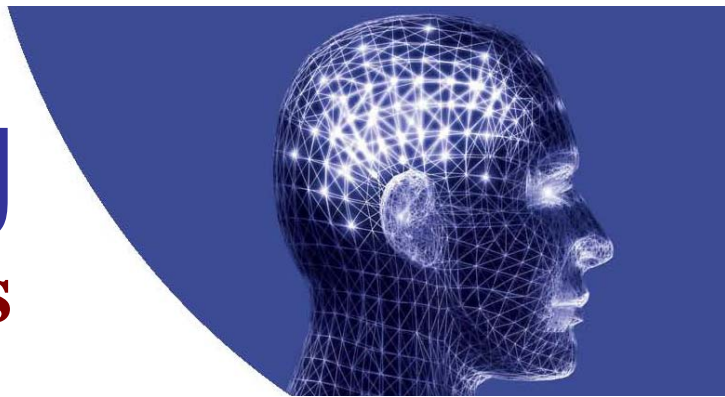


# Rethinking Mental Health Laws



Office of Professor Bernadette McSherry  
Australian Research Council Federation Fellow

## Mental health courts and diversion programs for mentally ill offenders: the Australian context

*Elizabeth Richardson*

BA LLB MCrim (Melb)  
PhD Candidate

14 July 2008

Paper presented at the 8<sup>th</sup> Annual IAFMHS  
Conference, Vienna, Austria 14-16 July  
2008

# Contents

- Introduction ..... 3
- Court directed diversion programs ..... 4
  - South Australia - Magistrates Court Diversion Program ..... 4
    - Eligibility..... 5
    - Early referral ..... 5
    - Consent..... 5
    - Ongoing Reviews ..... 6
    - Treatment plans, resources and personnel..... 6
    - Final outcomes ..... 6
    - Therapeutic judging..... 7
    - Is the Diversion Program achieving its aims?..... 7
  - Tasmania – Hobart Mental Health Diversion List Program ..... 8
    - Eligibility..... 8
    - Consent..... 9
    - Bail powers..... 9
    - Ongoing reviews and supervision ..... 10
    - Final outcomes ..... 10
    - Outcomes after the first 12 months ..... 10
- Court related diversion - Court Liaison Services ..... 11
  - Victoria - Mental Health Court Liaison Service ..... 11
  - New South Wales - Statewide Community & Court Liaison Service..... 12
- Fitness to Plead, Fitness to be tried and Criminal Responsibility ..... 13
  - Queensland - Mental Health Court..... 13
- Legislative powers of diversion ..... 15
  - New South Wales – Sections 32 and 33 of the Mental Health (Criminal Procedure) Act 1990 (NSW) ..... 16
- Issues for consideration for future mental health courts and diversion programs for the mentally ill offender ..... 17
  - Indigenous offenders ..... 18
  - Use of bail powers..... 18
  - Intellectual Disability ..... 19
- Conclusion..... 20

# **Mental health courts and diversion programs for mentally ill offenders: the Australian context**

## **Introduction**

Mental health courts and diversion programs for mentally ill offenders are a relatively recent innovation in Australia. The first mental health court established in Australia was the Magistrates Court Diversion Program in South Australia in 1999. A similar program is currently being piloted in the Hobart Magistrates Court, Tasmania. These programs differ significantly to the Mental Health Court of Queensland, a specialist court which primarily determines issues of fitness and criminal responsibility. In other Australian States a range of diversionary measures operate, including mental health court liaison services, legislative diversion powers and other court lists which directly or indirectly target mental health issues or mental impairment.

The way in which a mental health court operates in each jurisdiction is determined by the particular deficiencies in the mental health and criminal justice system of that jurisdiction.<sup>1</sup> As Schneider, Bloom and Heerema note, mental health courts are a broadly defined category. However, although there are a large range of different models, mental health courts are all generally ‘attempting a rehabilitative response to what would otherwise have been criminally sanctioned behaviour’.<sup>2</sup> A mental health court will usually have one or more of the following aims:

- 1) “diversion” of accused who have been charged with minor to moderately serious criminal offences and offering them an alternative;
- 2) expediting the pretrial process of assessing the accused’s fitness to stand trial;
- 3) treatment of the accused’s operative mental disorders; and
- 4) a slowing of the so-called “revolving door” phenomenon, whereby accused tend to become repeat offenders.<sup>3</sup>

In short, Australian States have addressed the issue of mentally ill offenders differently and it is an area of continuing interest and change. The Australian Parliament Senate Select Committee on Mental Health recommended in 2006 that there should be a ‘significant expansion of mental health courts and diversion programs, focussed on keeping people with mental illness out of prison and supporting them with health, housing and employment services that will reduce offending behaviour and assist with recovery.’<sup>4</sup> As with other overseas jurisdictions, diversion and problem solving courts generally are becoming increasingly popular in Australia, particularly targeting drug addiction. While it is not possible to discuss every initiative in this paper the main programs currently operating in Australia in relation to mentally ill offenders are described below. This paper also highlights

---

<sup>1</sup> Richard D Schneider, Hy Bloom and Mark Heerema, *Mental Health Courts: Decriminalizing the Mentally Ill* (Irwin Law, Toronto, 2007), 102.

<sup>2</sup> Ibid 3.

<sup>3</sup> Ibid 2.

<sup>4</sup> Senate Select Committee on Mental Health, Parliament of Australia, *A national approach to mental health – from crisis to community: Final Report* (2006) 20.

some issues that Australian States will need to consider should they decide to establish a mental health court or related diversion program.<sup>5</sup>

## **Court directed diversion programs**

### **South Australia - Magistrates Court Diversion Program**

In South Australia a mental health court has operated since August 1999. The Magistrates Court Diversion Program (the 'Diversion Program') was initially established as a pilot program aimed at improving the management of mentally impaired offenders who came through the Magistrates Court of South Australia.<sup>6</sup> The Diversion Program in part came about due to changes in defence of insanity legislation in South Australia in 1995<sup>7</sup> and a recognition that the Magistrates Court needed to improve the way in which mentally impaired offenders were identified and dealt with.<sup>8</sup> A program based on the United States mental health court model was created with court based health professionals working together with the judiciary, to address the offending behaviour of mentally impaired offenders.<sup>9</sup>

The Diversion Program began with three court-based staff members and one magistrate, sitting once a fortnight for half a day.<sup>10</sup> The Diversion Program has continued to grow and today has a team of approximately 10 people including 4 Clinical Advisors and 5 Clinical Liaison Officers. Three to four magistrates sit on the Diversion Program on a weekly rotating basis. The court sits for a full day once a week in Adelaide, on a monthly basis in four suburban locations, and on a bi-monthly basis in four rural locations in the State.<sup>11</sup>

The Diversion Program is not based in specific legislation but rather relies on the bail and sentencing powers under existing legislation. Offenders who are eligible to participate in the program have their case adjourned while assessment treatment and support services are put into place through a treatment plan.<sup>12</sup> The aims of the program are to provide access to early assessment and interventions that address mental health or disability needs of mentally ill offenders and prevent further offending behaviour; to provide assistance to the court in the identification and management of people with a mental impairment in the court system; and to provide a diversion option in the Magistrates Court for people who may otherwise plead a mental impairment defence.<sup>13</sup>

---

<sup>5</sup> This outline provides the basis for my doctoral studies to critically analyse whether Australia should establish more mental health courts and if so what can be learnt from the experiences of mental health courts and other problem solving courts within Australia and overseas.

<sup>6</sup> Sue Dusmohamed and Michael Burvill, 'Development of a Specialist Sentencing Court in South Australia' (2003) (106) *Canberra Bulletin of Public Administration* 41-44, 41.

<sup>7</sup> *Ibid* 42.

<sup>8</sup> Grace Skrzypiec, Joy Wundersitz and Helen McRostie, *Magistrates Court Diversion Program - An Analysis of Post-Program Offending*, Office of Crime Statistics and Research South Australia (2004) <[http://www.ocsar.sa.gov.au/docs/evaluation\\_reports/MCDP2.pdf](http://www.ocsar.sa.gov.au/docs/evaluation_reports/MCDP2.pdf)> at 30 May 2008, 13.

<sup>9</sup> Dusmohamed and Burvill, above n 6, 42.

<sup>10</sup> Michael Burvill, et al., 'The management of mentally impaired offenders within the South Australian criminal justice system' (2003) 26 *International Journal of Law and Psychiatry* 13-31, 16.

