 cited in Mark Findlay, Stephen Odgers, Stanley Yeo, *Australian Criminal Justice 2nd ed.* Oxford University Press 1999, England, page321

summarily. To be eligible for the defence it must be proved that at the time of the offence, aperson must have been suffering from a mental impairment that had the effect that he or she did not know the nature and quality of the conduct or he or she did not know that the conduct was wrong. [235] If this defence is established the person must be found not guilty and if heard in the Magistrates Court, the person must be discharged.[236] In the County or Supreme the person can be detained in custody or in an appropriate place or the court can order a supervision order.[237] A supervision order can include that the person be detained or can impose certain conditions on the person. Section 27 states that a supervision order is indefinite.

Due to the inability of the Magistrates Court to make any order, the current practice is that the Department of Public Prosecutions tries to get matters heard in the higher courts so that an order can be made.[238] This is costly and time consuming. [239] Another problem with this scheme is that those being heard in the Magistrates Court have minimal link to services or treatment. Therefore recidivism is likely to occur.

Human Rights

International law creates an obligation to afford basic human rights to the mentally impaired.

Once an International Convention has been ratified and signed, it then becomes binding on the member States in terms of a moral obligation of that state or a statement of intention to the rest of the world. However in Australia, International law is not enforceable until an Act of Parliament directly incorporates it into Australian law. Non-incorporated International Conventions only have some use as interpretative instruments when there is ambiguity in legislation or if there is no legislation.

The *UN Declaration on the Rights of Mentally Retarded Persons 1971* states that, those with a mental impairment have a, 'Right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he (or she) shall have a right to due process of law with full recognition being given to his (or her) degree of mental responsibility.' (Art. 6) This means that people with a mental impairment have the right to due process without discrimination, however

[235] *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20
[236] *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 5
[237] *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 24
[238] Internal Magistrates' Court proposal, provided by Jelena Popovic (2004) 'Mental Impairment List' page 9
[239] Internal Magistrates' Court proposal, provided by Jelena Popovic (2004) 'Mental Impairment List' page 9

they also have a right to action that recognises their capacities and limitations. In Australia sometimes the impairment is not recognised and action that recognises their capacity and limitations is not taken. until well into trial, which denies them a right to have their condition fully taken into account. [240] As one expert in the field has said, the courts 'do not acknowledge the offender's illness or take it into consideration'.[241]

The *International Covenant on Civil and Political Rights* states that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law' (Article 26). Looking at the overrepresentation of mentally impaired in the justice system may be an indicator of a lack of such equality before the law. By being a signatory to the Covenant, Australia undertakes to respect and ensure the rights recognised in the covenant. It is the responsibility of the countries that have ratified these conventions, to ensure that all individuals are able to enjoy the rights recognised (Article 2.1).

Further, the *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* 1991, states that, 'every patient in a mental health facility shall, in particular, have the right to full respect for his or her recognition everywhere as a person before the law' (Principle 13). This means that people being treated for a mental illness should be recognised as people before the law. It is quite sad that in this modern world the UN see a need to state that people with a mental illness are human beings with human rights. [242] These principles also state that, 'all criminal offenders who are detained and have a mental illness shall be given the best available mental health care' (Principle 20).

The *Body of Principles for the protection of all persons under any form of detention or imprisonment 1988, principle 11,* states that, 'A person should not be kept in detention without being given an effective opportunity to be heard...'

IS A MENTAL HEALTH COURT A GOOD IDEA?

There are a number of arguments for and against having a mental health court to address the discrimination faced by those affected by a mental illness.

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[240] New South Wales Law Reform Commission '*People with an Intellectual Disability and the Criminal Justice System. Issues Paper*' (1992) Sydney, page 64

[241] Response to questionnaire, May 2004

[242] Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of people with a mental illness,* volume 1 (1993) Australian Government Publishing Service, Canberra, page 21

Disadvantages

One of the largest worries with implementing anything new is that there is no evidence that guarantees it will be successful. Mental health courts are a relatively new idea, and doing anything that has not been done before will entail some risk of outcome. [243]

Mentally impaired people may feel institutionalised and stigmatised by having a separate special court only for mentally impaired people. This may criminalize mental impairment. [244]

Others argue that the role of a court is not to solve social problems. Having a Mental Health Court would be fusing the justice system with the welfare system, when the two should be kept separate. It is argued that having a better mental health system would be a better option than a mental health court.[245]

A further argument is that a mental health court introduces psychiatric treatment as punishment for a crime. This may have the effect of increasing the amount of offences being committed as it could be seen as a soft approach. It could also have the effect of people committing crime just so they can get treatment.[246]

Coercion is seen as an ineffective way of tackling mental health problems. [247] Yet the Mental Health Court in having criminal sanctions for non-compliance of the treatment is coercive.

Benefits

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[243] Petrila, John, (2003) 'Publishers note: An introduction to special jurisdiction courts' 26 *International* Journal *of Law and Psychiatry* 3: 6

[244] Alexander Zammit, (2004) 'Disability and the courts: an analysis of problem solving courts and existing dispositional options: the search for improved methods of processing defendant's with a mental impairment through the criminal courts.' *Office of the Public Advocate* <http://www.publicadvocate.vic.gov.au/CA256A8D001AC7A1/Lookup/OPASystemicAdvocacy/$file/Disability%20and%20the%20Courts.pdf> 9 June 2004

[245] Vivienne Topp, 'Specialist Courts – The Impact Upon the Individual' paper presented at the Law Institute of Victoria conference, Medina Grand Melbourne, 15/16 August 2002),page 4

[246] 'Mental health courts' (2001) *National Mental Health* Association<http://www.nmha.org/position/mentalhealthcourts.cfm> 9 June 2004 page 2

[247] 'Mental health courts' (2001) *National Mental Health Association* <http://www.nmha.org/position/mentalhealthcourts.cfm> 9 June 2004 page 2

Mental Health Courts use therapeutic jurisprudence, which has been around since the Aztecs[248]. This type of jurisprudence has been adopted in America, Canada, Europe and Australia. Other examples of such courts include the Drug court, Koori court, and in the US there is even a court devoted to teen smoking.[249] There are many advantages of using this type of jurisprudence and these are outlined in chapter two of this report. Therefore althoughadopting a Mental Health Court in Australia would be innovative, the concept behind such a court has a long history.

Far from stigmatising offenders, the experience of other therapeutic courts has found that an individual feels appreciative of the special consideration and more comfortable being judged by people who are aware of their situation. [250]

Most importantly a Mental Health Court will tackle the problem of the overrepresentation of mentally impaired people in our justice system. Studies of other therapeutic courts have proved that there is less of a risk of re-offending if individuals are treated in a therapeutic way. [251] A study undertaken by the American King County District Court Mental Health Court showed that 80% of offenders who had "graduated" had not committed any further offences for one year. Prior to the mental health court program 54.2% had re-offended. [252] A Mental Health Court implements a treatment plan rather than sending individuals to jail for minor offences. This reduces incarceration rates of mentally impaired people. The study referred to above also found that people in the mental health court system spend an average of 1.8 days in jail. These same people spent an average of 15.54 days in jail before they entered the mental health court program. [253]

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[248] Petrila, John, (2003) 'Publishers note: An introduction to special jurisdiction courts' 26 *International* Journal *of Law and Psychiatry* 3: 4

[249] John Petrila, 'Publishers note: An introduction to special jurisdiction courts' (2003) 26 *International* Journal *of Law and Psychiatry* 3: 3

[250]Internal Magistrates' Court proposal, provided by Jelena Popovic (2004) 'Mental Impairment List' page 2

[251] Anthony Shaddock and Ann Shaddock, (2000) 'Evaluation of the Illawarra Criminal Justice Project' in Tony Shaddock, Margaret Bond, Isla Bown, Ken Hales, (2000) *Intellectual disability and the law: Contemporary Australian Issues Monograph No. 1*, Australian Society for the study of Intellectual Disability, University of Newcastle NSW, page 114

[252] Alexander Zammit, (2004) 'Disability and the courts: an analysis of problem solving courts and existing dispositional options: the search for improved methods of processing defendant's with a mental impairment through the criminal courts.' *Office of the Public Advocate* <http://www.publicadvocate.vic.gov.au/CA256A8D001AC7A1/Lookup/OPASystemicAdvocacy/$file/Disability%20and%20the%20Courts.pdf> 9 June 2004

[253] Alexander Zammit, (2004) 'Disability and the courts: an analysis of problem solving courts and existing dispositional options: the search for improved methods of processing defendant's with a mental impairment through the criminal courts.' *Office of the Public Advocate* <http://www.publicadvocate.vic.gov.au/CA256A8D001AC7A1/Lookup/OPASystemicAdvocacy/$file/Disability%20and%20the%20Courts.pdf> 9 June 2004

If it is accepted that law is a 'social force that has inevitable consequences for mental health and psychological functions of those it affects',[254] then it should be logical to include more services that address psychological issues within the legal system.

Understanding the complex legal system is hard enough for others, however it is especially hard for those with a mental impairment. [255] If adequately qualified individuals can deal with the mentally ill offenders it will make sure the court remains sensitive, patient, has knowledge aboutthe disability and ensure dignity and justice is afforded to those affected.

