

"I didn't use my mental illness for an excuse for anything...it's embarrassing you know"

"I wish it wasn't so brief. I wish I understood. I wish they'd explain a bit more about the law. Because I've sort of being left in the dark a little bit"

"...from the point of view of paranoia, it's the most daunting thing you can go through"

"Part of my illness was that I thought that the Police and the doctors were all sort of colluding against me...The Courts and the Magistrates and everyone, I thought they were all against me."

Experiences of the Criminal Justice System —the perspectives of people living with mental illness



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CHAPTER 1 - INTRODUCTION

This project was carried out by the Mental Health Legal Centre Inc. (“MHLC”) pursuant to a Victoria Law Foundation grant. MHLC is a specialist community legal centre that provides free and confidential legal services to anyone who has experienced mental illness or has contact with mental health services (also/sometimes referred to as consumers). All Centre activities aim to promote the rights of people who experience mental illness, including through community education and policy and law reform work.

The MHLC was aware of the disproportionate number of people with a mental illness in the criminal justice system. In a previous publication of the Centre, entitled “Your Rights - Mental Illness & the Criminal Justice System in Victoria”, it was noted:

You are more likely than most people to come into contact with the police and the Courts if you have a mental illness. This may or may not mean that you have committed a crime. It is estimated that at least 70% of people in prison have experienced mental illness. (July 2002, p. 8)

There is no evidence to suggest that this figure has substantially altered since 2002.

The Mental Health Legal Centre was keen to further investigate this matter. In particular, we sought to explore the views and experiences of people with a mental illness in the Victorian criminal justice system, specifically in relation to sentencing or dispositions by the Magistrates’ Court following criminal charges. The aim of this study is to record the participant experience(s) of the criminal justice process, from initial contact with the police, through to post conviction experiences in the prison system, from the perspective of the individual.

Further, this study sought the views of participants in relation to the proposed separate mental health court or list in the Melbourne Magistrates’ Court. It is noted that since this study was conducted this court has been established as the Assessment and Referral Court pilot in the Melbourne Magistrates’ Court. Accordingly, some of the information gathered from participants in relation to this Court is now dated, but we believe still relevant in relation to the practices and procedures of that Court.

This project consulted a wide range of people with a mental illness who have first-hand experience of the criminal justice system in the Magistrates’ and higher Courts. The participants included individuals in prison; in Thomas Embling Hospital (being a secure psychiatric hospital); those sentenced to non custodial Community Corrections orders; and, those living freely in the community. We have also sought the views of Magistrates, including those involved with specialist lists; barristers and lawyers who frequently act for individuals with mental illness, Victorian Police, consumer consultants and carers.

Our extensive literature review has located only one similar study, (Ministry of Justice, “Court experiences of adults with mental health conditions or learning disabilities”, 20 July 2010, <<http://www.justice.gov.uk/court-experiences-adults-mental-health.htm>>). . This UK

study in 2010 examined the court experiences of adults with mental health conditions or cognitive disabilities, however, it was limited in its scope in that it only covered the experiences of victims and witnesses in criminal matters, and participants in civil and family matters. However, some of the findings and recommendations of that study support our findings, including;

- the recommendation that there be improved training for professionals and access to legal representation
- the finding that participants were unlikely to disclose their condition
- and the finding that participants were daunted by the court environment.

Given the lack of studies of this nature, we anticipate that this report will inform policy and law reform in both the areas of mental health and criminal justice.

The fundamental aim of this report has been to give voice to individuals living with a mental illness who find themselves involved with the criminal justice system. This report presents the information gathered from people who were interviewed as part of the project. It is intended that the voices of those interviewed will speak as loudly as possible; presented simply, and with minor editing. The report presents a summary of the information gathered, and recommendations based on those findings.

It is intended that the findings of this project will inform the views of the Mental Health Legal Centre in relation to criminal justice issues, and related policy and strategic advocacy. Furthermore, it is hoped that the information will be disseminated as broadly as possible in an attempt to inform policy and decision making in relation to the experience of people with mental illness in the criminal justice system.

Therapeutic Jurisprudence

This project explores the concept of therapeutic jurisprudence, and ways in which encounters with the criminal justice system can be more ‘therapeutic’ for those experiencing mental illness. This is a concept of justice which is fundamentally opposed to more traditional views of justice. The notion of justice has traditionally been viewed as one that emerges from a rigid adherence to rules and impersonal conduct. As a result, Courts and tribunals may be perceived as places where a person’s emotional well-being is not considered in any meaningful way. In this view, the negative effects on an individual are viewed as peripheral.

This belief system has, however, been challenged in more recent times. In the early 1990s a number of researchers, predominantly in the United States, became interested in the effects of this tendency of the Courts/Court officials to ignore the way legal processes may impact upon the health of people before them. The theory underpinning the results of this research, which suggests corrective measures to observed inappropriate practices, is known as therapeutic jurisprudence.

David Wexler & Bruce Winick, being the seminal proponents of therapeutic jurisprudence, are at pains to point out that therapeutic considerations are not the only considerations that must be taken into account. For example, there would still remain the need to acknowledge: the protection of the interests of society; the daily procedural interests of the legal system; and, the protection of the defendants’ rights. (David B. Wexler & Bruce J. Winick (eds),

“Law in a Therapeutic Key” *Developments in Therapeutic Jurisprudence*, Carolina Academic Press, Durham, North Carolina, 1996.)

In his support of a theory that appears to be an anathema to the manner in which Courts usually go about their decision-making function, Winick notes that:

Law is not an artefact on display in a museum: it is a living, breathing organism. Law functions within a particular society, absorbing and reflecting the culture in which it exists. Judges, although acting within a framework of precedent, are political actors who make law in the process of applying it. To understand how law functions we must understand political science, economics, anthropology, sociology, and psychology, and we must examine law with the tools of these disciplines. (Ibid., Bruce J. Winick, “The Jurisprudence of TJ”, Chapter 32, pp. 647.)

Following years of understanding therapeutic jurisprudence Victorian Chief Magistrate Ian Gray, in an interview in June 2006, posits that:

...[it’s] just new language for old ideas. But it does help, people actually start to think about, “Well, how do you make sure people don’t have an anti-therapeutic [experience]?”...

“It was dignified, I thought I was respected, it was fair”, and then you’ve had a therapeutic, for want of a better word, experience in the Court system...

But it’s become a little bit of a catchcry...revisionism is alive and well, I think, and that’s healthy. And we use it less and less often, frankly.

For the accused with a mental illness within the criminal justice system, an alienation from the legal system may be the result of a variety of factors, including: an inability to understand legal jargon; not having Court processes properly explained; being mentally unwell; not having a legal advocate who has some background knowledge of mental illnesses; and/or, a Magistrate who does not follow the precepts of therapeutic jurisprudence.

