ROUGH JUSTICE

The Collision of the intellectually disabled and the mentally ill with the Queensland Criminal Justice System

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EXECUTIVE SUMMARY

INTRODUCTION

The Context

People with disabilities may exhibit behaviours that make them more likely to become involved in the criminal justice system. These behaviours include: poor impulse control; lack of insight into offending behaviours; lack of self control; lack of knowledge around social norms/rules; and difficulties in learning and communication.[1] Such behaviour is further exacerbated by the marginalisation of those with a disability that exposes them to a greater risk of vulnerability to societal environments and elements conducive to criminal activity. Evidence suggests offenders with disabilities are over represented in the criminal justice system, including over representation in prisons. Whilst there exists a fundamental need for early intervention strategies that are effective in curtailing this over representation, consideration also needs to be given to systemic issues that see those with a disability: -

- more likely to be arrested, questioned and detained for minor infringements of public order law;
- more likely to come before the courts as a result of police policies with respect to prosecuting cases where the offender appears abnormal or possibly dangerous;
- persuaded to confess to a crime they have not committed;
- not have their "rights", such as the right to silence, explained in a way they can understand;
- be convicted more easily as they tend to confess rather than plea-bargain;
- be more often refused bail, "perhaps as a result of previous breaches of conditions, or lack of support and resources enabling them to obtain bail, or inadequate supervisory arrangements which do not satisfy the court's requirements";
- receive more custodial sentences, for example because of the lack of alternative placements in the community;

[1] From Corrections to the Community 2003, Office of the Public Advocate, Victoria

- tend to serve longer sentences or a greater percentage of their sentence before being released on parole; and
- require maximum security facilities for segregation and "protection" needs. [2]

In 1998 the Australian Bureau of Statistics (ABS) estimated that around 3.6 million Australians, or nearly 19 percent of the population, had some kind of disability[3]. Around 3.2 million of these people with a disability experienced some specific restriction in their core activities, including access to schooling or employment. A further 3.1 million people have an impairment or long term condition that may, at times, restrict their everyday activities. Furthermore, it is generally conceded that people with a disability as a group have, in varying degrees, common experiences of vulnerability to abuse, discrimination, and social marginalisation due to their disability. That is to say that people with a disability are disadvantaged by a limited and usually segregated education, and a greater likelihood of being unemployed and living on welfare on, or just above, the poverty line.[4]

In the community, people with a disability often reside in unstable communal accommodation such as boarding houses or hostels.[5] Deinstitutionalisation of mental health facilities has seen inadequate support mechanisms within the community for this cohort who often were unprepared for reintegration back into the community.[6] Moreover, people with a disability often experience a lack of social, recreational and sexual relationship opportunities in their lives. Substance abuse is also a frequent problem. Indeed, the high rate of appearances before the courts has been linked to the lack of support services able or willing to address the "high support" needs of individuals with challenging behaviour[7]. It has even been commented that "[s]ome support workers look to the criminal justice system as a way of relieving them of 'troublesome' individuals".[8] This experience has been corroborated on numerous occasions by the experiences of the Disability Law Project.

The Law and Justice Foundation of New South Wales in its background paper[9] listed a number of groups who have been previously identified as being economically or socially disadvantaged in terms of their ability to access the law and justice. Of paramount concern to the Foundation was the excessive prevalence of people with a disability within the criminal justice framework. It was identified that people with intellectual disabilities face a wide range of legal problems, especially including:

- Problems with the criminal justice system as alleged offenders, victims and witnesses.
- Problems reflecting their vulnerability, physical mistreatment, financial exploitation, and inappropriate decisions made on their behalf.

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[2] NSW Law Reform Commission 1996 *Crime and People with an Intellectual Disability*
[3] Australian Bureau of Statistics: *Disability, Ageing and Carers, Australia*, publication 4430.0, 1998
[4] Ibid
[5] J Noble and R Conley 1992 "*Towards an epidemiology of relevant attributes"* in R Conley, R Luckasson and G Bouthilet (eds) *The Criminal Justice System and Mental Retardation: Defendants and Victims,* Paul H Brookes, Baltimore, 1992 at 17-53
[6] C Robinson 2001, *A Long Road to Recovery: A social justice statement on mental health,* St Vincent de Paul Society, New South Wales
[7] Report 80 (1996) - People with an Intellectual Disability and the Criminal Justice System

[8] Intellectual Disability Rights Service *Submission* (6 January 1992) at 2.
[9] Schetzer, L.,Mullins, J. Access to Justice and Legal Needs – A project to identify legal needs and barriers for disadvantaged people in NSW – Background Paper, Law and Justice Foundation of New South Wales, August 2002.

The Foundation concluded that people with intellectual disabilities are significantly over represented in the criminal justice system, both as prisoners and victims of crime. The Foundation noted that whilst the New South Wales Legislative Council Standing Committee on Law and Justice found that in excess of 20% of the current prison population suffer from intellectual disability, the under-reporting of crimes against those with an intellectual disability was excessive. The Foundation further noted that the 'unreliability' of evidence from those suffering from disability led to alleged crimes against those with a disability not being pursued by police. It was further noted that the lack of access to appropriate advocates can cause significant access to justice problems.

The legal profession and other court personnel play a crucial role within the criminal justice system for people that suffer from either intellectual or mental health disability. The Law Reform Commission of New South Wales noted that lawyers for example working in the area of intellectual disability are most likely to identify the disability, probably because of the time spent with the client.[10] Conversely, it may well be construed that lawyers that don't normally work with those that suffer from a disability, or are in a setting where the gaining of instructions are restricted by a time frame, such as a duty lawyer arrangement, the disability may not be identified. Despite the inadequacy of such arrangements, it is the fundamental role of the lawyer to ensure that the client's disability is properly assessed, fitness for trial and unsoundness of mind issues examined and presented to the court in a manner which allows the client to receive a fair hearing and, if convicted, an appropriate sentence. The Law Reform Commission found that few lawyers received any instruction about the special needs of clients with an intellectual disability.

Associate Professor Lindsay Gething of the University of Sydney's Community Disability and Ageing Program ("CDAP") has stressed the importance of determining community and professional attitudes towards people with disabilities when assessing the needs of people with an intellectual disability in the criminal justice system. In her research, Professor Gething found that community attitudes towards people with disabilities are marked by negative stereotypes, which affect the manner and fairness of their treatment by various organisations and institutions. She concluded that unless attitudes are changed by increased awareness of disability issues, institutional and procedural changes to the criminal justice system will achieve little for people with an intellectual disability. Hence, she advocates mandatory disability awareness training for police, lawyers, and correctional services officers, tailored to the needs of the particular group.[11]

In a further report to the Law Reform Commission, Associate Professor Gething suggested that there is a trend towards people anticipating higher levels of discomfort at the prospect of meeting someone with an intellectual disability ……. than for most other forms of disabling conditions.

Professor Gething further found that members of the judicial system [legislators, judges, lawyers, solicitors, police and legal clerks] experience more discomfort and hence display more negative attitudes than members of the Australian population towards people with disabilities generally.[12]

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[10] J McAfee and M Gural "Individuals with mental retardation and the criminal justice system: the view from the State Attorneys-General" (1988) 6 *Mental Retardation* 5-12, cited in New South Wales. Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts* (Research Report 4, 1993) at para 4.15.

[11] Associate Professor L Gething, Community Disability and Ageing Program, University of Sydney *Submission* (5 July 1992). cited in New South Wales. Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts* (Research Report 4, 1993)

[12] L Gething *Attitudes Towards People with an Intellectual Disability of Professionals within the Judicial System* (Report compiled for the New South Wales Law Reform Commission, Community Disability and Ageing Program, University of Sydney, 14 September 1992) at 2. This preliminary report relied upon information taken from the computerised database for the

To corroborate such view, the Commission received submissions reflecting these concerns about the attitudes of some lawyers. For example, the Queensland Department of Family Services and Aboriginal and Islander Affairs stated that usually ... difficulty is experienced in locating a lawyer with appropriate attitudes towards people with an intellectual disability. Often the attitudes expressed by lawyers are paternalistic and view the person with an intellectual disability as a child.[13]

Another submission stated that [w]e have sometimes found lawyers' attitude towards victims very disturbing with clear implications from their comment and behaviour that crimes against people with an intellectual disability were somehow not so serious as the same offence against others.[14]

Whilst there appears no historical empirical evidence to suggest that with proper representation that fully acknowledges and appreciates the disability of the offender/complainant the outcome is markedly different, it is clear from the research represented herein that the representation of people with an intellectual disability will be inadequate and the process flawed if the lawyer fails to recognise and deal with issues arising from that disability. To omit such detail is to perpetuate the very oppressive practices that have marginalised and continue to marginalise those within our community that suffer from a disability. The Disability Law Project's ultimate aim was to minimise this risk.

Mental Health in the Criminal Justice System

According to a Victorian research project conducted within custodial settings, it was found that in excess of 25% of prisoners had had prior contact with mental health service providers. It was also found that males who had been diagnosed with schizophrenia and a coexisting substance abuse were over 12 times more likely to be convicted than the general population.[15]

In respect to actual offences, most mentally disordered defendants are arrested for summary offences or minor crimes. Of the total prison population in NSW, approximately 60% of female and 44% of male prisoners convicted for a minor crime were diagnosed with a mental disorder, including psychosis, anxiety and affective disorder. [16]

The 2001 New South Wales Inmate Health Survey found that 54% of women and 41% of men had received some form of treatment or assessment by a psychiatrist or doctor, for an emotional or mental problem, during their life. The survey further found that of this cohort, 25% of women and 34% of men had been admitted to a psychiatric unit or hospital. [17]In addition to research conducted by the Law and Justice Foundation with regard to intellectual disability, it was noted that people that suffer from mental health illness also suffer considerable difficulty in accessing

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Interaction with Disabled Persons Scale, which is the only widely validated Australian instrument designed to measure community and professional attitudes towards people with disabilities.

[13] Queensland. Department of Family Services and Aboriginal and Islander Affairs *Submission* (18 August 1992) at 3. cited Discussion Paper 35 (1994) - People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues

[14] Community Living Programme Inc *Submission* (7 February 1994). cited Discussion Paper 35 (1994) - People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues

[15] P. Mullen, A Review of the relationship between mental health disorders and offending behaviours on the management of mentally abnormal offenders in the health and criminal justice system, Criminology Research Council, Melbourne, 2001, p.11

[16] Corrections Health Service, 2002). NSW Corrections Health Service (1997) *Inmate Health Survey.* NSW Health Department publication.

[17] Corrections Health Service 2001, *Inmate Health Survey* NSW Health Department publication

justice. The Foundation reported that approximately 18% of the national population reported a mental disorder at some time during the twelve months prior to the ABS Survey.[18] In deciphering access to justice issues, it was found that homelessness is synonymous with mental health illness. According to a 1998 report [19] by five welfare agencies it was found that 75% of persons using inner city hostels had at least one mental disorder, often in combination with substance addiction. In drawing the inter-relatedness between mental health, homelessness and law infringement, Legal Aid Queensland in their research with respect to homelessness and street offences found that in excess of half of the sample group represented in the Brisbane Magistrates Court suffered from a mental health condition and much of their anti-social behaviour that contributed to the offending was a result of their impaired-decision making ability.[20]

CASE STUDY NUMBER #1

T –male, aged 20 years

Diagnosis

Diagnosis Axis I - severe depression

Axis II – anti-social traits

Predisposition to impulsive behaviour

Suicidal tendencies

Charges

s411(1)&(2) – Robbery with actual violence armed/in company/wounded/used personal violence

Submissions were made by DLP to have the charge substituted for 'entering premises with intent'.

Police prosecutions accepted the submissions and the charge were substituted to 'entering premises with intent'.

Background

Clinically depressed 20 year old man had recently been discharged from hospital for suicidal tendencies and prescribed medication

He took an overdose of his prescribed anti-depressant medication, entered a gun shop, stating that he needed gun to kill himself.

The gun-shop attendant instructed T to go and sit in the corner whilst he called the police

[18] Australian Bureau of Statistics, Mental Health and wellbeing; profile of adults, Australia No. 4326.0 Canberra, 1998.
[19] St Vincent de Paul, Sydney City Mission, Salvation Army, Wesley Mission & Haymarket Foundation, Down and Out in Sydney. Sydney 1998.
[20] Legal Aid Queensland 2005, *Homelessness and Street Offences Project*

T complied with the request and sat quietly in the corner waiting for police to arrive at the scene

T had a knife secreted down the front of his trousers which was later discovered by police body search

T was transported by police and admitted to AMHU and placed on an ITO

Prior to transportation to AMHU, T participated in a record of interview with police at the gun-stop whilst under the influence of anti-depressant medication in an overdose quantity

After a two (2) month admission to AMHU, T's ITO was revoked he was discharged into police custody, despite a request by DLP that they be notified three (3) days prior to any discharge plans

DLP received no notification of the discharge into police custody until contacting AMHU to speak with T on the morning of his court appearance.

Intervention

T was referred to DLP

T wanted to have the matter 'dealt with' and was willing to plead guilty to the original charge

Police opposed bail, however, DLP made a successful bail application for T

DLP made submissions to police to have the original charge substituted for the lesser charge of 'entering premises with intent'

Police accepted the submissions

Outcome

Whilst on bail, T's mental health deteriorated and he was re-admitted to AMHU

T's addiction to prescription drugs led to his breach of bail and T instructed that he wanted to have his bail revoked and be placed into custody as he had 'nowhere else to go'

T was transferred to Arthur Gorrie Correctional Centre while waiting for his next mention date

T advised that during incarceration a number of attempted rapes had been made towards him

T pleaded guilty to the substituted charge of 'entering premises with intent'

In mitigation, DLP highlighted T's mental health plight and his horrific experience in jail whilst awaiting his next court mention

No conviction was recorded for T, the Magistrate stated that T's time in custody sufficed and in the circumstances no conviction was recorded

Intellectual Disability in the Criminal Justice System

Despite the inherent difficulties in accessing information that relates to intellectual disability and the Queensland criminal justice system, recent studies conducted in other states of Australia clearly indicate that this cohort are overwhelmingly over-represented within the criminal justice system, both as offenders and as victims.

In Victoria, approximately 40,000 people suffer from an intellectual disability which equates to near 3% of the Victorian population.[21] Although, due to the strictness of the definition of "intellectual disability" there is research opinion that suggests that the number of people that actually suffer from the subject disability is considerably higher. For example, the Victorian Adult Parole Board reported a significant number of parolees that may exhibit a borderline intellectual disability.[22] (2003) More generally, research has found that many prisoners that were deemed ineligible for services afforded to intellectually disabled prisoners, 'were nonetheless suffering from diagnosed significantly sub-average intellectual functioning.' (Glaser & Deane 1999) Be that as it may, conservatively in 2003 Victoria reported 1.66% of its prison population as suffering from an intellectual disability as defined in that state.

Like Victoria, New South Wales has an approximate 2-3% of its population suffering from an intellectual disability.[23] By contrast to the Victorian research, the most recent New South Wales prisons study suggested that people with an intellectual disability comprise at least 20% of the New South Wales prison population, that is, approximately six times that of the general population[24]. This study used a definition of intellectual disability that included both the results of intelligence tests and social and adaptive skills.

While most research in relation to offenders has occurred in prisons, it has also been suggested that offenders with an intellectual disability are over-represented in other parts of the criminal justice system. Associate Professor Susan Hayes of the University of Sydney and based upon a sample drawn from six New South Wales Local Courts, opined that more than one third of persons appearing before such courts on criminal charges may have significant intellectual deficits.[25] The primary aim of the study was to explore one of the unanswered questions in relation to the acknowledged over-representation of people with an intellectual disability in prison populations, namely, whether the over-representation at the prison stage reflects an over-representation of persons with an intellectual disability appearing before courts, or whether they received differential treatment by the courts, resulting in a greater proportion of accused persons with an intellectual disability receiving custodial sentences. Local Courts were selected because of the high flow-through rate of court appearances, and the range and diversity of offences. Most minor offences are disposed of at this level, and serious criminal offences also initially come before Local Courts for committal proceedings.