A mental health court would make the road of justice easier to follow by consolidating the existing services both in the court and in the community. There would be another option to using the costly and time consuming mental impairment defence.

The advantage of using a court to tackle social problems that offenders have, is that the formal and authoritative nature of a court works as an incentive for the offender to maintain treatment and accept services. [256] In order for sucha court to be viable and not set these people up for failure, adequate resources for services would need to be forthcoming from Treasury.

CONCLUSION

Whilst it is clear that mentally impaired people are discriminated against in the criminal justice system, how to remedy this is the focus of much debate. This Report will argue that although there are concerns about implementing a mental health court, the benefits to the justice system, the mentally impaired and society in general outweigh these concerns. A mental health court takes affirmative action that will act in accordance with human rights laws in catering for the special needs of those with a mental impairment.

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[254] Susan Daicoff, 'The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement' in Dennis P. Stolle, David B. Wexler, Bruce J. Winick (2000) *Practicing Therapeutic Jurisprudence: Law as a helping profession*, Carolina Academic Press, North Carolina, page 483

[255] Anthony Shaddock and Ann Shaddock, (2000) 'Evaluation of the Illawarra Criminal Justice Project' in Tony Shaddock, Margaret Bond, Isla Bown, Ken Hales, (2000) *Intellectual disability and the law: Contemporary Australian Issues Monograph No. 1*, Australian Society for the study of Intellectual Disability, University of Newcastle NSW, page 112

[256] Sue Dusmohamed and Michael Burvill (2003) 'Development of a Specialist Sentencing Court in South Australia', 106 *Canberra Bulletin of Public Administration*, 41: 42

Chapter Six

Treatment vs. Punishment: An examination of established specialist courts

By Sayuri Piper

INTRODUCTION

When one turns one's mind to the idea of a specialist court, a number of words come to mind, such as therapeutic[257], rehabilitative[258], holistic[259] and problem solving[260]. All of these words have been used to describe what we label as 'specialist courts', which emerged from a framework of therapeutic jurisprudence – an interdisciplinary approach that 'utilises social science knowledge to determine ways in which the law can enhance psychological wellbeing'[261].

Specialist courts aims to look at a defendant's situation not only from a legal perspective, but also 'in the context of any underlying physical, psychological, social or economic circumstances'[262].

Today a number of variations of specialist courts have emerged as working models, including drug and youth courts, domestic violence courts, koori courts, mental health courts and bail conditions or specialist lists (for example, CREDIT and the Tuesday Afternoon List - Street Sex Worker List[263]). Some are courts in their own right or legislative instruments; others are diversion programs, lists or even divisions of the magistracy. The key features of them generally include early intervention, non-adversarial proceedings, supervision and collaboration and co-operation between the court and community treatment services[264].

This chapter will explore three main types of specialist courts that have emerged, the koori court, the drug court, and the mental impairment courts, by examining a particular model of each within an Australian framework. This chapter will also include illustrative case studies, drawn from real life legal practice in and around Melbourne.

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[257] Michael Burvill, Sue Dismohamed, Nichole Hunter and Helen Rostie (2003) 'The Management of Mentally Impaired Offenders Within the South Australian Criminal Justice System' 26 *The International Journal of Law and Psychiatry* 13: 13

[258] Daniel McGlone (2003) 'Drug Courts – a departure from adversarial justice' 28(3) *Alternative Law Journal* 136: 139

[259] Vivienne Topp 'Specialist Courts –The Impact Upon the Individual' (paper presented at the Law Institute of Victoria conference, Medina Grand Melbourne, 15/16 August 2002) 7

[260] Wexler in Vivienne Topp 'Specialist Courts –The Impact Upon the Individual' (paper presented at the Law Institute of Victoria conference, Medina Grand Melbourne, 15/16 August 2002) 2

[261] Bigden in Arie Frieberg, (2003) 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' 20(2) *Law in Context* 6: 8

[262] Vivienne Topp 'Specialist Courts –The Impact Upon the Individual' (paper presented at the Law Institute of Victoria conference, Medina Grand Melbourne, 15/16 August 2002) 1

[263] Internal Magistrates' Court proposal, provided by Jelena Popovic (2004) 'Mental Impairment List' 2

[264] Arie Frieberg (2003) 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' 20(2) *Law in Context* 6: 12.

THE KOORI COURT

Pilot programs for specialist courts for indigenous Australians have been initiated in South Australia (the Nunga court), New South Wales and Queensland[265]. Although these courts are not one and the same, they all share common features. This chapter will focus on the model that has been implemented throughout Victoria – the Koori Court, which is located in the rural town of Shepparton and the Melbourne suburb of Broadmeadows, with a circuit court in Warrnambool and Portland[266].

In 2000, ten years after the release of the Royal Commission's Report into Aboriginal Deaths in Custody, the over-representation of Aboriginals in our justice system still remained constant[267]. Subsequent to this, the Victorian Government entered into the *Aboriginal Justice Agreement Initiative*[268], of which the pilot Koori Court was a key recommendation. It became fully operational in Shepparton in January 2002 and six months later in Broadmeadows.

The Koori Court was established to create a process that was more culturally appropriate and inclusive for the Aboriginal community[269], and it aimed to reduce perceptions of intimidation and cultural alienation experienced by Aboriginal offenders[270] within the court system. It is recognised that Aboriginals are particularly disadvantaged and institutionalised in our justice system, and as a result 'are often victims themselves'[271].

Firstly, those eligible to take part in the Koori Court must:

- Be Aboriginal
- Plead guilty to an offence and show an intention that they take responsibility for their actions

The offence or offences involved must not be related to family violence or sexual offences. The magistrate and all other parties (which include an aboriginal elder or 'respected person', an Aboriginal Justice Worker, Community Corrections Officer, Solicitor, and may include family members and other relevant persons) sit at a round table. There is no bench or witness box. The magistrate will hear pleas of guilty and may ask the Koori Elder or Respected Person about any information relevant to the proceedings. They can comment particularly on matters of cultural significance, and 'try to instill a sense of cultural pride and community belonging, tools which

[265] *Magistrates' Court (Koori Court) Bill* 2002 – Second Reading Speech 2
[266] Information provided by Koori Court staff member (2004) Broadmeadows Magistrates' Court 13 May 2004
[267] 'Koori Court Discussion Paper' (2002) unpublished, 11 June 2002 1
[268] See <http://www.justice.vic.gov.au> 6 June 2004
[269] *Magistrates' Court (Koori Court) Bill* 2002 – Second Reading Speech 1
[270] *Koori Court* – unpublished, questions and answers booklet 1
[271] 'Koori Court Discussion Paper' (2002) unpublished, 11 June 2002

might help offenders break their cycle of crime'[272]. Any other member involved in the proceedings may also contribute.

The defendant will then work with the Aboriginal Justice Worker to develop a case management plan, which could include community work or other suitable services. The case is then adjourned until the order is complete. Close collaboration between family, community service providers and criminal justice agencies is needed. Imprisonment always remains an option of last resort however, if there are continual breaches of an order, custody may be the only alternative.

Suggestions from other similar court programs are that re-offending rates have been greatly reduced, which is a crucial result in relation to Aboriginals, who are often institutionalised within our justice system. This outcome infers financial savings in a number of areas, including prosecution, defence and correctional services, as well as welfare costs[273]. Since April 2003, the Koori Court at Broadmeadows has heard 87 new matters. Five of those have re-offended and six have been imprisoned[274].

Today the Koori Court is still limited to the locations mentioned above, and hearings need to be heard in the magistrates' courts mentioned.

THE DRUG COURT

The Drug Court is a popular, universally emerging specialist court. Different models have been implemented across regions in Canada, Ireland, Scotland, and England[275] and over 500 exist in the United States[276]. In Australia the first drug courts were established in New South Wales, Queensland, South Australia and Victoria respectively. It must be noted that not all of these 'courts' are set up as individual courts, but operate as a division of already existing magistrate courts.

The Victorian model of the drug court imposes on drug-related offenders a drug treatment order (DTO) that consists of a custodial part (suspended while treatment occurs) and a treatment and supervision part. It can only be accessed in the Dandenong region, and participants must reside in one of the designated postcode areas to be eligible.

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[272] 'Shepparton's Koori Court' radio show transcript – The Law Report (2004) 8.30am 3 February 2004 Radio National <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1035995.htm> 13 May 2004

[273] *Magistrates' Court (Koori Court) Bill* 2002 – Second Reading Speech 5

[274] Information provided by Koori Court staff member (2004) Broadmeadows Magistrates' Court 13 May 2004

[275] *Drug Court* Magistrates' Court of Victoria pamphlet (2002) Department of Justice, May 2002 3

[276] *Drug Court* Magistrates' Court of Victoria pamphlet (2002) Department of Justice, May 2002 3

Firstly the offender undergoes an assessment for initial screening – this establishes whether the offender satisfies criteria such as, whether they live in the designated area, whether a significant cause of the offence was drug or alcohol abuse and identification of any immediate intervention is required[277]. The offender must also plead guilty and be facing a term of imprisonment. The hearing is then adjourned for 21 days while a detailed assessment is prepared. Following this a case conference is held in the offender's absence, while all other parties involved attend. The offender then goes to a Review Hearing where a final decision is made. Further Review Hearings are scheduled at regular intervals.

