Aboriginal Legal Service (NSW/ACT) Limited

SUBMSISSION TO THE NEW SOUTH WALES LAW REFORM COMMISSION

ABN 93 118 431 066

Reference: People with cognitive and mental health impairments in the criminal justice system

1. The Aboriginal Legal Service (NSW/ACT) Limited (ALS) is concerned in relation to the apparent overrepresentation of mentally ill persons in custody and supports reform which seeks to reduce the number of mentally ill persons in custody, provide pathways for diversion from the criminal justice system and offer therapeutic alternatives to the mentally and cognitively impaired.

2. The ALS is concerned that the overrepresentation of mentally ill persons in custody may have an effect on the rates of self harm by Aboriginal people in custody and any initiatives and reform to reduce this risk is advocated.

3. The submission prepared by the NSW Legal Aid Commission (Legal Aid) has been considered and is supported by the ALS.

4. In addition to the issues raised by Legal Aid, the ALS submits that the following would assist to reduce the numbers of mentally ill persons in custody and would improve outcomes for mentally ill persons within the criminal justice system:

   A. extending the application of section 32 of the *Mental Health (Forensic Provisions) Act* 1990 to indictable charges. The basis and arguments in favour of this proposed reform is set out in the document annexed hereto as "A".

   B. the provision of Justice Health court liaison services to all Courts across New South Wales and for service provision to be afforded to both defendants who are in custody and defendants on bail. It is understood that presently, this service operates across only 17 Courts in New South

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Wales.[1] If Justice Health are unable to provide mental health services at Court to persons on bail, it is submitted that NSW Health may be the appropriate department to perform this role.

Further, it is submitted that the service should be provided to persons charged with summary and indictable offences to ensure that the benefits of this service are being maximised by being available to all defendants.

Justice Health published on their website that in the "12 months leading up to June 2008, 14,746 persons before the NSW Courts were screened for mental illness. Of these 1,990 had a comprehensive assessment and in 1,662 cases, a severe mental illness or disorder was identified".[2] It is submitted that this statistic illustrates the effectiveness of and need for the service.

It is submitted that early detection of mental health issues by referral to Justice Health at Court gives defendants the opportunity to connect to community services to address their illness and may lead to defendants engaging in treatment before they enter a custodial setting. This is not only is in the best interest of the defendants and their families but also may enhance the protection of the community by reducing re-offending by those who are experiencing symptoms of undiagnosed or untreated mental illnesses.

5. Thank you for your consideration of our submission.

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[1] Justice Health website, accessed 11.8.10 <http://www.justicehealth.nsw.gov.au/our-services/mental-health-directorate.html.
[2] Ibid

ANNEXURE A

SUBMSISSION TO THE NEW SOUTH WALES LAW REFORM COMMISSION

This submission analyses the current NSW District Court mental health options for the mentally ill and submits that there is a need for a therapeutic diversionary option for the mentally ill and disabled which may be achieved by broadening the application of section 32 of the Mental Health (Forensic Provisions) Act 1990 to indictable matters.

> *"Unless something is done to improve the delivery of mental health services in the community and in prisons and parole, the numbers of people in our prison system with mental health problems are likely to spiral.....There is simply no safety for the community nor is there any principle in warehousing people who require mental health services to be provided and not merely to be incarcerated for longer and longer terms".*[1]

1. Introduction

The overrepresentation of the mentally ill and disabled within the NSW prison system demands that urgent attention be paid to overhauling the current options for dealing with the mentally ill within our criminal justice system. An analysis of the current pathways in the NSW District Court for dealing with accused persons who have mental health issues reveals significant disadvantages for this category of persons. It also highlights the Court's focus upon legal outcomes and the systemic favouring of punishment over rehabilitation by virtue of the lack of court based programs to assist the mentally ill and disabled.

In addition to the overrepresentation of the mentally ill in custody and the disadvantages suffered by the mentally ill under the current regime, it is argued that the inadequate state of community mental health services, research linking mental health and offending and the cost to the community of imprisonment provide justification for a therapeutic approach to be introduced. This submission further considers whether, in accordance with therapeutic jurisprudence principles, the current jurisdictional limits of s32 of the *Mental Health (Forensic Provisions) Act* 1990 (NSW) should be extended to apply to indictable charges.