An individual who perceives that they have not received due process can then exhibit:

...[a] reluctance to accept decisions, diminished respect for the judge, mediator, or other third party, diminished respect for the Courts and the legal system, and a diminished willingness to follow legal rules. These effects are completely consistent with the suggestion that experiencing arbitrary procedures leads to social malaise and decreases people’s willingness to be integrated into the polity, accepting its authorities and following its rules.

(Ibid., Tom R. Tyler, “The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings”, Chapter 1, p. 13.)

In summary, it is suggested that the theory of therapeutic jurisprudence:

... provides lawyers with a means (or lens) with which they can look to their clients’ broader interests...it does not seek to “trump” other values, such as legal interests, but rather to suggest that, wherever other things are at least equal, law ought to aid, rather than harm or hinder, therapeutic outcomes.

(Ibid., David Carson & David B. Wexler, “New Approaches to Mental Health Law: Will the UK Follow the US Lead, Again?”, Chapter 31, p. 641.)

Of course, there will be any number of views about, for example: what is/not a therapeutic process for any particular individual; the manner in which the Court and its officials should conduct themselves; the question of how great a part the individual should play in the Court process; and, whether the ideals of therapeutic jurisprudence could indeed bring about a different result for the individual and the community. The views of participants in this study highlight some possible approaches and suggestions in response to these questions, which are reflected in the recommendations

Methodology and research tools

The Centre secured funding from the Victoria Law Foundation for the project. We developed methodology using an action research model where data collection and evaluation proceeded simultaneously in a series of feedback loops, to broadly scope major issues and to capture a range of experiences in depth. This enabled participants to ‘tell their story’ from their own viewpoint. It has also provided us with the opportunity to re-evaluate and make adjustments in the focus of the project as the data has been concurrently evaluated and assessed, and to utilise the material in response to other Victorian law reform projects. This study is also informed by another Victorian study undertaken by the Mental Health Legal Centre exploring the experience of participants in the Victorian Mental Health Review Board (V Topp, M Thomas and M Ingvarson “Lacking Insight: Involuntary Patient Experience of the Victorian Mental Health Review Board” October 2008

http://www.communitylaw.org.au/mentalhealth/cb_pages/li_contents.php

Ethics approval

Ethics approval for the project was obtained from the Victorian Department of Justice for the project. The Ethics committee was particularly concerned about the vulnerability of project participants and was ultimately satisfied that the project had considered both legal and emotional supports to people interviewed. All interviewees were provided with information about the ethics approval.

This report is presented as a series of chapters which trace a participant’s path through the criminal justice system in a chronological manner. The views of participants are presented simply, and we believe speak clearly for themselves.

CHAPTER 2 - FIRST CONTACT

A person's first encounter with the criminal justice system will ordinarily be through the police. This will normally be true for both the accused and complainants. This is equally true for people with a mental illness. People with a mental illness may come to the attention of police if they are investigated in relation to an offence, or if they are a victim of crime. Police also have specific powers in relation to apprehending people with a mental illness, via section 10 of the *Mental Health Act (Vic) 1986*, which states:

10. Apprehension of mentally ill persons in certain circumstances

(1) A member of the police force may apprehend a person who appears to be mentally ill if the member of the police force has reasonable grounds for believing that-

(a) the person has recently attempted suicide or attempted to cause serious bodily harm to herself or himself or to some other person; or

(b) the person is likely by act or neglect to attempt suicide or to cause serious bodily harm to herself or himself or to some other person.

(1A) A member of the police force is not required for the purposes of subsection (1) to exercise any clinical judgment as to whether a person is mentally ill but may exercise the powers conferred by this section if, having regard to the behaviour and appearance of the person, the person appears to the member of the police force to be mentally ill.

(2) For the purpose of apprehending a person under subsection (1) a member of the police force may with such assistance as is required-

(a) enter any premises; and

(b) use such force as may be reasonably necessary.

(3) A member of the police force exercising the powers conferred by this section may be accompanied by a registered medical practitioner or a mental health practitioner.

(4) A member of the police force must, as soon as practicable after apprehending a person under subsection (1), arrange for-

(a) an examination of the person by a registered medical practitioner; or

(b) an assessment of the person by a mental health practitioner.

(5) The mental health practitioner may assess the person, having regard to the criteria in section 8(1) and-

(a) advise the member of the police force to-

(i) arrange for an examination of the person by a registered medical practitioner; or

(ii) release the person from apprehension under this section; or

(b) complete an authority to transport the person to an approved mental health service in accordance with section 9A(1).

(6) If the mental health practitioner assesses the person and advises the member of the police force to arrange for an examination of the person by a registered medical practitioner the member of the police force must do so as soon as practicable.

(7) If the mental health practitioner assesses the person and advises the member of the police force to release the person from apprehension under this section the member must do so unless the member arranges for a personal examination of the person by a registered medical practitioner.

(8) If an arrangement is made under this section to have a person examined by a registered medical practitioner, a registered medical practitioner may examine the person for the purposes of section 9.

(9) Nothing in this section limits-

(a) any other powers of a registered medical practitioner or mental health practitioner in relation to that person under this Act; or

(b) any other powers of a member of the police force in relation to that person.

Police may be presented with significant dilemmas when dealing with a person with a mental illness. In the first instance police may be unaware that a person is experiencing symptoms of an illness. LEAP (Law Enforcement Assistance Program) is a Victorian Police database which stores information relating to crime and all people apprehended by police. This database may flag whether a person has a mental illness.

People may also be unwilling to admit that they have a mental illness, or disagree with their diagnosis. Police will often be faced with decisions as to whether they should divert a person to mental health services, or whether a person should be charged. It is beyond the scope of this report to consider other issues faced by police, for example when a person is denied access to services, or where police may feel that a person is not being adequately treated.

This chapter aims to capture and present the experiences of people with a mental illness when they first come into contact with the police. It also presents the views of others in the criminal justice system.

Participant experience of police

The experiences of people with a mental illness when they first encountered police vary. Below are a small selection of people's experiences, which highlight some of the difficulties faced by people at this stage.

“Perhaps [things may have been different if the police had been aware that I had a mental illness]. But I want to be punished, because I hate myself. And I think that's why I hurt myself...”

*...When I was interviewed...I was too scared...too embarrassed to say I didn't feel well, that I was having problems. Because I had a good job and a family and I was - it's embarrassing and I didn't want them to know...". - **Danny***

"If you're a police officer and you have access to...LEAP, it would say a lot of things about me on their file...