The implementation of a DTO requires teamwork with a number of stakeholders, including a police informant, Legal Aid solicitor, caseworker and Drug Court clinician. It also requires information exchange between these parties. The magistrate can vary the DTO as needed, with rewards and sanctions such as verbal warnings or praise, lengthened custody or community work. Cancellation of the DTO can also be used as a reward.

The New South Wales Drug Court (which is set up as an entirely separate court) has reported encouraging results from its participants. A New South Wales Bureau of Statistics and Crime Research report[278] has indicated that the Drug Court is effective in that those that remain on the Drug Court program commit far fewer offences and generally take longer to commit their first offence. In the United States studies show that, even for participants who do not successfully graduate from a drug court program, rates of re-offending considerably decrease. These findings are consistent with statistics in Australia[279].

The New South Wales Drug Court report also says that (for the 23 months that the court was evaluated) the Drug Court, on a daily basis, is estimated to cost less than the regular court process. The report recognises that it is impossible for these estimates to be reliable, but states that there are variable factors that lead to this reduction in costs. These include reduced need in health and criminal justice systems in the long term, reduced insurance claims and victim's compensation, fewer social security expenses and other benefits to the community in general. The report is aware that 'had it been possible to quantify these benefits and costs, the gap between the Drug Court and

[277] Daniel McGlone (2003) 'Drug Courts – a departure from adversarial justice' 28(3) *Alternative Law Journal* 136: 137
[278] 'New South Wales Drug Court Evaluation: Cost-Effectiveness' (2003) *Bureau of Statistics and Crime Research* see <http://www.lawlink.nsw.gov.au/bocsar1.nsf/pages/L15textlink> 28 May 2004
[279] Daniel McGlone (2003) 'Drug Courts – a departure from adversarial justice' 28(3) *Alternative Law Journal* 136: 138

conventional sanctions in terms of cost-effectiveness may well have been larger'. Daniel McGlone also acknowledges that Drug Courts can reap a variety of 'general societal benefits'[280].

Case Study One

Ms X was attending a regular review hearing in accordance with her Drug Treatment Order. As is the case with every participant in the Drug Court, the magistrate asked her how she was feeling, and whether she would like to discuss any issues with the court on that day.

Ms X was very enthusiastic; she informed the magistrate that as a result of her DTO, she had started a part-time job and visiting time with her children had been increased from an hourly basis to overnight. The magistrate commended her on this and asked Ms X how she felt, commenting that she must be very proud. Ms X was extremely happy with these particular developments, as it was obviously an important part of her life. The magistrate was outwardly pleased that this participant was able to move ahead not only in the Drug Treatment Order and staying 'clean' from drugs, but as a consequence, make better other aspects of her life.

As an observer of this sort of dialogue between an offender and a magistrate, the feeling one comes away with is a sense of achievement. This kind of exchange is something that is rarely experienced in any other courtroom.

MENTAL HEALTH COURTS AND DIVERSION PROGRAMS

Mental Health Courts are mainly an American phenomenon, however modified versions have emerged around Australia. In Victoria the closest we have come to recognise the issue is the Disability Co-ordinator appointed in the Melbourne Magistrates' Court, who ensures that the court has access to relevant information for such people. There is also a psychiatric nurse available who

[280] Daniel McGlone (2003) 'Drug Courts – a departure from adversarial justice' 28(3) *Alternative Law Journal* 136: 138

can carry out assessments on request by magistrates[281]. The idea of a Mental Impairment List[282] is currently being researched by magistrate Jelena Popovic in Victoria at the moment but is yet to be proposed or implemented.

The idea of defences for the mentally ill has been embedded in our legal system, from the early origins of the McNaghten Rules[283] to its incorporation into law as the defence of mental impairment and unfitness to plead.[284]. These laws are outlined further in chapter one of this report.

In South Australia the Magistrates Court Diversion Program has been running successfully since 1999. One of the reasons this program was introduced was to provide an alternative for those who sought a defence under Part 8A (the mental impairment provisions) of the Criminal Law Consolidation Act 1935 (SA), which could be a costly and time consuming exercise in preparing psychiatric reports and other evidence for relatively minor offences. It is also recognised that it is extremely difficult to get service providers for the mentally ill to attend court hearings, such as caseworkers and treating professionals[285]. At present the Magistrates' Court Diversion Program (MCDP) has passed its pilot phase and is operating in several South Australian courts.

The MCDP recognises that the mentally impaired are a special class of people that are more vulnerable than others, especially throughout the legal process[286]. The program involves early intervention, appropriate referrals and treatment, and adjourns the case until these treatments are complete. There are three key players: the Co-ordinator, who has a background in mental health and disability issues, the Clinical Psychologist and the Mental Health Liaison Officer. They create a partnership with the court staff – the magistrate, two designated police prosecutors and a publicly funded solicitor for unrepresented litigants. The program relies entirely on treatment being available within the community as it uses already existing resources.

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[281] Nichole Hunter and Helen Rostie (2001) 'Information Bulletin – Magistrates Court Diversion Program – Overview of Key Data Findings' *Adelaide Office of Crime Statistics* 2 <http:www.oscar.sa.gov.au/docs/information_bulletins/IB20.pdf> 18 May 2004

[282] Internal Magistrates' Court proposal, provided by Jelena Popovic (2004) 'Mental Impairment List'

[283] See <www.fact-index.com/m/mc/mcnaghtern_rules.html> 6 June 2004

[284] Michael Burvill, Sue Dismohamed, Nichole Hunter and Helen Rostie (2003) 'The Management of Mentally Impaired Offenders Within the South Australian Criminal Justice System' 26 *The International Journal of Law and Psychiatry* 13: 14

[285] Internal Magistrates' Court proposal, provided by Jelena Popovic (2004) 'Mental Impairment List' 10

[286] Michael Burvill, Sue Dismohamed, Nichole Hunter and Helen Rostie (2003) 'The Management of Mentally Impaired Offenders Within the South Australian Criminal Justice System' 26 *The International Journal of Law and Psychiatry* 13: 15

Even though a plea of guilty is not required, the offender must not dispute any of the key elements of the offence or offences being alleged. The participants need to give informed consent and their involvement must be voluntary. They need to be assessed for an intellectual or mental impairment, and of course have committed an offence that can be tried in the Magistrates' Court. Generally violent offences and those that are regulatory in nature, such as traffic offences, mean that the person will be made ineligible[287]. The program's definition of mental impairment is used as an umbrella term, which encompasses intellectual disability, personality disorder, acquired brain injury and neurological disorder (for example, dementia), drawn from the CLCA (Mental Impairment) Amendments 1995 (SA)[288]. The court process itself uses less formal language and focuses on monitoring and review, much like the drug court, and an individualised intervention plan[289]. Anticipated program length and actual program length are often different because non-compliance is mainly punished by extending the offender's program.

All this comes before a final determination, where the MCDP relies on police prosecutors to withdraw charges where an offender has complied with treatment. At the end of the pilot phase, the Office of Crime Statistics in South Australia[290] reported that 87 males and 36 females had participated in the program, with 58 already given a final determination. None were sentenced to imprisonment, but ten received suspended sentences, and the majority of the rest were put on a good behaviour bond[291].

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[287] Michael Burvill, Sue Dismohamed, Nichole Hunter and Helen Rostie (2003) 'The Management of Mentally Impaired Offenders Within the South Australian Criminal Justice System' 26 *The International Journal of Law and Psychiatry* 13: 17

[288] Michael Burvill, Sue Dismohamed, Nichole Hunter and Helen Rostie (2003) 'The Management of Mentally Impaired Offenders Within the South Australian Criminal Justice System' 26 *The International Journal of Law and Psychiatry* 13: 14

[289] Nichole Hunter and Helen Rostie (2001) 'Information Bulletin – Magistrates Court Diversion Program – Overview of Key Data Findings' *Adelaide Office of Crime Statistics* 4 <http:www.oscar.sa.gov.au/docs/information_bulletins/IB20.pdf> 18 May 2004

[290] Sue Dismohamed and Michael Burvill (2003) 'Development of a Specialist Sentencing Court in South Australia' 106 *Canberra Bulletin of Public Administration* February 2003, 41: 43

[291] Michael Burvill, Sue Dismohamed, Nichole Hunter and Helen Rostie (2003) 'The Management of Mentally Impaired Offenders Within the South Australian Criminal Justice System' 26 *The International Journal of Law and Psychiatry* 13: 30

Case Study Two

Mr Y was referred from a psychiatric health organization to a free legal service. He had been charged with a number of minor offences and upon further investigation it was discovered that he already had a warrant issued for his arrest for not attending court in regard to previous charges.

Mr Y is a diagnosed schizophrenic. His offences are of a non-violent nature. He has prior convictions recorded of which he is not aware because they were held ex parte and notification sent to an address when he was homeless. His case is hopeless without legal representation. Due to his condition he has difficulty remembering events, and has no recollection of circumstances surrounding the charges.

With the help of Victoria Legal Aid and a private barrister, it is established that Mr Y may have a possible defence of mental impairment. However, due to his income status, it is extremely difficult to obtain an appropriate psychiatric report. His treating psychiatrists have been regularly changed over the past three years, so there is really no one professional qualified to give a detailed analysis of Mr Y's condition and the effect it has on his everyday life. As a result it is extremely difficult to mount a defence of mental impairment on his behalf.