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[1] The Hon. Justice Murray Kellam AO (2006), "Mental Health Issues in Parole" , National Conference of Parole Authorities 2006 Coogee, NSW, 10 May 2006 at 20

2. The problem of overrepresentation of mental illness and disability within New South Wales prisons

The exact extent of the overrepresentation in NSW gaols of those suffering from mental illness is difficult to ascertain. However, it is indisputable that there is a very high prevalence amongst prisoners of all psychiatric disorders compared to the general population in NSW.[2] In 2003, NSW Corrections Health (now Justice Health) surveyed those incarcerated and identified 74% of the NSW adult prison population as suffering from a 12 month prevalence of "any psychiatric disorder" (psychosis, anxiety disorder, affective disorder, substance abuse disorder, personality disorder or neurasthenia), as compared to 22% of the general population.[3] The 12 month prevalence of psychosis was 30 times higher in the NSW inmate population than the general community.[4] Disturbingly, 1 in 20 inmates reported attempting suicide in the 12 months prior to being interviewed for the survey.[5] A more recent survey found that 80% of the prison population had a 12 month prevalence of any psychiatric disorder compared to 31% of the general population.[6] These findings are supported by other nationwide research which has suggested that rates of major mental illnesses are three to five times higher in offender populations than the general population.[7]

With regards to intellectual disability, studies have suggested that people so defined comprise only 2-3% of the general population,[8] but at least 12-13% of the NSW prison population[9], some four times greater than the average. The NSW Law Reform Commission (1996) points out the difficulties in ascertaining the actual rates of persons with intellectual disabilities within the justice system. These include the lack of empirical evidence, the use of divergent methods in assessing disabilities and the non-identification of the disability by lawyers, police or corrective services.[10] There has only been limited research available since the publication of this report. The area would benefit from the obtaining of further empirical data.

As regards the question of whether those who have had their matters dealt with in the District Court accord with the general findings above, the available studies do not distinguish between persons charged or convicted of a summary offence or an offence dealt with on indictment. Nor do they identify the type of offence which has led to the incarceration. However, it must be inevitable that the incidence of mental health issues is widespread within the District Court, given both the proportion of prisoners who suffer a mental condition within the general prison population and the workload of that court.

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[2] Ibid at 3

[3] Butler, T & Allnutt, S (2003) "Mental Illness among NSW Prisoners", New South Wales Corrections Health Service, Sydney at 2 & 15

[4] Ibid at 3

[5] Ibid at 3

[6] Butler, A, Andrew, G, Allnutt, s, Sakashita, C, Smith, N & Basson, J (2006) 40 *Australian and New Zealand Journal off Psychology 272*

[7] Mullen, P, Holmquist, C, Ogloff, J (2003) *National forensic mental health scoping study*, Department of Health and Aging, Canberra: http://www.aic.gov.au/publications/tandi2/tandi334t.html

[8] New South Wales Law Reofrm Commission (1996) *People with an intellectual disability and the criminal justice system*, Report No. 80 at 2.4

[9] Ibid at 2.4

[10] Ibid at 2.4

The overrepresentation of mentally ill persons within NSW prisons demands the implementation of policy to reduce the proportion of mentally ill prisoners. The question thus arises: are the current alternatives adequate in order to carry out that policy objective?

3. Current mental health processes and principles in the District Court

Once a person suffering from a mental illness is charged with a strictly indictable offence or the prosecution (or defence) elect to have a charge dealt with on indictment, the avenues for dealing with the charge are very limited. An issue regarding the fitness to be tried may be raised, the accused may put forward a defence on the grounds of mental illness or alternatively, the matter is dealt with at law and if convicted, mental conditions taken into account on sentence.

3.1 Fitness

The issue of fitness has its roots in the fundamental principle of ensuring that an accused person has a fair trial, in that it is designed to ensure that the accused understands the nature of the charges they face and is capable of participating in the proceedings sufficiently to properly raise their defence.[11] The minimum standards for determining fitness are found in *R v Presser* [1958] VR 45[12], a decision that has been adopted in NSW.[13]

There are very few cases in which persons are found to be unfit. The NSW Mental Health Review Tribunal (MHRT) reports that as at 30 June 2006, of the 310 forensic patients that it manages, only 33 of the patients had been found unfit to be tried and only 15 subject to limiting terms.[14] It may be that those surprisingly low rates are in part attributable to the fact that in many cases, the identification of a mental health issue and subsequent psychiatric inquiry relies upon the lay opinion of defence lawyers to identify fitness as a potential issue. It may also be that only the most acutely mentally ill and disabled are found unfit and therefore the option only applies to a small proportion of the total number of accused persons.

3.2 Mental illness as a defence

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[11] Howard, D & Westmore, B (2005) "Crime and Mental Health Law in New South Wales". LexisNexis, Butterworths, Sydney at 93 citing *John Frith's* case (1790) 22 St Tr 307 at 318

[12] *R v Presser* [1958] VR 45 at 48 provides that the accused must be able to understand the charge and be able to plead to it; be able to exercise their right to challenge jurors; understand and follow the proceedings generally; understand the substantial effect of any evidence against them and be able to decide upon a defence and make their defence known to the court and to their counsel

[13] If the accused is found unfit, the proceedings will not continue and the accused will be referred to the Mental Health Review Tribunal (MHRT). If the MHRT finds that the accused is unlikely to become fit within the next 12 months, a "special hearing" may be held which presents the available evidence. If it is found at the hearing that the accused committed the offence, the court considers whether, if this was a normal criminal trial, it would have imposed a sentence of imprisonment upon conviction. If so, the court sets a limiting term which represents the "best estimate" of the sentence the court would have imposed had the special hearing been a normal trial. The limiting term represents the longest term for which the person can be detained as a forensic patient.