<sup>11</sup> Magistrates Court of South Australia, *Magistrates Court Diversion Program* <[http://www.courts.sa.gov.au/courts/magistrates/court\\_diversion.html](http://www.courts.sa.gov.au/courts/magistrates/court_diversion.html)> at 5 June 2008.

<sup>12</sup> Dusmohamed and Burvill, above n 6, 41.

<sup>13</sup> Magistrates Court of South Australia, above n 11.

## **Eligibility**

A person is eligible to participate in the Diversion Program if he or she is over the age of 18, has been charged with a minor indictable or a summary offence and has impaired intellectual or mental functioning arising from mental illness, intellectual disability, personality disorder or other cognitive disability.<sup>14</sup> The program has taken a flexible approach to eligibility regarding the types of offences involved and considers referrals on a case-by-case approach.<sup>15</sup> This approach ensures that those people who could benefit from the program are not excluded on the basis of the offence committed.<sup>16</sup> The majority of participants in the Diversion Program have a mental illness, namely schizophrenia. However, many participants have more than one diagnosis, particularly substance abuse disorders.<sup>17</sup>

## **Early referral**

The Diversion Program is aimed at providing a mechanism where early identification of mental impairment can occur. The program is said to be most effective when the person is referred as early as possible, ideally at the time charges are laid.<sup>18</sup> Although it was initially anticipated that most referrals to the Diversion Program would be from police, in the first year of operation the majority of referrals were from magistrates or solicitors.<sup>19</sup> This may have been due to difficulties police face in identifying mental impairment particularly if the police only have limited contact with the person prior to charges being laid.<sup>20</sup>

## **Consent**

Participation in the Diversion Program is voluntary and participants must give their consent to participate. A Clinical Advisor (a registered psychologist) must be satisfied at the preliminary assessment that the person understands the program and consents to being involved. If the person cannot consent due to intellectual disability, his or her guardian may give consent.<sup>21</sup> A written report is provided to the Magistrate who makes the decision whether to accept the person into the program. The Magistrate also ensures that the person understands what is required of him or her on the program and whether the person consents to being involved. In practice even if the person is eligible to be accepted onto the program the person will be not forced to participate if he or she does not wish to be involved.

The offender is not required to plead guilty to the alleged offences. However, he or she is required to admit to the objective elements of the offence. The prosecutor will indicate at the first court hearing what outcome the prosecution is likely to seek should the offender successfully complete the Diversion Program. Program participants can generally expect a reduction in the sentence they would have received in the general court list.<sup>22</sup>

---

<sup>14</sup> Ibid.

<sup>15</sup> Burvill, et al., above n 10, 23.

<sup>16</sup> Ibid.

<sup>17</sup> In 2001-2002 Courts Administration Authority Annual Report it was reported that 75 percent of participants that more than one diagnosis.

<sup>18</sup> Magistrates Court of South Australia, above n 10.

<sup>19</sup> Burvill, et al., above n 10, 22.

<sup>20</sup> Ibid.

<sup>21</sup> Dasmohamed and Burvill, above n 6, 43.

<sup>22</sup> Burvill, et al., above n 10, 29.

## **Ongoing Reviews**

A key feature of the Diversion Program is the bi-monthly reviews that the Court conducts while the offender is participating in the program aimed at motivating the offender to continue treatment. The complexities of the problems faced by the individual will determine the length of the program; the aim being to allow sufficient time for the person to engage with the relevant treatment programs to gain a benefit.<sup>23</sup> The Diversion Program usually runs for six months however there is no set length of time. There will usually be two court reviews after the first court hearing, with a third and final hearing at six months if the person has been compliant with treatment.<sup>24</sup> If necessary the program can be extended. Each individual is assigned a Clinical Liaison Officer to support and advise him or her while on the program. The Clinical Liaison Officer liaises with service providers about the person's progress.<sup>25</sup> The ongoing monitoring of the offender enables the treatment plan to be reviewed and updated where necessary.

If the person is not complying with treatment, sanctions are not used. However, the person will be required to attend court where the Magistrate will try to encourage the person to engage with the treatment programs and motivate them to stay with the Diversion Program. If it appears that the Diversion Program is not suitable for the person then participation may be terminated and the person returned to the normal court list or sentenced by the Diversion Program Magistrate. The fact that a person has performed badly or has failed to make satisfactory progress is not relevant to the sentencing process.<sup>26</sup>

## **Treatment plans, resources and personnel**

A team of Clinical Liaison Officers is responsible for the implementation of the treatment plans including 'linking individuals with relevant services and maintaining good working relationships with service providers to ensure they understand the aims of the program and allow access to the services they provide.'<sup>27</sup> The Diversion Program does not provide services; rather the program facilitates the involvement of service providers based in the community. The Clinical Liaison Officers will also attend court to provide the Magistrate with advice or information from the clinical perspective. The service providers are responsible for the case management of the offender on the particular treatment program.<sup>28</sup> However, members of the Clinical Liaison Team regularly have contact with service providers and the offender to monitor the offender's progress on the program.<sup>29</sup> Progress in the program is assessed in relation to the individual's overall mental well-being, and some flexibility is generally shown to the personal circumstances and difficulties faced by each person.<sup>30</sup>

## **Final outcomes**

Until 2006, the prosecution was responsible for making the decision whether to withdraw charges against the offender or not. At the first court hearing, usually an indication of the prosecution decision would be given. If charges are not withdrawn, at the final hearing, pleas

---

<sup>23</sup> Ibid 28.

<sup>24</sup> Ibid.

<sup>25</sup> Magistrates Court of South Australia, above n 11.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Dasmohamed and Burvill, above n 6, 43.

<sup>29</sup> Ibid.

<sup>30</sup> Burvill, et al., above n 10, 28.

are taken and the magistrate determines the sentence. Although it was originally envisaged that participation in the program would lead to a withdrawal of charges following successful completion of the program,<sup>31</sup> in the first year of the program approximately two thirds of the program graduates left with a criminal record.<sup>32</sup>

In 2006 legislative amendments gave Diversion Program Magistrates the power to dismiss charges where the prosecution did not withdraw charges.<sup>33</sup> A magistrate can now decide to release the person without conviction and penalty or dismiss charges or release the person on an undertaking to complete the Diversion Program. The Courts Administration Authority Annual Report for the 2006-2007 year reported that 32.5 percent of offenders left the program with no penalty, as a result of dismissal, withdrawal or no conviction or penalty given.<sup>34</sup>

## **Therapeutic judging**

The Diversion Program list, when it sits in Adelaide each week, spreads itself over three separate time slots throughout the day. New acceptances on to the program are heard at 10 am, reviews of participants' progress are heard at 11.30 am and at 2.15 pm matters for finalisation (sentencing) are heard. The court processes are less formal than those in the general list. The offender sits at the bar table and the magistrate often talks directly with him or her rather than talking through the legal representative.<sup>35</sup> At review hearings the Magistrate will ask the offender to tell the Court what he or she has been doing on the program and how he or she has been finding it. The impression is one of a genuine conversation between the Magistrate and the offender. Depending on the situation, the Magistrate will encourage the offender to keep on going with positive behaviour, or encourage him or her to participate more and to trust the program.

## **Is the Diversion Program achieving its aims?**

The Diversion Program is aimed at providing an opportunity for change, at a time when offenders are likely to be receptive to such change.<sup>36</sup> Two evaluations have been conducted of the Magistrates Court Diversion Program by the Office of Crime Statistics and Research of South Australia. The first evaluation report<sup>37</sup> published in July 2001 examined how the program had operated in the first year. Whereas the second evaluation report<sup>38</sup> published in July 2004, focussed on whether the program had reduced recidivism amongst program participants and the factors that predicted the likelihood of post-program offending.<sup>39</sup>

The second evaluation report concluded that the fact that a majority of offenders, who had participated in the Diversion Program, were not apprehended for offending in the 12 month post-program period and that the number of incidents was also reduced meant that it was

---

<sup>31</sup> Ibid 13.

<sup>32</sup> Ibid 29.

<sup>33</sup> The *Statutes Amendment (Intervention Programs and Sentencing Procedures) Act 2005 (SA)* inserted s 19C into the *Criminal Law (Sentencing) Act 1988 (SA)*.

<sup>34</sup> Courts Administration Authority South Australia, *Annual Report 2006-07*, Courts Administration Authority (2007) 25.

<sup>35</sup> Dushman and Burvill, above n 6, 43.

<sup>36</sup> Ibid 42.