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[21] Wen, X. (1997). The definition and prevalence of intellectual disability in Australia. Canberra, Australian Institute of Health and Welfare.

[22] Department of Justice Victoria, Adult Parole Board of Victoria Website (2003)

[23] S C Hayes and G Craddock *Simply Criminal* (2nd ed, Federation Press, Sydney, 1992) at 34, referring to S C Hayes and D McIlwain *The Prevalence of Intellectual Disability in the New South Wales Prison Population: An Empirical Study* (Sydney, November 1988) at 39.

[24] NSW Legislative Council Standing Committee on Law and Justice, pp.159 – 161.

[25] New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts* (Research Report 4, 1993) ("NSWLRC RR 4"); and New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Two Rural Courts* (Research Report 5, 1996) ("NSWLRC RR 5").

The first phase of the study was undertaken in four Local Courts and found that 14.2% of the sample of 120 persons was in the mildly intellectually disabled range of cognitive ability with a further 8.8% in the borderline intellectual disability category. Since the first phase was limited by the small number of Aboriginal people in the sample, a follow-up study focused on two rural Local Courts, Bourke and Brewarrina, to ensure greater Aboriginal representation. The results revealed that 36% of the sample of 88 persons appearing before these Courts had an intellectual disability, including 7% in the range of moderate intellectual disability, with a further 20.9% of borderline intellectual ability. When the results of the two phases were combined, 23.6% of the sample had results in the intellectual disability range and a further 14.1% in the borderline range. Thus 37.7% of the total sample obtained results which indicated serious deficits in cognitive skills.[26] Obviously, such people would have serious difficulties comprehending the court processes.

Whilst there exists no apparent Australian research on the prevalence of suspects with an intellectual disability coming to the attention of the police, recent research in the United Kingdom indicates that over-representation also occurs at the initial stages of police contact. For example, in one study 9% of suspects at police stations had an IQ below 70 (indicating intellectual disability) and a further 42% had IQ scores between 70 and 79 (indicating borderline intellectual disability).[27]

According to the New South Wales Law Reform Report - People with an Intellectual Disability and the Criminal Justice System, there are many possible explanations for the over-representation of those with an intellectual disability within the system. Whilst the report essentially focused on intellectual disability, in the absence of other research, the theories identified in relation to offenders include:

Susceptibility hypothesis - this suggests that people with an intellectual disability "are more likely to engage in delinquent behaviour because of their impaired mental abilities".[28]

Different treatment hypothesis - this suggests that people with an intellectual disability are not more delinquent but more likely to be found so by the courts owing to their vulnerability in criminal justice processes.[29]

Psychological and socio-economic disadvantage - this covers a variety of theories about psychological and socio-economic disadvantage leading to over-representation, for example the fact that people with an intellectual disability are more likely to be living in community environments where they can become involved in, or suspected of, committing crimes.[30]

Recidivism rates in this cohort also are reportedly high. Research by the New South Wales Department of Corrective Services revealed that prisoners that suffered from an intellectual disability were 78% more likely to re-enter the criminal justice system than other prisoners. (The Framework Report 2001) More specifically, between 1990 and 1998, 68.3% of prisoners that

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[26] NSWLRC RR 5 at para 3.67.
[27] G Gudjonsson, I Clare, S Rutter and J Pearse *Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities* (Royal Commission on Criminal Justice, HMSO, 1993) at 24. See also I Lyall, A J Holland, S Collins and P Styles "Incidence of persons with a learning disability detained in police custody: A needs assessment for service development" (1995) 35 *Medicine, Science and the Law* at 61-71.
[28] C A Buser, P A Leone and M E Bannon "Segregation: Does educating the handicapped stop here?" (1987) 49 *Corrections Today* at 17.
[29] J Zimmerman, W D Rich, I Keilitz and P K Broder "Some observations on the link between learning disabilities and juvenile delinquency" (1981) 9 *Journal of Criminal Justice* 1 at 10.
[30] Hayes and McIlwain at 10.

were identified as having an intellectual disability were reimprisoned within the following two years post their release. (The Framework Report 2001)

CASE STUDY NUMBER #2

M9 – male, aged 37 years

Diagnosis

Profound Congenital Intellectual disability

Charges:

Wilful damage of a ornament valued at $70 (Regulatory Offences Act)

Background

M9 suffers from a profound congenital intellectual impairment and has a long history of involvement by Disability Services Queensland (DSQ)

In the past, M9 had been hospitalised at a psychiatric institution for approximately 10 years

M9 suffers behavioural problems regarding aggression and poor impulse control

M9 currently received full-time care from his live-in carer

According to the police report, M9 was remorseful and has already begun making restitution of the $70.00

Intervention

Court support staff referred M9 to DLP when M9 and his carer presented at the Magistrates Court

M9's carer encouraged M9 to plead guilty with the intention of teaching 'M9 a lesson'

M9's carer wanted M9 to go through the court process to teach him the difference between right and wrong

Upon interviewing M9, it was overtly obvious to DLP that lack of capacity was an issue as the M9 presented as profoundly intellectually impaired

M9 could not comprehend the role of a lawyer, a Magistrate, a Court or the Police

Outcome

DLP made submissions to Police that the matter be discontinued, or in the alternative, the matter would be listed for hearing.

THE AIM OF THE DISABILITY LAW PROJECT

During January 2005, the author entered into discussions with Legal Aid Queensland regarding methods through which specialised legal services could be delivered to people with intellectual disability and/or mental illness living within the Toowoomba community.

The author was successful in a bid to receive funding through Legal Aid Queensland for a period of six (6) months for the provision of legal support, advice and representation for people with the noted disabilities who had been charged by police in Toowoomba. This project was named the 'Disability Law Project' and was auspiced by the Advocacy & Support Centre.

The objectives of the research were to: -

Ensure the project is available to all clients with the subject disabilities who have been charged by police and are to appear at the Toowoomba Magistrates Court;

Provide competent legal advice, support and representation to such clients;

Ensure that clients that are in need of assistance and/or support from other disability services are appropriately referred on;

Provide government with a comprehensive report detailing interventions and outcomes.

The Disability Law Project commenced operated in late February 2005. Provision of legal advice, support and representation was provided by the author and later supported by two other criminal lawyers with a strong background in social services.

In late 2005, upon expiration of funding from Legal Aid Queensland, the Attorney General of Queensland funded the project for a further twelve months via the LPITAF Grant Scheme.

In July 2006, the Attorney General of Queensland provided a further twelve months of funding again via the LPITAF Grant Scheme.

WHY THE DISABILITY LAW PROJECT EXISTS?

At every facet, the Queensland criminal justice system predisposes the mentally ill and the intellectually disabled to injustice. People that suffer from mental illness and/or intellectual disability are often vulnerable to apprehension by police by virtue of their behavior that may emanate out of their disability. They are often questioned in the absence of an independent person or availed a support person as required by the Police Powers and Responsibilities Act and are prone to make admissions for reasons that do not always relate to guilt. In court, frequently they are funneled through a duty lawyer system that moves at such a velocity that it doesn't identify the disability, and if it does, often doesn't know what to do with it. Accordingly, this cohort pleads guilty to charges in circumstances where they may be afforded a defence or alternatively be unfit for trial.

The Disability Law Project was spawned by a lack of contemporary research which not only identified these gaps within our criminal justice system in dealing with the mentally ill and the intellectually disabled, but was acutely interested in making a difference at a practical level. It lamented the fact that despite there being research, albeit not on point, but rather evidence generally that spoke of the injustice often experienced by disabled people in their collision with the criminal justice system, little of it has persuaded legislative and administrative change.

Accordingly, if there could be an adage that well suited the purpose of the Disability Law Project it would be that synonymous with the credence of liberation theologians, “contemplation is nothing without action.”

The work of the Disability Law Project was recently acknowledged by the state government in awarding it with the Queensland Award for outstanding service to disabled people.

METHODOLOGY

Literature Review

As denoted earlier, much of the existing research on the issue of the disabled and the criminal justice system in Queensland has largely been focused at the incarceration end. Many researchers, be it in this state or elsewhere, have highlighted the extent of disability within custodial settings and the inappropriateness of such settings for treating particularly mental illness. Conversely this research has acknowledged that body of work but was motivated by asking ‘how such people actually become incarcerated or entrenched in the criminal justice system.’

Accordingly, the focus has been on literature, both nationally and internationally that looks to these issues, as well as the adoption of innovative strategies that minimize the injustice that presently faces the disabled in their contact with the criminal justice system in Queensland.

Methods

In its plainest language this research asks whether there are existing deficiencies, flaws or gaps within the criminal justice system in Queensland that see disabled people, particularly those that suffer from a mental illness and/or intellectual disability predisposed to being manhandled by the prickly end of the criminal justice stick? This research obviously follows the well researched premise that those with either an intellectual disability and/or mental illness are by virtue of their illness and/or disability at a disproportionate risk than others of making contact with the criminal justice system. People with such disabilities may exhibit behaviors that make them more likely to become questioned and/or apprehended by police. These behaviors include: poor impulse control; lack of insight into offending behaviors; lack of self control; lack of knowledge around social norms/rules; and difficulties in learning and communication. Such behavior is said to be further exacerbated by the marginalization of those with a disability that exposes them to a greater risk of vulnerability to societal environments and elements conducive to criminal activity.

Be that as it may, this research has placed itself at the juncture between the alleged offence and the judicial outcome. It was placed to investigate what happens from the time when a disabled client is charged by police and given a ‘notice to appear’ to the time when the client is dealt with or not dealt with by the court. Its investigation is occurring by way of provision of legal advice and representation to those clients. In the course of this inquiry, 140 people were provided such legal services.

The research design was further complimented by the formation of a reference group consisting of people immersed in the subject material. The reference group consisted of criminal lawyers, representatives of Legal Aid Queensland, Disability Services Queensland, Queensland Health, Community Corrections, Department of Communities, Queensland Police and the magistracy. The Attorney General of Queensland was further consulted regularly with the progress of such research.

Limitations of the Research

The focus of this research was on: -

identifying gaps in legal representation;

the nature of those gaps, and

whether the Queensland criminal justice system was capable of adequately responding to the needs of disabled people charged with either an indictable and/or simple offence.

In the last twelve (12) months, the Disability Law Project availed itself every day at the Toowoomba Magistrates Court. The project lawyer acted for people that were referred by the duty lawyer/court support worker, referred by a disability service, or self-referred. However, it is acknowledged that there were a number of disabled offenders that were represented by private law firms. Moreover, in the duration of the project, the Aboriginal Legal Service did not refer any aboriginal offenders. It is further acknowledged that a significant number of mentally ill defendants were Indigenous, and that this cohort sadly is not represented in this research. data. It is also the case that the Disability Law Project fielded many requests for legal representation from disabled people that resided outside the geographical boundaries of the project.

The project lawyer acted within the jurisdiction of the Magistrates Court and the Mental Health Court. All criminal matters of a serious nature that were outside the jurisdiction of the Magistrates Court were referred on to private practitioners.

While the Project Lawyer represented a number of juvenile clients, it was an area due to resourcing that the project was reluctant to service given the excessive number of young offenders with underlying mental health issues.

THE LAW

The Central Pillar of Criminal Justice

Historically, the common law has guaranteed an accused person of a trial according to law, and that one aspect of that guarantee is that a criminal trial cannot proceed unless the accused is fit to plead. [31]

The right to a 'fair trial' is the central pillar of our criminal justice system,[32] and a fundamental right of the accused.[33]

As expressed by Deane J. of the High Court of Australia in *Jago*,[34] this right of the accused to a fair trial is: -

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[31] Dietrich v The Queen [1992] HCA 57; (1992) 177 CLR 292 F.C. No 92/044 as per Mason C.J. and McHugh J. affirming Jago v The District Court (NSW) (1989) 168 CLR 23, pre Mason CJ at p 29; Deane J. at p 56; Toohey J. at p 72; Gaudron J. at p 75.
[32] Ibid
[33] Ibid
[34] Jago v The District Court of New South Wales and Others [1989] HCA 46; (1989) 168 CLR 23 F.C. 89/041(12 October 1989) as cited by Deane J.

'… more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial.'

Therefore there cannot be a fair trial if the accused person is 'unfit for trial'. [35]

Fitness for trial

In R v Presser [36] , Smith J. outlined the test for 'fitness to plead' as the ability of the accused person :

'to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in the court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand… the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is… [H]e must… have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any". [37]

This test was also confirmed by the High Court in *Kesavarajah*[38] and referred to in a number of Queensland Mental Health Court decisions. [39]

According to the Mental Health Act[40] 'fit for trial' means 'fit to plead at the person's trial, and to instruct counsel, and endure the person's trial with serious adverse consequences to the person's mental condition unlikely'. [41]

In essence, the accused must be able to :

- understand the nature of the charge;
- plead to the charge and to exercise the right of challenge
- understand the nature of the proceedings, namely that it is an inquiry as to whether the accused committed the offence charged;
- follow the course of the proceedings;
- understand the substantial effect of any evidence that may be given in support of the prosecution; and
- to make defence or answer the charge[42]

The question of 'fitness for trial' may be raised by the accused, the defence, the prosecution or the judge. [43]

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[35] Re NGW (2005) QMCH 001 as per Chesterman J.
[36] [1958] VR 45; [1958] ALR 248.
[37] Ibid as confirmed by the High Court in Eastman v The Queen [2000] HCA 29 (25 May 2000).
[38] Kesavarjah v The Queen (1994) HCA 41; (1994) 181 CLR 230; (1994) 123 ALR 463, (1994) 68 ALJR 670.
[39] Re RBD [2002] QMHC 2; Re NGW [2005] QMHC 001 citing R v M [2002 QCA 464.
[40] Mental Health Act Qld (2000) as cited by Wilson J in Re NGW [2005] QMHC 001.
[41] Ibid Wilson J.
[42] Kesavarjah v The Queen.

In R v Presser [44] it was held that regardless whether the defence or prosecution fail to seek an inquiry regarding fitness, there is still a duty upon the court to determine whether an accused person if fit for plead.

Presumption of soundness of mind

In the Queensland Criminal Code there is a presumption of soundness of mind whereby:

'every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved'.[45]

The onus is upon the defence to show 'on the balance of probabilities' that the accused is of 'unsound mind'.

Definitions

The definition of 'disability' in relation to the criminal justice system is confined by Queensland legislation. Whilst, the terms 'intellectual disability' and 'mental illness' are perhaps afforded a more cerebral meaning in other social contexts, for the purpose of criminal law discussion, the definitive focus issues is on 'unsoundness of mind' and 'fitness for trial.'

Mental illness is defined as 'a condition characterised by a clinically significant disturbance of thought, mood, perception or memory'. [46]

Reference to the Mental Health Court

A matter may be referred to the Queensland Mental Health Court for determination under Chapter 7 Part 4 of the Mental Health Act [47] whereby there is reasonable cause to believe a person alleged to have committed an indictable offence is mentally ill or was mentally ill when the alleged offence was committed.[48]

This reference to the Mental Health Court may be made by the accused person or the person's legal representative,[49] with reference made by filing a notice in the approved form with the Mental Health Court Registry accompanied by a copy of any expert's report on the expert's examination of the person. [50]

The Mental Health Court must also decide whether a person is 'unfit for trial' if the person was found 'not of unsound mind' [51]and if so, whether the unfitness for trial is 'of a permanent nature'. [52] I

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[43] Ibid.
[44] [1958] VR 45; [1958] ALR 248
[45] Carter's Criminal Law of Queensland , The Criminal Code s26 - presumption of sanity.
[46] Mental Health Act Qld (2000) s12.
[47] Ibid ss256, 257 and 258 as cited by Wilson J in Re RBD [2002] QMHC 02
[48] Ibid s256(a).
[49] Ibid s257 (1)(a).
[50] Ibid s258(1) & (2).
[51] Ibid s270(1)(a) as cited by Wilson J in Re RBD [2002] QMHC 02.
[52] Ibid s271 as cited by Wilson J in Re RBD [2002] QMHC 02.