[14] New South Wales Department of Health (20006), *Consultation Paper – Review of the forensic provisions of the Mental Health Act 1990 and the Mental Health (Forensic Provisions) Act 1990*, Sydney at 1

An accused may be found not guilty of an offence if it is proved, as set out in *M'Naghton's case.*[15]

As at 30 June 2006, there were only a total of 203 forensic patients under the jurisdiction of the MHRT who had been found not guilty on the grounds of mental illness.[16] The MHRT statistics do not specify for how long the patients had been under the jurisdiction of the MHRT or how many of which are persons who were found not guilty at the District as opposed to the Supreme Court. Inquiries were made with the MHRT as to whether such information was available and it was advised that the information is not available in an easily accessible form and a review of each file would be necessary to ascertain this information.

In any event, having regard to how few people are currently under the jurisdiction of the MHRT who have been found not guilty on mental health grounds, the comments above regarding the careful and sparing exercise of the discretion to release and the fact that the District Court recorded 3150 registered cases in 2006[17] alone, it is an indisputable inference that very few cases result in a finding of not guilty on mental health grounds.

3.3 Mental illness as a mitigating factor on sentence

The low rate of cases where an accused is found unfit or not guilty on mental health grounds means that the vast majority of mentally ill or disabled accused who are convicted are dealt with in one way only: by taking an offender's mental health into account in mitigation on sentence.

A number of concessions are made in sentencing law that take into account mental health and disability issues. Paragraph 21A(3)(j) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) provides that an offender's disability insofar as it impacts upon their awareness of the consequences of their actions must be taken into account as a mitigating circumstance. In *R v Anderson*[18] it was held that a mental disorder or disability suffered at the time of the offence or sentencing may be taken into account. The NSW Court of Criminal Appeal in *R v Hemsely*[19] confirmed the

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[15] The standard as set out in McNaghton's case is that the person 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 it, that he did not know he was doing what was wrong." If the accused is found to be not guilty on the grounds of mental illness, a sentence is not imposed. However, the court may make an order that the person be detained in a place and manner that it thinks fit until released by due process of law, or make any order it think appropriate including ordering the release. If the person is not released unconditionally, the person may be detained indefinitely. The MHRT must review the patient every six months and may make a recommendation to the Minister regarding release if it is satisfied that the safety of the person or any member of the public would not be seriously endangered. The discretion to release is "most carefully and sparingly exercised" by order of the Governor, on advice of the Executive Council.

[16] New South Wales Department of Health (2006), *Consultation Paper – Review of the forensic provisions of the Mental Health Act 1990 and the Mental Health (Forensic Provisions) Act 1990*, Sydney at 9

[17] New South Wales Bureau of Crime Statistics and Research: *NSW District Court: Summary statistics 2002 – 2006*

[18] *R v Anderson* (1980) 2 A Crim R 379

[19] *R v Hemsley* [2004] NSWCCA 228

relevance of mental illness as a mitigating factor in that it may reduce an offender's moral culpability, may render them an inappropriate vehicle for general deterrence and custody may weigh more heavily on such an offender.[20]

An offender with mental health problems is, however, dealt with in accordance with the same legal procedures and the sentencing court is to consider the application of the same sentencing principles as all other offenders. Whilst concessions such as the abovementioned principles are applied, the overrepresentation of mentally ill and disabled persons in custody raises the question of whether these principles are given sufficient weight in the sentencing process.

4. Inadequacy of current options

Not only do the current options in the District Court present significant disadvantages for the mentally ill, the absence of any structured programs to treat and divert persons highlights the lack of commitment to the principle of rehabilitation in respect to mentally ill offenders.

4.1 Fitness

There are significant disadvantages for a person who is found to have committed an offence following special hearing relative to others convicted of the same charge at law. Firstly, by virtue of the fact that the person may be too unwell or disabled to adequately instruct their lawyers as to the circumstances surrounding the allegations or their possible defence. The likelihood of a finding the person has committed the offence must be higher because in some cases available defences are not communicated to defence lawyers and therefore not explored. Additionally, information may not be conveyed by the accused to their legal representatives in relation to matters such as a victim's motive to lie or other issues which may substantially affect the credibility of Crown witnesses.