<sup>37</sup> Nichole Hunter and Helen McRostie, *Magistrates Court Diversion Program: Overview of key data findings*, Office of Crime Statistics and Research South Australia (2001).

<sup>38</sup> Skrzypiec, Wundersitz and McRostie, above n 8.

<sup>39</sup> Ibid 79.

likely that the program was having a positive effect on offenders.<sup>40</sup> It would be valuable to compare many of the issues raised in the first and second evaluation reports with the operation of the Diversion Program now, nearly 10 years after it commenced.

## **Tasmania – Hobart Mental Health Diversion List Program**

A mental health court also has recently been established in the Hobart Magistrates Court, Tasmania, in response to an increasing number of offenders suffering from mental illness appearing before the Magistrates Court of Tasmania. The Hobart Mental Health Diversion List Program (the 'Hobart Diversion List') commenced on 24 May 2007 as a 12-month pilot.<sup>41</sup> The Court cites factors such as de-institutionalisation, increased drug and alcohol use by mentally ill people and the limited capacity of community based mental health services to cope with the needs of mentally ill offenders as contributing to the high number of offenders with mental illness.<sup>42</sup>

The main aim of the Hobart Diversion List is 'to provide an opportunity for eligible individuals to voluntarily address their mental health and/or disability needs associated with offending behaviour.'<sup>43</sup> Those who commit minor, nuisance type offences in the Hobart region are the target participants of the list.<sup>44</sup> The Hobart Diversion List evolved out of the Forensic Mental Health Liaison Service that already operates at the Magistrates Court. The forensic mental health workers, the Deputy Chief Magistrate, the Office of Public Prosecutions and legal practitioners recognised that the Court could deal with mentally impaired offenders in a better way by running a specialised court list.<sup>45</sup> A 12 month pilot list was established sitting once a month, using existing resources and legislation.<sup>46</sup> The list relies on the collaboration and cooperation of the Court, Forensic Mental Health workers, prosecution and legal practitioners.<sup>47</sup>

In the first year of the pilot the Hobart Diversion List was presided over by one Magistrate. However, in the second year of operation, a second Magistrate will sit every alternate month. The list currently sits for one afternoon, one Thursday a month. At each sitting, on average, 15 to 20 cases are heard. The cases are not heard in any particular order, much like a general court list but with less formality.

### **Eligibility**

Adult offenders charged with summary offences and indictable offences triable summarily who have impaired intellectual or mental functioning as a result of a 'mental illness' are

---

<sup>40</sup> Ibid xi; For a detailed discussion of the outcomes of the Diversion Program evaluation please refer to the report at <[http://www.ocsar.sa.gov.au/docs/evaluation\\_reports/MCDP2.pdf](http://www.ocsar.sa.gov.au/docs/evaluation_reports/MCDP2.pdf)>.

<sup>41</sup> Magistrates Court of Tasmania, *Mental Health Diversion* <[http://www.magistratescourt.tas.gov.au/divisions/criminal\\_\\_and\\_\\_general/mental\\_health\\_diversion](http://www.magistratescourt.tas.gov.au/divisions/criminal__and__general/mental_health_diversion)> at 30 April 2008.

<sup>42</sup> Ibid.

<sup>43</sup> Magistrates Court of Tasmania, *Mental Health Diversion List Procedural Manual* <[http://www.magistratescourt.tas.gov.au/\\_\\_data/assets/pdf\\_file/0008/78740/Mental\\_Health\\_Diversion\\_List\\_Procedural\\_Manual-April\\_2007-ver1.pdf](http://www.magistratescourt.tas.gov.au/__data/assets/pdf_file/0008/78740/Mental_Health_Diversion_List_Procedural_Manual-April_2007-ver1.pdf)> at 30 April 2008.

<sup>44</sup> Michael Hill, 'Hobart Magistrates Courts Mental Health Diversion List' (Paper presented at the Justpartners - Family Violence, Specialist Courts and the Idea of Integration, Canberra, 22-23 May 2008) , 8.

<sup>45</sup> Ibid 2.

<sup>46</sup> Magistrates Court of Tasmania, above n 43, 3.

<sup>47</sup> Hill, above n 44, 2.

eligible to participate in the program.<sup>48</sup> Mental illness is defined in s 4 of the *Mental Health Act 1996* (Tas). Offenders with an intellectual disability are not eligible for the Hobart Diversion List unless they also have a dual diagnosis of mental illness. This is a major difference between the Hobart Diversion List and the South Australian Diversion Program. Young offenders and offenders charged with sexual offences, family violence offences and offences that attract a mandatory drivers' licence disqualification penalty are excluded from the Hobart Diversion List.<sup>49</sup>

In contrast to the South Australian Diversion Program, a person who would have a defence of insanity or an argument about fitness to plead is ineligible for referral to the Hobart Diversion List.<sup>50</sup> The person is required to give an acknowledgement of guilt or admission of responsibility for the offence, but a formal plea of guilty is not required.<sup>51</sup>

## **Consent**

Participation in the program is voluntary and the person must consent to be referred to the Hobart Diversion List. After being referred from the general court list, an assessment is conducted by the Forensic Mental Health Court Liaison Officer to determine whether the person has impaired intellectual or mental functioning as a result of a mental illness and whether the List will be able to meet the needs of the offender.<sup>52</sup> An eligible person will then appear before the Diversion List Magistrate who decides whether to accept the person onto the program. A offender accepted onto the Hobart Diversion List then undergoes a full assessment and is assisted to access treatment and services in the community by the Forensic Mental Health Court Liaison Officer via a detailed treatment plan.<sup>53</sup> Those offenders who are found not eligible to participate are referred back to the general list.

## **Bail powers**

At the first hearing before the Diversion List Magistrate the Forensic Mental Health Court Liaison Officer outlines the person's situation and makes recommendations to the Magistrate regarding a treatment plan.<sup>54</sup> The program does not run for a specified period of time (for example, six months); the time for each offender is set according to his or her needs.<sup>55</sup> The case is adjourned and the existing bail provisions under the *Bail Act 1994* (Tas) are used to grant bail with conditions attached so that the person can access treatment and services while his or her matter is adjourned. On average, during the first year of the Hobart Diversion List, participants attended 2.8 hearings, with 21 offenders of the 32 finalised cases appearing three to five times in total.<sup>56</sup>

---

<sup>48</sup> Magistrates Court of Tasmania, above n 41.

<sup>49</sup> Ibid.

<sup>50</sup> Magistrates Court of Tasmania, above n 43, 5.

<sup>51</sup> Ibid 7.

<sup>52</sup> Magistrates Court of Tasmania, *Mental Health Diversion Program Information Pamphlet* <[http://www.magistratescourt.tas.gov.au/\\_\\_data/assets/pdf\\_file/0009/79767/Mental\\_Health\\_Diversion\\_Info\\_Pamphlet-April\\_2007.pdf](http://www.magistratescourt.tas.gov.au/__data/assets/pdf_file/0009/79767/Mental_Health_Diversion_Info_Pamphlet-April_2007.pdf)> at 30 April 2008.

<sup>53</sup> Magistrates Court of Tasmania, above n 43, 9.

<sup>54</sup> Ibid 10.

<sup>55</sup> Ibid.

<sup>56</sup> Hill, above n 44, 8.

## Ongoing reviews and supervision

The Hobart Diversion List team, the offender (and any other person deemed relevant to the proceedings) appear before the Diversion List Magistrate at monthly court reviews.<sup>57</sup> The court hearing is preceded by monthly Diversion List team meetings attended by the Forensic Mental Health Court Liaison Officers, defence lawyers, and the dedicated List prosecutor to consider the progress of the offender on the program.<sup>58</sup> The Forensic Mental Health Court Liaison Officer provides a verbal report to the Magistrate on the progress of the offender on the program. At court reviews, reports of favourable behaviour may result in verbal encouragement being provided to the offender, adjustments to the treatment plan and/or supervision requirements or finalisation of participants in the program.<sup>59</sup> If the offender does not comply with the treatment plan throughout the program, verbal sanctions may be used, or adjustments made to the treatment plan and/or supervision requirements, or the offender may be excluded from the program.<sup>60</sup> If the person is excluded from the Hobart Diversion List, the matter reverts back to the general court list.