Due to the number of charges against Mr Y, there is a possibility that he will be sentenced to custody. This is certainly not in his best interests as Mr Y is in continuing case management and making considerable progress. He has indicated that he is proud of himself for 'dealing with' his legal problems.

The case for Mr Y has been continually lengthened with consolidations and adjournments. His outlook is bleak without alternative sentencing options available (as would be available in a mental impairment court) and the time needed to establish understanding by the court of his condition.

There are many concerns that have been expressed by various interested parties about the implementation of specialist courts as an alternative to our adversarial justice system. Most of these concerns revolve around:

- Political – creation of specialist courts may be motivated by the political rather than authentic issues[292]
- Stigma – would a mental impairment court increase stigma and labelling to the mentally ill?[293]
- Resources – specialist courts may put a strain on already poorly funded community organisations and treatment options[294]
- Social problems – that it is not for the courts to compensate for deficiencies in our health care system and inherent problems in our society[295]
- Legislation – the Mental Health Act 1986 (VIC) already provides for the adequate treatment of the mentally ill[296]
- Culture within the judiciary – for example, it is difficult to find support amongst traditionalists who see specialist courts as a 'soft' form of therapeutic jurisprudence[297]
- Time consuming – for example, Jelena Popovic observes that a Koori Court single hearing took 45 minutes, where in a regular court four similar hearings would be heard in about 30 minutes[298]
- Fragmentation -- too many specialist courts may disintegrate the operation of the courts[299]
- Media – only one case of an offender being released into the community and seriously offending could have dire consequences for such a program, such as loss of political and public support[300]

However, there are also many arguments for the implementation of a specialist court structure, especially in the mental health sphere. Although in Victoria we have existing services available,

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[292] Arie Frieberg (2003) 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' 20(2) *Law in Context* 6: 19

[293] 'Mental Health Courts Policy' (2004) National Mental Health Association <http://www.nmha.org/position/mentalhealthcourts.cfm> 6 June 2004

[294] 'Mental Health Courts Policy' (2004) National Mental Health Association <http://www.nmha.org/position/mentalhealthcourts.cfm> 6 June 2004

[295] The Age (newspaper) in Vivienne Topp 'Specialist Courts -The Impact Upon the Individual' (paper presented at the Law Institute of Victoria conference, Medina Grand Melbourne, 15/16 August 2002) 5

[296] Comments made anonymously by a practicing solicitor via our questionnaires

[297] Jelena Popovic (2003) 'Judicial Officers – Complementing Conventional Law and Changing the Culture of the Judiciary' 20(2) *Law in Context* 121: 131

[298] Jelena Popovic (2003) 'Judicial Officers – Complementing Conventional Law and Changing the Culture of the Judiciary' 20(2) *Law in Context* 121: 127

[299] Arie Frieberg (2003) 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' 20(2) *Law in Context* 6: 19

[300] Arie Frieberg (2003) 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' 20(2) *Law in Context* 6: 19

such as the Mental Health Legal Centre, such services are under-resourced and not able to meet legal needs of all clients[301].

Although there is ample academic backing for the notion that mentally ill offenders respond well to a formal, adversarial court system, 'the prerequisite is that patients must perceive the process as procedurally fair, in that they are given a voice, that is, an opportunity to put their case, and that they are treated politely and with dignity and respect'[302].

Arie Frieberg argues that the non-adversarial process that is inherent in specialist courts is a strength in itself. 'People are more willing to accept decisions of legal authorities whose motives they view as benevolent and more trustworthy ... if [the courts] are perceived to be acting in good faith, the affected party is more likely to accept the decision'[303]. Relationships of respect and trust in a courtroom results in an impression of procedural fairness[304] and are useful in achieving behavioural change[305].

The dominant adversarial court system entrenched in Australia is fundamentally flawed[306], and especially unsympathetic to those with a mental illness.

The Halliday Report in the United Kingdom[307] notes that those given the power to sentence do not necessarily see the outcome of their sentencing. Specialist courts give magistrates the opportunity to observe what happens to offenders after they are sentenced and the implications that punishments impose. It is problematic to administer mental health treatment once an offender is imprisoned[308], therefore intervention should be the preferred strategy.

Not only do new ideas and practices within our legal system need to be implemented, but education of those who may be dealing with mentally ill offenders on a day-to-day basis is required. Police need to be given guidance as to their management of mentally impaired offenders. At the very least

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[301] Response to questionnaire May 2004
[302] Alfred Allan (2003) 'Mental Health Law: A Therapeutic Jurisprudence Analysis' 20(2) *Law in Context* 24:39
[303] Arie Frieberg (2003) 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' 20(2) *Law in Context* 6: 16
[304] Jelena Popovic (2003) 'Judicial Officers – Complementing Conventional Law and Changing the Culture of the Judiciary' 20(2) *Law in Context* 121: 128
[305] Internal Magistrates' Court proposal, provided by Jelena Popovic (2004) 'Mental Impairment List' 10
[306] Arie Frieberg (2003) 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' 20(2) *Law in Context* 6: 7
[307] Arie Frieberg (2003) 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' 20(2) *Law in Context* 6: 13; see also < http://www.homeoffice.gov.uk/docs/halliday.html> 10 June 2004
[308] David Greenberg and Ben Nielsen (200) 'Court diversion in NSW for people with mental health problems and disorders' 13(7) *NSW Public Health Bulletin* 158: 158

those involved in the court structure need to be aware of the possibility of mental illness being a factor of offending, and have some sort of grasp as to what issues might be addressed.

In relation to funding, Arie Frieberg[309] argues that for any program to be effective, it must be adequately resourced even if it diverts certain resources away from mainstream community agencies. Arie Frieberg states that 'the protection of the rights of vulnerable people is never too expensive'[310].

CONCLUSION

In acknowledging the above fears in relation to specialist courts, this chapter argues that mentally ill offenders, as a disadvantaged class of people, need a commitment from our society that genuine efforts will be made to help them. While the implementation of specialist jurisdictional courts challenge long held traditions and processes in our justice system, a willingness to try new and innovative ways to tackle such problems is critical otherwise the mentally ill will continue to reside in prisons.

A wholehearted approach is necessary, not only in relation to funding from the government, but also in regard to other stakeholders within Victoria's judicial and wider community and patience by the media in the time it takes to tackle a complex issue. A solid, committed approach to a Mental Impairment Court that is sufficiently resourced, continually assessed and well informed isargued for by this report's authors.

[309] (2003) 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' 20(2) *Law in Context* 6: 14

[310] Alfred Allan (2003) 'Mental Health Law: A Therapeutic Jurisprudence Analysis' 20(2) *Law in Context* 24: 38

Chapter Seven

Arrangement and Operation of the Mental Health Court

By Brianna Nichols

INTRODUCTION

The Idea of a Mental Health Court

The proposal for a Mental Health Court aims to address the demand for more appropriate mechanisms to deal with those suffering from a mental impairment within the legal system and reduce the levels of incarceration of the mentally ill. It recognises that individuals with a mental impairment may be particularly vulnerable at the time of arrest and throughout the court process and that extra services may be necessary to assist individuals to address their mental health issues.[311]

Based on a therapeutic model of justice, the Mental Health Court actively aims to acknowledge the needs of these offenders and to ultimately make positive changes to their lives.[312] Individuals who enter the court's jurisdiction are encouraged to undergo treatment and are provided with the necessary support for them to control and handle their disabilities effectively.[313] Each treatment scheme seeks to rehabilitate and educate those with mental impairments about their behaviour and to link defendants with appropriate interventions aimed at ultimately reducing their rate of re-offending.[314]

Focus is therefore on treatment and support, rather than simply punishing these individuals or simply returning them to the community with their need for support and treatment remaining unidentified or dealt with.[315]

The intention here is to effectively 'reduce overcrowded prisons, address the lack of adequate support services in the community, as well as to provide tailored treatment and support networks for

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[311] Micheal Burvill, Sue Dusmohamed, Nichole Hunter & Helen McRostie, 'The management of mentally impaired offenders within the South Australian criminal justice system' (2003) 26 *International Journal of Law and Psychiatry* 13, 15.

[312] Office of the Public Advocate, *'Disability and the courts - An analysis of Problem Solving Courts and Existing Dispositional Options: The search for improved methods of processing defendants with a mental impairment through the criminal courts'* (2004) 4.

[313] Office of the Public Advocate, *'Disability and the courts - An analysis of Problem Solving Courts and Existing Dispositional Options: The search for improved methods of processing defendants with a mental impairment through the criminal courts'* (2004) 11.

[314] Micheal Burvill, Sue Dusmohamed, Nichole Hunter & Helen McRostie, 'The management of mentally impaired offenders within the South Australian criminal justice system' (2003) 26 *International Journal of Law and Psychiatry* 13, 13.