Secondly, a person who is unfit is unable to instruct their lawyers to enter charge negotiations. In contrast, persons who are fit may enter into and benefit from a significantly lesser sentence upon reaching a plea agreement to a reduced charge. This is particularly significant in relation to negotiations which may result in a plea to a lesser charge which is dealt with in the Local Court where maximum penalties are reduced and there are more diversionary options available. [21]

Thirdly, in regards to the limiting term, the New South Wales Court of Criminal Appeal in the case of *R v Mitchell*[22] held that the limiting term should represent the whole sentence rather than the minimum term. As a consequence, unless the MHRT decide to release the person at an earlier time, they will likely serve a longer period in custody than a person who was found guilty at a normal trial and who has the

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[20] *Ibid* at 33-36

[21] For example, in New South Wales, persons with drug dependence issues may participate in the Magistrates Early Referral into Treatment (MERIT) program which is a 12 week program offering specialised drug treatment for persons with pending summary charges. For the mentally ill and disabled, s32 of the s13 *Mental Health (Forensic Provisions) Act* 1990 is an available option which is discussed in detail at 6.1

[22] *R v Mitchell* (1999) 108 A Crim R 85

opportunity to be released at the expiration of the non-parole period. The court held that the limiting term should not be discounted to account for any contrition following this type of proceeding on the basis that it would be speculative. In theory, this means that the unfit person may spend 25% longer in detention than a fit person who has the opportunity to plead guilty and receive the maximum discount in accordance with the guideline judgement of *R v Thomson & Houlton* (2000) 49 NSWLR 383.

It has been suggested in a recent review of the mental health legislation by the NSW Department of Health (2006) that the Court should set a minimum term in addition to the limiting term or alternatively amend legislation so that the limiting term represents that minimum term (or non-parole period or target release date) that would have been set for a person dealt with at law.[23] This approach would be a step towards creating greater parity between the unfit and offenders sentenced at law. It is submitted that this recommendation by the Department of Health be legislated for two reasons. Firstly, to remove the current inequity between the fit and the unfit. Second, to provide motivation for health care providers to achieve the outcomes stipulated in health care plans by the target release date or minimum term.

4.2 Mental Illness as a defence

Senior practitioners have suggested that a mental illness defence should only be raised in exceptional cases because a plea of guilty with a strong case in mitigation may lead to a client serving a shorter period in custody than if the matter were dealt with under the mental health legislation.[24] It is not surprising, therefore, that so few cases are disposed of in this manner. The consequence of that reticence is that persons who may legitimately have available a defence of mental illness to an indictable charge might not advance it because of the uncertainty relating to the length of time they may be detained. The likelihood that they will be sentenced to imprisonment at law is thereby increased.

Creating more certainty in relation to the length of detention is one obvious method of encouraging accused persons who have this defence open to them to exercise this defence and thereby avoid being sentenced at law. The NSW Department of Health (2006) has suggested that a statutory period be set requiring the person to be released unless the release criteria have not been met. The report further suggested that the legislation also state that the persons responsible for the patient's care and treatment must make reasonable efforts to progress the patient towards the release time.[25] This would present challenges in developing principles to calculate the appropriate release dates and inconsistencies in relation to health professionals being able to meet to targets, however, progression towards a target release date which is scrutinised by an appropriate tribunal would provide a means of accountability. Further, target release dates may motivate health professionals to achieve the benchmarks that are set and if

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[23] New South Wales Department of Health (2006) *Consultation Paper – Review of the forensic provisions of the Mental Health Act 1990 and the Mental Health (Forensic Provisions) Act 1990*, Sydney at 29

[24] NSW Public Defenders website, "Criminal Law Survival Kit", NSW: http://www.users.bigpond.com/JohnStratton/ accessed on 4 November 2007

[25] New South Wales Department of Health (2006) *Consultation Paper – Review of the forensic provisions of the Mental Health Act 1990 and the Mental Health (Forensic Provisions) Act 1990*, Sydney at 33

release dates were achieved, it may encourage accused persons who may have this defence open to them to be diverted from the criminal justice system.

4.1 Mental health as a mitigating factor on sentence

As discussed above, the vast majority of District Court cases are dealt with at law. Consequently, the focus of the Court is upon legal outcomes and individual's criminal conduct at the expense of exploring causes of offending behaviour and avenues for rehabilitation. There are significant disadvantages for those with mental health problems being subject to the same sentencing options as all other offenders.

Firstly, offenders with "unresolved" mental health issues risk being found ineligible for community based sentencing options such as community service and periodic detention by the Probation and Parole Service on the grounds that they are unlikely to comply with such orders. There is no available research to confirm the proportion of mentally ill persons who are deemed ineligible for community based options. Research in this area would certainly determine the extent to which mentally ill and disabled persons suffer discrimination because of this systemic problem. The consequence of this discrimination is that the sentencing options available to the court are narrowed, which may increase the likelihood of a full time custodial penalty.

Secondly, by being subject to the same sentencing regime, the Court is bound to consider the same sentencing principles that apply to all offenders as set out in s3A of the *Crimes (Sentencing Procedure) Act* 1999, namely, punishment, deterrence, community protection, rehabilitation, accountability, denunciation and recognition of the harm to the victim.[26] Whilst the court has made various concessions including those set out above at 3.3, this has not prevented vast numbers of mentally ill offenders being sentenced to full time imprisonment. It is argued that this is in part because the District Court does not have at its disposal any real means to give effect to the principle of rehabilitation such as structured, court supervised, treatment programs. The lack of diversionary options and court support access to mental health services may be seen to place undue weight upon the principles of punishment and denunciation.