## Final outcomes

The Forensic Mental Health Court Liaison Officer provides a written report to the magistrate at the final review, describing the offender's involvement and progress on the program.<sup>61</sup> The magistrate takes this report into account when finalising the matter, which may result in the criminal charges being withdrawn (subject to discussion with defence counsel and prosecution) if the offender has successfully completed the program.<sup>62</sup> The Magistrate retains full sentencing powers under the *Sentencing Act 1997* (Tas) if he or she decides that it is necessary to use them.<sup>63</sup>

In the first twelve months of operation the majority of the offenders who completed the program received good behaviour bonds without conviction or the prosecution tendered no evidence and charges were discontinued.<sup>64</sup> A small percentage of cases received a suspended sentence and two cases were dismissed without conviction.<sup>65</sup>

## Outcomes after the first 12 months

The pilot program has recently been extended by the Magistrates Court of Tasmania Court Management Group. After the first 12 months, the program has the support of key stakeholders, including the legal profession, prosecution and Forensic Mental Health Services.<sup>66</sup> The genesis for the Hobart Diversion List is different to the South Australian Diversion Program in that it is closely associated with the operation of the existing Forensic Mental Health Court Liaison Service and this is reflected in its practice. However, there are many similarities between the two programs, namely the collaborative team approach; the informal nature of the court hearings; supervision by the court of the offender while accessing

---

<sup>57</sup> Magistrates Court of Tasmania, above n 43, 10.

<sup>58</sup> Hill, above n 44, 5.

<sup>59</sup> Magistrates Court of Tasmania, above n 43, 12.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Hill, above n 44, 8.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid 7, 10, 11.

and engaging with treatment; and the direct interaction between the offender and the Magistrate.

## **Court related diversion - Court Liaison Services**

Mental health court liaison services operate in many Australian States at the Magistrates Court level with varying levels of formalisation and staffing.<sup>67</sup> However, as yet, none have followed the Hobart Diversion List example by developing a separate diversion program (with court supervision of the offender). Rather most Mental Health Court Liaison Services play an assessment, referral and advice service to the court. These services, usually provided by forensic mental health agencies, are predominantly staffed by psychiatric nurses and occasionally psychologists and are aimed at creating cooperative links between the mental health and criminal justice systems.<sup>68</sup> Court liaison services are aimed at the early identification of mentally ill individuals appearing before the courts that require mental health and other services; conducting assessments and providing timely advice to the Court about the person's mental illness; and diverting offenders from the criminal justice system where appropriate.<sup>69</sup> These services do not have an ongoing supervisory role over offenders and therefore differ from the mental health court model discussed above. Court liaison services seek to ensure that mentally ill offenders are identified and diverted to treatment where appropriate. In the United Kingdom the mental health court liaison services are the predominant diversion model and resemble closely the court liaison services operating in Australia.<sup>70</sup> The following are examples of two programs currently operating in Australia.

### **Victoria - Mental Health Court Liaison Service**

The Magistrates Court of Victoria Mental Health Court Liaison Service has operated in Victoria since November 1994. The service consists of court-based psychiatric support services, provided and funded by Forensicare.<sup>71</sup> Experienced senior registered psychiatric nurses provide on-site services, with an on-call forensic psychiatrist available if required for consultation. The Forensic Mental Health Court Liaison Service is available in several urban and rural Magistrates Court locations.<sup>72</sup>

The Service aims to divert mentally ill offenders from the criminal justice system into appropriate mental health treatment services thus reducing recidivism and to reduce the frequency and length of time offenders spend remanded in custody while a psychiatric report is obtained.<sup>73</sup> The responsibilities of the Service include the identification and assessment of mentally ill people coming before the Court and linking those people to mental health facilities in the community or the prison system for treatment. The Service provides a

---

<sup>67</sup> James RP Ogloff, et al., *The Identification of Mental Disorders in the Criminal Justice System*, Criminology Research Council (2006), 3.

<sup>68</sup> John Sharples, et al., 'Offending Behaviour and Mental Illness: Characteristics of a Mental Health Court Liaison Service' (2003) 10(2) *Psychiatry, Psychology and Law* 300-315; James RP Ogloff, et al., *ibid*.

<sup>69</sup> Sharples, et al., *ibid* 304.

<sup>70</sup> David V James, 'Court diversion in perspective' (2006) 40 *Australian and New Zealand Journal of Psychiatry* 529-538, 532.

<sup>71</sup> Victorian Institute of Forensic Mental Health, known as Forensicare, is the statutory body responsible for the statewide provision of adult forensic mental health services in Victoria.

<sup>72</sup> Magistrates' Court of Victoria, *Guide to Court Support & Diversion Services*

<[http://www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Parallel\\_Services\\_Docs/\\$file/Guide\\_to\\_Court\\_Support\\_Services.pdf](http://www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Parallel_Services_Docs/$file/Guide_to_Court_Support_Services.pdf)> at 30 April 2008, 18.

<sup>73</sup> *Ibid*.

comprehensive consultancy and advice service on mental health issues within the Magistrates Court of Victoria.<sup>74</sup>

The Mental Health Court Liaison Service usually becomes involved when a person comes into the custody centre of the Magistrates Court and is referred by the offender's lawyer or by the magistrate who is determining the bail application. The Service also works closely with diversion programs operating in the Magistrates Court of Victoria such as the Court Integrated Services Program (CISP), a service aimed at providing offenders with treatment and case management support prior to sentencing. In practice once the Mental Health Court Liaison Service receives a referral it will ensure the offender receives appropriate medication and that other custodial management issues are addressed. An assessment is conducted and report is presented to Court regarding the person's mental health.<sup>75</sup>

## **New South Wales - Statewide Community & Court Liaison Service**

The New South Wales Statewide Community and Court Liaison Service was established in 2002 and provides mental health assessments and referral services to magistrates throughout courts in New South Wales.<sup>76</sup> The aims of the Service are to divert mentally ill offenders to mental health services, enable more efficient processing of mentally ill persons through the courts and allow mentally ill offenders to access mental health services in a more timely way.<sup>77</sup> The Service assists with the diversion of mentally ill people by referring them to appropriate mental health services, out of custody and towards community and hospital settings. Where this is not possible, referrals are made to mental health services within the correctional system. Diversion is available to those people charged with summary offences appearing in the Magistrates Court usually before conviction.<sup>78</sup>

If diversion is appropriate a magistrate will either make an order under sections 32 and 33 of the *Mental Health (Criminal Procedures) Act 1990* (NSW). These sections are discussed further in this paper under 'Legislative Powers of Diversion'.

The following table from Greenberg and Nielsen<sup>79</sup> sets out the diversion process in New South Wales for mentally ill offenders:

---

<sup>74</sup> Ibid.

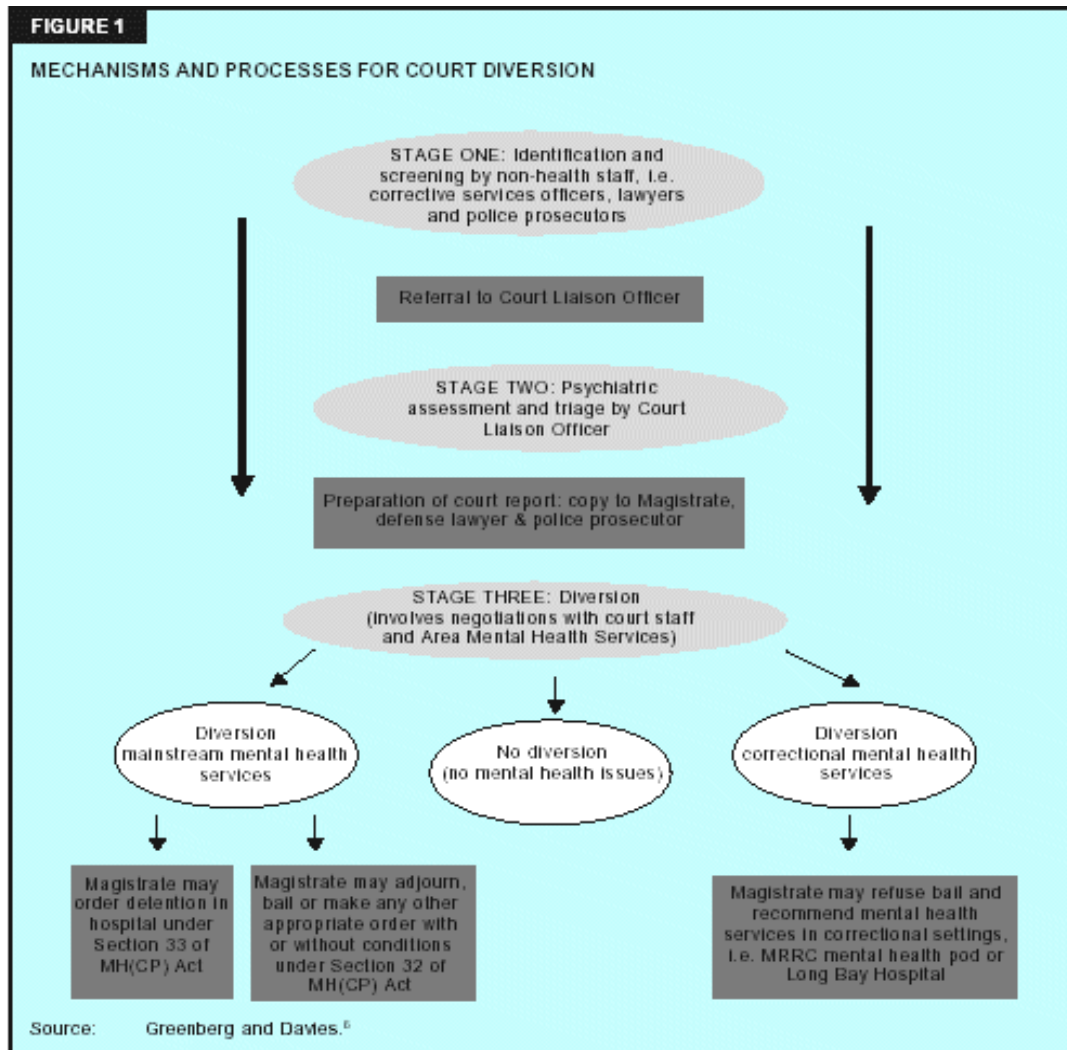
<sup>75</sup> Magistrates' Court of Victoria, *Magistrates' Court of Victoria Annual Report 2006/2007*, (2007) < [http://www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Annual\\_Report/\\$file/Annual\\_Report\\_06-07.pdf](http://www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Annual_Report/$file/Annual_Report_06-07.pdf) > at 16 June 2008, 53.