*... "Oh how long have you been sick for?" Some police, but some others are just as nasty...So it varies on the person." - **Janet***

*"But...see, when you're ill, when you're delusional and hearing voices, you're acting differently to what you normally would. So they can't see all that, what you're thinking and believing...you actually believe it. It's so real, it's true if you like, yeah." - **Theresa***

Some individuals provided examples of approaches that have been or could be adopted to address some of these difficulties:

*"[There]...was a period I was going pretty well...and...[a senior policeman at the local station] said that they would rather have cups of coffees with us, with me and my husband than having to arrest me and tackle me down and all that...So that worked okay for a little bit...That ended up only about twice [once a week]...just generally chatted, and had a cup of coffee..." - **Debra***

"Well, maybe [the police would have treated me differently if they had known that I had a mental impairment]...Because, I mean, I confessed to something I didn't even know what happened...But I shouldn't have been interviewed at the time...

*...well, see, I sort of don't like telling people stuff see what's going on in my head and that. But now I regret it, because I should have said something because I've just got myself deeper and deeper into trouble...I was saying stuff that I didn't even know nothing about, you know." - **Drew***

*"...I think the fact that I did have a mental illness at the time, and they knew about that, that perhaps my Case Manager could have been present. Perhaps they could have extended the same benefit as having a lawyer present when they are asking questions." - **Joseph***

*"There was one policeman who arrested me, out of all the...dozens of police that I've dealt with, there was one who has said, "We're going to get you to see a doctor, because we don't think you're well". I mean, I disagreed with him at the time, but looking back now, that one policeman...you know, he saved my life." - **Rupert***

*"Well, it was pretty scary [when the police arrived]....They were pretty good actually...they were pretty polite. They didn't sort of hassle me or anything. They just asked me questions...I think they did [have an understanding of mental illness, and treated me differently as a result]." - **Terence***

“...I think that in the past, the police have actually complained a lot [about the health services, because] ...they knew I was ill, but the hospitals weren't doing anything about it, and...[the police] were getting very frustrated.” – Theresa

Experiences of advocates:

One significant issue identified by an advocate was that the spectrum of mental illness is wide. The range of symptoms that can be displayed by people with a mental illness are broad, and mental illness is not necessarily something that can be easily identified. It may be that people who are very obviously unwell are identified, and other who may also be distressed are unnoticed;

“floridly psychotic people are the ones that are easy to identify. They're talking about things that are not - but, as we know, there's lots of sorts of - it's not an all or nothing and there's lots of ways in the spectrum and different types of mental illness” - Cathy (lawyer)

Some advocates gave examples of good practice by police in dealing with people with mental illness: -

“If police had...protocols that required them to allow a decent period of time to try and link these people up with some kind of service, rather than...rushing them into court, that might be a way of addressing it ...[or] there was a responsibility on police to not bring matters to court until people actually were linked in with services...” - Julie (Lawyer)

“I had a guy in the country ring one day and he had [severe] depression and he'd attempted suicide a couple of times, but the police had been called... he said, “You know, that policeman, he saved my life”. He said the policeman came and he sat down, and...had told him that he had lost his wife and his children and who he'd gone [to see on a professional basis] ...this is in [rural Victoria] and he said who he'd seen, because there's only one psychiatrist up there. So he told my client about the psychologist that he'd seen, and this policeman went back to see...[my client] to see how he was going, and linked him into the psychologist that he'd seen. My client said, “He saved my life”. - Ann (lawyer)

Building an awareness of mental health issues amongst police

Decisions made during a person's first contact with the police are crucial in determining whether or not a person enters the criminal justice system.

Participants and other stakeholders identified the importance of police having an understanding of and sensitivity to mental health issues.

“Well, they [the police] really don’t understand mental illness. To them, everything’s a joke. You know, ‘They’re loony’, ‘Oh, they’re putting it on’...” - Theresa

“...so I spoke to the police- they were very intimidating and calling me all sorts of names. ...I was so scared.” - Danny

Unsurprisingly there was a diversity of experiences amongst participants in their interaction with police. Those that had positive experiences with police highlight the importance of being treated with dignity and empathy. On the other hand, those who reported negative experiences with police say they felt intimidated, misunderstood and felt that they were treated as if they were guilty.

“You’re very lucky if you get good officers that have an understanding or an appreciation of what a mental illness is and a psychotic episode, for them to treat you with dignity. If not, then you are treated...like a criminal. That is, the police will talk to you like a criminal that has just committed a violent offence and will punish you in the same way - that is physically punish you...

When you’re engaged in the middle of an acute phase of an illness cycle... that then propels you into another area within the psychotic framework that ...tells you that you have to be...severely punished: for being who you are; for having experienced what you’ve experienced; and, for having a mental illness...” - Wayne

Assumptions made by police about a person without asking appropriate questions or communicating effectively can also adversely affect the person’s experience..

“...when people sit down and have a normal conversation with me...it’s very hard for people to tell that I’m sick. But, you know, just because a person carries themselves well, looks after himself, trains and does all these things, doesn’t mean this person’s not sick, and doesn’t mean this person’s not hearing voices or is suicidal or is depressed.” - Ahmed

“...they raided my house, they found psychiatric medication there, and antidepressants there, and not once asked me, “Why is that medication in your house? Why is it there? Whose is it, why do you take it?” - Abdul

Experiences of police

Some police have identified difficulties in making judgements as to whether or not a person’s behaviour is symptomatic of a mental illness and saw such clinical assessments as being more appropriately dealt with by a mental health professional. One member of police expressed that in general, it seems police are able to assess whether a person is in need of mental health support in circumstances where a person is acutely unwell. This reflects views expressed earlier from an advocate, who stated that those who were floridly psychotic were easy to identify. The member of the police stated;

An evaluation that was done out at the Western Hospital looked at police presentations of people under section 10 ...I think the rate was...in the 80

something...per cent of those that:...[were] either an acute, where you need hospitalisation; or those...[who needed to be] link[ed] ...in with other sort of health professionals. So I think the strike rate for police identifying those at the pointy end is...quite good. – Sam (Police)

In other circumstances, police sometimes found such assessments more difficult.

“I've had one...individual that was a sex offender and he knew exactly what he was doing, but he was playing that mental illness line... and really we knew that he could form the opinion at the time, but then he would just play on that. So, we've also got that aspect to consider as well, which makes it very difficult.... there's no doubt he did have an impairment, but he could still form the intent, and he knew exactly what he was doing.” - Tony (Police)

Access to health care and psychiatric assessments

It is of particular concern that there is evidence that police are not always linking a person to mental health services for assessment and treatment in circumstances where a person has expressly requested for it.