Genuine rehabilitative sentencing aims to reduce future crime by changing the behaviour, attitudes or skills of the offender.[27] The absence of any established programs funded by the State to assist accused persons to gain access to services or diversionary options in order to have their matters dealt with otherwise than at law does not empower the courts to attempt to change the behaviour or improve the skills and of accused persons with mental disorders. It thus reveals the low priority that is afforded to the principle of rehabilitation and to the task of addressing mental health issues as an underlying contributor to crime.

This significant disadvantage experienced by the mentally ill warrants the need for this category of offenders to be considered a special group requiring additional support and in appropriate cases be provided the opportunity for diversion.

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[26] s3A of the *Crimes (Sentencing Procedure) Act* 1999

[27] Henderson, S (2003) "Mental illness in the criminal justice system", Mental Health Co-ordinating Council at http://www.mhcc.org.au/projects /Criminal_Justice/contents.html accessed on 4 November 2007 at 4

It is submitted that the underlying philosophy within the District Court for dealing with people with mental conditions must shift away from traditional legalistic approach and towards a therapeutic approach. An approach which focuses on the accused and steps that can be taken to address mental health from a medical rather than a legal perspective with the view to improving the health of the accused. It is submitted that the consequence will likely reduce future offending, offer community protection in the long term and decrease the proportion of mentally ill and disabled persons in NSW prisons.

5. The need for an alternative approach

5.1 Therapeutic jurisprudence

The concept of therapeutic jurisprudence has its origins in the work of Wexler and Winick[28] which was originally conducted in the field of mental health law. It may be described as an approach which:

> *"... seeks to address the therapeutic and counter therapeutic consequences of law and how it is applied and to effect legal change designed to increase the former and decrease the latter. It is a mental health approach to law that uses the tools of behavioural sciences to assess the law's therapeutic impact, and when consistent with other important values, to reshape law and legal processes in ways that can improve the psychological functioning and emotional well-being of those affected."*[29]

A major contribution of this philosophy has been to broaden the focus of courts beyond the immediate dispute to include consideration of the needs and circumstances of the persons before it.[30] In focusing on those needs, the approach aims to remove or ameliorate the proximate causes of offending behaviour and therefore reduce crime.[31] It is conceded that the argument to incorporate therapeutic principles to the District Court is to some extent ideological. Justification cannot be grounded in direct empirical research by virtue of the fact that the system has not embarked on exploring the effectiveness of treating mentally ill accused in a therapeutic context in the past. There are, however, in addition to overrepresentation of mentally ill persons in gaol and the disadvantages faced by the mentally ill in the current District Court system, compelling reasons for the District Court trialling therapeutic jurisprudence. The reasons highlighted in this submission are the failure of the state to provide adequate mental health services, the links between mental health and offending and the cost of maintaining current prison populations.

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[28] Wexler & Winick, (1992) "The Potential of Therapeutic Jurisprudence: A New Approach to Psychology and the Law" in Ogloff (ed) *The Law and Psychology: the Broadening of the Discipline*, Durham, N.C, Carolina Academic Press at

[29] Winick, (2000) "Applying the Law Therapeutically in Domestic Violence Cases" 69(1) *UMKC Law Review* (in press) pl

[30] Friebergh, A (2001) "Problem-Oriented Courts: Innovative Solutions to Intractable Problems" 10 *Journal of Judicial* Administration at 11 citing Warren, *Reengineering the Court Process, 1998 cited in Rottman and Casey (1999) "Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts" 240* National Institute of Justice Journal 12, 14

[31] Freiberg, A (2005) 14 Journal of Judicial Administration 196 at 198

5.2 *The state failing to provide adequate mental health services in the community*

A number of factors have been identified to help explain the prevalence of mental health issues in the criminal justice system. Deinstitutionalisation is considered by many to be responsible for the high rates of incarceration.[32] However, deinstitutionalisation alone cannot explain why these persons have drifted from mental health institutions to the prison system. What can explain this flow is research which reveals that a poor job is done of adequately identifying the needs of the mentally ill prior to, and in order to avoid, their coming into contact with the criminal justice system.[33] The adoption of a therapeutic approach would appear justified on the basis that the community is presently failing to provide adequate health care in the first instance. It may be argued that the state is setting the mentally ill and disabled up to fail by inadequately funding screening services, accommodation, access to healthcare professionals and ongoing support, particularly for the most marginalised persons. It hardly seems conscionable that the mentally ill should suffer harsh punishment within the legal system when it is conceivable that their contact with that system may be attributable, at least in part, to an under resourced health system.