<sup>76</sup> David Greenberg and Ben Nielsen, 'Court diversion in NSW for people with mental health problems and disorders' (2002) 13(7) *NSW Public Health Bulletin* 158-160, 159.

<sup>77</sup> Ibid 158.

<sup>78</sup> Ibid 159.

<sup>79</sup> Ibid.



## Fitness to Plead, Fitness to be tried and Criminal Responsibility

### Queensland - Mental Health Court

In Australia, issues of a offender's fitness to plead, fitness to be tried and defences of mental impairment (insanity) are generally determined in the trial courts by jury or, in some States, by judge alone. At the Magistrates Court (or Local Court) level such issues are dealt with by the Magistrate. In Western Australia and South Australia Magistrates Courts, specific lists have been set up to deal with those cases more efficiently.<sup>80</sup>

<sup>80</sup> In Perth Magistrates Court the '12 o'clock List' deals with accused where there is an issue in relation to their mental health, in particular their fitness to plead or the availability of a defence by reason of unsoundness of mind. These matters are listed at noon on Tuesdays. In South Australia the s 269 List deals with matters of fitness to plead and defence of mental impairment.

In Queensland, in addition to the traditional system of determining these issues by jury, a separate Mental Health Court has been established.<sup>81</sup> The Queensland Mental Health Court commenced operation on 28 February 2002 under the *Mental Health Act 2000* (Qld) and is a specialist court determining issues of fitness to plead or be tried and criminal responsibility. The Court is presided over by a Supreme Court judge assisted by two psychiatrists sitting as assessors, and has inquisitorial powers to determine referrals. The Mental Health Court was introduced to replace the previous Mental Health Tribunal which performed many of the same functions.<sup>82</sup> The Court sits in the Supreme Court, predominantly in Brisbane.

The Mental Health Court has power to decide appeals from the Queensland Mental Health Review Tribunal and investigate the detention of patients in authorized mental health services. However, the majority of the work of the Court is to decide references regarding the mental condition of persons charged with criminal offences.<sup>83</sup> A case may be referred to the Mental Health Court if there is reasonable cause to believe that the offender is mentally ill or was at the time of the offence, or has a serious intellectual disability that raises issues of unsoundness of mind, diminished responsibility or fitness for trial.<sup>84</sup>

The Mental Health Court is not bound by the rules of evidence. However, in particular cases the court may decide that it is in the interests of justice to use the rules of evidence for all or part of the hearing.<sup>85</sup> No party bears an onus of proof and the Court must decide matters on the balance of probabilities.<sup>86</sup> If the facts of the offence are in dispute or there is reasonable doubt that the person committed the offence, the Mental Health Court cannot determine whether the person was of unsound mind.<sup>87</sup> However, a question of a person's fitness to be tried can still be dealt with in those circumstances.

The presiding judge of the Mental Health Court is able to accept a broad range of material including evidence from victims of crime or others not party to the proceedings who may submit a sworn statement for the Court's consideration.<sup>88</sup> A non-party might submit information that is not already known to the Court, including information about the mental condition of the offender at the time of the offence or the risk the offender poses to the person or his or her family.<sup>89</sup> The statement must be sworn and must be relevant to issues before the Court.<sup>90</sup>

Upon referral, the Mental Health Court is required to determine whether, at the time the offence was alleged to have been committed, the person was of unsound mind, or whether the defence of diminished responsibility applies in the case of murder, and if the person was not

---

<sup>81</sup> Justice Margaret Wilson, 'Queensland's Mental Health Court' (Paper presented at the 21st Annual AIJA Conference - New Challenges, Fresh Solutions, Fremantle, Western Australia, 19-21 September 2003) at 15 June 2008, 1.

<sup>82</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 14 March 2000, 350 (Wendy Edmond, Minister for Health)

<sup>83</sup> Department of Justice and Attorney-General of Queensland, *The Mental Health Court* <<http://www.courts.qld.gov.au/Factsheets/D-MHC-FactSheet.pdf>> at March 2008.

<sup>84</sup> *Mental Health Act 2000* (Qld) s 256.

<sup>85</sup> *Mental Health Act 2000* (Qld) s 404.

<sup>86</sup> *Mental Health Act 2000* (Qld) s 405.

<sup>87</sup> *Mental Health Act 2000* (Qld) s 268; Justice Margaret Wilson, 'Queensland's Mental Health Court' (Paper presented at the 21st Annual AIJA Conference - New Challenges, Fresh Solutions, Fremantle, Western Australia, 19-21 September 2003) at 15 June 2008, 4.

<sup>88</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 14 March 2000, 350 (Wendy Edmond, Minister for Health).

<sup>89</sup> *Mental Health Act 2000* (Qld) s 284(1B).

<sup>90</sup> *Mental Health Act 2000* (Qld) s 284(1).

of unsound mind whether he or she is fit for trial.<sup>91</sup> The Court must also determine whether the unfitness for trial is permanent.<sup>92</sup> If the Mental Health Court finds that a person is of unsound mind, the court may make a forensic order to detain the person in an authorised mental health service or a high security unit for treatment or care.<sup>93</sup> The Court may also order limited community treatment so that the person may be monitored by a mental health service while residing in the community.<sup>94</sup>

If the Mental Health Court decides not to make a forensic order, it may nevertheless make a non-contact order in relation to the victim of the alleged offence which is registered with police and filed in the Magistrates Court.<sup>95</sup> Once a forensic order has been made, the Mental Health Review Tribunal conducts a review of the patient every six months or on application.<sup>96</sup> The Tribunal may then discharge the patient, approve limited community treatment, order that the patient be moved to another hospital or removed from Queensland.<sup>97</sup> The Tribunal also periodically reviews findings of fitness to be tried.<sup>98</sup>

The role of the two psychiatrists assisting the Mental Health Court is clearly set out in legislation in s 389 of the *Mental Health Act 2000* (Qld). The role of the psychiatrists includes examining material received for a hearing and making recommendations to the Mental Health Court regarding that material; advising the judge on the meaning and significance of clinical evidence; and about clinical issues relating to the treatment and detention needs of persons under the *Mental Health Act 2000* (Qld).<sup>99</sup> The advice given by psychiatrists to the Court is limited to matters within their professional expertise and must be given in a way that allows all parties to hear it.<sup>100</sup>

## Legislative powers of diversion

In many Australian States specific legislation has been introduced that gives power to magistrates to defer taking a plea or sentencing to enable a person to undertake a diversion program before sentence, particularly in relation to young offenders.<sup>101</sup> In general all States have sentencing legislation which enables courts to give good behaviour bonds or adjourned undertakings or to defer sentencing. In New South Wales and under the Commonwealth *Crimes Act 1914* s 20BQ specific provisions in relation to the diversion of mentally ill offenders also exist. The New South Wales provisions are discussed below.