However reference to the Mental Health Court may only be for indictable offences. Non-indictable offences can therefore not be referred to the Mental Health Court unless accompanying an indictable offence. In other words, a client cannot have their matter brought before the Mental Health Court until they have been charged with an indictable offence. Only then can other outstanding non-indictable offences be joined to the indictable offence and then referred to the Mental Health Court.

'Unfitness for trial' – s613 of the Criminal Code

A mechanism does exist in the Queensland Criminal Code to have the matter of 'fitness for trial' decided by a jury.

Section 613 of the Criminal Code in regards to 'unfitness for trial' provides: -

"(1) If, when the accused person is called upon to plead to the indictment, it appears to be uncertain, for any reason, whether the person is capable of understanding the proceedings at the trial, so as to be able to make a proper defence, a jury of 12 persons, to be chosen from the panel of jurors, are to be empanelled forthwith, who are to be sworn to find whether the person is so capable or no.

(2) If the jury find that the accused person is capable of understanding the proceedings, the trial is to proceed as in other cases.

(3) If the jury find that the person is not so capable they are to say whether the person is so found by them for the reason that the accused person is of unsound mind or for some other reason which they shall specify, and the finding is to be recorded, and the court may order the accused person to be discharged, or may order the person to be kept in custody in such place and in such manner as the court thinks fit, until the person can be dealt with according to law.

(4) A person so found to be incapable of understanding the proceedings at the trial may be again indicted and tried for the offence. "

Fitness for Trial – Mental Health Act 2000

The Mental Health Act 2000 provides: -

"……if there is reasonable cause to believe a person alleged to have committed an indictable offence--

(a) is mentally ill or was mentally ill when the alleged offence was committed; or

(b) has an intellectual disability of a degree that issues of unsoundness of mind, diminished responsibility or fitness for trial should be considered by the Mental Health Court.

Unfitness for Trial in matters able to be heard summarily in the Magistrates Court

As it presently stands, if a person that suffers from mental illness and/or intellectual disability is charged with an indictable offence, and is deemed by medical opinion to be 'unfit for trial' the matter can be dealt with by the Mental Health Court or by virtue of section 613 of the Criminal

Code, have the matter dealt with by jury. Alternatively, in the case where the offence is not indictable, but rather a summary offence, there is no rite of passage at this moment to have the issue of 'unfitness for trial' dealt with by the Magistrates Court**.**

Whilst 'fitness for trial' issues are largely matters dealt with by the Mental Health Court, given

that these matters are summary offences, defence lawyers are barred from referral to that jurisdiction. Section 256 of the Mental Health Act 2000 states: -

"This part applies if there is reasonable cause to believe a person alleged to have committed an indictable offence--

(a) is mentally ill or was mentally ill when the alleged offence was committed; or

(b) has an intellectual disability of a degree that issues of unsoundness of mind, diminished responsibility or fitness for trial should be considered by the Mental Health Court.

In an attempt to have matters dealt with at the Magistrates Court, it would seem that defence lawyers are similarly barred by virtue of section 613 of the Criminal Code that states: -

"(1) If, when the accused person is called upon to plead to the indictment, it appears to be uncertain, for any reason, whether the person is capable of understanding the proceedings at the trial, so as to be able to make a proper defence, a jury of 12 persons, to be chosen from the panel of jurors, are to be empanelled forthwith, who are to be sworn to find whether the person is so capable or no.

(2) If the jury find that the accused person is capable of understanding the proceedings, the trial is to proceed as in other cases.

(3) If the jury find that the person is not so capable they are to say whether the person is so found by them for the reason that the accused person is of unsound mind or for some other reason which they shall specify, and the finding is to be recorded, and the court may order the accused person to be discharged, or may order the person to be kept in custody in such place and in such manner as the court thinks fit, until the person can be dealt with according to law.

(4) A person so found to be incapable of understanding the proceedings at the trial may be again indicted and tried for the offence. "

Section 1 of the Criminal Code states that an "indictment" means a written charge preferred against an accused person in order to the person's trial before some court other than justices exercising summary jurisdiction.

On this basis, it would seem that section 613 is not applicable. Defence lawyers are further barred, given the nature of the charges, to have them referred to the District Court by virtue of section 60 of the District Court of Queensland Act 1967.

The Mental Health Act and Involuntary Treatment Orders (ITOs).

In relation to further relevant provisions under the Mental Health Act 2000, if a person at the time of the commission of the alleged offence or subsequent to was on an Involuntary Treatment Order (Chapter 4 of the Act), Chapter 7 Part 2 of the Act applies.

237 Notice of application of part

(1) If the administrator of the patient's treating health service becomes aware that this part applies, or may apply, to the patient, the administrator must immediately tell the director.

(2) If the director is satisfied that this part applies to the patient, the director must immediately give written notice of the application of the part to the following persons--

(a) the administrator;

(b) the chief executive for justice;

(c) if the patient is a forensic patient--the tribunal.

(3) Immediately after receiving the director's notice, the administrator must tell the patient of the application of the part.

(4) The chief executive for justice must give written notice to the following persons of the application of the part to the patient--

(a) the registrar of the court before which the patient is to appear for the offence;

(b) the commissioner of the police service or the director of public prosecutions as appropriate in the circumstances;

(c) if the patient is a child--the chief executive for young people.

238 Examination of patient

(1) The administrator of the patient's treating health service must arrange for the patient to be examined by a psychiatrist as soon as practicable after the administrator receives the director's notice under section 237(2).

(2) In making the examination, the psychiatrist must have regard to--

(a) the patient's mental condition; and

(b) the relationship, if any, between the patient's mental illness and the alleged offence and, in particular, the patient's mental capacity when the alleged offence was committed having regard to the Criminal Code, section 27;87 and

(c) the likely duration of the patient's mental illness and the likely outcome of the patient's treatment; and

(d) the patient's fitness for trial; and

(e) anything else the psychiatrist considers relevant.

(3) The psychiatrist must give the administrator of the health service a report on the examination.

239 Reports on examination

Within 21 days after the administrator receives the director's notice under section 237(2), the administrator of the treating health service must give to the director the psychiatrist's report on the examination.

240 Director to refer patient's mental condition to Mental Health Court or Attorney-General

(1) On consideration of the information available to the director, including the psychiatrist's report, the director must--

(a) refer the matter of the patient's mental condition relating to the offence with which the patient is charged to the Mental Health Court or the Attorney-General;88 and

(b) if the reference is to the Mental Health Court--give written notice of the reference to the Attorney-General.

(2) The director must comply with subsection (1) within 14 days after receiving the psychiatrist's report.

Note--

This part ceases to apply to the patient if the involuntary treatment order for the patient is revoked under section 121, 122 or 191, the patient ceases, under section 207, to be a forensic patient or the prosecution of the patient for the offence is discontinued.

(3) However, the director must not refer the matter to the Mental Health Court if the patient is charged only with a simple offence.

(4) Also, if the patient is charged with an indictable offence, the director must not refer the matter to the Attorney-General unless the director is satisfied the offence is not of a serious nature having regard to any damage, injury or loss caused.

241 Director may defer reference

(1) Despite section 240, if the director reasonably believes the patient is unfit for trial but is likely to be fit for trial in less than 2 months, the director may defer referring the matter for the period that ends 2 months after the decision to defer.

(2) If the director defers a decision on the matter, the director must give written notice of the decision to the Attorney-General.

(3) The director must, under section 240, refer the matter of the patient's mental condition to the Mental Health Court or Attorney-General within the deferment period.

242 Reference to Mental Health Court or Attorney-General

(1) A reference is made by--

(a) for a reference to the Mental Health Court--filing notice in the approved form in the registry; or

(b) for a reference to the Attorney-General--giving written notice to the Attorney-General.

(2) The notice must be accompanied by a copy of the psychiatrist's report on the psychiatrist's examination of the patient.

(3) The director must give written notice of the reference to the administrator of the patient's treating health service.

(4) The administrator must give written notice of the reference to the patient and the patient's allied person.

247 Attorney-General's powers on reference

(1) The Attorney-General must have regard to the psychiatrist's report on the examination of the patient, any recommendation of the director and the matters mentioned in subsection (4) and decide that--

(a) proceedings against the patient for the offence are to continue according to law; or

(b) proceedings against the patient for the offence are to be discontinued; or

(c) the matter of the patient's mental condition is to be referred to the Mental Health Court.91

(2) However, the Attorney-General must not refer the matter to the Mental Health Court if the patient is charged only with a simple offence.

(3) The Attorney-General must make a decision under subsection (1) within 28 days after receiving the reference.

(4) For subsection (1), the Attorney-General must have regard to the following--

(a) the nature of the offence, including, whether any harm was done to a victim or any damage, injury or loss was caused;

(b) information available about the patient's mental condition when the offence was committed;

(c) information available about the patient's current mental condition, and, in particular, the patient's fitness for trial;

(d) information available about the likely effect of a continuation of proceedings on the patient's mental condition.

(5) However, the Attorney-General must not make a decision under subsection (1)(a) if the director, in the notice given to the Attorney-General under section 242(1)(b), states the patient is unfit for trial.

(6) The Attorney-General may make a decision under subsection (1)(a) or (b) regardless of whether an involuntary treatment or forensic order is in force for the patient.

Penalties and Sentences

For new players, the passage into our criminal justice system is a maze to navigate. This passage is ever so more complex and emotive for those that suffer from mental illness and/or intellectual disability.

Upon police becoming aware of an alleged commission of an offence, its usual practice for the police to investigate information from witnesses and the alleged offender (the defendant). It may be the case during this investigative process that the alleged defendant is arrested and taken to the police station for further questioning. Following this process, the defendant may be formally charged and issued with a "Notice to Appear" which very briefly outlines the offence. The defendant within a period of fourteen (14) days will appear in the nearest Magistrates Court. This short space of time is to allow the defendant to seek legal representation.

There are a number of options open to the defendant at the first court appearance, which is known as a "mention."

The defendant can plead guilty to the offence, in which case the Magistrate will sentence the defendant immediately and the charges are finalized.

The defendant can plead not guilty, at which point the court will set the matter down for hearing. The defendant may then released on bail.

The defendant can ask for an adjournment, in which case the court will allow a brief period of time for the defendant to address the reasons that were the basis of the request for adjournment. In the event that the defendant fails to return to court on the next court arranged date, the court may issue an arrest warrant.

Upon arresting the defendant, he/she will be met by a further charge, "Failure to Appear," and may not be again granted bail until the charges are finalized.

Where a defendant pleads guilty or is found guilty of an offence, under the Penalties and Sentences Act 1992 the Magistrate can select from the following: -

- sentencing options;
- convicted and not further punished;
- good behaviour bond;
- monetary fine;
- probation;
- community service, or
- imprisonment, including a wholly or partially suspended sentence

Good behaviour bond

A good behaviour bond (or recognisance) requires that a person be of good behaviour for a specified period not exceeding one year, and not commit further offences. This order is often imposed on young or first-time offenders. There is no formal supervision during the life of the order, and defendants subject to this order are reliant on their own resources to avoid re-offending.

Monetary fine

A monetary fine can be imposed pursuant to section 45 of the *Penalties and Sentences Act 1992*. Section 48 provides that the court must take into account:-

- the financial circumstances of the offender, and
- the nature of the burden that payment of the fine will be on the offender

The court often allows time to pay the fine (s51), usually at the rate of about $100 per month, and usually up to a maximum of six months, although this can vary depending on circumstances.

The court can order in default of payment of the fine - the offender is to serve a specified period of imprisonment (s182A). Although discretionary, current sentencing practice in Queensland courts suggests that each $50 of unpaid fines will result in one day's imprisonment. Failure to pay fines can lead to "in default" imprisonment. The project was unable to locate Queensland data on such fine defaulters. Offenders with fines may apply to the State Penalties Enforcement Registry ("SPER") for a Centrepay - regular small deductions from their Centrelink benefit, which postpones the "in default" imprisonment. There is a fee for registration and deductions are usually $20 per fortnight. The prescribed repayment amount is amended in accordance with increases in income.

While the SPER system can avoid the need for fine defaulters going to jail, it means that offenders face significant periods of debt and repayment. SPER has no power to cancel registered fines.

Probation order

A probation order is a supervised order, with conditions that the offender must:-

- report to their supervising officer as required;
- take part in counseling or other programs, and
- advise of any changes of place of residence

The court can also impose requirements that the offender submit to medical, psychiatric or psychological treatment. This order is clearly to rehabilitate, rather than punish offenders who the court considers are in need of supervision and assistance. Difficulties arise if the offender fails to come to appointments (especially the first one), misses counseling sessions or falls out of touch with their supervising officer. Each of these events is a breach of the probation order and exposes the offender to arrest and re-sentencing for the original offence as well as a further penalty for the breaching event.

Community service order

A community service order contains provisions similar to that of a probation order. The court can order the offender to complete between 40 and 240 hours of unpaid community service. This can be more onerous than a probation order as the offender must not only attend regularly and on time, but must also participate in unpaid (usually unskilled) work for several hours at a time until the order is complete. Again, this type of order could be considered suitable only for those members of the community with the ability to consistently meet such commitments.

Imprisonment

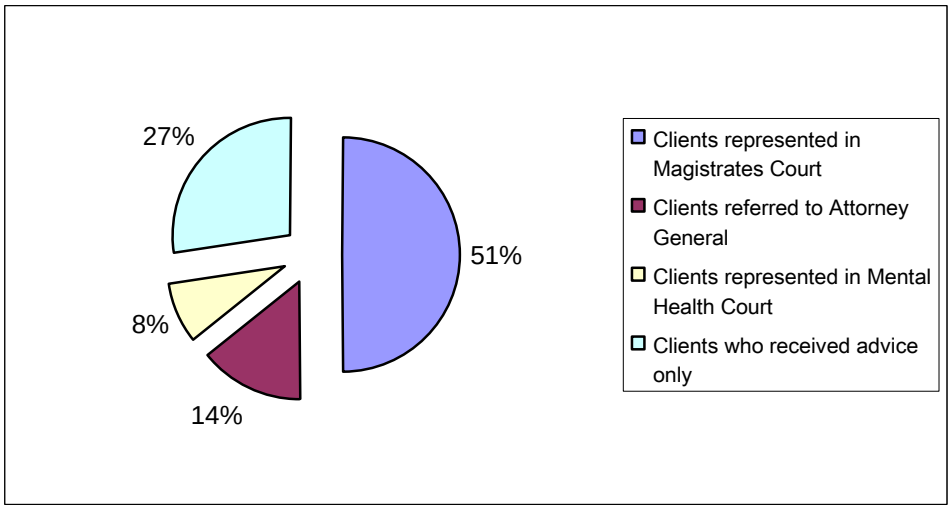
A term of imprisonment can be wholly or partially suspended, or ordered to be served full Imprisonment is usually considered a last resort when no other penalty is appropriate.

RESULTS

Type of legal assistance sought by clients from DLP

During the previous 14 months of the Disability Law Project, a total of 118 clients were provided with legal assistance (Figure 1). Of the 118 clients, 27 percent received only legal advice, and 51 percent were represented by the DLP lawyer in the Toowoomba Magistrates Court. A total of 14 percent of clients were placed on an Involuntary Treatment Order (ITO) by the Acute Mental Health Unit (AMHU) and had their matter referred to the Attorney General for determination under the Mental Health Act Qld (2000). For indictable offences, 8 percent of clients had their matter referred to the Mental Health Court (MHC) on the grounds of a psychiatric report that the client at the time of the alleged offence was of 'unsound mind' and/or was presently 'unfit for trial'. Note that only indictable matters could be referred to the MHC, and that reference to the Attorney General for determination could only be made if the client had been placed on an ITO and the ITO was not revoked by AMHU before the matter was referred according to the procedure in the Mental Health Act 2000 and set out here at page 21.

FIGURE 1: The type of legal assistance provided by DLP to intellectually impaired and/or mentally ill clients.