5.3 *The significance of early intervention and links between mental health and offending*

A 2007 study by leading Sydney psychiatrists including Dr Olav Nielssen and Dr Bruce Westmore found that the period of greatest risk that persons suffering a psychotic illness would commit a homicide was during the earliest phase of the illness, in particular the first episode.[34] They also concluded that many of the offences could have been avoided if the dangerous symptoms had been identified and intervention made.[35] Whilst this study deals with the most serious of crimes, the direct link between symptoms and commission of homicide and research which suggests intervention may prevent such crimes should raise concern and provide a sound basis for employing intervention strategies within the criminal justice system to prevent future danger to the community.

More general research by Mullen (2001) relating to mental health as a risk factor in predicting violence has suggested that each of the following may be used as a predictor of subsequent offending: active symptoms, poor compliance with medication and treatment, poor engagement with treatment services, treatment resistance and lack of insight into the illness.[36] The need for more extensive screening

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[32] Ogloff et al (2007) "The Identification of mental disorders in the criminal justice system". *Trends and Issues in Crime and Criminal Justice* No. 334, Australian Institute of Criminology, Canberra at 2; Henderson, S (2003) "Mental illness in the criminal justice system", Mental Health Co-ordinating Council at http://www.mhcc.org.au/projects /Criminal_Justice/contents.html accessed on 4 November 2007

[33] Ogloff (2007) "The identification of mental disorders in the criminal justice system : report to the Criminology Research Council Consultancy, Monash University, Fairfield Victoria at 1

[34] Nielssen, O, Westmore, B, Large, M, Hayes, R (2007) 186(6) *Medical Journal of Australia* 303-304

[35] Ibid at 304

[36] Mullen (2001), *Dangerousness, risk and the prediction probability* in Geldner, M, Lopez-Ibor, J & Andreason, N (Eds) New Oxford Textbook of Psychiatry, Oxford University Press, London at 2066-2078 cited in McSherry, B (2004) *Risk Assessment by Mental Health Professionals and the Prevention of Future Violent Behaviour*, Criminology Research Council: http://www.aic.gov.au/crc/reports/200001-18.pdf

for mental health disorders has been identified as an intervention strategy which may help to reduce the cycle of admissions into the criminal justice system.[37] The identification of these risk factors as having a potential impact on the safety of the community demands that the courts take responsibility for identifying those at risk of offending and for implementing therapeutic intervention strategies to reduce those risk factors.

A recent review of research on recidivism by Payne (2007) has also suggested that offenders with mental health problems who also have limited social and medical support are more likely to re-offend.[38] This research suggests that the most socially marginalised of those with mental health problems are coming into contact with the criminal justice system, providing further justification for providing therapeutic assistance because of the degree of disadvantage these people suffer. Further, it is asserted that in order to deal with issues such as social isolation and lack of support, a holistic approach is required to maximise the benefits of the intervention.

5.3 Cost of imprisoning offenders to the community

The financial cost of imprisonment upon the community is high. The 2008/2009 NSW Department of Corrective Services' report estimated that the cost of custody services per inmate per day was $205.94.[39] The highest daily number of inmates for that period being 10 492[40], this represents a significant cost to NSW particularly when comparing the average cost of the services to offenders sentenced to community based options which is $20.23 per day[41].

Whilst it is conceded that a meaningful therapeutic approach would require significant expense, the current level of expenditure raises the question as to whether long term economic benefits may flow from adopting intervention strategies and court based therapy if recidivism is lowered and accused persons continue to remain on community based options which may, over time, require less intensive intervention. It is important that any new initiative as suggested in this submission is closely monitored in terms of recidivism rates and service cost to identify areas of modification or indeed whether the model itself can be justified as beneficial in this regard to the community. Having said that, the point remains that the present system is failing the community as a whole, composed as it is both of those who pass through it and those who must pay for it.

6. Practical considerations in introducing therapeutic jurisprudence to the NSW District Court

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[37] Ogloff, J, Davis, M, Rivers, G, Ross, S (2007) *The identification of mental disorders in the criminal justice system*, Trends and Issues in crime and criminal justice No. 334, Australian Institute of Criminology, Canberra at 2

[38] Payne, J (2007) Recidivism in Australia : findings and future research" Research and public policy series, No. 80, Australian Institute of Criminology at 97

[39] NSW Department of Corrective Services, 2008/2009 annual report at 44: http://www.correctiveservices.nsw.gov.au/__data/assets/pdf_file/0003/195303/csnsw-annual-report-2008-2009.pdf

[40] Ibid at 8

[41] Ibid at 44

In order for therapeutic jurisprudence to be introduced in order to tackle the failings of the current system, a number of reforms would be required. One would be the introduction of a legislative scheme to provide the court with the power to order accused persons to undertake rehabilitative services. Another would be the establishment of a constructive context in which the rehabilitative services could be provided, monitored, assessed and to decide how the cases will be ultimately resolved.

It is suggested that as regards the former such reform, the introduction of the application of s32 of the *Mental Health (Forensic Provisions) Act* 1990 (NSW) to the court would be an appropriate means of achieving that objective.