---

<sup>91</sup> *Mental Health Act 2000* (Qld) s 267.

<sup>92</sup> *Mental Health Act 2000* (Qld) s 271.

<sup>93</sup> *Mental Health Act 2000* (Qld) s 288.

<sup>94</sup> *Mental Health Act 2000* (Qld) s 289.

<sup>95</sup> *Mental Health Act 2000* (Qld) ss 313A, 313B.

<sup>96</sup> *Mental Health Act 2000* (Qld) s 200.

<sup>97</sup> *Mental Health Act 2000* (Qld) s 203.

<sup>98</sup> *Mental Health Act 2000* (Qld) s 215.

<sup>99</sup> *Mental Health Act 2000* (Qld) s 389.

<sup>100</sup> *Mental Health Act 2000* (Qld) s 389(2), 407.

<sup>101</sup> For example the *Magistrates' Court Act 1989* (Vic) s 128A, *Youth Justice Act 2005* (NT); *Drug Rehabilitation (Court Diversion) Act 2000* (Qld) and *Juvenile Justice Act 1992* (Qld); *Sentencing Act 1995* (WA). Part 3A; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11.

## **New South Wales – Sections 32 and 33 of the Mental Health (Criminal Procedure) Act 1990 (NSW)**

In New South Wales magistrates have been provided with specific legislative powers under ss 32 and 33 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) to divert mentally ill and intellectually impaired offenders from the criminal justice system. The provisions apply to summary offences or indictable offences triable summarily which are heard by a magistrate, including any bail related proceedings, but not committal proceedings.<sup>102</sup> Under s 32 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) a magistrate has powers in relation to offenders who are, or were at the time the offence was committed, mentally ill, or developmentally disabled, or suffering from a mental condition for which treatment is available in a mental health facility but is not a mentally ill person. A magistrate may decide when dealing with these classes of offenders that it is appropriate to adjourn the proceedings, grant bail or make any other order that the magistrate considers appropriate under s 32.<sup>103</sup>

The Magistrate may also make an order dismissing the charge and discharge the offender unconditionally or into the care of a responsible person or on the condition that the offender attend on a person or at a place specified by the magistrate for assessment of the offender's mental condition or treatment.<sup>104</sup> If the magistrate makes an order under s 32(3) and suspects that the person is not complying with the conditions of the order the magistrate has powers to call on the offender to appear in Court within six months of the order being made.<sup>105</sup>

Magistrates also have power under s 33 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) to order that mentally ill persons be:

- taken to a mental health facility for assessment and detention by police, or
- taken to a mental health facility for assessment and detention and if the offender is found on assessment not to be a mentally ill person or mentally disordered person, the person be brought by a police officer back before a Magistrate or an authorised officer, or
- be discharged, unconditionally or subject to conditions, into the care of a responsible person.

A Magistrate may make a community treatment order in accordance with the *Mental Health Act 2007* (NSW) for implementation by a health care agency in relation to the offender. If, after a period of six months, the offender has not been brought before a Magistrate to be further dealt with in relation to the charge dealt with pursuant to s 33, the charge which gave rise to the proceedings is taken to have been dismissed.<sup>106</sup>

Sections 32 and 33 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) enable magistrates in New South Wales to divert mentally ill or intellectually disabled offenders at any time after the latter have been charged with summary offences. This is an example of diversion being incorporated into the mainstream system without the need to refer a person to a specific list. This may have some benefits over mental health courts because the ability to divert offenders is more widely available to any magistrate sitting on any day. However,

---

<sup>102</sup> *Mental Health (Criminal Procedure) Act 1990* (NSW) s 31.

<sup>103</sup> *Mental Health (Criminal Procedure) Act 1990* (NSW) s 32(2).

<sup>104</sup> *Mental Health (Criminal Procedure) Act 1990* (NSW) s 32(3).

<sup>105</sup> *Mental Health (Criminal Procedure) Act 1990* (NSW) s 32(3A).

<sup>106</sup> *Mental Health (Criminal Procedure) Act 1990* (NSW) s 33(2).

magistrates must have confidence in such legislative provisions otherwise they will not use them. Sections 32 and 33 have not always been widely utilised by New South Wales magistrates for a number of reasons including a lack of confidence that the offenders will receive appropriate treatment or services in the community or that the order could be enforced against the offender if there is non-compliance.<sup>107</sup>

In 2004, amendments giving magistrates power to bring back offenders before the court if they are not complying with the conditions of the order has led to a far greater use of s 32. However, this has also occurred in conjunction with mental health liaison nurses working in courts through the Statewide Community & Court Liaison Service aiding the better identification of mentally ill offenders and providing timely clinical advice to the court.<sup>108</sup> The New South Wales experience highlights that legislative provisions alone are not sufficient and must be coupled with a cooperative approach to the issue of mental illness between the court and the mental health sector.

## **Issues for consideration for future mental health courts and diversion programs for the mentally ill offender**

Mental Health Courts are not without their critics. The Deputy Chief Magistrate of New South Wales, Helen Syme, has recently stated that she is wary of embracing the idea of a Mental Health Court due to the potential stigma that attaches to the offender by being dealt with by such a court.<sup>109</sup> In Australia, while the mental health court framework appears to work well in South Australia and Tasmania, such a program operating in a larger jurisdiction would need proper resources to deal with the demand from more offenders. In New South Wales, in Deputy Chief Magistrate Syme's view, a better solution is to 'ensure all courts ... became equipped to deal with offenders who suffer from a mental health or intellectual disability' and that the courts, police, and government departments communicate more effectively so that all are working together to achieve the best possible outcome for the offender and the community.<sup>110</sup> Not all courts, however, may have the time to spend in dialogue with participants, which an integral element of a specialist court. Further, in a mainstream system there may be greater demand on resources and hence difficulties accessing the treatment team. Judicial officers would also need training in the therapeutic approach to judging.

Freiberg has identified two possible future directions for problem-oriented courts.<sup>111</sup> One is to create more specialised courts which either encompass more problems or create courts where they do not already exist. Alternatively, a problem-solving orientation could be integrated into the mainstream criminal justice system.<sup>112</sup> Certainly, it seems that judicial officers are open to ideas about how the problem solving approach could be incorporated into courts more

---

<sup>107</sup> Deputy Chief Magistrate Helen Syme, 'Local Court procedure and sentencing of offenders with mental illness' (Paper presented at The Mental Health Act – Issues and Consequences Professional Development Course, University of Technology Sydney, 28 March 2008) 15.

<sup>108</sup> Ibid, 18; see also Tom Gotsis and Hugh Donnelly, *Diverting mentally disordered offenders in the NSW Local Court*, Judicial Commission of New South Wales (2008) <  
<http://www.judcom.nsw.gov.au/monograph31/monograph31.pdf> > at 23 June 2008.

<sup>109</sup> Syme, above n 107, 3.

<sup>110</sup> Ibid.

<sup>111</sup> Arie Freiberg, 'Innovations in the Court System' (Paper presented at the Crime in Australia: International Connections, Melbourne, 30 November 2004) 13.

<sup>112</sup> Ibid 14.

broadly.<sup>113</sup> Methods to include problem-solving into the mainstream court system might include the court being made aware of the offender's particular problems and creating more personalised sanctions; on-going judicial supervision in cases where dispositional decisions could be conditionally adjourned or deferred; and the increased use of treatment oriented sanctions.<sup>114</sup> Other options for legislators may include strengthening powers to divert in sentencing legislation and greater use of police discretion to divert.<sup>115</sup>

The following factors are relevant to the Australian context and should be considered if courts or governments decide to go down the path of establishing more mental health courts or diversion programs for mentally ill offenders.

### **Indigenous offenders**

In the first year of operation of the South Australian Magistrates Court Diversion Program only seven people (3.5 percent) were of indigenous background.<sup>116</sup> This figure seems to be anomalous when the high representation of indigenous offenders in the criminal justice system is considered.<sup>117</sup> The low rates of participation of indigenous offenders on the South Australian Diversion Program may have been due in part to reluctance by indigenous offenders to acknowledge mental illness and access services, or alternatively due to a desire by indigenous offenders to have their matters resolved in the Nunga court (a specialist court for indigenous offenders).<sup>118</sup> Recent research indicates that there are also low rates of indigenous offenders accessing many drug diversion programs.<sup>119</sup> Whether separate culturally specific programs are needed, or ensuring that diversion programs are culturally sensitive, is an issue that Courts and governments need to assess in administering current or developing future diversion programs in order to better engage indigenous offenders.