[315] Micheal Burvill, Sue Dusmohamed, Nichole Hunter & Helen McRostie, 'The management of mentally impaired offenders within the South Australian criminal justice system' (2003) 26 *International Journal of Law and Psychiatry* 13, 15.

people with a mental impairment'.[316] The Mental Health Court specifically aims to generate positive change by attempting to find solutions to the problems faced by those with a mental impairment, which many traditional court processes have failed to adequately consider or address.[317]

KEY FEATURES OF THE PROPOSED MENTAL HEALTH COURT

The main features of the proposal include that:

- The defendant's entry into the court is dependant upon a voluntary submission by the individual. The option of participation is at their entire discretion.[318] All offenders or suspected offenders referred to the Mental Health Court shall be required to provide consent to the jurisdiction of the court and it is suggested that consent actually be obtained at two different stages of the process. Firstly, consent will be required upon assessment and again to become a participant member of the program.[319] There is no mandated requirement that the defendant must have their case heard within the Mental Health Court simply because they possess a mental impairment. Therefore those who do not agree to participate in the program should be returned to the Magistrates' Court whereby they will be subject to the normal court processes and sentencing options.[320]
- To provide early assessment and intervention[321] through the use of expert staff, such as psychologists and clinicians, in collaboration with the legal officers of the court. This team approach is employed to ensure that the best methods for treatment are implemented for each individual entering the program.[322]

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[316] Office of the Public Advocate, *'Disability and the courts - An analysis of Problem Solving Courts and Existing Dispositional Options: The search for improved methods of processing defendants with a mental impairment through the criminal courts'* (2004) 10.
[317] Office of the Public Advocate, *'Disability and the courts - An analysis of Problem Solving Courts and Existing Dispositional Options: The search for improved methods of processing defendants with a mental impairment through the criminal courts'* (2004) 11.
[318] Internal Magistrates' Court proposal, provided by Jelena Popovic *'Mental Impairment List'* (2004) 2
[319] Nichole Hunter & Helen McRostie, *'Information Bulletin. Magistrates Court Diversion Program: Overview of the key data findings'* (2001) 5.
[320] Nichole Hunter & Helen McRostie, *'Information Bulletin. Magistrates Court Diversion Program: Overview of the key data findings'* (2001) 4.
[321] Office of the Public Advocate, *'Disability and the courts - An analysis of Problem Solving Courts and Existing Dispositional Options: The search for improved methods of processing defendants with a mental impairment through the criminal courts'* (2004) 4.
[322] Office of the Public Advocate, *'Disability and the courts - An analysis of Problem Solving Courts and Existing Dispositional Options: The search for improved methods of processing defendants with a mental impairment through the criminal courts'* (2004) 4.

- To provide and establish adequate links with social service providers and mental health organisations in order to prompt reform in the way that services are delivered to those with mental impairments.[323]
- All individuals participating in the court program should be treated in the least restrictive manner available, with institutionalisation and imprisonment being avoided wherever possible.[324]

COURT ARRANGEMENT

Court location

The Mental Health Court should be based as an extension of the Magistrates' Court and positioned within a separate courtroom. Given that there are such a high number of individuals affected by mental illness and/or intellectual disabilities, it is expected that there will be a great demand for the court, and that to simply set aside one day a week for example in the Magistrates' Court would not be sufficient.

This set-up will ensure that the Mental Health Court will have access to and the utilisation of the entire Magistrates' Court's support services and facilities.[325] and improve the efficiency of the court processes through transferring the difficult cases to the Mental Health Court where adequate assessments, speedy intervention and the necessary treatment will be provided.[326] Court diversion ultimately allows the judiciary to continue on with their job of processing individuals through the courts.[327]

Staff

Like the South Australian Magistrates' Court Diversion Program, one Magistrate with three full time staff members should be employed to run the Mental Health Court initially.[328] A principle co-ordinator, a senior clinical advisor/psychologist and a mental health justice liaison officer[329] shall all be required to work alongside the Magistrate and to work as a collaborative team. Accordingly, the co-ordinator should possess a background in mental health assessment and disability issues and will

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[323] Office of the Public Advocate, *'Disability and the courts - An analysis of Problem Solving Courts and Existing Dispositional Options: The search for improved methods of processing defendants with a mental impairment through the criminal courts'* (2004) 14.
[324] National Mental Health Association, 'Mental Health Courts' (2001) National Mental Health Association <http://www.nmha.org/position/mentalhealthcourts.cfm> 6 June 2004
[325] Internal Magistrates' Court proposal, provided by Jelena Popovic *'Mental Impairment List'* (2004) 9
[326] Nichole Hunter & Helen McRostie, *'Information Bulletin. Magistrates Court Diversion Program: Overview of the key data findings'* (2001) 3.
[327] David Green and Ben Neilson, 'Court Diversion in NSW for People with Mental Health Problems and Disorders' (2002) 13(7) *NSW Public Health Bulletin* 158, 158.
[328] Nichole Hunter & Helen McRostie, *'Information Bulletin. Magistrates Court Diversion Program: Overview of the key data findings'* (2001) 4.
[329] Sue Dusmohamed and Michcal Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41, 42.

be required to oversee the operation of the court and all offenders.[330] Overall he/she will be responsible for monitoring clients' assessed clinical status, treatment needs and program suitability.[331] Conducting eligibility assessments and providing psychological advice should be left to the clinical psychologist, while the liaison officer is responsible for connecting entrants to the relevant and appropriate service providers.[332]

A significant feature of the Mental Health Court is the importance placed on the judicial officer who is responsible for solving problems and encouraging positive outcomes and changes in the defendant's behaviour.[333] A single Magistrate should be appointed to manage, direct and supervise within the court in order to provide a consistent approach across the board.[334] The Magistrate is required to adopt a less adversarial approach than in the traditional courts[335] whereby interaction and communication with the defendant is encouraged and expected.

Other officers of the court should include two designated police prosecutors and a publicly funded solicitor to help those individuals without legal representation.[336] While many mental health courts have chosen to operate through the use of only one defence lawyer to represent all clients, it is anticipated this job may be too big for one person.[337] This will impact on the quality of assistance that may be provided to each defendant and on the amount of individuals who will be able to take advantage of the Mental Health Court. Therefore while the court may be able to function with only one lawyer in the initial stages of the program, it is likely that a further defence lawyer may need to be employed further down the track.

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[330] Michcal Burvill, Sue Dusmohamed, Nichole Hunter & Helen McRostie, 'The management of mentally impaired offenders within the South Australian criminal justice system' (2003) 26 *International Journal of Law and Psychiatry* 13, 16

[331] Eric Trupin and Henry Richards, 'Seattle's mental health courts: early indicators of effectiveness' (2003) 26 *International Journal of Law and Psychiatry* 33, 37.

[332] Michcal Burvill, Sue Dusmohamed, Nichole Hunter & Helen McRostie, 'The management of mentally impaired offenders within the South Australian criminal justice system' (2003) 26 *International Journal of Law and Psychiatry* 13, 16

[333] Office of the Public Advocate, *'Disability and the courts - An analysis of Problem Solving Courts and Existing Dispositional Options: The search for improved methods of processing defendants with a mental impairment through the criminal courts'* (2004) 4.

[334] Sue Dusmohamed and Micheal Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41, 42.

[335] Roger Boothroyd, Norman Pythress, Annette McGaha and John Petrila, 'The Broward Mental Health Court: process, outcomes, and service utilization' (2003) 26 *International Journal of Law and Psychiatry* 55, 56.

[336] Micheal Burvill, Sue Dusmohamed, Nichole Hunter & Helen McRostie, 'The management of mentally impaired offenders within the South Australian criminal justice system' (2003) 26 *International Journal of Law and Psychiatry* 13, 16

[337] Office of the Public Advocate, *'Disability and the courts - An analysis of Problem Solving Courts and Existing Dispositional Options: The search for improved methods of processing defendants with a mental impairment through the criminal courts'* (2004) 36.

All of these individuals should be present during any hearing involving the defendant, as well as any friend, family member or support staff the defendant may wish to be present throughout the process.[338] It is important to note that the roles of all individuals involved in the Mental Health Court are rather different to what normally is expected within the traditional courts.[339] All involved adopt a dedicated team oriented approach as far as operationally possible in order to encourage program compliance and for reaching the most effective outcome for the individual.[340] Another important aspect of the court is also that the same staff are present throughout the proceedings, as this will not only help to increase expertise in the field and therefore improve decision making. It also allows staff to gain an increased awareness of any important issues relating to the defendant and particularly to any matters which may have an adverse impact on the defendant's ability to conform to the program.[341]

Basic court processes

The court processes should operate relatively normally however recognition is required of the defendants' special needs.[342] In acknowledging this, a less formal approach should be put into operation. The use of legal terminology should be reduced to increase clients understanding[343], and speech should be slow and clear. It is important that statements and answers to enquiries are spoken simply[344], with adequate time being allowed for the person to respond.[345] If necessary the Magistrate, and other court officers, should restate and rephrase important points and clarification should constantly be sought from the defendant, as those with intellectual or mental disabilities often give the impression of understanding when they do not.[346]

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[338] Western Australian Committee on Persons with Intellectual Disability, 'Persons with an Intellectual Disability: Issues for Consideration of the Courts' (1993) 11.
[339] Bruce Arrigo, 'The Contours of Psychiatric Justice: A Postmodern Critique of Mental Illness, Criminal Insanity, and the Law' (1996) 43.
[340] Eric Trupin and Henry Richards, 'Seattle's mental health courts: early indicators of effectiveness' (2003) 26 *International Journal of Law and Psychiatry* 33, 37.
[341] Office of the Public Advocate, *'Disability and the courts - An analysis of Problem Solving Courts and Existing Dispositional Options: The search for improved methods of processing defendants with a mental impairment through the criminal courts'* (2004) 15.
[342] Sue Dusmohamed and Micheal Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41, 41.
[343] Sue Dusmohamed and Micheal Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41, 43.
[344] Western Australian Committee on Persons with Intellectual Disabilities, 'Persons with an Intellectual Disability: Guidelines for Associates, Orderlies and Security Officers' (1993) 4
[345] Western Australian Committee on Persons with Intellectual Disabilities, 'Persons with an Intellectual Disability: Guidelines for Associates, Orderlies and Security Officers' (1993) 4
[346] Western Australian Committee on Persons with Intellectual Disabilities, 'Persons with an Intellectual Disability: Guidelines for Associates, Orderlies and Security Officers' (1993) 4

It is helpful for an individual with an intellectual disability or mental illness to familiarise themselves with the court before appearing in it as a defendant.[347] This should be encouraged by the court and an opportunity for the defendant to do this should be made.