Additionally, it is submitted that the length of the order as prescribed under section 32(3A) be extended beyond 6 months to, for example, 2 years to ensure there is adequate time to develop and commence a treatment plan and monitor compliance and progress under that order. The length of time of the order, it is submitted, should be determined in consultation with health care experts to ensure the legislation provides for adequate time for the therapeutic aims to be achieved.

In relation to the latter reform, it is suggested that section 32 applications should be open to be made in the Local and District Courts. Consideration may also be given, for the more serious matters being considered, to establishing a constructive context within which to monitor cases, for example by extending the jurisdiction of the MHRT or the establishment of a Mental Health Court.

6.1 Section 32 of the Mental Health (Forensic Provisions) Act 1990

It is proposed that the proper recognition of the principle of rehabilitation for mentally ill offenders in the District Court may be in part achieved by extending the jurisdictional limits of s32 of the *Mental Health (Forensic Provisions) Act.*[42]

Section 32 is a diversionary option which is currently limited in its application to summary charges. It provides magistrates with the discretion to deal with persons who suffer from a mental illness[43] or condition or developmental disability by dismissing the charge and discharging the person conditionally or unconditionally, rather than dealing with the person at law.

If the case is dealt with pursuant to s32, a conviction is not recorded and the person is not subject to sentencing options under the law, but rather may be ordered to undergo a treatment plan generally based on the recommendations of health care

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[42] Section 32 of the *Mental Health (Forensic Provisions) Act* 1990. It is also proposed section 20BQ of the Commonwealth *Crimes Act* 1914 which is a similar provision available in the Commonwealth jurisdiction which is also currently limited in its application to summary matters. s20BQ

[43] Section 32 does not apply to mentally ill persons as defined in section 9 of Chapter 3 of the Mental Health Act 1990 which, in general terms means a person whose mental illness requires treatment or control for the person's own protection from serious harm, or for the protection of others from serious harm.

professionals.[44] It is submitted that this time frame should be extended beyond 6 months.

If the person is discharged, the magistrate may order that the person be brought back before the Court at any time within six months of the order being made if the person fails to comply with the conditions of discharge and the matters may be dealt with at law.[45]

The three stage process of determining applications pursuant to s32 is set out in *Director of Public Prosecutions v El Mawas* [2006] NSWCA 154 as follows:

1. the magistrate determines whether the defendant is eligible to be dealt with under the section, the test being satisfied if a diagnosis by a qualified professional that the person suffers a mental illness or a mental condition for which there is treatment or a developmental disability;

2. a discretionary judgment is to be made as to whether it is more appropriate to deal with the defendant under s32 rather than under the general law; and

3. if it is found that it is more appropriate to deal with the defendant under the section, a discretionary judgement is required in relation to the orders to be made, which usually relates to the nature of the conditions upon which the person is discharged.

The benefits for the mentally ill and disabled would be many. By virtue of the first limb of the test, a diagnosis is required. This of course is crucial to identifying the existence of a mental condition, the appropriate treatment and other risk factors which may have an impact upon the mental health problem otherwise being untreated. This is a basic but crucial step in identifying a potential underlying cause of offending behaviour.

Section 32 has the potential to be applied quite broadly. First, it may be applied to a person who suffered a mental condition or illness or a developmental disability either at the time of the commission of the offence or at the time when the defendant is before the court.[46] Second, the judiciary has been granted considerable leeway in applying the section:

> "*... the magistrate is permitted latitude as to the decision which might be made, a latitude confined only by the subject matter and object of the Act*"[47]

Thirdly, the Court of Appeal has held that whilst the seriousness of the offence was a relevant matter to be taken into account in determining whether to apply the section, it may be applied to serious offenders as long as it is regarded, in the magistrate's opinion, as more appropriate than the alternative. In arriving at that opinion, a relevant consideration is whether proceeding in accordance with s32 will produce a better outcome both for the individual and the community.

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[44] Section 32(3) of the *Mental Health (Forensic Provisions) Act* 1990
[45] Section 3(A) and 3(D) of the *Mental Health (Forensic Provisions) Act* 1990
[46] Section 32(1) of the *Mental Health (Forensic Provisions) Act* 1990
[47] *Director of Public Prosecutions v El Mawas* [2006] NSWCA 154 per McColl JA[3]

The potential of these sections to apply to those charged with indictable charges are consistent with goals of therapeutic jurisprudence and would provide the District Court with the power to deal with appropriate cases in this manner. In doing so, the Courts would be giving proper effect to the principles of rehabilitation in deciding that in particular cases it is more appropriate to improve the health of the applicants rather than defaulting to a prison sentence.