“[When I was picked up by the police] ... this time, I told them I had a mental illness, but without a doctor or anything, they didn't believe me.” - Jim

“In the police interview, I did tell them that I had issues and I needed to see a psychiatrist. ...the police just kept telling me that they didn't know what a psychiatrist was going to do for me at that point in time.” - Mustafa

Whilst it was apparent that Tom was acutely psychotic (drug induced), there was no forensic medical check-up. ...I insisted whilst Tom was still in custody, that he be seen by the local Psychiatric Services. However, the Police were not prepared to organise this.” Peter, father of Tom

Mental illness and police records

Some interviewees suggested that it would be a useful tool for police if a person's diagnosis is kept on police records, such as the LEAP database . It has been suggested that having some background information about a person may assist police in implementing strategies to effectively de-escalate a crisis situation without using coercive tactics. This is an approach which received mixed responses.

Some police themselves identified problems with the accuracy and consistency of information recorded on the basis of a member of the police's assessment at a particular point in time:

“We've still got our obligations obviously to the community as well, so it puts us in an awkward position really...because we don't have the ability to do a clinical assessment.

And we pick up behavioural traits, and so really it depends on how they present on the day. If they're having an episode or a crisis situation, some members are able to pick it up better than others; and, if they're borderline it's sometimes very awkward for us to actually make that judgment.

*We are looking at streamlining our processes...[and] our flagging system,...so if somebody has come into contact with us in the past...[who has] had a particular condition...[and] if we're actually doing a check on that person, that [information] automatically...comes up...[The member can then say,] “Hey, that's a prompt. We should be actually referring to this sort of person” or “We need an Forensic Medical Officer to come in first or an Independent Third Person”...But, if it's a first time situation, it is a judgment call on the day really...And, if they're borderline, it makes it very awkward.”- **Tony (Police)***

Some people saw a benefit in information being recorded that may help to explain to others the person's circumstances.

“...[possibly if there was] a kind of pre-court process that police were committed to that was documented, whereby...it is recorded...in some sort of police record that a person has come to their attention....[Further,] that...[the police] think they have some sort of psychiatric disability, [and] they've reported whatever has happened to their family...some sort of support service and the victim(s). [Of course, the alleged offender must] know that that has happened...[be] informed...[of the alleged] case, and made aware that the...local police are going to have [a]...record of that. [Thus]...if the person comes to their attention again [the police will have some background in relation to that person]

*...I think [that] a lot of victims, once they're made aware of someone's circumstances, like their mental health circumstances and...almost universally ...circumstances of disadvantage...they'll have a fair bit of understanding... so long as they feel that something is being done and there is...some sort of ongoing record of people's contact with police and someone else is being notified about it.” **Julie (Lawyer)***

Some police described how information about the person's circumstances, and in particular helpful, constructive strategies for engaging the person, could assist them in resolving the situation more effectively.

“I've [also] had people actually self-reporting. So, it might be health professionals saying, “Look, I've spoken to my client and have to let you know that they suffer from Acquired Brain Injury; and, their traits, if you come into contact with them are going to be this, this and this. This is what you should do when they come into contact. Here's the contact details etc etc.”

*So I can put that on a warning flag on the system somewhere...”OK, don't try and engage in routine with her, because she won't understand. Do this, this and this.” So then, instead of members engaging in what they think will resolve it, it's actually giving us the answers to how to sort of deal with it...” - **Sam (Police)***

“...when I spoke to someone from Autism Victoria [the example was given of] ...a person there [who] has a fascination with bombings...whenever a bombing occurs on TV, they become obsessed with it, and repeat it all the time.

Out in a public place - you can imagine being at Parliament Station or somewhere like that and [him] starting doing that talking - it would draw the attention pretty smartly of the public who'd call the police. Police would get down there, and you could see how things would start to escalate.

...the person I spoke to at Autism Victoria said that [this person] get[s] agitated. [You can imagine the situation where] police speak to him, and you could just sort of see how the police are engaged, and you get to the point where police would probably have to deploy their capsicum spray or maybe use batons to subdue this person.

Now, if you knew that this is the person's condition - we don't need to know all the clinical stuff - but this is why, and they have a fascination, and they don't cause any sort of risk. You could actually go there, and once you've maybe got their details, you'd have access to that information and you could de-escalate it fairly quickly.”-

Sam (Police)

Another member of police described the development of a plan for a person, together with the person themselves and a health professional,

“[I'll give you a real example of a rural police station where they] ...just gave us a copy of a case management of a person down there who has some anti-social behaviour or traits, and constantly comes into contact with police.

So, they've sat down (police, health professionals have sat down) with the person, devised a plan: “When you behave in this manner, this is what we're going to do”.

Now this was told to...[the person] whilst she wasn't in crisis so she understands; [and, the] police are there as well, so that when she does muck up...she understands what process is going to take place.

So...[this kind of] case management is one that is occurring in a number of areas.

And that is probably sort of identifying those high-risk or repeat sort of contacts that police are having.”- Sam (Police)

The nature and use of such police information can present problems. The use of such information can result in people being stigmatised or discriminated against if it is revealed that person has a mental illness. Police may have preconceived and undue presumptions about a person based solely on that person's diagnosis. This is of particular concern for example where the person is a complainant. Interviewees expressed the need to ensure that persons with a mental illness will be treated seriously by police in the event that the diagnosis of the person comes to light.

One lawyer expressed the importance of training police to ensure that they do not prejudge a complaint on the basis of a person's diagnosis.

[In the event that police are aware that someone has a psychiatric disorder, they may not accept that that person has been the victim of an offence] ...to prevent that happening...[it is necessary to] educate police about the reality that they ought to believe people, that they can't assume that someone's account of events is unreliable just because they have a diagnosis.

...I think, by and large, [the police] are pretty open to that if effort is made to educate them in that way...[Further,] there might be some way of...sealing this kind of

warning/notification...from access by other officers and in relation to other things like reports that they make as victims. – Julie (Lawyer)

Similarly, some police acknowledged the effect of the stigma of the label of ‘mental illness’

I suppose the other thing too is, when we're talking about mental illness...it places that stigma on someone. Because someone has a mental illness...are we then maybe suggesting that...[they] don't have the capacity to understand? – Sam, Police

Some participants held concerns of ill-treatment by police if police found out a person had a mental illness.

I knew what state of mind I was in, I knew how sick I was, so I knew to make a ‘no comment’ statement... If I just started talking while I was there, I mean everything was going to be turned against me. They’re not going to think, “Oh, this bloke has psychiatric issues.”- Abdul

Some participants were also reluctant to pathologise their behaviour and would prefer taking responsibility for their actions where it is more appropriate to do so.