ELIGIBILITY

The Mental Health Court is intended to cover all individuals with a mental impairment. The definitions which should be adopted in the assessment of one's mental state are outlined in Chapter One of this report, which is based largely on the definitions contained within present Victorian legislation such as the *Mental Health Act* 1986 and the *Intellectually Disabled Persons' Services Act* 1986.[348] Further, the individual must be deemed to be eligible by the court staff in their assessment of the defendant's mental status.

The individual must only be charged with summary offences and certain indictable offences[349], or alternatively those offences which may be heard within the Magistrates' Court. While the South Australian program sought to basically eliminate offences of a violent nature, it is not believed that these guidelines should be overly restrictive and these sorts of cases should ultimately be assessed and accepted on a case by case basis contingent on the relevant factors of each situation. Ultimately, discretion must be given to the Magistrate to make the final decision as to whether an individual is appropriate for inclusion into the court[350].

Unlike most already established Mental Health Courts within other jurisdictions, it is suggested here that entrance into the court should not be subject to a plea of not guilty or an indication that one will not contest the charges that have been laid. Minimising coercion is seen to be essential to providing effective treatment and assistance for those with a mental impairment[351] and thereby to require one to plead guilty may lead to increased coercion and be detrimental to the individual's treatment and recovery. The Mental Health Court as proposed here seeks to accommodate both those who wish to enter a plea of not guilty as well as those who are effectively willing to plead guilty.

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[347] Western Australian Committee on Persons with Intellectual Disabilities, 'Persons with an Intellectual Disability: Guidelines for Associates, Orderlies and Security Officers' (1993) page 5.
[348] The use of current definitions within Victorian legislation is also suggested in the Internal Magistrates' Court proposal, provided by Jelena Popovic *'Mental Impairment List'* (2004) 3
[349] Sue Dusmohamed and Micheal Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41, 43.
[350] Internal Magistrates' Court proposal, provided by Jelena Popovic *'Mental Impairment List'* (2004) 3
[351] National Mental Health Association, 'Mental Health Courts' (2001) National Mental Health Association <http://www.nmha.org/position/mentalhealthcourts.cfm> 6 June 2004

Under the Mental Health Court Program the Magistrate will have the authority to adjourn proceedings until completion of the program whereby charges may be withdrawn or alternative outcomes may be arranged. Therefore although no plea is to be submitted for entrance into the actual treatment program, it must be indicated that the individual will not be contesting the charges. Alternatively if one wishes to make a plea of not guilty, then they still possess the right to have their case heard in the Mental Health Court with the suitable support services available. In these situations the appropriate bail conditions should be set and the case should be referred to a court hearing which will be dealt with in the Mental Health Court.[352]

It should be noted however that this proposal strongly disagrees with the suggestion that 'the eligibility criteria may stipulate an involvement with mental health services within the previous 5 years'[353]. It is of the belief that this would go against the entire purposes of the Mental Health Court, and reduce the effectiveness of the program. A large part of the proposal and the idea of the Mental Health Court are to provide services and assistance to those with a mental impairment who may have slipped through the nets and who have not received the services and assistance that they need.

OPERATION OF THE COURT

It is suggested that the operation of the Mental Health Court in Victoria should be based largely on the South Australian Magistrates Court Diversion Program[354] however some changes are strongly recommended.

Those individuals with a suspected mental impairment should be referred to the Mental Health Court as early as possible.[355] The referral process should be relatively flexible with individuals involved at all stages in the criminal justice system being permitted to make recommendations. Such individuals include guardians, the police, solicitors, case managers, mental health services, Magistrates and the defendants themselves.[356] Ideally however it is intended that referral should

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[352] It is understood that a similar approach has also been forwarded by the Magistrates' Court of Victoria in their Mental Impairment List proposal. See Internal Magistrates' Court proposal, provided by Jelena Popovic *'Mental Impairment List'* (2004) 15.
[353] Internal Magistrates' Court proposal, provided by Jelena Popovic *'Mental Impairment List'* (2004) 3
[354] Nichole Hunter & Helen McRostie, *'Information Bulletin. Magistrates Court Diversion Program: Overview of the key data findings'* (2001).
[355] Nichole Hunter & Helen McRostie, *'Information Bulletin. Magistrates Court Diversion Program: Overview of the key data findings'* (2001) 4.
[356] Nichole Hunter & Helen McRostie, *'Information Bulletin. Magistrates Court Diversion Program: Overview of the key data findings'* (2001) 4.

occur at the time the charges are laid[357] as this will ensure the most effective and immediate action. Although it is beyond the depth of this report, it is suggested that extra education and information about the mentally impaired should particularly be provided to the police and to those involved in the early stages of the process. Such a referral process aims to make certain that all offenders with a mental impairment have the opportunity to enter into the Mental Health Court.[358]

Once a defendant has been referred to the court program, and prior to assessment, the staff and the defendant's legal representation will ensure that consent is obtained for assessment and that the voluntary nature of the program is explained to the defendant.[359] They will then be required to undergo an assessment to ascertain the presence of a mental impairment and to determine eligibility.[360] If the defendant is determined to be eligible for admittance into the program, they will be required to submit or consent to the courts jurisdiction once again. Where the individual is found to be ineligible or chooses not to consent to the jurisdiction of the court they will be required to have their case determined through the traditional court processes.[361]

During the assessment phase, the defendant will also be asked whether they wish to enter the program directly and therefore not contest the charges, or whether they wish to argue their case and plead their innocence. Those who choose to take this path and contest the charges will be linked with the courts defence solicitor, if they do not possess appropriate representation, and a court date shall be set for their hearing.

Those who opt to enter the program however, and are deemed suitable, will have an individualised plan created for them. This will focus on all relevant issues to their situation along with possible intervention strategies and recommendations.[362]

Following this assessment and the creation of the relevant reports, the client is to appear before the Magistrate for the first time, where the judge will make determinations on a number of issues.

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[357] Micheal Burvill, Sue Dusmohamed, Nichole Hunter & Helen McRostie, 'The management of mentally impaired offenders within the South Australian criminal justice system' (2003) 26 *International Journal of Law and Psychiatry* 13, 17.
[358] Office of the Public Advocate, *'Disability and the courts - An analysis of Problem Solving Courts and Existing Dispositional Options: The search for improved methods of processing defendants with a mental impairment through the criminal courts'* (2004) 15.
[359] Sue Dusmohamed and Micheal Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41, 43.
[360] Nichole Hunter & Helen McRostie, *'Information Bulletin. Magistrates Court Diversion Program: Overview of the key data findings'* (2001) 4.
[361] Nichole Hunter & Helen McRostie, *'Information Bulletin. Magistrates Court Diversion Program: Overview of the key data findings'* (2001) 4.
[362] Nichole Hunter & Helen McRostie, *'Information Bulletin. Magistrates Court Diversion Program: Overview of the key data findings'* (2001) 4.

Firstly, the Magistrate will have the final say as to whether the individual is to be entered into the program or not. He/she will also arrange and assign the appropriate interventions that must be put into operation by the individual and the court staff for the plan to be activated. Program completion should also be addressed. Proceedings would then be adjourned so that treatment could commence.[363]

From there the individual will then be required to attend regular review hearings to assess progress and compliance. Upon the end of the program the defendant will be obliged to attend court for the final determination hearing. Here a final report will be provided to the Magistrate by the court staff which will detail the progress of the defendant and any other relevant information.[364] A conclusion will then be reached relating to the outcome of the charges, whether a conviction is to be laid, and to the future implications and obligations for the defendant.

FIRST HEARING

As outlined above, the defendant would be required to appear before the Magistrate following assessment. This hearing would basically cover an introduction to the Mental Health Court, reaching an official determination of acceptance into the program, and addressing treatment requirements. As there are reports that suggest that many clients of existing mental health courts are unaware of the right to decline participation within the specialist court and that they may in fact opt to have their case heard in the regular manner[365], it is advised that the Magistrate should cover the consent issues once more. There are two important legal issues that the Magistrate shouldaddress here which are relevant to mental health courts and participation.[366] These include that the defendant must have an understanding that the courts primary focus is on treatment rather than the adjudication of their case (unless they opt to contest the charges) and that ultimately participation is voluntary.[367] The option of contesting the charges and having their case still heard in the Mental Health Court should also be discussed with the client.