6.2 Establishing a context to administer section 32 applications

It is submitted that there are many indictable matters which could properly be dealt with under section 32 by the Local or District Courts. However, it is submitted that if the application of this section was to broaden to include more serious offences, consideration could be given to the introduction of specialised courts. A specialised court has the function of working collaboratively with partner agencies in case management and program delivery as a means of enhancing rehabilitation through ongoing contact.[48]

A number of jurisdictions have risen to the challenge of attempting to reduce the overrepresentation of mentally ill and disabled prisoners through the establishment of mental health courts. In the United States, more than 80 such courts aim to divert defendants from prisons to treatment programs.[49] The only mental health specialty court dealing with criminal charges in Australia is South Australia.[50]

The proposal that accused persons suffering from mental illness would be able to be discharged under s32 in relation to indictable charges would no doubt raise concern particularly amongst the popular media and victim's groups that those accused are not being adequately punished and that to so deal with the charge would send a message to the community that our courts undervalue the effect of crime.

In order to justify an indictable matter being dealt with under s32, it is suggested that it be mandatory that the applicant be subject to an intensive program which aims to properly psychiatrically assess, establish links with appropriate mental health services, monitor treatment, encourage compliance and assist the person in other aspects which may encourage compliance with treatment such as housing and substance dependence. The MHRT or alternatively a specialised Mental Health Court would each be an appropriate context for administering these services as it could incorporate into its operation the input and evidence of health professionals who have had ongoing contact with the accused. Their assistance may give the court the ability to discharge the person with confidence that the likelihood of recidivism is reduced and the prospects of rehabilitation are increased.

There are several advantages associated with broadening the jurisdiction of the MHRT to administer s32 applications rather than establishing a new, specialised

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[48] Payne, J (2005) *Specialty Courts in Australia: Report to the Criminology Research Council*, Australian Institue of Criminology, Canberra at 4

[49] Freiberg, A (2005) "Problem oriented courts: an update", 14 *Journal of Judicial Administration*, 196 at 202

[50] Courts Administration Authority of South Australia: http://www.courts.sa.gov.au/courts/magistrates/court_interv_officers.html

court. The Tribunal has experience in dealing with mentally ill persons charged with criminal offences and currently has forensic patients under its jurisdiction. It possesses an established and experienced panel of psychiatrists and members. Building upon the current procedures and infrastructure rather than establishing a fresh body to deal with those applications would not only save significant expenditure but would also allow benefit to be derived from the knowledge and experience of the current members of the MHRT.

The NSW legislature may also look to aspects of the South Australian experience for guidance in developing its own model. The South Australian Magistrates' Court Diversion Program, as the name suggests, deals only with matters that fall within the jurisdiction of the Magistrates' Court. The intention is that offenders with mental health issues are identified early in the criminal justice process and the offending behaviour of those suffering from those issues is addressed accordingly. One magistrate is allocated all matters so referred. Court staff carry out the tasks required for the successful running of the program, such as mental health assessments, contact with service providers and acting as a conduit between such bodies and the court.[51] Treatment plans are devised and their progress in relation to that plan is monitored and subject to regular reviews. Depending upon the results obtained, either the charges will be withdrawn or a sentence is imposed.[52] Justification for expanding the jurisdiction of the specialist court or tribunal which is established to include indictable charges could be drawn from the NSW Drug Court which extends its jurisdiction to indictable charges.[53]

Even if the court considers that the matter should not proceed by way of discharge, the opportunity to participate in the program may render an accused eligible for community based options. Thus reducing the systemic discrimination that currently exists under the current District court regime. Even if it is found that a custodial penalty is inevitable if convicted, the participation in this program may assist the accused in reducing the non-parole period following a finding that the accused's prospects of rehabilitation are greater by virtue of their participation in that program and in similar programs that might be introduced in connection with their parole conditions.

6. Conclusion

It is impossible to ignore that the current NSW District Court is inadequately geared towards applying rehabilitative principles to mentally ill and disabled offenders. The mentally ill suffer detention for unspecified periods when acquitted pursuant to a mental health defence, are subject to the same penalty as other offenders when they are found unfit for more than 12 months and are systemically disadvantaged when they are dealt with at law under the current sentencing regime.

The current system sustains the overrepresentation of mentally ill persons in our prison systems. It is only by acknowledging that identifying and treating mental

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[51] Freiberg, A (2005) "Problem oriented courts: an update", 14 *Journal of Judicial Administration*, 196 at 203.
[52] Ibid
[53] NSW Attorney Generals Department, Lawlink, Drug Court of New South Wales: http://www.lawlink.nsw.gov.au/drugcrt

disorders has the real potential to reduce crime and protect the community that we may start to look forward to reducing the proportion of mentally ill persons in custody.

Mental health courts have rightly acknowledged and bravely sought to address the potential links between mental conditions and recidivism and have resisted the easy option to succumb to political and media pressure to impose longer and harsher sentences and rather seek to protect the community by investing in properly treating those with mental disorders and disabilities. The legislature should look to these models and consider expanding the current jurisdictional limitations of section 32 to include indictable charges as a means of achieving the aim of properly treating and supporting the mentally ill rather than continue to warehouse these vulnerable persons in our prisons.

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