See I didn't use my mental illness for an [sic] excuse for anything. ...Yeah it has contributed... Because I just don't think- its embarrassing you know. I like to be like everyone else...- Drew

One police member identified that in relation to sexual offences there were procedures in handling complaints made by people with mental illness and impaired capacity. The view was expressed that such procedures should apply to all complainants;

“...there's a code of practice in relation to – specifically with sexual offences, and there are criteria there for those with a cognitive impairment, disability and for mental illness. So, it sort of stipulates as to what process members should be going through, obviously not treating them any sort of differently. So, that's in practice what should take place.

I would be the first to admit that personalities play a big part in any one that you come into contact with and that could be someone that has no mental illness but maybe can be quite abrasive when they're talking to police about an alleged crime as opposed to someone that is very sort of humble and all the rest...

...the Sexual Offences & Child Abuse Units (SOCA) are sort of fairly well trained and have a very good understanding and application of the code of practice etc. So, I would have thought that having this specialty area that looks after those victims in relation to sexual offences whether they do or don't have a mental illness, cognitive impairment would be far better.

I would have thought that if there's room for improvement it probably would have been in the general population areas of those victims with mental illnesses that maybe just report run of the mill offences...- Sam, Police

However these values and methods of interaction are relevant to how police interact with members of the broader community, not just those living with a mental illness. A sensitivity to the unique circumstances of other marginalised and minority groups could also assist

police in assessing whether criminalising certain behaviour will appropriately prevent recidivism or achieve long-term benefits to the individual and the community.

Police training

The training that police receive is of particular importance, and plays a significant role in how police relate to people with a mental illness.

“[In] Region 3, which sort of covers Northcote, Preston...Reservoir and sort of surrounding areas, they had some...day training. And that was rolled out to about 250 or 300 odd members. And then they got members to fill out some evaluations, just giving some feedback about the training and they spoke very well...[including] some mental health first aid...

...to give an example...some people...[had a] headset on that had voices just sort of speaking...and then I would then have a conversation...[One member] was saying the other day where say Sam was talking to someone and another person would come up behind and start talking in their ear...and it is actually very difficult for the members. And what it was, I suppose, is it really sort of gave awareness. They use that word. It was bloody difficult to sort of have this conversation (and they were just talking about basic things like, “What's your favourite colour?” and “Where do you like to go out for dinner?”) and [one member] just [said], “Oh, shut up!”...it really was extremely distracting. So, some simple things like that I think [assist members to understand mental illness]...

[The training]...was outsourced. It was one thing the Senate Committee had actually recommended, especially for rural areas...and some of that Mental First Aid is actually - I spoke to Beyond Blue - it was very much geared at members, I suppose like from a wellbeing type of thing with your colleagues.

But the good thing too, of course, there is that what you learn there is obviously transferable to the clients that we're having contact with. Sometimes, if it's actually solving that sort of - when you're talking about the member's interest, if it's sold in maybe a way where so X is aware of maybe the types of things with depression for his family and relatives and all the rest, you're probably more likely to maybe [educate members about mental illness in general].”- Sam (Police)

Some police raised issues with the impact of specialist mental health training on police resources and the need to balance the time and skills of the individual member.

“Training is a big issue. Because, you've got 8 or 10,000 people, so even if you do an hour [of additional training], it's 10,000 hours - that's a lot of time for people. And again, it's how much you want them to know, or how much they need to know.” - Wes (Police)

“...[spending time with people in the community with mental illness is] one of about 15 jobs on the plate at the time...And the thing is, you know, it's all well and good in a perfect world when you actually do have that time and also the skills as well to be

able to do that, to be able to pick that up and that follow on ability, whereas this is the real world and it doesn't always work that way. So we've got that balance as well. There's other people out there as well that need our help and assistance. So, it's a bit of a balancing act for us, but I think more than anything else what we're trying to do here as part of the process is not only build partnerships but more so awareness for members as well.”- Tony (Police)

Diffusing the crisis – the role of mental health professionals

Mental health professionals can play a significant role in diffusing a situation before it develops into a crisis. The availability of appropriate health care that is available can be significant in diverting people from the criminal justice system, and also from more restrictive psychiatric treatment.

One consumer consultant described an innovative model of mental health service provision which was an effective, and accessible intervention in what might otherwise be a threatening environment.

“...you have to look at the model that works in reference to the best outcomes, and one of those models occurs in Broome...Broome is...a 4½ hour care flight into the nearest psychiatric hospital in Perth.

...there is a safe house that has been set up in...[Broome] that is auspiced and run through the mental health service in Broome...a consumer or a patient...[who is] having, or [is] on the verge of a psychotic episode or on their way to having difficulties in terms of mental health issues, is accompanied by a consumer/carer, an immediate family member and a registered psychiatric nurse...

And, they hold down at the house for anywhere...up to 72 hours, and the consumer has the ability to see a doctor if they wish for immediate medication purposes. If not, the longest stay is a 3 day stay...they reduce admission rates to save on the cost of the care flight, by well over 50% in that type of a model...

... it is before admission [and is testing the least restrictive alternative]....[It is an asylum in the true sense of the word. A place]:...to debrief; to then put in other interventions; to talk out strategic measures; to put in place a plan; to remove yourself from the environment that is threatening or that others are providing a threatening environment, or that you find threatening, in order for all parties to just chill out. [It is a place to] work out the best strategy and to move forward with a care and treatment plan that is consistent with the goals and aspirations of a network that is set up that espoused those [ideals] within their mission statements, but are unable to deliver directly.” Jordan (Consumer Consultant)

Diverting people with a mental illness away from the criminal justice system– exercising police discretion

Police have the discretion not to charge a person suspected of committing an offence, and diverting them away from the criminal justice system, into appropriate care and treatment, where it is appropriate to do so.. The value of such an approach can be that the experience

can be more positive and therapeutic for the individual involved, and there is less cost and burden on the justice system.

It is increasingly acknowledged that incarceration and custodial sentences are not necessarily the most appropriate disposition for people with mental illness. Some police acknowledged in general the unsatisfactory outcome of incarceration in prison or police cells for people with mental illness.

Unfortunately, we've had occasions and we probably still will into the future, where you have people that are genuinely in a really bad way that end up in our cells because of their violent disposition...- Wes (Police)

"...the alternative for us [presenting at hospitals aside]...is to incarcerate them, and that's what we're trying to move away from, because that's an even worse outcome in many respects, because our cells aren't designed to hold mental patients at all. – Wes (Police)

From the point of view of police, there are a number of considerations taken into account in determining whether or not to lay charges in the first place. In circumstances where there is a victim involved, the views of the victim are considered. In circumstances where there is no victim involved, then there appears to be greater scope for exercising the discretion not to lay charges. An essential difficulty with the exercise of discretion is that there can be a lack of consistency across police members.