### **Use of bail powers**

In several Australian states, including South Australia, Tasmania and Western Australia, magistrates are required to use their bail powers, attaching bail conditions to divert offenders to treatment. Using bail as the basis for diversionary programs is problematic as the traditional purpose of bail is to ensure attendance in court, not to facilitate treatment.<sup>120</sup> Freiberg and Morgan argue that the use of bail to attach non-traditional bail conditions such as treatment and place offenders on bail for long periods of time blurs the lines between guilt, conviction and sentence.<sup>121</sup> In Victoria the power to divert offenders prior to sentence has been given a legislative basis under s 128A of the *Magistrates Court Act 1989* (Vic) and in New South Wales under ss 32 and 33 of the *Mental Health (Criminal Procedure) Act 1990*

---

<sup>113</sup> Ibid; Forole, D.J., Puffett, N., Rempel, M. and Byrne, F. (2004) Can Innovation be Institutionalized? Problem-Solving in Mainstream Courts Center for Court Innovation, New York; Donald J Farole, et al., *Problem-Solving and the American Bench*, Center for Court Innovation (2008) < [http://www.courtinnovation.org/\\_uploads/documents/natl\\_judges\\_survey.pdf](http://www.courtinnovation.org/_uploads/documents/natl_judges_survey.pdf) > at 28 June 2008.

<sup>114</sup> Forole, D.J., Puffett, N., Rempel, M. and Byrne, F. *ibid*.

<sup>115</sup> Syme, above n 107, 3.

<sup>116</sup> Burvill, et al., above n 10, 21.

<sup>117</sup> *Ibid*.

<sup>118</sup> *Ibid*, 22.

<sup>119</sup> Jacqueline Joudo, *Responding to substance abuse and offending in Indigenous communities: review of diversion programs*, Australian Institute of Criminology (2008) < <http://www.aic.gov.au/publications/rpp/88/> > at 15 June 2008, 88.

<sup>120</sup> Arie Freiberg and Neil Morgan, 'Between bail and sentence: the conflation of dispositional options' (2004) 15(3) *Current Issues in Criminal Justice* 220-236.

<sup>121</sup> *Ibid*, 220.

(NSW). Without such legislative provisions Courts often have little choice but to use bail powers to facilitate diversion.<sup>122</sup> Jurisdictions considering introducing diversion schemes should examine the appropriate legislative foundation on which this can be done to avoid any conceptual and practical difficulties that arise by the use of bail powers.<sup>123</sup>

## **Intellectual Disability**

The problems associated with offenders who have an intellectual disability are relevant to mental health courts, as many Australian jurisdictions have legislation which has a broad definition of mental impairment that includes intellectual disabilities and other cognitive impairments. In South Australia, for example, the Magistrates Court Diversion Program deals with offenders who have intellectual disability and other forms of mental impairment, not just mental illness. In Tasmania these offenders are not eligible for the Hobart Diversion List unless they have a mental illness as their primary diagnosis.

Intellectually disabled offenders pose a problem for sentencers for many of the same reasons as the mentally ill including a lack of suitable sentencing options. The high number of prisoners with intellectual disability has led to several calls by law reform bodies and others to ensure measures are introduced to divert intellectually disabled offenders from prison.<sup>124</sup>

An Intellectual Disability Diversion Program has operated in Western Australia since 2003 in much the same way that the South Australian Diversion Program operates. The Intellectual Disability Diversion Program diverts offenders to a special list in the Perth Magistrates Court. The program enables offenders with intellectual disabilities who plead guilty to offences to return to Court on a regular basis to report their progress to a magistrate.<sup>125</sup> The types of offences are generally for less serious offending such as nuisance offences, possession of cannabis, less serious indecent assaults and burglaries.<sup>126</sup>

If the person has an intellectual disability and is eligible for services from the Disability Services Commission, is willing to participate in the program and shows an intention to plead guilty, a tailored plan is developed to help support the person in the community.<sup>127</sup> On the Intellectual Disability Diversion Program the magistrate places the person on bail with conditions with the case adjourned for up to six months with reviews by the court on a six to

---

<sup>122</sup> Jelena Popovic, 'Meaningless versus meaningful sentences: Sentencing the unsentencable' (2006) 15 *Journal of Judicial Administration* 190-205, 201.

<sup>123</sup> Freiberg and Morgan, above n 120, 221.

<sup>124</sup> See for example Lynette Byrnes, 'Justice and Intellectual Disability' (1997) 22(5) *Alternative Law Journal* 243-247; Intellectual Disability Rights Service, *Enabling Justice: A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System*, Intellectual Disability Rights Service (2008) < [http://www.idrs.org.au/pdf/enabling\\_justice.pdf](http://www.idrs.org.au/pdf/enabling_justice.pdf) > at 24 June 2008; Susan Hayes, 'A Review of Non-custodial Interventions with Offenders with Intellectual Disabilities' (2005) 17(1) *Current Issues in Criminal Justice* 69-78; Peter McGhee and Siobhan Mullany, 'Keeping people with intellectual disability out of jail' (2007) 83(November/December 2007) *Precedent* 16-21.

<sup>125</sup> Government of Western Australia, Department of Correctives Services, Intellectual Disability Diversion Program, <

[http://www.correctiveservices.wa.gov.au/I/intellectual\\_disability\\_diversion\\_program.aspx?uid=3627-2354-6373-5281](http://www.correctiveservices.wa.gov.au/I/intellectual_disability_diversion_program.aspx?uid=3627-2354-6373-5281)> at 28 April 2008.

<sup>126</sup> Michael S. King, 'Problem-Solving Court Programs in Western Australia' (Paper presented at the Sentencing Principles, Perspectives and Possibilities Conference, Canberra, 10-12 February 2006) 8.

<sup>127</sup> Amanda Perlinski and Francine Holder, 'Small but Beautiful' (Paper presented at the Disability and Justice Conference 2007, Perth, 13 November 2007 <

[http://www.justice.wa.gov.au/D/disability\\_justice\\_conference\\_2007.aspx?uid=9710-3745-1105-6520](http://www.justice.wa.gov.au/D/disability_justice_conference_2007.aspx?uid=9710-3745-1105-6520)> at 28 April 2008.

eight week interval.<sup>128</sup> At reviews, the magistrate encourages the offender for progress made, and ultimately program participants receive a discount on their sentence and a certificate.<sup>129</sup> The Program is said to be successful in significantly reducing or ceasing offending and getting people to engage with the services offered by the Disability Services Commission of Western Australia.<sup>130</sup>

States considering establishing a Mental Health Court or mental health diversion program will need to decide whether to include intellectually disabled or other mentally impaired persons within that program. Finding and accessing treatment for intellectually disabled offenders can pose difficulties. State legislation regarding mental impairment defences are likely to have a significant influence on whether such programs are inclusive of those intellectually disabled or other cognitively impaired offenders.

## Conclusion

Unlike the experience in the United States, since the first mental health court was established in South Australia in 1999, there has not been a rapid expansion of similar courts in Australia. The Mental Health Court in Queensland has focussed on the assessment of fitness to plead, fitness to be tried and criminal responsibility. It is not a problem-solving court as such, although it does resemble in some ways the Toronto Mental Health Court in Canada.<sup>131</sup> The impetus around mental health courts and diversion programs seems to be gradually changing and there is building interest in developing more mental health courts in other Australian States, with Tasmania the first state to follow suit with the Hobart Diversion List. There is, at the same time, a growing interest in the judiciary in different ways of judging and ‘doing justice’.

Other States have chosen different ways to deal with the difficult issues raised by the mentally ill offender, utilising court liaison services and specific legislative provisions to divert the mentally ill. Western Australia in contrast, although using a similar diversion program model to South Australia and Tasmania, has focussed solely on the intellectually disabled offender with the creation of an Intellectual Disability Diversion Program. Many other diversion programs deal with a broader range of issues, including mental illness, although all are aimed at addressing the underlying issues of offending. These holistic programs, focussing on offenders with ‘special circumstances’, may enable courts to reach to more offenders.

As these programs are shown to be successful, or as problem solving and therapeutic jurisprudence gain strength, it is inevitable that more such programs will be developed in Australia and will potentially expand to the higher courts. As this paper highlights, there are several models in Australia to choose from, and whether more specialised courts are created or a problem-solving orientation is integrated into the mainstream criminal justice system,<sup>132</sup> it is an area of continuing change as courts grapple with the issues posed by the mentally ill offender and attempt to halt the revolving door.