Time of initial contact by client with DLP

A majority of DLP client initial contact (43 percent) were seen by the DLP prior to their court date, often referred to the service by other legal service providers such as Legal Aid Queensland (Figure 2). Some clients were also referred to the service by their family/support service.

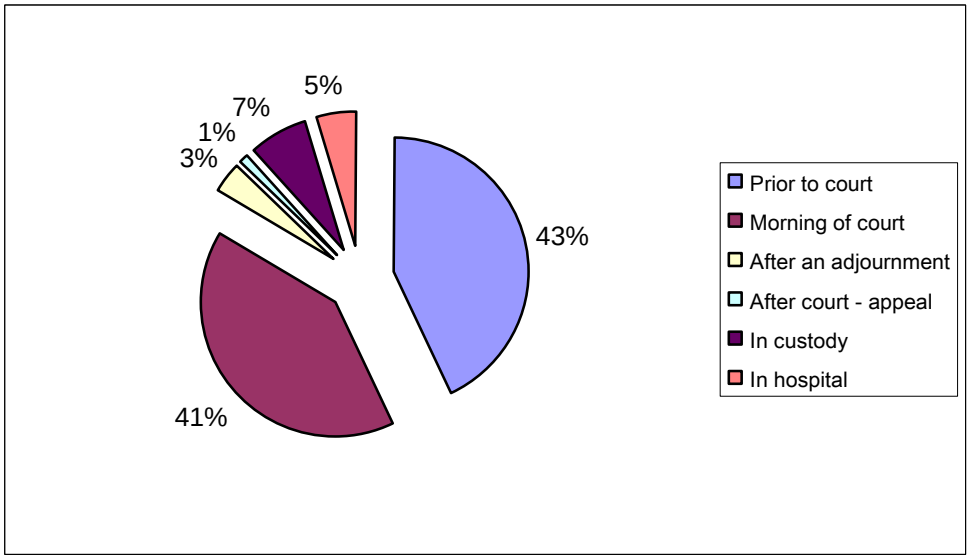
A total of 41 percent of clients were referred to the DLP by the court support officers or the duty lawyer at the Magistrates Court on the client's first court mention date. Of these referrals, a majority were made by the court support staff, on the basis of their observations during the initial interview with the client. Upon referral, the client was interviewed by the DLP lawyer attending the court and the matter adjourned to facilitate further investigation into the client's mental health status and/or intellectual disability.

The duty lawyer also referred clients to the DLP service, however this usually occurred after the matter was adjourned at the first court mention and the client then making contact with the service.

A total of 7 percent of clients were referred to DLP whilst in custody with the referral made by either the duty lawyer or a family member of the client. On occasion referral was also made by police or the Magistrate.

No hospitalised clients were referred to the DLP service by Queensland Mental Health. Instead, the DLP would often be contacted by a family member/support service of the mental health patient.

FIGURE 2 : The time of initial client contact and referral to DLP



The category of the offence/s the client had been charged with

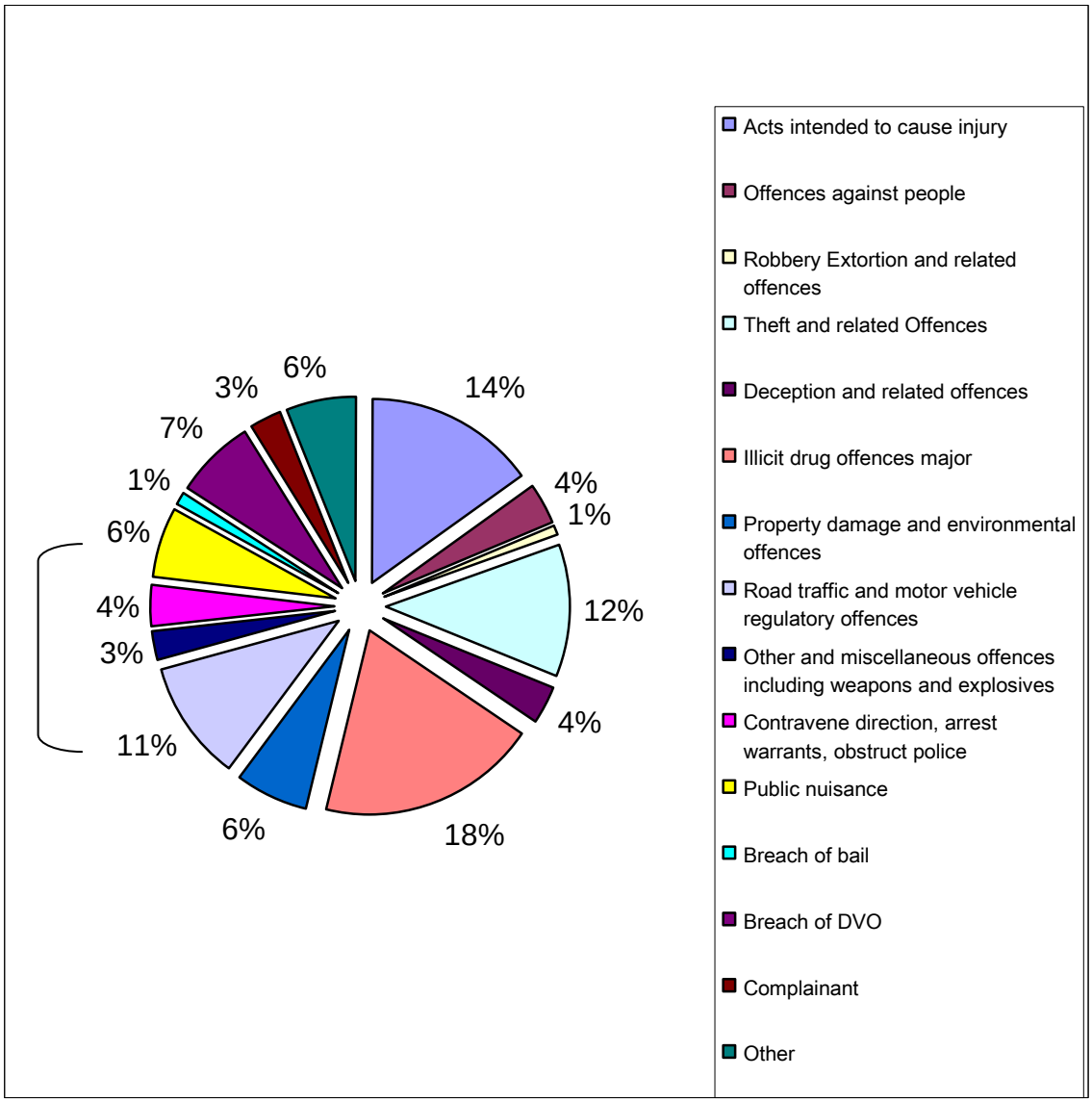
A majority of offences (Figure 3) were either acts intended to cause injury; theft; illicit drug offences; traffic offences; and offences under the *Police Powers and Responsibilities Act* (PPRA).

Note that the PPRA offences were subdivided into the offences of public nuisance; breach of bail; contravene direction by police/warrant/obstruct police; and other PPRA offences. In total 18 percent of offences were PPRA offences.

Clients were often charged with more than one (1) offence.

Note : The ‘complaint’ refers to the successful applications by DLP for Peace & Good Behaviour Bond on behalf of two (2) intellectually disabled clients that had been subjected to physical abuse and threats by the respondent. These clients were referred to the DLP by their carers. One particular client and his carer had gone to the police station and made a complaint to the police however a formal complaint was not taken by the police. Upon query by the DLP, police explained that a formal complaint could not be taken from the intellectually impaired client as he could not himself articulate the exact words used by the respondent.

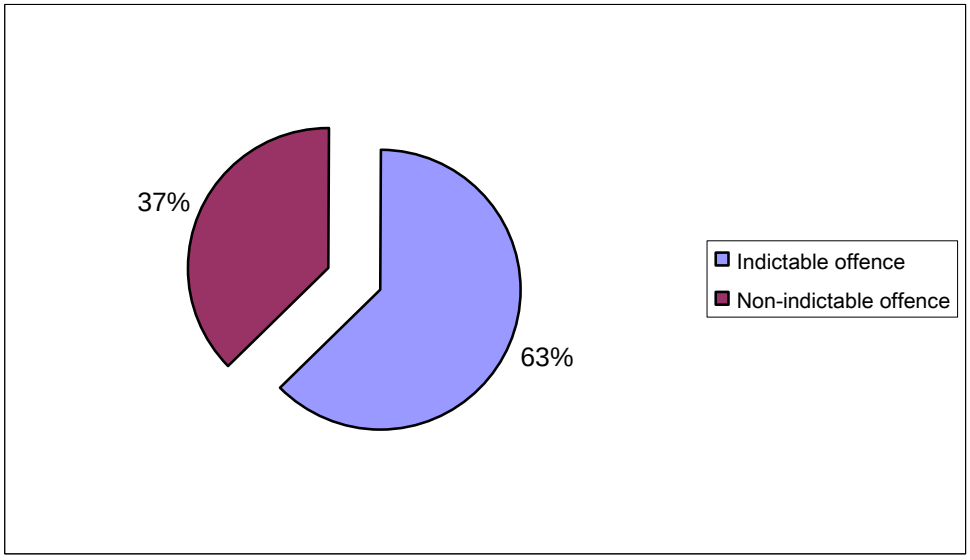
FIGURE 3: The category of the offence



The type of offence -Indictable or non-indictable offence

Whether an offence was indictable or non-indictable played a pivotal role in whether the matter was eligible for reference to the Mental Health Court for determination of 'unsoundness of mind' and 'fitness for trial'. Of the offences, 63 percent were indictable offences, and 37 percent were non-indictable offences (Figure 4).

FIGURE 4: Type of offence – indictable or non-indictable



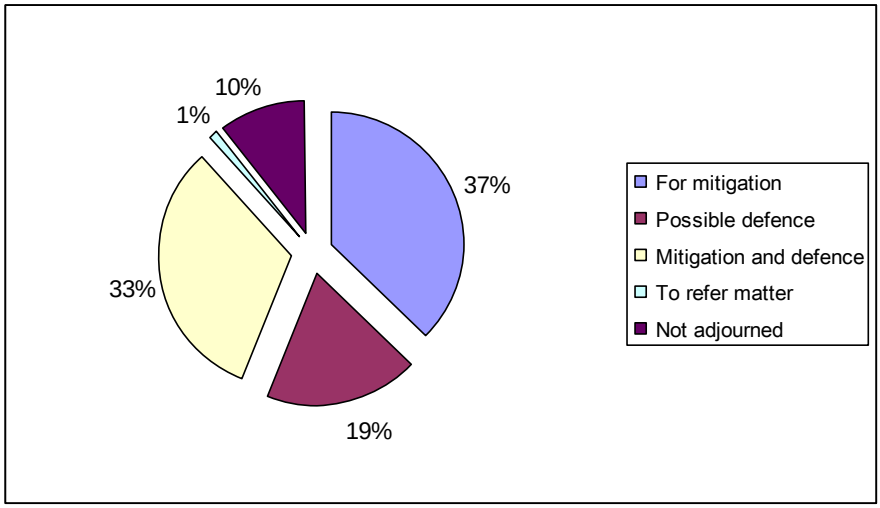
The reason for initial adjournment of the matter by DLP

Of the cases 37 percent of matters were adjourned by DLP to enable the gathering of information for use in mitigation. Another 33 percent of matters were adjourned to enable further investigation by DLP of a possible defence and/or mitigation purposes. .

Following the initial client interview by DLP, 19 percent of matters were adjourned for a possible defence of 'unsoundness of mind'. These matters were then further investigated via Freedom of Information requests by DLP to Medico-Legal of Acute Mental Health for documentation of the relevant mental health history of the client. For indictable offences, submissions were then made to Legal Aid Queensland for funding of a psychiatric report. On the basis of funding being granted to instigate an expert opinion and depending upon it's opinion, matters were then referred to the Mental Health Court for determination.

In 10 percent of cases, the client instructed that they did not want the matter adjourned, and that they would instead like the matter dealt with on the day.

FIGURE 5: Reason for adjournment of matter by DLP



Whether the client was on an Involuntary Treatment Order - status of ITO

In the majority, 39 percent of clients had previously been on an Involuntary Treatment Order (ITO) for a mental illness condition, however not on an ITO at the time of the alleged offence.

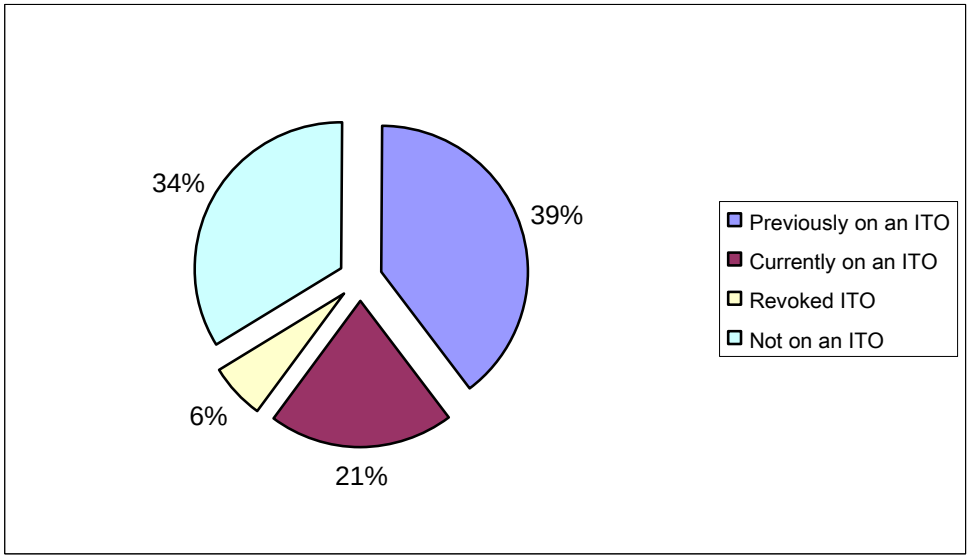
In certain cases relating to the 34 percent of clients not on an ITO, and due to observations by the DLP lawyer, it was suggested to the client that they voluntarily present at the AMHU for an evaluation and determination of their mental health status in order to receive treatment if necessary. In some instances, upon presentation to AMHU, the client was then placed on an ITO and the matter was then referred by the Director of Mental Health to the Attorney General for determination. In this situation, had the client not voluntarily presented to AMHU, their matter would have proceeded according to law.

Upon contact with DLP, 21 percent of clients were already on a current ITO with the matter therefore referred under the Mental Health Act Chapter 7 Part 2 to the Attorney General for determination.

In some cases, clients were on an ITO which later was revoked before the process of referral to the Attorney General by the Director of Mental Health was initiated. In these cases, DLP lawyer was not informed by AMHU of the revocation of the ITO.

There were situations whereby some clients, presumably due to a lack of insight into their own legal situation or fear of being hospitalised, did not inform AMHU of the criminal charge they were facing when placed on an ITO. Under the Mental Health Act (2000) s237(1), notice of application of Chapter 7 Part 2 for referral of the matter to the Attorney General by the Director of Mental Health is only initiated *'if the administrator of the patient's treating health service* ***becomes aware*** *that this part applies, or may apply, to the patient'.* It is only then that the administrator must immediately tell the Director of Mental Health. In some cases, there was a significant delay in the administrator becoming aware of the client's legal predicament.