I think that when you have a minor matter, and especially when there's no victim involved, I think it obviously gives police far more capacity to sort of move one way or another. And I think in that situation my experience has been that police will then treat...[the offending] more as a health issue...we don't [have any figures as to what percentage of offenders this would encompass].

...let us just say it was someone that is urinating in the street, at the very lowest end [of the scale of criminal activity]...they're committing an offence, albeit a summary offence, but there are some mental health issues. Police get called, they speak to the person, identify something that's not quite right and give an informal sort of warning...organisationally, we don't capture that, [so the public's perception]...is going to be very much around those ones where people have been charged.

...I've probably spoken to about 160 – 170 members during our focus groups State-wide, and this is one of the questions I asked, and the resounding response from those members was, "Yes", they were just treated as a health issue and...[wouldn't] progress it...

But then the other problem...[is if it is ongoing] minor offending...people then think, "How do I then put something in place to stop it? I don't really want to ...put the person through the criminal justice system, but they are offending at a lower level. How do I do that?" And, quite often, members are telling me that they will then use the court system because [we're advised by the court]...that there are all these wonderful programs that are going to be rolled out but the only way to access these things is that you have to be charged...

...I suppose police are sort of outcome...driven; so if they know that something...is unlikely to progress, it's like, "Well, what's the point?" - Sam (Police)

A long-term vision of dealing with potentially criminal behaviour may involve linking the person to suitable support services.

...[in relation to people with a psychiatric illness who do not receive services, it would be necessary for the] police,...clinical services...[and a] broader sort of psycho-social disability rehabilitation support service,...housing services,...the more vocational services [and/or] social support services...[to] have better links ...and [for the police to be] committed to essentially...avoiding people having to go through the court process at all. - Julie (lawyer)

Linking people with appropriate support services is an important part of diverting someone from the criminal justice system, however, appropriate services need to be available. One member of police relevantly highlighted the usefulness of being aware of what services are available, but expressed his frustration at the lack of specific services for those experiencing personality disorder;

Well, I don't know there's anywhere particularly at the moment that we can take those that may be suffering your other mental illnesses [for example, borderline personality disorder]. So we probably don't deal with them any differently, I suppose.

The ideal would be if you could link people into some of these services that then gives you the opportunity to go, well hang on a sec, if I do think – especially if it's at a minor level, if you can link someone in, that you may be don't have to take them through the criminal justice system. But I suppose it's again knowing what services are out there, what their criteria is, their capacity to accept a person....

I spoke to Spectrum...but they are very much at the pointy end as well. And you will have people that stay there, I think, for like 3 or 6 months, and they only have I think 12 at a time. So I think their capacity is, again, which is one of the underlying themes, is...quite small. - Sam (Police)

...the dilemma for an operational member is, "Do I put them before the criminal justice system or not?" And I think, when there is that concern that the mental illness is the reason for the offending, in those situations it would be more likely that members...may not want to...progress the matter through the criminal justice system...

...[however], if they can't link that person into specific services, well quite often...they have to put them through the criminal justice system and then have maybe a court give a condition. Now, if it's a first time offender, maybe using the diversion program where that member could say, "Well, one of those conditions would be something that would address the mental health issues".

Maybe it's not up to the member to...decide what the conditions are, but... obviously the health professional...[should] make a determination...[as to] what treatment is...required. I suppose police often feel they have to do something: so if the mental illness is the reason for the re-offending, or the offending, if you can't put something in place, that cycle is going to continue. - Sam (Police)

Some police indicated a reluctance to make a definitive decision as to whether a person was mentally impaired at the time of the offence, preferring instead to lay charges and leave the assessment to the courts.

*...I think that...probably one of the fundamental problems for members is that you go, "Well, OK, even someone who has offended, obvious psychiatric issues, we call the CAT team and the CAT team come down and then makes the person involuntary" ... [However,] do we then sort of say, "Well, hang on a second, did this person...whilst they might have some serious mental health issues, but did they know what they were doing?" ...So members then...[think,] "Well, hang on a second, do we put it before the court, [or] do we make our own assessment?" ... Now...that is a defence that has to be raised by...[the advocate] or...client; yet, when we go through that process we're still applying that rule of, "Is there a reasonable prospect of a conviction?" ...I'm looking at the brief of evidence: OK, the person was seen by the CAT team and then admitted...Some members you'll find will go, "Hang on, they've been committed so we won't progress the case any further". Other members will go, "Well, maybe that's a matter for the court to decide, it's not for me to decide". – **Sam (Police)***

*"I think it would be a good idea if the prosecutors and those prosecuting people with mental illness have the ability to understand...[that] they have got a wide discretion. The fear I have is that they're police. Sometimes they won't exercise their discretion: they want the court to make the order; they would be quite happy for the court to make the decision...a lot of people don't have to be in the criminal justice system, they should be diverted and the police have got the ability to do it... ... Now, what's the use of now putting him or her on a Community Based Order or suspended sentence or something like that, if the matters are not that serious?", but they are instructed by superior officers to go to court, and let the court decide... ...I don't want to be critical, but there's a lot of failure, hospital departments, everywhere. But what they do is give the police an opportunity to...[present to] the Court, and their whole interest is to get rid of the defendant, and the Courts will have to be warehousing them in different places...this should never be the function of the Court...". **Frank (Magistrate)***

*"[about diversion] ...I think it needs to be controlled by the Court not by the police, because I don't think they should be the gatekeepers...". **Meredith (Magistrate)***

Involuntary treatment under the Mental Health Act 1986 (Vic)

The provisions of the Mental Health Act 1986 (Vic) allow for the involuntary treatment and detention of people with a mental illness. Participants often expressed distress in regards to their experience of involuntary treatment, and often frustration towards police who they viewed as being involved in this treatment through their role in transportation.

“...then they [the police] deliver you to a place where that punishment is even more punitive, by [your] not having the right to refuse treatment and not having the right to have any type of time out to be able to sort yourself out, to be able to calm down and to be able to have the information available that are afforded you through your rights that are dismissed within a system that still relies on compressed timeframes and a compressed pressure-cooker situation.

...you're delivered by the police to Emergency Department, you're detained within a secured section within that Emergency Department, that sends you even more psychotic due to the nature of the bright lights, the white walls, the security officers.

There are no provisions to be made for any sort of outside secure areas to have a cigarette, to have a coffee, to have fluids, to have a drink.