---

<sup>128</sup> Perlinski and Holder, above n 127, 10-11.

<sup>129</sup> Ibid 12.

<sup>130</sup> Ibid 15.

<sup>131</sup> Schneider, Bloom and Heerema, above n 1, 108.

<sup>132</sup> Freiberg, above n 111, 14.

## **Bibliography**

Burvill, Michael, et al., 'The management of mentally impaired offenders within the South Australian criminal justice system' (2003) 26 *International Journal of Law and Psychiatry* 13-31.

Byrnes, Lynette, 'Justice and Intellectual Disability' (1997) 22(5) *Alternative Law Journal* 243-247.

Condon, Anne and Marinakis, Annie, 'The Enforcement Review Program' (2003) 12 *Journal of Judicial Administration* 225-231.

Courts Administration Authority South Australia, *Annual Report 2006-07*, Courts Administration Authority (2007).

Department of Justice and Attorney-General of Queensland, *Homeless people* <<http://www.justice.qld.gov.au/722.htm>> at 30 April 2008.

Department of Justice and Attorney-General of Queensland, *The Mental Health Court* <<http://www.courts.qld.gov.au/Factsheets/D-MHC-FactSheet.pdf>> at March 2008.

Dusmohamed, Sue and Burvill, Michael, 'Development of a Specialist Sentencing Court in South Australia' (2003) (106) *Canberra Bulletin of Public Administration* 41-44.

Ebert, Alana, 'Homelessness, Mental Health and Law Enforcement' (2005) 12(1) *Psychiatry, Psychology and Law* 152-162.

Farole, Donald J, et al., *Problem-Solving and the American Bench*, Center for Court Innovation (2008)  
<[http://www.courtinnovation.org/\\_uploads/documents/natl\\_judges\\_survey.pdf](http://www.courtinnovation.org/_uploads/documents/natl_judges_survey.pdf) > at 28 June 2008.

Freiberg, Arie, '*Innovations in the Court System*' (Paper presented at the Crime in Australia: International Connections, Melbourne, 30 November 2004) 1-19.

Freiberg, Arie and Morgan, Neil, 'Between bail and sentence: the conflation of dispositional options' (2004) 15(3) *Current Issues in Criminal Justice* 220-236.

Gotsis, Tom and Donnelly, Hugh, *Diverting mentally disordered offenders in the NSW Local Court*, Judicial Commission of New South Wales (2008)  
<<http://www.judcom.nsw.gov.au/monograph31/monograph31.pdf> > at 23 June 2008.

Greenberg, David and Nielsen, Ben, 'Court diversion in NSW for people with mental health problems and disorders' (2002) 13(7) *NSW Public Health Bulletin* 158-160.

Hayes, Susan, 'A Review of Non-custodial Interventions with Offenders with Intellectual Disabilities' (2005) 17(1) *Current Issues in Criminal Justice* 69-78.

Hill, Michael, '*Hobart Magistrates Courts Mental Health Diversion List*' (Paper presented at the Justpartners - Family Violence, Specialist Courts and the Idea of Integration, Canberra, 22-23 May 2008).

Hunter, Nichole and McRostie, Helen, *Magistrates Court Diversion Program: Overview of key data findings*, Office of Crime Statistics and Research South Australia (2001).

Intellectual Disability Rights Service, *Enabling Justice: A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System*, Intellectual Disability Rights Service (2008)  
<[http://www.idrs.org.au/pdf/enabling\\_justice.pdf](http://www.idrs.org.au/pdf/enabling_justice.pdf) > at 24 June 2008.

James, David V, 'Court diversion in perspective' (2006) 40 *Australian and New Zealand Journal of Psychiatry* 529-538.

Joudo, Jacqueline, *Responding to substance abuse and offending in Indigenous communities: review of diversion programs*, Australian Institute of Criminology (2008)  
<<http://www.aic.gov.au/publications/rpp/88/> > at 15 June 2008.

Magistrates' Court of Victoria, *Guide to Court Support & Diversion Services*  
<[http://www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Parallel\\_Services\\_Docs/\\$file/Guide\\_to\\_Court\\_Support\\_Services.pdf](http://www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Parallel_Services_Docs/$file/Guide_to_Court_Support_Services.pdf)> at 30 April 2008.

Magistrates' Court of Victoria, *Magistrates' Court of Victoria Annual Report 2006/2007*, (2007)  
<[http://www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Annual\\_Report/\\$file/Annual\\_Report\\_06-07.pdf](http://www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Annual_Report/$file/Annual_Report_06-07.pdf) > at 16 June 2008.

Magistrates Court of South Australia, *Magistrates Court Diversion Program*  
<[http://www.courts.sa.gov.au/courts/magistrates/court\\_diversion.html](http://www.courts.sa.gov.au/courts/magistrates/court_diversion.html)> at 5 June 2008.

Magistrates Court of Tasmania, *Mental Health Diversion*  
<[http://www.magistratescourt.tas.gov.au/divisions/criminal\\_\\_and\\_\\_general/mental\\_health\\_diversion](http://www.magistratescourt.tas.gov.au/divisions/criminal__and__general/mental_health_diversion)> at 30 April 2008.

Magistrates Court of Tasmania, *Mental Health Diversion List Procedural Manual*  
<[http://www.magistratescourt.tas.gov.au/\\_\\_data/assets/pdf\\_file/0008/78740/Mental\\_Health\\_Diversion\\_List\\_Procedural\\_Manual-April\\_2007-ver1.pdf](http://www.magistratescourt.tas.gov.au/__data/assets/pdf_file/0008/78740/Mental_Health_Diversion_List_Procedural_Manual-April_2007-ver1.pdf)> at 30 April 2008.

Magistrates Court of Tasmania, *Mental Health Diversion Program Information Pamphlet*  
<[http://www.magistratescourt.tas.gov.au/\\_\\_data/assets/pdf\\_file/0009/79767/Mental\\_Health\\_Diversion\\_Info\\_Pamphlet-April\\_2007.pdf](http://www.magistratescourt.tas.gov.au/__data/assets/pdf_file/0009/79767/Mental_Health_Diversion_Info_Pamphlet-April_2007.pdf)> at 30 April 2008.

McGhee, Peter and Mullany, Siobhan, 'Keeping people with intellectual disability out of jail' (2007) 83(November/December 2007) *Precedent* 16-21.

Ogloff, James RP, et al., *The Identification of Mental Disorders in the Criminal Justice System*, Criminology Research Council (2006).

Popovic, Jelena, 'Meaningless versus meaningful sentences: Sentencing the unsentenceable' (2006) 15 *Journal of Judicial Administration* 190-205.

Queensland, *Parliamentary Debates*, Legislative Assembly, 14 March 2000, 350 (Wendy Edmond, Minister for Health).

Schneider, Richard D, Bloom, Hy and Heerema, Mark, *Mental Health Courts: Decriminalizing the Mentally Ill* (Irwin Law, Toronto, 2007).

Senate Select Committee on Mental Health, *A national approach to mental health – from crisis to community: Final Report*, Parliament of Australia (2006).

Sharples, John, et al., 'Offending Behaviour and Mental Illness: Characteristics of a Mental Health Court Liaison Service' (2003) 10(2) *Psychiatry, Psychology and Law* 300-315.

Skrzypiec, Grace, Wundersitz, Joy and McRostie, Helen, *Magistrates Court Diversion Program - An Analysis of Post-Program Offending*, Office of Crime Statistics and Research South Australia (2004) <[http://www.ocsar.sa.gov.au/docs/evaluation\\_reports/MCDP2.pdf](http://www.ocsar.sa.gov.au/docs/evaluation_reports/MCDP2.pdf)> at 30 May 2008.

Syme, Deputy Chief Magistrate Helen, '*Local Court procedure and sentencing of offenders with mental illness*' (Paper presented at The Mental Health Act – Issues and Consequences Professional Development Course, University of Technology Sydney, 28 March 2008).

Walsh, Tamara, 'The Queensland Special Circumstances Court' (2007) 16 *Journal of Judicial Administration* 223-234.

Wilson, Justice Margaret '*Queensland's Mental Health Court*' (Paper presented at the 21st Annual AIJA Conference - New Challenges, Fresh Solutions, Fremantle, Western Australia, 19-21 September 2003) at 15 June 2008.