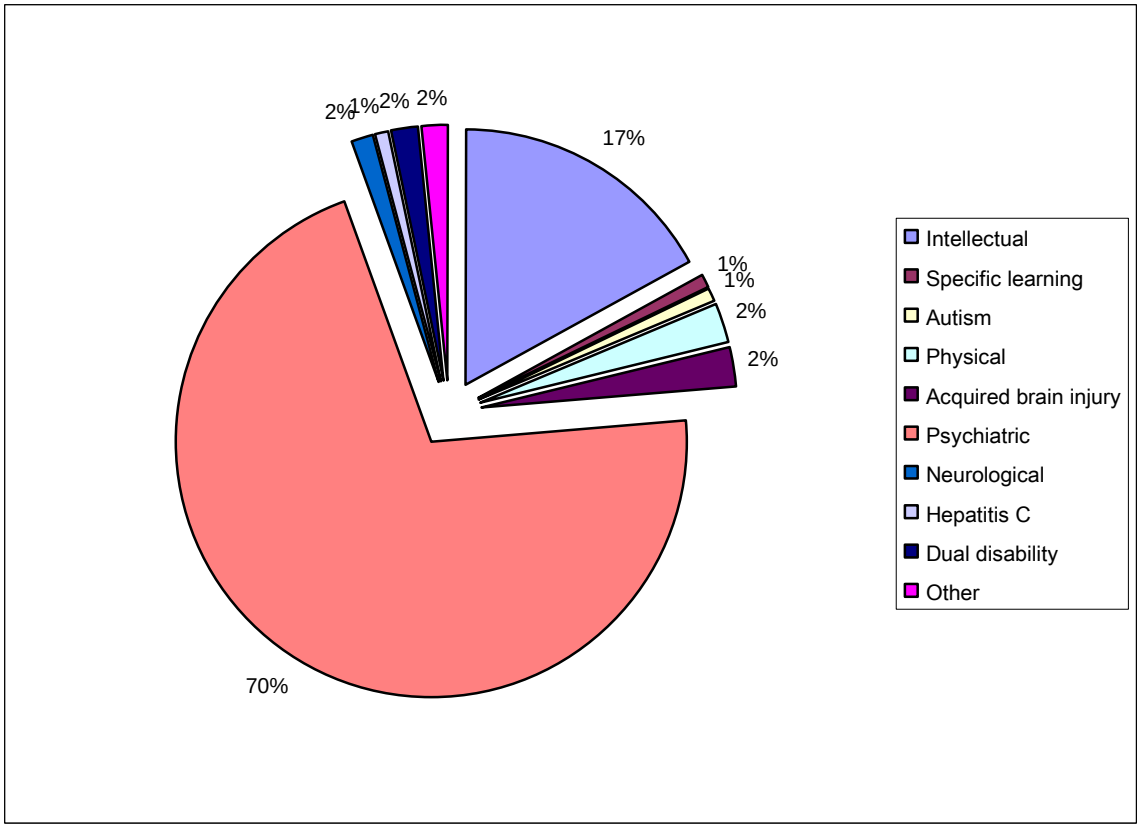
FIGURE 6: The status of the involuntary treatment order



The type of disability afflicting the client

An overwhelming 70 percent of clients represented by the DLP were diagnosed with a psychiatric condition (Figure 7). Intellectual disabilities accounted for 17 percent of DLP clients. Specific learning disabilities, autism and acquired brain injury disabilities accounted for 4 percent of clients.

FIGURE 7: The type of disability


2%
1%
2%
2%
17%
1%
1%
2%
2%
70%
Intellectual
Specific learning
Autism
Physical
Acquired brain injury
Psychiatric
Neurological
Hepatitis C
Dual disability
Other

Client case outcome

Due to delays in the processes involved in determining the mental health status of DLP clients, 39 percent of cases are pending an outcome (Figure 8). The pending cases include matters currently referred to the Mental Health or the Attorney General for determination.

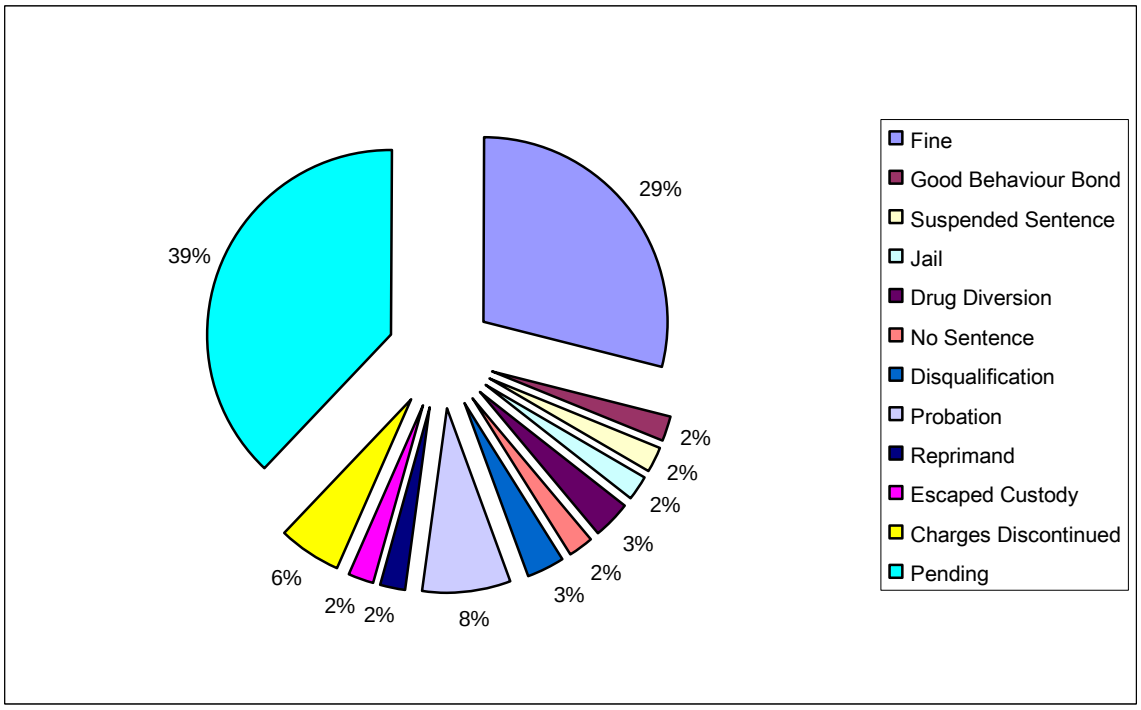
Time delays in case matters may be attributed to many factors, including :

- 45 to 60 day waiting periods for the provision of documents requested under Freedom of Information from Medico-Legal services of Acute Mental Health;
- time necessary to draft submissions to Legal Aid requesting psychiatric report funding, and processing of the request;
- time delays in accessing an appointment time for the client to consult with a private psychiatrist;
- time delays in matters coming before the Mental Health Court for determination

Of the cases which were dealt with and finalized in the Magistrates Court, 29 percent of clients were required to pay a fine, and a further 8 percent of clients were placed on probation.

For 6 percent of clients, the matter was discontinued.

FIGURE 8: Case outcome for clients after DLP representation

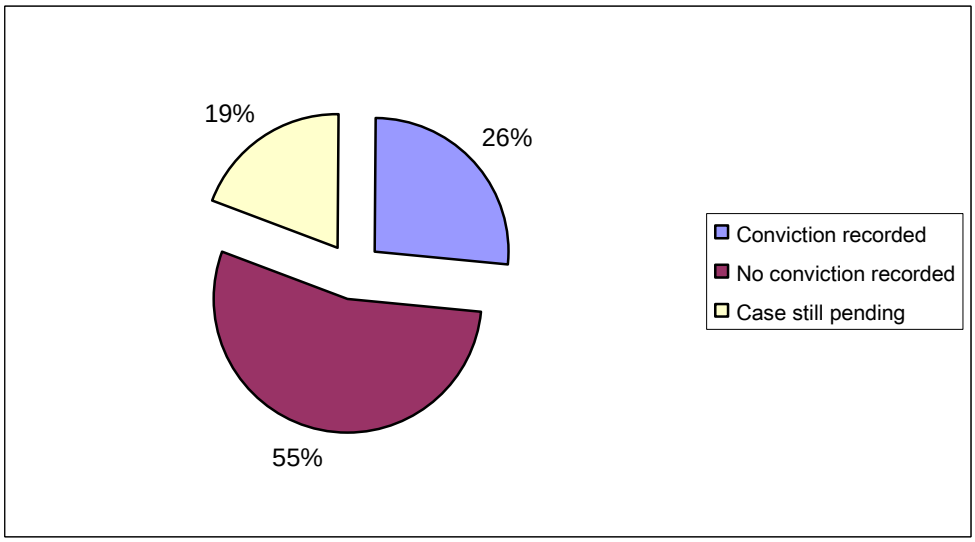


Magistrates Court outcome for clients

After representation by DLP, 55 percent of finalised matters in the Magistrates Court resulted in no conviction recorded against the client (Figure 9). Cases pending are currently under in the process of investigation by DLP for mitigating circumstances in relation to the client's disability and the offence. This process includes Freedom of Information requests to AMHU and other organisations to ascertain the client's disability.

In several cases, certain clients have been identified by medical health professionals such as psychiatrists and psychologists as 'unfit for trial' due to their mental illness and/or intellectual disability. These clients have been charged with simple offences (non-indictable offences) such as traffic offences, and by virtue of being non-indictable offences and the client not on an ITO, the matters do not have a legislative mechanism for referral to the Mental Health Court nor Attorney General for determination.

FIGURE 9: Magistrates Court outcome for DLP clients – whether a conviction was recorded.



Access to Justice or Injustice

The contact between the mentally ill and/or the intellectually disabled and the criminal justice system is fraught at every level. Disabled defendants are required to be vigilant at every facet of the system to ensure that their vulnerability is not exploited or ignored.

Identification of the disability

People with a mental illness sometimes don't know why they're mentally ill. So, they will go to court and they won't tell anyone that they have a mental illness. The court thinks they don't have one and if they can keep themselves focused for a period of time, nobody will know until they end up in prison [53]

[53] Karras, M 2006, *On the Edge of Justice: The legal needs of people with a mental illness sin New South Wales* Law and Justice Foundation of NSW

While the Disability Law Project did not utilize any diagnostic assessment tools in determining intellectual disability or mental illness, there exists a wide range of diagnostic tools used widely to determine such disabilities. The Disability Law Project operated on the premise that all defendants were entitled to legal support/representation until such time as medical opinion sought by the project deemed them not suffering from either a mental illness and/or intellectual disability.

Be that as it may, in criminal justice settings, particularly in court environments, diagnostic screenings of both mental illness and intellectual disability need to be conducive to the high number of screenings that would occur in a relatively short period of time as well as in an atmosphere that does not lend itself to therapeutic intervention. Screenings would also need to be of such a nature that allowed them to be administered by people not necessarily trained in the area of the subject disabilities and be simple to administer and score. Consideration would also need to be given to the authenticity of the results of the screening index being applied to people that may at the time of screening being drug induced.

Intellectual Disability

The Hayes Ability Screening Index

According to Associate Professor Susan Hayes, education and screening are intrinsic when identifying whether a person has an intellectual disability in their contact with the criminal justice system.[54] The Hayes Ability Screening Index (HASI) is an individually administered screening index intended for use with people over the age of thirteen years. The HASI has been piloted extensively in the New South Wales Department of Corrective Services and the Legal Aid Commission of New South Wales. The index purportedly correctly identified 82% of people with an intellectual disability, while correctly excluding 72% of non-intellectually disabled people. The HASI correlates significantly with usually applied tests of intelligence and adaptive behaviour. [55] The tool is designed to be a brief, but relatively accurate instrument capable of identifying people that due to a suspected intellectual disability may be vulnerable.

Hayes, further points out that despite the credibility of the HASI, no screening instruments are 100% accurate in identifying intellectual disability. Moreover, she asserts that if HASI is administered poorly, the results may be very inaccurate. [56]

The Wechsler Adult Intelligence Scale – Revised (WAIS-R)

As previously mentioned, the HASI was used extensively by the New South Wales Department of Corrective Services. More specifically, the index was applied during the 2001 Inmate Health Survey. In respect to the accurate identification of people within a custodial environment in New South Wales at the time, 80% of women and 73% of men who had failed the HASI were administered the WAIS-R. Of this number, 13% of women and 3% of men were found to have an

[54] Hayes, S 2006, People with intellectual disabilities in the criminal justice system – when is disability a crime? Conference Paper, 17-19 May 2006 Brisbane

[55] Hayes, S 2006, *Hayes Ability Screening Index Website* http://www.usyd.edu.au/su/bsim/hasi/display

[56] Ibid 54

intellectual disability, with 36% of men considered by the index as functioning in the 'borderline' range. [57]

The Wechsler intelligent tests of intelligence (IQ) are the most widely utilized neuropsychological assessment tools in the world.

The WAIS is a general test of intelligence (IQ) published in February 1955. The revised test incorporated the Wechsler-Bellevue test (1939). It is a standardized test used for people over the age of sixteen years.

The most recent test, WAIS-III consists of 14 subtests and takes approximately 60–75 minutes to complete. The test is applied individually by a competent test administrator. [58] Given the length of time of administration, it would seem hardly feasible for the screening index to be utilized effectively in court environs.

Mental Illness

Mini—International Neuropsychiatric Interview (MINI)

The MINI is a short, structured diagnostic interview that was developed by Professor of Psychiatry, University of South Florida David V Sheehan and Yves Lecrubier, National Institute of Health and Medical Research in Paris France. The diagnostic tool was developed in 1990 for DSM-IV and ICD-10 psychiatric disorders. The MINI can be administered within 20 minutes.

The coauthors of the Mini International Neuropsychiatric Interview (MINI) presented results from validity testing in which their instrument was compared with the lengthier Structured Clinical Interviews. From their research and wider research generally, the MINI appears to be a valid, and more time-efficient, alternative to other diagnostic screening tools.[59]

Composite International Diagnostic Interview (Short Form CIDI-SF)

The World Health Organisation Composite International Diagnostic Interview, Short Form. CIDI is a complete, fully-structured psychiatric diagnostic interview designed to be used by trained non-clinician interviewers to diagnose more than 40 mental disorders among adults from different cultures. [60]

Referral Decision Scale

The Referral Decision scale was primarily developed for prison environments and arose out of the need to identify inmates with a high probability of mental illness. The RDS is not a definitive screening index, but rather a tool that is capable of indicating sufficient symptoms to justify further, more in-depth analysis. RDS has the capacity to broadly identify issues that may relate to schizophrenia, bi-polar and major depression. The tool consists of three scales that fall under the three identified mental illnesses and each comprises of five questions. The tool has been developed for use by non-clinicians and can be used promptly. [61]

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[57] Corrections Health Service 2001, *Inmate Health Survey* NSW Health Department publication http://www.justicehealth.nsw.gov.au/pubs/Inmate_Health_Survey_2001.pdf p93
[58] http://www.minddisorders.com/Py-Z/Wechsler-adult-intelligence-scale.html
[59] https://medical-outcomes.com/HTMLFiles/MINI/MINI.htm
[60] http://info.stakes.fi/mindful/EN/database/glossary2.htm
[61] The 2001 New South Wales Inmate Health Survey

Police Contact

Upon police becoming aware of an alleged commission of an offence, it's usual practice for the police to investigate information from witnesses and the alleged offender (the defendant). It may be the case during this investigative process that the alleged defendant is arrested and taken to the police station for further questioning. Following this process, the defendant may be formally charged and issued with a "Notice to Appear" which very briefly outlines the offence. The defendant within a period of fourteen (14) days will appear in the nearest Magistrates Court. This short space of time is to allow the defendant to seek legal representation. The Police Powers and Responsibilities Act sets out proper police procedure in dealing with disabled people……..

According to Cockram, an offender with an intellectual disability intellectual disability is more likely to have their crimes detected due to lack of skill in concealing their actions (Cockram et al. 1998). (Corrections to Community Victoria) With respect to mental illness, the Burdekin Report found that police were often drawn to people suffering from an untreated mental illness clearly because they may have behaved irresponsibly, irrationally and in a bizarre fashion. (Burdekin) (page 58 on the edge of justice book)

Moreover, when apprehended by police and later questioned, a person with an intellectual disability are more likely to admit to offences, including those offences that they may have not committed, due to a desire to please an authority figure (police) or a desire to conceal the fact they do not understand the questions being asked (NCOSS, Fact sheet ten, 2003; Petersilia, 1997). Furthermore, a person with an ID may be more likely to respond affirmatively to questions despite the question's content (Leighton, 2003). Illustrative of this, is the following exert from a police transcribed interview of an overtly intellectually disabled man with the cognitive ability of an eight-year old child.