*You are held up at the behest of the Registrars at the hospital, other psychiatrists and doctors that need to assess you. That can take...in some cases up to 6 hours, so by that time there's no wonder why Emergency Departments are having to be redeveloped, such as the one at the Royal Melbourne Hospital, to provide a separate area for psychiatric patients.” - **Wayne***

“...quite some years ago, [a friend of mine] had just had enough of the mental health system...before she committed suicide, [she] was in touch with me...asking about what the ramifications are in terms of a Community Treatment Order. How do you actually get off a Community Treatment Order, and the measures that are taken.

*...that was part of a whole package of just wanting out of the mental health system, and taking her life...it's all part and parcel of the most extreme measure that anyone could ever be asked to take, and that is to commit suicide. It all forms part of that whole facet of wanting to make that decision, you just want out. You just want out completely. And it's just remarkable that more of those patients or consumers don't opt for that, although the figures are pretty staggering.” **Jordan – (Consumer Consultant)***

“[In relation to how it feels to be labelled as a person with a mental illness]...it starts through involuntary hospitalisation, where...[they] don't have the time to have anything explained to you in terms of any type of forced treatment. So, treatment is forced upon you in the most ghastly fashion; and, consumers talk about being assaulted...if you're physically assaulted and physically harmed during the process of having forced medication treatments afforded you, then that's the basis of the experience that you don't want...anything to do with a system that provides that type of treatment for an illness.

*...then the fear of a Community Treatment Order...is compounded with the worst aspects of that type of a treatment; that is, if you do not comply, that the police can arrive at your house and deliver you back to the point of where the first "assault" occur[red].”- **Jordan (Consumer Consultant)***

“[The CTO] ...is seen as a way in which to force you to go and see a psychiatrist, even if you wish to choose to have some other psychiatrist to treat you...[Secondly] ...it forces you to maintain a regime, and...if it's deemed that you are unable to attend appointments or not maintain that regime, ...the power is there for the police to detain you again at home to take you back to that point.

So it's just a cyclical system that has no regard for the alternative ways in which clients and consumers can be treated.”- Wayne

*“We've now got a set of protocols with Western Health [Sunshine, Williamstown and Western Hospitals] whereby our members can get people admitted, or received at least to hospital quickly, which takes a lot of pressure off the members...
...the police pulling up in a van with somebody in the back of it, and waiting three hours to see a doctor, is not a good outcome for anybody...
But, you've got to find the right mix, and you've got to have the right sorts of resources available to make the appropriate mix work...some places seem to be able to do it better than others...just as some relationships with some of the other services are better in some locations than others.”Wes (Police)*

CHAPTER 3 - PRE-HEARING PREPARATION

Participant views of legal representation and advocacy

Participants views as to the quality of their legal representation were mixed. There were reports of a lack of awareness amongst various professionals, including police and lawyers, of issues relating to mental illness.

Concerns were expressed that there was often a lack of preparation in relation to obtaining doctors reports, and a lack of awareness of the options available to people with a mental illness.

"[I didn't mention mental illness...I could have been psychotic at the time] of this offence for what I'm in now...I don't remember a lot of it..."- Abdul

"It's gone to court and the Solicitor hasn't followed through on...my mental illness and he hasn't...got doctor's reports and that sort of thing. Even the last time I was in court, in the Magistrates' Court, the Magistrate said to the Solicitor, "Well, where's the doctor's reports, where's this and that? You haven't done your homework.""- David

There were also reports of advocates who were of the issues faced by their clients, who advocated strongly on their behalf.

"I used to have a really good barrister... she said, [to the Magistrate] "She's not a risk to the community, she's just a pain in the arse who has a mental illness". And I won that.... And I think she's the only one that's really truly fought for me in the past. She's really put her foot down about things like that."- Janet

*"...there was one Solicitor who really helped me a lot. I mean he worked for me for free. Because I've got a feeling he knew that I had something wrong with me, you know.
... Yeah, he was on my side. But at the time I didn't see it. I even thought that he was against me too. I was so ill..."- Rupert*

Some participants viewed disclosure of a mental illness – even to their advocate – as a negative thing.

...that seed is sown right through any of the processes post-hospitalisation, such as: Community Treatment Orders; applications that are made for State Trustees to take control of all of your finances...

...at a time of recovery or graduating through to being well and fully recovered from that particular episode...that's the time when you're more reticent to make decisions on your [own] behalf and for those processes and procedures to be put through the network to have a strong defence...During that recovery phase after a hospitalisation...you're more adept at just allowing anything to take place on your behalf without being fully informed, fully briefed...”- Jordan (Consumer Consultant)

Lawyers’ sound understanding of the law as well as funding options, opportunities for negotiation with the police and the defences open to people with a mental illness, together with their impact on the client, is also crucial.

“there are...a lot of lawyers out there who don't understand fundamental things like what a mental impairment defence is and what the implications of it might be; who don't understand that if you push the boundaries of a diversion application then you may well be able to get diversion for someone with a significant history of priors and facing fairly serious sorts of offences.

Lawyers don't understand that there is a fairly flexible Special Circumstances Guideline for Legal Aid that will mean that someone they're working with probably could get Legal Aid funding. So there certainly seems to be a lack of understanding out there about what it is that can be achieved for clients.

[Further,] ...there are lawyers out there who don't bother pushing for charges to be dropped when it might be quite possible for that to happen. Lawyers who very readily go straight to a guilty plea for someone because they're likely to only get a good behaviour bond anyway, when they could actually avoid them having a record at all...[the lawyer has not thought] through the consequences of a record in terms of police checks and that sort of thing.

...[I have often heard] from people who are in prison who [say they] have been let down by lawyers, or who haven't been properly advised about the choice they have between going for a mental impairment defence or pleading guilty and being imprisoned...”- Julie (lawyer)

The need for strong and effective advocacy – both in terms of legal representation and non-legal support from other workers – was also highlighted, to ensure that decision-makers understood the impact of a person’s mental illness and other circumstances.

“...if decision-makers are properly informed about what people are struggling with and what they're dealing with, they're very often sort of blown away by the significance of it...[this] really just support[s] the view that people need adequate advocacy and access to expert evidence or evidence or support from support workers who really know them to communicate that stuff to decision-makers.” - Julie (lawyer)

Independent Third Person

An independent third person is a volunteer trained by the Office of the Public Advocate who can assist people with a mental illness or cognitive disability during police interviews, or when making a formal statement to the police.

The role of the Independent Third Person is not to provide legal advice, but to support a person, facilitate communication, and assist a person in understanding their rights.

The benefits of having Independent Third Persons present was emphasised by some police.