Information obtained during and subsequent to assessment should be submitted and disclosed to the Magistrate within this initial hearing to assist him/her to decide on whether the individual before

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[363] Nichole Hunter & Helen McRostie, '*Information Bulletin. Magistrates Court Diversion Program: Overview of the key data findings*' (2001) 4.
[364] Nichole Hunter & Helen McRostie, '*Information Bulletin. Magistrates Court Diversion Program: Overview of the key data findings*' (2001) 4.
[365] Roger Boothroyd, Norman Pythress, Annette McGaha and John Petrila, 'The Broward Mental Health Court: process, outcomes, and service utilization' (2003) 26 *International Journal of Law and Psychiatry* 55, 56.
[366] Roger Boothroyd, Norman Pythress, Annette McGaha and John Petrila, 'The Broward Mental Health Court: process, outcomes, and service utilization' (2003) 26 *International Journal of Law and Psychiatry* 55, 57.
[367] Roger Boothroyd, Norman Pythress, Annette McGaha and John Petrila, 'The Broward Mental Health Court: process, outcomes, and service utilization' (2003) 26 *International Journal of Law and Psychiatry* 55, 57-58.

them should be accepted into the court and what tactics should be adopted for the treatment plan.[368] A report based on the assessment, along with any past psychological, medical or other relevant reports should be presented to the court, as should an individualised intervention plan prepared by the team.[369] This plan should address any number of issues that the staff deem relevant, including homelessness, drug or alcohol addictions, the diagnosis, and an outline of the appropriate intervention strategies recommended for the particular individual.[370]

The final plan being activated by the Magistrate in this hearing should ultimately outline a strategy for the management of each participant as formulated in consideration of the report provided by staff and in consultation with service providers.[371] A determination of the length of time the individual should be expected to participate in the program should also be provided to the defendant.

Within other established Mental Health Courts, the prosecution have developed a routine of providing the likely outcome of the charges and case upon completion of the program.[372] It is suggested that this system also be adopted within the Victorian Mental Health Court, with the withdrawal of charges being a common outcome of cases.

Throughout this hearing the defendant should be provided the opportunity to raise any questions or concerns that he/she may have with the Magistrate directly.

TREATMENT

Treatment may be seen to be the ultimate goal of Mental Health Courts. It is recognised that those with a mental illness or impairment, and in particular those with an intellectual disability, may not be able to fully recover from their disability. Primarily the treatment plan will provide links either through referral to an agency that the defendant is already or has previously been associated with, or through referral to a specific agency or agencies that are deemed to be appropriate for their needs.[373]

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[368] Sue Dusmohamed and Micheal Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41, 43.
[369] Nichole Hunter & Helen McRostie, '*Information Bulletin. Magistrates Court Diversion Program: Overview of the key data findings*' (2001) 4.
[370] Nichole Hunter & Helen McRostie, '*Information Bulletin. Magistrates Court Diversion Program: Overview of the key data findings*' (2001) 4.
[371] Sue Dusmohamed and Micheal Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41, 43.
[372] Sue Dusmohamed and Micheal Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41, 43.
[373] Roger Boothroyd, Norman Pythress, Annette McGaha and John Petrila, 'The Broward Mental Health Court: process, outcomes, and service utilization' (2003) 26 *International Journal of Law and Psychiatry* 55, 59.

The treatment plan may address many areas of the individual's life and situation. Consideration should particularly be made to what further assistance may be needed in order for the individual to comply with the program. Therefore, the order should cover the following in relation to the defendant: mental and physical health care; medication; living and housing arrangements; their financial situation; travel arrangements; their ability to keep meetings and appointments; supportive education[374]; substance abuse treatment[375]; and the possible allocation of a legal guardian.

Other than treatment for the offender the Magistrate may make a range of orders that should be completed throughout the program. These may require the offender to:

- Apologise to any victims that may have been involved in the offence, either by letter or in person;
- Provide compensation to the victim, which may be either monetary or based on some other arrangement;
- Attend counselling;
- Perform a number of hours of community service;
- Attend Road Trauma Awareness Programs, drug related programs and/or defensive driving courses; and/or
- Any other orders or requirements that the judge deems necessary and appropriate in the circumstances.[376]

REVIEW HEARINGS

Progress should be closely monitored through regular contact between staff, the Magistrate, the participant and service providers.[377] As it is understood that judicial monitoring may help prompt positive change in the defendant's behaviour by increasing satisfaction and support[378] these review hearings should be held as often as possible. The treatment plans may therefore be modified and

[374] National Mental Health Association, 'Mental Health Courts' (2001) National Mental Health Association <http://www.nmha.org/position/mentalhealthcourts.cfm> 6 June 2004
[375] National Mental Health Association, 'Mental Health Courts' (2001) National Mental Health Association <http://www.nmha.org/position/mentalhealthcourts.cfm> 6 June 2004
[376] This list was adopted from the Internal Magistrates' Court proposal, provided by Jelena Popovic *'Mental Impairment List'* (2004) 13.
[377] Sue Dusmohamed and Micheal Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41, 43.
[378] Office of the Public Advocate, *'Disability and the courts - An analysis of Problem Solving Courts and Existing Dispositional Options: The search for improved methods of processing defendants with a mental impairment through the criminal courts'* (2004) 14.

altered over time in order to accommodate the changing needs of the defendant.[379] Changes may also reflect a need to effect referrals to more appropriate services and to allow the inclusion of supplementary services to improve the original treatment plan.[380]

Within these review hearings the Magistrate, along with the defence lawyers, police prosecutors and other staff, look at any defaults in compliance and further offending.[381] A decision as to the continuation or removal of a participant from the program may need to be made, which will require the consideration of 'the individual's circumstances, the nature of their impairment, additional stresses they may have been facing, or difficulties with the provision of services'.[382] In making this decision some degree of flexibility should be administered, whereby individuals should be given several chances to improve their level of participation and compliance in the program.[383] The Magistrate must also be careful when punishing for non-compliance that the consequences for the offender are not worse than they would have received within the traditional court system.[384] While compliance is crucial to the overall assessment of the defendant's progress and consequently the final outcome for that individual,[385] the Magistrate and staff should seek to assist the individual as much as possible to meet their requirements and obligations.

FINAL DETERMINATION / SENTENCING OPTIONS

Towards the end of the defendants treatment plan a final report is prepared which summarises the progress and compliance of the participant throughout the program.[386] If the charges are not withdrawn by the prosecution, then a plea should be made by the individual and a determination provided by the same Magistrate, based on all of the information before him/her.[387] The sentencing

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[379] Micheal Burvill, Sue Dusmohamed, Nichole Hunter & Helen McRostie, 'The management of mentally impaired offenders within the South Australian criminal justice system' (2003) 26 *International Journal of Law and Psychiatry* 13, 20.
[380] Micheal Burvill, Sue Dusmohamed, Nichole Hunter & Helen McRostie, 'The management of mentally impaired offenders within the South Australian criminal justice system' (2003) 26 *International Journal of Law and Psychiatry* 13, 20.
[381] Sue Dusmohamed and Micheal Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41, 43.
[382] Sue Dusmohamed and Micheal Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41, 43.
[383] Nichole Hunter & Helen McRostie, '*Information Bulletin. Magistrates Court Diversion Program: Overview of the key data findings*' (2001) 12.
[384] Heather Barr, 'Mental Health Courts: An Advocate's Perspective'
[385] Nichole Hunter & Helen McRostie, '*Information Bulletin. Magistrates Court Diversion Program: Overview of the key data findings*' (2001) 11.
[386] Sue Dusmohamed and Micheal Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41, 44.
[387] Sue Dusmohamed and Micheal Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41, 44.

options may be influenced by considerations such as the ability of the defendant to comply with any conditions that may be placed on them and his/her ability to cope with imprisonment.[388]

It is extremely important for the success of the court and for the outcome of the defendant that incarceration is only used as the ultimate last resort, and that individuals leave without a conviction wherever possible.[389] Treatment, assistance and support to those individuals afflicted with a mental impairment, rather than simply imprisoning and punishing them for what they are not capable of understanding, are at the centre of the court's objectives. At present, treatment is not currently an accessible sentencing option within Victoria for such individuals.[390] This needs to be addressed in order for the Mental Health Court to come into effect. A more flexible and compassionate approach that can adjust to new situations as they arise is needed.[391]

While the judge can order imprisonment where he/she believes that this is the only option, the final sentence must not be longer than what the defendant would have received in the normal court through the normal processes.[392] Essentially the scheme relies heavily on police withdrawing charges following successful completion[393] however it is understood that this may not be and should not be applied in all situations.

Contested hearings

Where the defendant has chosen to contest the hearing the above considerations should be applied, and the option to participate in the program should be forwarded to the defendant once again. Where a finding of innocence is reached however the client should be released and the case dismissed. The judge may still assign a guardian and suggest relevant institutions for support and treatment where, it appears from the assessment report, that the individual is in need of a little more assistance and support for their disability. It is not a requirement for the Magistrate to solve the individual's problems but merely to offer assistance and potentially make a great difference simply by referring them to those who can help.