Police Officer = P

Client = C

"P – C as we said earlier, what I'd like to do and going to do tonight is ask you a couple of questions about a complaint B H made to me about a crystal horse of his that was taken from his house and damaged, that's what I want to speak to you tonight about do you understand what I am going to ask you questions about?

C – Yes P

P – Thanks mate

C – That's alright P

P – C before I start do you understand that you are not under arrest?

C: What does that mean?

P: That I haven't arrested you, that you are free to go at any time if you like to tonight do you understand that that you're not under arrest.

C: Yes P, what does arrest mean

P: That means when a police officer comes and arrests you and takes you to the watch house

C: Yeah

P: Do you understand that I haven't arrested you and that you're not under arrest

C: Yes P

P: Alright, Ok. Do you understand that you can leave here at any time or stop talking to me at any time when you choose to?

C: Yes P

P: And do you understand that you are free to leave at any time and you don't have answer any of my questions unless you want to

C: Yes P

P: C before I ask any questions I must tell you that you have the right to remain silent. This means that you do not have to say anything you do not have to answer any of my questions or make any statements unless you wish to do so

C: Yes P

P: However if you do say something or make any statement to me now while I am asking you questions it may later be used as evidence. Do you understand that

C: Yes P

P: Mate can you tell me in your own words what you understand by that

C: I dunno

P: You don't know?

C: No

P: I will say it again and you should listen carefully alright, you have the right to remain silent

C: Yes P

P: And what that means is that you don't have to answer any of my questions unless you want to

C: Yes P

P: So if you decide that you don't want to talk to me about B H's crystal horse you don't have to

C: Yes P

P: All you have to tell me is that you don't wish to talk to me and you don't wish to answer any of my questions, and what I will do is I'll open the door for you and you'll go home

C: Yes P

P: Do you understand that mate that you don't have to talk to me unless you want to

C: Yes P

P: You also have the right to telephone or speak to a friend or relative to inform that person that you are here talking to me now, you also have the right to telephone or speak to a lawyer of your choice

C: I haven't got a lawyer have I?

P: Would you like to contact a lawyer?

C: I haven't got one

Despite the run of affirmative answers, the interview concludes with an overt example of the intellectually disabled man confusing the offence for which he's being interviewed as not a wilful damage charge, but rather a stealing charge.

P: C is there anything you wish to say before we turn the machine off and we finish having a chat?

C: No, I won't steal again P

P: Ok, thanks.

C: No problem

P: I'm now going to terminate the interview and the time is seven thirty

C: Half past seven [62]

Compounding the problem is the lack of understanding of police officers, particularly determining the difference between mental health issues and intellectual disability. (Cockram et al. 1998).

While the Police Powers and Responsibilities Act requires police to source an independent or support person present during a police interview where a disability is apparent and in circumstances that are practicable, a number of disabled defendants represented by the project were not afforded this right.

Court Contact

[62] Transcript of police interview 2006

The entry into the court system for most disabled defendants begins at the Magistrates Court. In laconic terms, the Magistrates Court of Queensland, consistent with this jurisdiction in other states is the engine room of the criminal justice system generally. All criminal matters initially funnel through the Magistrates Court, with the court Queensland wide entertaining in the vicinity of some 344,000 charges each year. [63] Accordingly, the Magistrates Court jurisdiction has extraordinary demands placed upon it by the sheer volume of work. Working at the coal face of this system is the duty lawyer. The duty lawyer scheme is funded by Legal Aid Queensland and ensures that a lawyer is available at courts throughout Queensland to provide advice and legal representation for adjournments and in pleas of guilty in simple matters that meet the Legal Aid funding criteria. The criteria generally is that where the defendant has a reasonable defence to the charge and the charge does not in involve a minor traffic prosecution or regulatory offence, aid may be approved if one (1) of the following criteria apply: -

conviction would be likely to result in imprisonment, or

conviction would be likely to have a detrimental effect on the defendant's livelihood or employment (actual or prospective), or

the defendant suffers from a disability or disadvantage which prevents self representation or,

there are reasonable prospects of acquittal, and/or

the applicant is a child.

In order to be successful to qualify for a grant of legal aid for a trial on a street offence, the most relevant criteria is a prospect of acquittal.

According to legal aid literature, the following are some common examples in which it may be unreasonable to expect a plea to be handled by the duty lawyer: -

when an interpreter is required;

when social security offences involving more than $2,000 and there are no mitigating circumstances;

when the defendant suffers from a mental or physical disability;

when, having regard to all the circumstances surrounding the incident including prior convictions, a conviction will result in a term of imprisonment being imposed.

Legal Aid Queensland guidelines do not define “disability.” [64]

Despite the reluctance of Legal Aid in encouraging duty lawyers to handle matters in circumstances where a defendant suffers from a mental or physical disability, the reality overwhelmingly is that there is no other alternative. Accordingly, the Disability Law Project has found that it is often the case that the relevant cohort of people are pleaded out by duty lawyers who may not identify the disability and thus, be oblivious to whether or not the disability is causally related to the alleged offending. This lack of identification is further exacerbated by the lack of time available to a duty lawyer to properly and thoroughly excavate a matter prior to

[63] Department of Justice and the Attorney General 2005, *Annual Report: Magistrates Court of Queensland*
[64] Legal Aid Queensland 2005, *Homelessness and Street Offences Project*

entering a plea. Moreover, there is no encouragement from Legal Aid Queensland offered to duty lawyers to refer such matters on for deeper analysis by private practitioners. That is to say, there is no direction afforded to duty lawyers as to where such matters can be referred on. Accordingly, the Disability Law Project filled this gap and in doing so, found that within a relatively short period of time a significant proportion of defendants made contact with the service prior to their first court appearance.

One defendant represented by the Disability Law Project that suffered from an intellectual disability had pleaded guilty via her duty lawyer on six occasions for stealing and on the seventh when first contact was made with the project was looking at an imminent custodial sentence. Upon instructions, the project adjourned the matter, referred the defendant for psychiatric opinion which deemed the defendant permanently unfit for trial. Consequently, the matter was referred to the Mental Health Court that found similarly and discontinued the charges. This matter provides a stark example of the velocity of our court system, a duty lawyer struggling to keep up with it and minimal options, including time, the most important commodity in transacting proper justice for those that suffer from a disability.

CASE STUDY NUMBER #8

M8 – female, aged 36 years

Diagnosis

Mild retardation with significant impairment of behaviour (WHO classification ICD-1- manual F70.1)

Emotionally unstable personality disorder, borderline type (F60.31)

IQ of 64 reported in psychometric assessment in 1987 when M8 was 18 years old

IQ of between 50 to 69 from current assessment

Charges

4 x stealing offences

1 x possession of tainted property

Background

At birth, forceps delivery and resulting in several medical conditions and delayed development as an infant

At 3 years of age, M8's verbal ability was delayed

At 8 years of age, M8 was diagnosed as suffering from mild intellectual handicap with short attention span and hyperactivity

M8 received special schooling

M8's stealing charges were in relation to her continuous taking of greeting cards, envelopes and calendars from shops

M8 had a lengthy criminal history of stealing as a consequence of her continuous behaviour

In the past M8 had pleaded guilty in the first instance

M8 was at real risk of imprisonment due to the repetitive nature of the offending

Intervention

M8 was referred to DLP by her defence lawyer due to concerns of 'capacity' as result of her intellectual disability and learning difficulties

DLP referred client to AMHU –diagnosis NO mental illness, instead it was an intellectual disability and behavioural problem

DLP made successful submissions to Legal Aid for psychiatric report funding

Psychiatric Report found M8 'permanently unfit for trial'

Issues

Why 'fitness for trial' issues were not raised by either the previous defence lawyers, duty lawyers, arresting police, police prosecutions, and the magistrate when it was overtly noticeable that M8 lacked understanding of the legal process

When interviewed by DLP, M8 was incapable of providing coherent instructions as a client

Until M8 had committed an indictable offence, the regulatory offences could not be referred to the Mental Health Court

In the regulatory offences by virtue of deficiencies in the legislation, her permanent unfitness for trial could not be dealt with by the magistrates

M8 was not diagnosed with mental illness nor ever been placed on an ITO therefore the matter could not be referred to the Attorney General for determination

Therefore M8's matters could not be referred to the Mental Health Court until she had committed the indictable offence of stealing instead of the regulatory offence of ' taking of goods'

Outcome

Matters were referred to Mental Health Court and subsequently discontinued

The issue is further compounded if the duty lawyer lacks understanding of disability generally and more particularly legislative avenues that seek to minimize the risk of a disabled person being entrenched in the criminal justice system. The project found on a number of occasions defendants that presented at the Magistrates Court who by virtue of their mental illness were subject to Chapter 7 Part 2 of the Mental Health Act but were either unaware of the operation of

section 237 of the Act or were fearful that notification of criminal charges against them to the treating health service may result in hospitalization. In the event that a duty lawyer does not inquire as to whether the defendant is being involuntary treated the matter will proceed by way of law and not be availed the opportunity that Chapter 7 Part 2 of the Act affords.

In cases concerning intellectual disability, should the matter proceed such offenders may be convicted more easily, as they tend to confess rather than plea-bargain. (Hayes & McIlwain, cited in Law Reform Commission Paper 80, 1996) Furthermore, this cohort tend to be refused bail more often, 'perhaps as a result of previous breaches of conditions, or a lack of support or resources enabling them to obtain bail, or inadequate supervisory arrangements which do not satisfy the court's requirements (NSW Law Reform Commission, Paper 80, 1996). They may receive custodial sentences due to a lack of alternative placements in the community, (NCOSS, Fact sheet ten, 2003; Glaser & Deane, 1999).

While the project had first contact with 7% of all defendants represented by it, all defendants were placed in custody as a result of outstanding failure to appear charges. The project further noted that this charge in particular was synonymous with this cohort, the predicament of which was further compounded by insufficient supports in the community to ensure court attendance at the next mention date. In matters where unsoundness of mind or unfitness for trial may be an issue in such cases, difficulties further arise in securing prompt psychiatric consultation. Accordingly, it is often the case if bail is refused that a defendant may spend at least three (3) months in custody awaiting consultation.

The project found that of all people represented by it, where the relationship between the disability and the offending resulted in either reference to the Mental Health Court or was not to such a degree it afforded a defence or deemed the defendant unfit for trial, but nevertheless was relied upon in mitigation, some 70% of defendants had no conviction recorded against them. While it is impossible to hypothesize what the result had been in the absence of such submissions, it in the least provokes an argument for not only the identification of the disability buts its importance in putting it before the court.

Therapeutic Jurisprudence

Therapeutic Jurisprudence

Despite 'therapeutic jurisprudence' largely belonging to contemporary times, from an academic point of view, Philip Rieff's 1966 work *The Triumph of the Therapeutic* largely instigated the movement.[65] Since then, the upsurgeance of the movement can largely be attributed to Wexler and Winick.[66] Wexler redefined the term 'therapeutic jurisprudence' as:

> the study of the role of the law as a therapeutic agent. This approach suggests that the law itself can function as a therapist. Legal rules, legal procedures, and the roles of legal actors, principally lawyers and judges, may be viewed as social forces that can produce therapeutic or anti-therapeutic consequences. The prescriptive focus of therapeutic

[65] Nolan, J.L. (2001). *Reinventing Justice: The American Drug Court Movement.* New Jersey: Princeton University Press at page 47

[66] Whitley, A.B. (1993). 'Therapeutic Jurisprudence: A New Approach to the Criminal Law', *American Journal of Criminal Law, 20,* pp 303-306.

> jurisprudence is that, within the important limits set by principles of justice, the law ought to be designed to service more effectively as a therapeutic agent.[67] (Wexler, 1993b: 280).

In a practical sense, therapeutic jurisprudence affords a philosophical shift in court practice from one of an adversarial nature to one that looks towards problem solving.[68] While the operation of problem solving courts in this country is seen largely as being the only benefactors of the notion of therapeutic jurisprudence, there exists a continuum of initiates that encompass its ideals. Such initiatives as pre-sentencing reports and victim-impact statements imbue therapeutic jurisprudence characteristics.[69]

Problem Solving Courts

The phenomenon of courts doing more than operating out of a punitive framework is relatively new in this country. Until recently, the notion of "problem-solving courts" or "problem orientated courts" was unknown in Australia, despite its rapid and well received movement in the United States judicial system. (Frieberg 2001) In that country, there are at least 250 problem-orientated courts that straddle a diverse range of issues that traditionally would have been disposed in the cut and run practice of the adversarial system. Instead, the underpinning issues that may relate to criminal offending are being explored and prompting the conventional courts to consider how they can incorporate the practice and philosophies underlying problem-orientated courts. (Frieberg Innovations in the Court System 29-30 November 2004) Indicative of the paradigm shift that is occurring, Phelan following a review of problem-orientated courts in Australia and the United Stated opined that they:

> represent more than just structural or process changes. They challenge the nature of courts and represent something of a revolution in the way in which courts might operation in modern, democratic societies.[70]

The Difference between specialized courts and problem-oriented courts.

The South Australia Experience

The Promise of Problem Solving Courts in Queensland

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[67] Wexler, D.B. (1993b). Therapeutic Jurisprudence and the Criminal Courts. *William and Mary Law Review, 35,* pp 280.

[68] Transforming the Criminal Courts: Politics, Managerialism, Consumerism, Therapeutic Jurisprudence and Change Samantha Jeffries CRC Post-Doctoral Fellow at p15

[69] Ibid at page 15

[70] Phelan, A. (2003-4) 'Solving Human Problems or Deciding Cases? Judicial Innovation in New York and its Relevance to Australia, Parts I-III', 13 *Journal of Judicial Administration* 89-130; 137-181; 244-258.

CASE STUDY NUMBER #1

Z – female, aged 23 years

Diagnosis

- Disorganised schizophrenia – characterised by poor insight, lack of judgement and lack of follow-through on simple tasks. Poor memory – "patchy working memory with her cognitive ability quite severely compromising her abilities" according to her psychological report and recommendation for hospitalisation in Baillee Henderson
- Z is currently an inpatient at Baillie Henderson Psychiatric Hospital on an ITO and is expected to be a long-term admission
- Z was diagnosed with disorganised schizophrenia at age 16 (refer to background information) and has been on a continuous ITO since

Charges

- **without reasonable excuse** contravened a requirement by police - Failure to attend Drug Diversion program (as ordered by Police)
- **without reasonable excuse** contravened a requirement by police – Failure to attend Police Station to provide identifying particulars (within 7 days)
- arrest warrant

Background

- Since 2000, aged 16 yrs Z has been on Involuntary Treatment Order
- Z has remained on an ITO since 2000
- Z has been mentally ill since the age of 16 -she was raised by her father
- From ages 12 years and onwards, Z's father gave her methyl-amphetamines to ingest.
- Z's father was apparently imprisoned for drug manufacturing
- In 2001, Z was hospitalised for one year in Baillee Henderson Hospital.
- Since 2003, Z's finances have been solely administered by the Queensland Public Trustee
- In 2005, Z was admitted to the AMHU on 12 occasions.
- Recently, Z was admitted from the AMHU to Baillee Henderson Hospital due to her **poor cognitive abilities and poor memory** - it anticipated that her hospitalisation at Baillee Henderson will be for a considerable time
- According to Z's AMHU case-manager, Z's 'disorganised' symptoms of her schizophrenia manifest in her daily tasks..

Intervention

- 17 December 2005, an arrest warrant was issued for Z because of her failure to attend police station and provide her particulars (fingerprints and photograph). This was result of Z's failure to attend a drug diversion clinic
- Police alleged that they *'had made extensive inquiries into the defendant's location however were unable to locate the defendant'* – Z was at the AMHU
- 12 January 2006 Z was discharged from the AMHU however still dazed and slow
- Later that same day, police arrived at Z's house and executed the warrant .
- Z was re-admitted to the AMHU on 24 January 2006 and remained at the AMHU until her recent transfer to Baillee Henderson Hospital where it is expected Z will be a long term inpatient

Issues

- The matter was referred to the AG for determination under the Mental Health Act as the client was on an ITO -The matter was deemed by the AG to proceed according to law
- Submissions were made to Police Prosecutions on the grounds of **'reasonable excuse' for contravening police direction or requirement,**
- However the Police Prosecutor was under the impression that he could not withdraw the charges as it would in effect be 'over-ruling' the AG
- Police **did not contact** the AMHU in their efforts to locate the defendant, despite being told by the defendant that she suffers from an acute mental illness.

Outcome

- Submissions made to Police Prosecutions **have not been accepted** at this point in time
- The matter has been set down for hearing mention and **will go to trial**

CASE STUDY NUMBER #2

M2– female, aged 35 years

Diagnosis

- Paranoid schizophrenia
- MBD mania with psychotic symptoms

Charges

- Obstruct police
- Public nuisance

Background

- Police were called following complaints by a neighbour of excessive noise emanating from M2's flat at 10.45pm - a female yelling, screaming and using obscene language
- When police knocked on M2's door, M2 answered the door yelling abuse and accused the police of raping her and murdering her friend, a well known Australian heart surgeon and other delusional thoughts
- M2 refused to open the security door and let the police in for fear in her own mind that she would be raped by the police
- police left a notice to appear lodged in M2's security door grill charging her with public nuisance and obstruct police – police did not refer M2 to mental health services
- M2 had an extensive mental health history and had been on previous ITOs

Intervention

- M2 was referred to DLP by Legal Aid as they had been unable to elicit intelligible instructions from the client and suspected mental illness.
- M2's instructions to the DLP were obviously of a psychotic and delusional nature
- Since the charges were simple offences and M2 was not at risk of imprisonment, DLP were unsuccessful in obtaining Legal Aid funding for a psychiatric report
- M2 was not on an ITO at the time of the offence, but it was overtly noticeable to Legal Aid lawyers and DLP that M2 needed mental health assessment and assistance

- DLP suggested to M2 that perhaps she needed to voluntarily consult AMHU to discuss her current mental state of mind
- M2 voluntarily attended AMHU and was placed on an ITO
- Once on an ITO, M2's matter was referred by the Director of Mental Health to the Attorney General for determination

Issues

- M2's charges were simple offences and NOT indictable, therefore could not be referred to the Mental Health Court
- At the time of the offence, M2 was not on an ITO, and therefore the matter could not be referred to the Attorney General for determination under the Mental Health Act
- Had M2 not presented herself voluntarily to AMHU for assistance, she would not have been placed on an ITO and her matter would have proceeded in the Magistrates Court
- Issues regarding the difficulties for the defence lawyer to obtain clear instructions from a client presenting as delusional and psychotic
- Issues of M2's mental health status at the time of the offence
- Issues regarding police procedures and margins of error permissible for police discretion – M2 may have benefited more if police had instead referred her to mental health services for assistance rather than charging her
- Non –indictable matters create difficulties in obtaining Legal Aid funding for psychiatric reports and the client obtaining evidence of their mental health condition
- Time delays with FOI requests and the Magistrates Court's discourse with the delays
- Due to delays in FOI requests, the client at times is unable gain the benefit of an early plea – with the mental health status of the client needing to firstly be determined before a plea can be entered

Outcome

- M2's matter was referred to the Attorney General for determination by virtue of M2 being on an ITO
- The Attorney General's determination was that M2's matter was to be discontinued given 'unsoundness of mind' status

Suggestions

- The MHA does not seem to provide for non-indictable offences to be referred to the MHC for issues of soundness of mind and fitness for trial
- Clients with previous mental health histories and not on a current ITO require a mechanism for referral of their matter to the Attorney General for determination
- Specialist police liaison officers for mentally ill and intellectually impaired members of the public

- Police protocols and procedures regarding police discretion in diverting a suspected mentally ill person to the appropriate mental health service – these procedures may need reassessment
- Delays in obtaining Freedom of Information documents regarding a client's mental health history to assist the defence lawyer – lengthy delays result in numerous adjournments and the matter at times taking months to finalise
- The Magistrates may need further information in regards to the delays in Freedom of Information requests by defence lawyers

Increasing the awareness of police and judiciary that the absence of an ITO does not negate the existence of a mental illness nor the consequential symptoms of that mental illness

CASE STUDY NUMBER #3

T –male, aged 20 years

Diagnosis

- Diagnosis Axis I - severe depression
- Axis II – anti-social traits
- Predisposition to impulsive behaviour
- Suicidal tendencies

Charges

- **s411(1)&(2) – Robbery with actual violence armed/in company/wounded/used personal violence**
- Submissions were made by DLP and David Burns Lawyers to have **the charge substituted for 'entering premises with intent'.**
- Police prosecutions accepted the submissions and the charge was substituted to 'entering premises with intent'.

Background

- Clinically depressed 20 year old man had recently been discharged from hospital for suicidal tendencies and prescribed medication
- He took an overdose of his prescribed anti-depressant medication, entered a gun shop, stating that he needed gun to kill himself.
- The gun-shop attendant instructed T to go and sit in the corner whilst he called the police
- T complied with the request and sat quietly in the corner waiting for police to arrive at the scene
- T had a knife secreted down the front of his trousers which was later discovered by police body search
- T was transported by police and admitted to AMHU and placed on an ITO
- Prior to transportation to AMHU, T participated in a record of interview with police at the gun-stop whilst under the influence of anti-depressant medication in an overdose quantity
- After a two (2) month admission to AMHU, T's ITO was revoked he was discharged into police custody, despite a request by DLP that they be notified three (3) days prior to any discharge plans

- DLP received no notification of the discharge into police custody until contacting AMHU to speak with T on the morning of his court appearance.

Intervention

- T was referred to DLP
- T was vulnerable to suggestions and wanted to have the matter 'dealt with' and was willing to plea guilty to the original charge
- Police opposed bail, however, DLP made a successful bail application for T
- DLP in conjunction with David Burns Lawyers made submissions to police to have the original charge substituted for the lesser charge of 'entering premises with intent'
- Police accepted the submissions

Issues

- Police interviewing T despite the obviousness of his incoherent state due to a prescription drug overdose
- Usage of leading questions and loaded language as interviewing techniques
- Vulnerability of mentally ill persons to suggestive interview techniques
- No support person contacted
- No immediate referral to the TACT team at AMHU for a mental health status determination
- Lack of essential communication to the defence lawyer by the mental health service and police
- The defence lawyer must rely on the mentally ill client to inform them of necessary and important information, and this is a difficult and at times not possible for clients the lack insight into their own situation and/or the severity of their mental illness and/or intellectual disability

Outcome

- Whilst on bail, T's mental health deteriorated and he was re-admitted to AMHU
- T's addiction to prescription drugs led to his breach of bail and T instructed that he wanted to have his bail revoked be and placed into custody as he had 'nowhere else to go'
- T remained in police custody while waiting for his next mention date
- T told his DLP lawyer that his experience in jail was "horrific"
- T pleaded guilty to the substituted charge of 'entering premises with intent'
- In mitigation, DLP highlighted T's mental health plight and his horrific experience in jail whilst awaiting his next court mention
- **No conviction was recorded for T, the Magistrate stated that T's time in custody sufficed and in the circumstances no conviction was recorded**

Suggestions

- Legislative reforms are necessary
- The establishment of protocols for mental health and police to keep the defence lawyer fully informed, as the client due to their mental health issues is often incapable
- Police procedures, interviewing protocols and techniques when dealing with the mentally ill and suicidal persons under the influence of an prescription drug overdose
- No support person or family member was contacted prior to the interview when person is clearly unwell
- In such situations, that a suspect should be evaluated by the TACT team from AMHU for their mental health status prior to police interviewing
- **For mental health services to have a legislative obligation to keep the defence lawyer informed of their client's situation**

CASE STUDY NUMBER #4

A – male, aged 29 years

Diagnosis :

- Paranoid Schizophrenia
- Two separate injuries resulting in Acquired Brain Injuries (ABIs)

Charges :

- 3 x wilful damage
- 1 x public nuisance
- 2 x assault/obstruct police
- 1 x armed to cause fear
- 1 x breach bail
- potential charge in relation to a single-motor vehicle accident

Background

- A had a prior mental health history dating back 15 years
- The incidents occurred in Rockhampton
- Four (4) days after the 'armed to cause fear' incidence, A attended the Mental Health Unit and was placed on an Involuntary Treatment Order (ITO)
- A then moved back to his family in Toowoomba and sought further mental health assistance (AMHU)
- A offending occurred during a psychotic episode

Intervention

- Duty lawyer referred the matter to DLP on the basis of A's indication of a mental health history
- A was released from custody
- A was advised to visit the AMHU to determine his mental health status
- DLP made submissions to Legal Aid requesting funding for an independent psychiatric report for A
- Legal Aid approved the grant
- A was referred to a private psychiatrist

Issues

- According to Rockhampton MHIS, A was placed on an ITO four (4) days after the 'armed to cause fear' incident, with the ITO revoked six (6) days later, then again admitted to the MHIS ten (10) days later and placed on an ITO which was again revoked four (4) days later
- A was NOT placed on an Involuntary Treatment Order (ITO) by Toowoomba AMHU, therefore the matter could NOT be referred to the Attorney General under Chapter 7 Part 2 of the Mental Health Act
- Unless Legal Aid funding could be obtained for an independent psychiatric report, then the matter was to proceed according to law
- Difficulty in obtaining coherent instruction from the client due to the infusion of extreme delusional thoughts into the client's legal instructions

Outcome

- Upon A's voluntary presentation (after release from police custody) to the Toowoomba AMHU, the AMHU was of the opinion that A was not mentally ill
- The private psychiatrist was of the opinion that A was of 'unsound mind' at the time of the offending due to mental illness and two (2) acquired brain injuries (a brain injury from childhood and a later brain injury due to a lack of oxygen to the brain in another incident) and that the matter should be referred to the Mental Health Court for determination
- The client also suffers from epilepsy and diabetes
- DLP will be referring the matter to the Mental Health Court in the near future

CASE STUDY NUMBER #5

A2 – male, aged 28 years

Diagnosis

- Undiagnosed at time of offence
- Subsequently diagnosed with Schizophrenia

Charges

- Common Assault

Background

- A2 was found at a shopping centre roof car park. Police asked A2 to come down. A2 decamped and fled down a stairwell.
- A security guard then approached A2 to question him and A2 allegedly punched the security guard and fled
- Police arrested A2 and charged him with 'common assault'

Intervention

- A2 was an undiagnosed at the time of the offence
- Ten (10) days after the offence, A2 was transported by his mother to the AMHU and placed on an Involuntary Treatment Order (ITO)
- He was diagnosed with schizophrenia with schizo typal disorder and was hospitalised for one (1) month on an ITO
- A2's mother contacted DLP about her son's situation.
- On the initial interview with A2, it was apparent to DLP he was paranoid and delusional and had no coherent recollection or understanding of events leading to charge

Issues

- Police did not contact the TACT Team of the AMHU nor transport him to AMHU for evaluation. Questions as to why this did not take place.
- Mother 'tricked' A2 into attending AMHU for assessment approx 10 days after charges. A2 admitted immediately on ITO.

- Due to A2's incoherence, it is plausible that without intervention, A2 may have plead guilty to the charge, or not even attended on his court date
- **The case highlights the need for timely notification and referral by the police to the AMHU for intervention and evaluation in the interests of personal safety for A2 and public safety**

Outcome

- With medication and treatment for his mental illness, A2's mental state dramatically improved
- A2 and his mother received disability advocacy services with support was co-ordinated for the family
- Complainant withdrew charges when advised of A2's mental illness diagnosis.
- The charge was then formally withdrawn by police

Advocacy

- A2 linked to support programs, Centrelink DSP and specialised employment assistance organisations
- A2 now living independently
- A2 now under Mental Health Case Management –ongoing

CASE STUDY NUMBER #6

L – female, aged 44 years

Diagnosis

- Paranoid Schizophrenia

Charges

- Failure to supply (roadside)
- 2 x contravene requirement by police – failed to state name and address
- fail to supply breath specimen
- in charge of motor vehicle whilst under the influence of liquor
- DUIL over the general but over the high alcohol limit

Background

- Earlier diagnosis of Paranoid Schizophrenia in 2003
- Client lost to the Mental Health system according to treating psychiatrist's report and L became non complaint with medication resulting in acute paranoia and psychotic behaviours
- Being unwell, L attended police station to make a complaint against neighbour – delusional thoughts that her neighbour trying to attack her
- Police later that day charged L with 4 traffic offences within a 24 hour period
- L contacted DLP after previously receiving disability advocacy from TASC
- L presented as overtly unwell when interviewed by DLP
- A Justice Examination Order was granted by the Magistrate and resulted in L being admitted to AMHU under an ITO
- L was discharged from AMHU after a few weeks and placed on a community ITO
- L re-offended resulting in another traffic offence
- This final charge has been referred to the Attorney General by virtue of L being on an ITO at the time of the offence – pending determination
- AMHU's psychiatrist's report relating to first traffic charges (prior to admission on ITO) states client had no defence on mental health grounds

- L had no prior traffic history or criminal history

Issues

- L needed mental health intervention – questions as to why L was not referred by police to TACT team for assessment
- How did the L become 'lost to the mental health system'? as stated in the AMHU psychiatric report
- L apparently went from being 'well' to overtly 'unwell' within a 6 week period – questions regarding the original psychiatric report by AMHU – contradiction that L could be well according to the report yet so unwell to be placed onto an ITO – which is remains on to this date (approximately 12 months now)
- Being a traffic matter and not an indictable offence, the matter can not be referred to the Mental Health Court despite the psychiatric opinion that L was of 'unsound mind' at the time of the offences
- Final charge has been referred to the Attorney General for determination as L was on at ITO at the time, however the other charges prior to her admission to AMHU and placement on ITO will go to trial in the Magistrates Court
- Submissions were made to the Magistrate by DLP to have these offences referred together with the last offence to the Attorney General for determination now that the client was on a continuous ITO – however the Magistrate rejected the submissions
- Limited funds from Legal Aid for psychiatric report grants – it is only because L was facing the real possibility of imprisonment that the grant was successful
- Had funding not been granted to L, the psychiatric report by AMHU would have prevailed – that L was of sound mind

Intervention

- DLP successfully made submissions to Legal aid to fund an independent psychiatric report
- Psychiatric report opinion that L was of unsound mind at the time of all of the offences due to her mental illness
- Other reports obtained by DLP including medical evidence under FOI requests, employer's statements and friends and family
- Submissions were made to police but were rejected by police

Outcome

- First 4 charges that occurred prior to admission to AMHU on ITO are to go to trial
- Second charge referred to AG – still awaiting outcome of referral
- Client now on Disability Support Pension
- Client now under Case Management Mental Health
- Client now well and working in community

Suggestions

- Police practices and protocols regarding the mentally ill and diversion to the appropriate mental health service for evaluation and determination prior to charging
- Mechanism for diversion of traffic matters to a Special Circumstances Court

CASE STUDY NUMBER #7

R– male, aged 41 years

Diagnosis

- Schizophrenia

Charges

- 474.17(1)Using a carriage service to menace, harass or cause offence
- 444(1) assault or obstruct police officer

Background

- No admissions to AMHU for 15 yrs - stable and compliant with medication
- Admitted to AMHU when became unwell in November 2005 –in patient for 3 months which indicates seriousness of his condition
- 4 days after release from AMHU R lost his wallet and medication and was without medication for a period of 72 hours prior to the offending
- R made numerous calls police and emergency services of a threatening nature
- In later phone calls, R gave details of his address and phone number to police
- R was placed into police custody
- The Magistrate demonstrated his concern by setting a bail condition that R attend the local psychiatric clinic the same day and also make contact with DLP
- Unfortunately the psychiatric clinic happened to be closed that day and R remained without medication.
- DLP contacted the TACT team – TACT refused to attend to R until the next week at his next appointment, despite the order of the Magistrate that he receive treatment
- R continued remained without medication and committed another offence involving nuisance telephone calls
- R was again placed in police custody