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[388] Western Australian Committee on Persons with Intellectual Disability, 'Persons with an Intellectual Disability: Issues for Consideration of the Courts' (1993) page 15.
[389] Heather Barr, 'Mental Health Courts: An Advocate's Perspective'
[390] Internal Magistrates' Court proposal, provided by Jelena Popovic *'Mental Impairment List'* (2004) 9
[391] Dan Howard, 'Mental Health Issues and the Criminal Law: A Case of Asperger's Disorder' (2003) 15(9) Judicial Officers' Bulletin 75, 75.
[392] Heather Barr, 'Mental Health Courts: An Advocate's Perspective'
[393] Sue Dusmohamed and Micheal Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 *Canberra Bulletin of Public Administration* 41, 41.

BEYOND THIS REPORT

In writing this report we came across a number of issues that warrant further discussion. For example, assistance for mentally impaired people charged with more serious crimes needs to be looked at and the issues of please taken for entry to a Mental Health Court need further thought. While the Mental Health Courts currently in existence are beneficial for those involved, they do nothing to assist those facing lengthy imprisonment sentences[394] although long term more people may be diverted.

Also as suggested earlier in this chapter, greater education to the police and judicial officers regarding mental illness and intellectual disabilities needs to be undertaken to increase understanding and the effectiveness of the Mental Health Court. Improving the attitudes of those within these fields towards those with mental impairments is crucial for the improvements in access to justice for these individuals.[395]

CONCLUSION

In recent times there has been a rising awareness of the need to improve the treatment and to provide alternative remedies within the criminal justice system for dealing with those suffering from a mental impairment.[396] The Mental Health Court seeks to address and rectify these needs, and is based largely on facilitating eligible defendants with the aim of reducing offending behaviour.[397]

It is important to note in concluding that the program does not identify itself as a health service provider as this is not the business of the courts. [398] The use of expertise within the program is to simply provide the Magistrate and the court with 'expert information, clinical legal advice, to assist in the identification of individuals with mental health or disability issues, and to inform how they may be contributing to the offending behaviours exhibited by defendants.'[399] It is not the intention

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[394] Heather Barr, 'Mental Health Courts: An Advocate's Perspective'

[395] National Mental Health Association, 'Mental Health Courts' (2001) National Mental Health Association <http://www.nmha.org/position/mentalhealthcourts.cfm> 6 June 2004

[396] Micheal Burvill, Sue Dusmohamed, Nichole Hunter & Helen McRostie, 'The management of mentally impaired offenders within the South Australian criminal justice system' (2003) 26 *International Journal of Law and Psychiatry* 13, 13.

[397] Micheal Burvill, Sue Dusmohamed, Nichole Hunter & Helen McRostie, 'The management of mentally impaired offenders within the South Australian criminal justice system' (2003) 26 *International Journal of Law and Psychiatry* 13, 13.

[398] Sue Dusmohamed and Micheal Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 Canberra Bulletin of Public Administration 41, 42.

[399] Sue Dusmohamed and Micheal Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) 106 Canberra Bulletin of Public Administration 41, 42.

of this specialist court, or this report, to become entirely responsible for fixing the mental health system, but simply to supplement and improve the services and treatment of those with mental impairments within the criminal justice system. The scheme is looking to provide access to justice.

In short, 'a referral to the mental health system does not discharge an individual defendant from his/her responsibility for an otherwise illegal act'[400] but looks to assist those who would have serious difficulties understanding the court processes and finding the best treatment approach for them.[401] Overall, it appears reasonable to conclude the Mental Health Court will be highly beneficial as those in other jurisdictions have continued to make significant impacts on their participants.[402]

[400] Bruce A. Arrigo, 'The Contours of Psychiatric Justice: A Postmodern Critique of Mental Illness, Criminal Insanity, and the Law' (1996) 40.
[401] Susan Hayes for the New South Wales Law Reform Commission, 'People with an Intellectual Disability and the Criminal Justice System: Two Rural Courts' (1996) 1.
[402] Eric Trupin and Henry Richards, 'Seattle's mental health courts: early indicators of effectiveness' (2003) 26 *International Journal of Law and Psychiatry* 33, 52.

Recommendations

Recommendation 39:

A Mental Health Court should be established in Victoria in order to deal with the high number of individuals with a mental impairment in our courts.

Recommendation 40:

The primary focus of this court should be on treatment and rehabilitation in order to reduce the rate of re-offending by these individuals.

Recommendation 41:

The Mental Health Court should be based as an extension of the Magistrates' Court and positioned within a separate courtroom.

Recommendation 42:

A single Magistrate should reside over the court in order to provide a consistent approach across the board.

Recommendation 44:

The Magistrate should be supported by a team of experts including a principle co-ordinator, a senior clinical advisor/psychologist, a mental health justice liaison officer and a defence lawyer, who shall all be required to work as a collaborative team.

Recommendation 45:

The Magistrate, and staff, should adopt a less adversarial approach than in the traditional courts, with the Magistrate being able to communicate and interact with the defendant directly.

Recommendation 46:

Efforts should be made to ensure that the client understands proceedings at all times. Importantly, this should include reducing the use of legal terminology, restating and rephrasing important points and constantly seeking clarification from the defendant.

Recommendation 47:

Entry into the Mental Health Court should be voluntary.

Recommendation 48:

The consent of the individual should be obtained before assessment and again prior to becoming an official participant of the program. Those who refuse to consent should be able to have their case heard within the traditional court processes.

Recommendation 49:

The eligibility criteria for the Mental Health Court should include those diagnosed with a serious mental illness, an intellectual disability, personality disorder, acquired brain injury and/or neurological disorders such as dementia.

Recommendation 50:

The definitions for mental illness and intellectual disability used within the *Mental Health Act* 1986 and the *Intellectually Disabled Persons' Services Act* 1986 should be applied

within the court. However the term serious mental illness should refer to those who have a 'psychotic' form of mental illness, including schizophrenia, bipolar disorder, severe depression and some anxiety disorders.

Recommendation 51:

To be eligible for participation in the Mental Health Court, the individual's case would ordinarily be heard in a Magistrates' Court.

Recommendation 52:

Offences of a violent nature must be assessed and accepted on a case by case basis contingent on the relevant factors of each situation.

Recommendation 53:

The Mental Health Court should seek to accommodate both those who wish to maintain their innocence and present their case, as well as those who intend not to contest the charges laid against them. An indication that one will not contest the charges should be necessary before entrance into the Mental Health Court Program may be granted. Those who wish to contest the charges should be able to have their case heard within the Mental Health Court, however entry into the program will be restricted.

Recommendation 54:

The Magistrate, upon the advice of the staff, should make the final determination about whether an individual shall be permitted to participate in the program.

Recommendation 55:

Eligibility should not be affected at all by the defendant's past involvement with mental health services over the years.

Recommendation 56:

Individuals with a suspected mental impairment should be referred to the Mental Health Court as early as possible by guardians, the police, solicitors, case managers, mental health services, Magistrates and/or the defendants.

Recommendation 57:

A treatment plan should be generated based on the assessment of the individual by the court, along with any other past psychological or medical reports presented.

Recommendation 58:

The treatment plan should address any number of issues that the staff deem relevant, including homelessness, drug or alcohol addictions, the diagnosis, medication, their ability to keep appointments, and travel arrangements.

Recommendation 59:

The treatment plan should specify an expected date for completion, which should not be longer than 2 years.

Recommendation 60:

Progress should be closely monitored with regular review hearings. How often should be determined by the Magistrate and support team. Changes may be made to the treatment plan where necessary.

Recommendation 61:

A large degree of flexibility should be exercised in relation to non-compliance.

Recommendation 62:

Sentences imposed in response to non-compliance should be proportionate to the severity of the offence and should not be worse than the punishment that would have been imposed had the defendant proceeded through the traditional court processes.

Recommendation 63:

The withdrawal of charges should be a common outcome of cases. Where this is not possible, the outcome should result in a bond or suspended sentence being imposed.

Recommendation 64:

The court should endeavour to ensure all avenues are explored and that for mentally ill offenders imprisonment should be the option of last resort.

Recommendation 65:

Greater assistance for those mentally impaired charged with more serious crimes needs to be examined in the near future.

Recommendation 66:

Education about mental illnesses and intellectual disabilities should be increased to all professions that may make referrals, in order to enhance awareness and improve attitudes and treatment of these defendants from the beginning of the process.

Recommendation 67:

This report recommends that the implementation of a *Mental Health Justice Agreement* be investigated but that its terms have practical evaluation tools rather than being a rhetorical statement.

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Appendix A

MENTALLY ILL OFFENDERS

Part B: Justice for those suffering from a mental illness – A specialised court

General:

1. How well do you think the legal system and the courts handle individuals with mental illness?

2. Do you know of any services that are currently available for people with a mental illness who have legal issues? Are these services effective? Why? Why not?

3. What experiences have you had regarding individuals with mental illnesses that have had to go to court?

Specialised Courts:

4. How successful do you believe other specialised courts, such as the Koori and Drug courts, have been?

5. Do you think that there is room for another specialised court, or would another specialised court be too much? Why or why not?

Mental Illness Court:

7. What do you think of the idea of a mental illness court?

8. How should it differ to a normal court?

9. Please specify any particular views you may have on any areas dealt with here, such as eligibility, voluntary submission, the process and punishment.

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