- An Assessment Order was then issued by Magistrate requiring a mental health assessment by TACT team of AMHU – result not mentally ill
- Psychiatrist from AMHU provided a report which failed to mention R's 3 month inpatient admission to AMHU on an ITO and alleged that R had a history of serious violence and assault, despite the absence of a criminal record at age 41 years

Intervention

- DLP attended to R in custody, as ordered by the Magistrate
- At the cells, R was obviously overtly unwell to the observations of DLP, the Magistrate and other watch house staff
- R's medication was eventually re-commenced an a dramatic improvement was noticeable

Issues

- Issues of 'conflict of interest' as the complainants including Rs mental health treating team at AMHU including the psychiatrist that provided the report to the court
- Issues regarding the timing of the revocation of R's community ITO
- Police did not refer client to AMHU for assessment, nor ask the question if R had been diagnosed with a mental illness

Outcome

- DLP requested in light of all circumstances and R's unwell ness that a fine be imposed and no conviction recorded
- R was placed on an Intensive Correctional Order
- Given the inaccuracies and damning nature of the psychiatric report, there was a real risk that had the DLP not been involved R would have faced a term of imprisonment

Suggestions

- Police protocols/procedures when dealing with persons in psychotic episodes/manic episodes need to be improved and implemented immediately- including referral of the person in custody to AMHU for evaluation and determination of mental health status
- Police ensuring implementation of the police manual on mental health issues in their observations and during questioning of persons with suspected mental illness
- Consideration for providing specialised Police Liaison Officers trained in the field of intellectual disability and mental illness

CASE STUDY NUMBER #8

M8 – female, aged 36 years

Diagnosis

- Mild retardation with significant impairment of behaviour (WHO classification ICD-1-manual F70.1)
- Emotionally unstable personality disorder, borderline type (F60.31)
- IQ of 64 reported in psychometric assessment in 1987 when M8 was 18 years old
- IQ of between 50 to 69 from current assessment

Charges

- 4 x stealing offences
- 1 x possession of tainted property

Background

- At birth, forceps delivery and resulting in several medical conditions and delayed development as an infant
- At 3 years of age, M8's verbal ability was delayed
- At 8 years of age, M8 was diagnosed as suffering from mild intellectual handicap with short attention span and hyperactivity
- M8 received special schooling in ACT and Qld throughout her schooling years
- M8's stealing charges was in relation to her continuous taking of greeting cards, envelopes and calendars from shops
- M8 had a lengthy criminal history of stealing as a consequence of her continuous behaviour
- In the past M8 had pleaded guilty in the first instance
- M8 was at real risk of imprisonment due to the repetitive nature of the offending

Intervention

- M8 was referred to DLP by her defence lawyer due to concerns of ' capacity' as result of her intellectual disability and learning difficulties
- DLP referred client to AMHU –diagnosis NO mental illness, instead it was an intellectual disability and behavioural problem

- DLP made successful submissions to Legal Aid for psychiatric report funding
- Psychiatric Report found M8 ‘permanently unfit for trial’

Issues

- Why ‘fitness for trial’ issues were not raised by either the previous defence lawyers, duty lawyers, arresting police, police prosecutions, and the magistrate when it was overtly noticeable that M8 lacked understanding of the legal process
- When interviewed by DLP, M8 was incapable of providing coherent instructions as a client
- Until M8 had committed an indictable offence, the regulatory offences could not be referred to the Mental Health Court
- In the regulatory offences by virtue of deficiencies in the legislation, her permanent unfitness for trial could not be dealt with by the magistrates
- M8 was not diagnosed with mental illness nor ever been placed on an ITO therefore the matter could not be referred to the Attorney General for determination
- Therefore M8’s matters could not be referred to the Mental Health Court until she had committed the indictable offence of stealing instead of the regulatory offence of ‘ taking of goods’

Outcome

- Matters has been referred to Mental Health Court and a determination is pending

Suggestions

- That Queensland legislation be amended to address the above-mentioned issues
- The duty lawyer system does not have the appropriate time available to dedicate to such cases, therefore another process may be necessary in the interests of justice to people with intellectual disabilities or mental illness that have committed simple offences
- A special magistrates court for summary matters and issues of unfitness for trial in relation to non-indictable offences

CASE STUDY NUMBER #9

M9 – male, aged 37 years

Diagnosis

- Profound Congenital Intellectual disability

Charges:

- Wilful damage of a glass figurine valued at $70 (Regulatory Offences Act)

Background

- M9 suffers from a profound congenital intellectual impairment and has a long history of involvement by Disability Services Queensland (DSQ)
- In the past, M9 had been hospitalised at Baillee Henderson for approximately 10 years
- M9 suffers behavioural problems regarding aggression and poor impulse control
- M9 currently received full-time care from his live-in carer
- According to the police report, M9 was remorseful and has already begun making restitution of the $70.00
- M9 had broken the figurine as he was 'jealous' tantrum as the $70 figurine had not been purchased for him, instead for another person

Intervention

- Court support staff referred M9 to DLP when M9 and his carer presented at the Magistrates Court
- M9's carer wanted to plead M9's case out on his behalf and **enter a plea of guilty** with the intention of teaching 'M9 a lesson'
- M9's carer wanted M9 to go through the court process to teach him the difference between right and wrong
- Upon interviewing M9, it was overtly obvious to DLP that lack of capacity was an issue as the M9 presented as profoundly intellectually impaired
- M9 could not comprehend the role of a lawyer, a Magistrate, a Court or the Police

Issues

- Charge is of a minor nature and monetary amount, therefore psychiatric reports would be expensive and an unaffordable exercise for the client

- M9 presents as obviously profoundly intellectually disabled and that his problem seems behavioural rather than criminal – M9 needs disability services intervention and support for his behavioural problems
- The criminal justice system appears to be the inappropriate venue to address M9's behavioural problems and lack of impulse control stemming from his profound intellectual disability
- Unlikelihood that Legal Aid funding for a psychiatric report would be granted for such a minor regulatory offence as there is no risk of imprisonment
- The matter cannot be diverted to the Attorney General under Chapter 7 Part 2 of the Mental Health Act as the client is not under an Involuntary Treatment Order (ITO) – instead the client suffers from a intellectual disability
- The matter cannot be diverted to the Mental Health Court as it is a minor regulatory offence
- Issues of a conflict of interest between M9 and his carer, whereby his carer sees the court as the appropriate venue to 'teach M9 a lesson'.

Outcome

- The case is current and pending receipt of FOI requests to medical services regarding M9's extensive medical history.
- Submissions will be made to the police prosecutor to withdraw the charges on the basis of M9's profound intellectual disability and lack of capacity.

Suggestions

- Police procedures and protocols regarding police discretion in such situations where a person is profoundly intellectually disabled
- Diversion of such matters to a Special Circumstances Court where appropriate – and to reduce the associated costs and resources necessary to establish a client's intellectual disability and fitness for trial
- The exercising of a Magistrates discretion to query the fitness for trial in such situations where the intellectually impaired person is charged with a simple offence

RECOMMENDATIONS

RECOMMENDATION 1

The Queensland Legislature makes the necessary amendments to allow unfitness for trial issues to be addressed by a newly formed Mental Health Magistrates Court with respect to summary matters.

A fundamental principle of our justice system is that anyone charged with an offence is entitled to a fair trial, and if that person is unfit for trial there cannot be a fair trial. This was enunciated by Chesterman J in *Re NGW (*2005) QMHC 001.

The expression "fit for trial" is defined in the schedule of the Mental Health Act as "fit to plead at the person's trial, and to instruct counsel, and endure the person's trial with serious adverse consequences to the person's mental condition unlikely." This question of fitness to plead and to instruct counsel is determined by reference to tests applied in *R v Presser* (1958) VR 45.

Whilst 'fitness for trial' issues are largely matters dealt with by the Mental Health Court, given that these matters are summary offences, defence lawyers are barred from referral to that jurisdiction. Section 256 of the Mental Health Act 2000 states: -

"This part applies if there is reasonable cause to believe a person alleged to have committed an indictable offence--

> (a) is mentally ill or was mentally ill when the alleged offence was committed; or
>
> (b) has an intellectual disability of a degree that issues of unsoundness of mind, diminished responsibility or fitness for trial should be considered by the Mental Health Court.

In an attempt to have matters dealt with at the Magistrates Court, it would seem that defence lawyers are similarly barred by virtue of section 613 of the Criminal Code that states: -

"(1) If, when the accused person is called upon to plead to the indictment, it appears to be uncertain, for any reason, whether the person is capable of understanding the proceedings at the

trial, so as to be able to make a proper defence, a jury of 12 persons, to be chosen from the panel of jurors, are to be empanelled forthwith, who are to be sworn to find whether the person is so capable or no.

(2) If the jury find that the accused person is capable of understanding the proceedings, the trial is to proceed as in other cases.

(3) If the jury find that the person is not so capable they are to say whether the person is so found by them for the reason that the accused person is of unsound mind or for some other reason which they shall specify, and the finding is to be recorded, and the court may order the accused person to be discharged, or may order the person to be kept in custody in such place and in such manner as the court thinks fit, until the person can be dealt with according to law.

(4) A person so found to be incapable of understanding the proceedings at the trial may be again indicted and tried for the offence. “

Section 1 of the Criminal Code states that an “indictment" means a written charge preferred against an accused person in order to the person's trial before some court other than justices exercising summary jurisdiction.

On this basis, it would seem that section 613 is not applicable. Defence lawyers are further barred, given the nature of the charges, to have them referred to the District Court by virtue of section 60 of the District Court of Queensland Act 1967.

Accordingly, it would seem that in light of this there is an apparent need to widen existing relevant legislation.

The establishment of a Mental Health Magistrates Court, in line with the operation of the Mental Health Court, would allow matters of unfitness for trial and unsoundness of mind to be entertained. Such court could be presided over by a Magistrate, in company with one psychiatrist.

RECOMMENDATION 2

The Queensland Legislature makes the necessary amendments to Chapter 7 Part 2 of the Mental Health Act 2000 so as to allow people that have a mental health diagnosis, but aren't subject to an Involuntary Treatment Order (ITO) to have their matters at first juncture to be directed to the Attorney General for determination.

Many people that suffer from a mental illness are not necessarily subject to an Involuntary Treatment Order (Chapter 4 of the Mental Health Act 2000). The fact that people aren't subject to an Involuntary Treatment Order does not necessarily mean that a person's condition is not significantly symptomatic. In the course of the Disability Law Project, we have represented a number of clients who were overtly unwell and not contained by Chapter 4 of the Mental Health Act 2000.

A number of clients following criminal charges being laid against them come to the attention of mental health treatment facilities and are then placed on the subject order. Moreover, mentally ill people that live in rural and remote areas may become unwell, but due to lack of mental health services in the community may not access a psychiatrist, thus not afforded the possibility of being placed on an order. Accordingly, in these cases, there exists no right to have charges that may have emanated out of a person's illness directed to the Attorney General for determination.

RECOMMENDATION 3

The Queensland Legislature makes the necessary amendment to Chapter 7 Part 2 of the Mental Health Act 2000 to allow appeal provisions to the Mental Health Court for indictable matters and the Mental Health Magistrates Court for summary matters.

There presently exists no right of appeal against the decision of the Attorney General with respect to references made under Chapter 7 Part 2 of the Mental Health Act 2000.

The Disability Law Project has found on a number of occasions an alternate psychiatric opinion, which challenges the opinion of the psychiatric report, relied upon by the Attorney General in considering the matter.

The Mental Health Magistrates Court would be in a position to hear such matters.

RECOMMENDATION 4

The Queensland Government address the lengthy delays in having matters dealt with by the Mental Health Court.

The some twelve-month delay in having matters dealt with by the Mental Health Court is unacceptable. The containment of severely mentally ill or substantially impaired people in

custodial environments whilst on bail for lengthy periods of time predisposes them to a litany of injustices. Such injustices would be significantly minimised should the Mental Health Court sit more regularly.

RECOMMENDATION 5

The Queensland Government address the peculiarity of Chapter 7 Part 2 of the Mental Health Act 2000 that requires often mentally unwell people to notify their treating mental health service of criminal charges against them, before such matters can be directed to the Attorney General.

People subject to an Involuntary Treatment Order (Chapter 4 of the Mental Health Act 2000) are often people with a florid mental illness who may have a history of non-compliance with medication. The Disability Law Project has found on a number of occasions, clients that have allegedly committed an offence while subject to an Involuntary Treatment Order, but have not disclosed this information to the treating health service.

RECOMMENDATION 6

The Attorney General of Queensland ensures that judicial officers are regularly trained in areas of mental illness, intellectual disability and drug addiction.

The Disability Law Project has been surprised at the lack of understanding of both mental illness and/or intellectual disability exhibited by judicial officers.

RECOMMENDATION 7

The Minister of Police ensures that Queensland Police are regularly trained in areas of mental illness, intellectual disability and drug addiction.

The Disability Law Project has been surprised at the lack of understanding of both mental illness and/or intellectual disability exhibited by Queensland Police. Commonly we have found confusion by police officers, particularly police prosecutors with issues relating to unfitness for trial and unsoundness of mind.

RECOMMENDATION 8

The Attorney General of Queensland approve the continuance of the Disability Law Project for a further period to coincide with the first evaluation of the Special Circumstances Court operating out of the Brisbane Magistrates Court.

The work of the Disability Law Project over the last twelve months provides compelling evidence of the deficiencies both administratively and legislatively of our criminal justice system. The velocity of the court system, lack of understanding by lawyers and judicial officers of mental illness/intellectual disability, Legal Aid funding constraints, and legislative peculiarities are some of the difficulties in the level of legal representation afforded to disabled people. The Disability Law Project provides one way to effectively address many of the issues. The Special Circumstances Court operating out of the Brisbane Magistrates Court is another way of addressing the same issues. The Disability Law Project believes that it would be useful to extend funding for the Disability Law Project until such time as a evaluation of the Special Circumstances Court is completed. This way, the Attorney General of Queensland is afforded the opportunity of viewing different models, the cost-comparative analysis between the two and the outcomes.

RECOMMENDATION 9

The Attorney General of Queensland in company with the Health Minister approve funding for Queensland's first state-wide Mental Health Legal Service.

In excess of 70% of all clients represented by the Disability Law Project suffered from mental illness. In the representation of these clients, the Disability Law Project often contended with a myriad of administrative and legislative peculiarities that impacted negatively against them. The project believes that given the enormity of these issues and the time needed to address them at a systemic level requires its own service.

RECOMMENDATION 10

The Chief Magistrate provide all Magistrates with a practice direction that in matters where mental illness and/or intellectual disability are an issue, adjournments in excess of the usual three weeks be granted to allow defence lawyers time to access necessary information and medical reports.

Whilst the Disability Law Project has been afforded good judicial support with respect to seeking at times lengthy adjournments, we acknowledge that this may not be the case in some Magistrates Courts. Accordingly, given the considerable delay in accessing medical information, more notably via the Freedom of Information Act 1992, longer adjournments are necessary.

RECOMMENDATION 11

That the Queensland Legislature widens the Mental Health Act 2000 to include contemporary mental health disorders.

The Disability Law Project represented a number of people that suffered from an illness not treatable under the Mental Health Act 2000. Accordingly, the Disability Law Project believes it may well be prudent to investigate the possible widening of the Act to allow the inclusion of contemporary mental health disorders.

RECOMMENDATION 12

That the Queensland Government institute facilities conducive to the appropriate housing of people with severe mental health issues and/or cognitive deficits instead of custodial environments.

The Disability Law Project urges the Queensland Government to initiate innovative housing options for significantly impaired and/or mentally ill people as an alternative to custodial settings. Consistent with the plethora of research available regarding the incarceration of such people in our prison system, the project has had first hand experience of clients being sexually assaulted, harassed and stood over by other inmates largely due to their immense vulnerability within the system.