“...[in the first instance, the Independent Third Person is] a support mechanism for the individual...Because quite often a lot of the behavioural aspects are that they feel alone, they're vulnerable, and quite often that other person there also assists us to be able to make sure that we explain the processes, procedures to them.

Well, it's our obligation also to ensure that the Independent Third Person knows their roles and responsibilities and, in turn, passes that information back on to the individual. So, therefore, it actually improves our communication with the individual through that [Independent] Third Person.

It just provides...checks and balances...So I think a lot of members would find ...like it's very much just covering their backside to ensure that they've sort of followed [protocol] ...”- Tony (Police)

The training of Independent Third Persons is also an important consideration.

“Well, it's interesting, because I spoke to Autism Victoria, and their belief is that with the Independent Third Person that we actually need...[one] who is familiar with autism or Asperger's: that specific understanding.

Because, you'll have a situation where you could ask that person, “Do you hear voices?”, [and, they may respond], “Oh, yes, I do”. That's not voices imaginarily in their head, but it's hearing me asking the question. So they can be very concrete with their thinking.

So, I mean, maybe that's not so much an issue for me, but is I think a relevant issue for the Office of the Public Advocate as to what sort of training you give so that you understand.”- Sam (Police)

CHAPTER 4 -THE HEARING

Participants' experience of court rituals and environment

The experiences of participants relate to all aspects of the court process, from an initial appearance at a mention through to sentencing. The experiences of the accused person/defendants in the court environment revealed common themes. These included feelings of distress, and confusion when not understanding what was happening.

“As a person who suffers from paranoia at times, just having to go to a Court is a daunting sort of thing, particularly when you're in there and all these other people are heard before you...” **Joseph**

“(it) was very surreal. Most of the time my psychiatric state was so bad that I had no idea what was going on. It was like I was outside myself watching someone else. I think I was just bemused – the gowns and the wigs and the court guards with guns, right beside me. From what I remember of it, I thought it was funny.” - **Madeleine**

“I wish it wasn't so brief. I wish I understood. I wish they'd explain a bit more about the law. Because I've sort of been left in the dark a little bit.” – **Frederico**

Others described experiences of fundamental disrespect especially when judges / magistrates' spoke with advocates and ignored participants.

“...[albeit occurring in another jurisdiction, this example is highly relevant. I can recall] the Tribunal member who...looks at someone with a piercing sort of gaze and says, “What are you?,” meaning, “What kind of illness have you been diagnosed with...?”

And, this is an experienced Tribunal member acting in the Anti-Discrimination List at the Victorian Civil and Administrative Tribunal. So, those fundamental communication [and] respect...issues are very significant. That's an example of the sort of experience people have had in a whole range of hearings that I've been involved in.” - **Julie – (Lawyer)**

“...[I have unfortunately witnessed decision-makers] who are clueless and disrespectful and don't talk to the person or direct their attention to the person with the illness but only to their advocate.” **Julie (Lawyer)**

“I don't know if a lot of them [Magistrates] understand. It is kind of like, “Pull your socks up, or you go to jail”. “Don't do this”. “Take your medication, and everything

will be wonderful". And it's not that easy...because you don't realise a lot of stress can bring on illnesses...". - Theresa

"...[the Magistrate had] a misunderstanding of what it is to have a mental illness, to have gone down the path of recovery, to maintain wellness and wellbeing... I felt belittled...[she said], "I wish you well for the future, be of good behaviour..."... "..."You seem to be doing good work, I encourage that and I ask you to maintain good health."..." - Wayne

A significant difference between the court process and consumers' experiences in the health system is the lack of confidentiality in the former. Given the public nature of most Court proceedings, the disclosure of mental illness in the legal system will ordinarily involve a lack of confidentiality.

"...within the health system...information is dealt with in the strictest of confidence within the confines of treatment...and you are explained carefully that this information will be divulged upon your permission. ...in order just to get off a series of parking fines, you have to divulge to that court..... is recorded and also available [to] ...other members of the public, that in any other circumstances within a treatment regime would be considered to be the most confidential of information...". - Wayne

The issues that contributed to a negative experience apply equally to court users who are not experiencing mental illness. Issues surrounding lack of proper communication, respect and awareness of court process can serve to alienate all court users.

"...we have a mental health system that still can't deliver the type of outcomes that consumers, families, carers and friends are still trying to push for and work hard to get. [In addition] ...we've got...[the court] system that punishes you further...[with] a whole range of...legal jargon as well as a whole range of...bureaucracy that still can't deliver timely and respectful procedures and decisions. Just simply for...being a part of having a mental illness." - Wayne

In contrast to these negative experiences, some participants spoke of positive experiences in the court room, especially when judges who were more understanding of the experiences of people with mental illness.

"The problems for...[defendants with mental illness appearing before Court include that] the level of anxiety will be higher. Therefore the level of immediate comprehension and functional active involvement will be lower, so they must generally be anxious or hyper-anxious...and more anxious than the average person. They'll have more difficulty understanding it..." - Derek (Magistrate)

“When I was...[at]...[Court] I had a really nice Judge...He could see that my mental illness was driving me bonkers and I'd just had enough of it...

And he asked to get my forensic doctor on the stand...and my doctor just said, "Oh, basically, she's not going to get well, she's going to be a lifer and I can't see her getting better"...and the [Judge]...just went beserko at him saying, "How dare you"... "How do you know she's going to be a lifer, and how do you know she's going to keep on committing crimes?"

*...[the Judge] ignored the whole thing...and said [to me], "I believe you are going to get well. I believe even if you don't get well, I think you'll turn a different path and you'll go from committing crime..." - **Janet***

“Yes, I would say [that the Judge]...accepted that...[I felt] remorse; he accepted I suffered a depressive illness, obviously undiagnosed...he said, "Look, I find it wasn't premeditated, he acted as a man stressed and depressed, and not as a man in control".

*So, at the end of the day, I can read over that...in a way it makes me get through sometimes. - **Jerome***

*“See, I was very lucky with the Judge...[I had]...She was very interested with all the mental health stuff...Usually the Judges have got their mind made up before they even come into court.” - **Jim***

*“Well, I suppose...having a Magistrate who's more understanding...it seems so little about justice and all about these rules. And that's quite shocking and you don't feel like you're getting...your story [across], or getting to have your say...because the rules all manipulate you into a certain thing and...you can't actually say what it is you did or didn't do.” - **Lucy***

Some people had specific suggestions about how their experiences at court could have been improved.

*“It would be nice if they had like a special waiting area [for people with a psychiatric disorder. It would be good if there was]...a quiet room...Because most of the times I was pretty scared too. I mean I was unwell, but I knew I was in trouble, and I was scared out of my wits that I was going to get locked up for a long time. And they should do something to put your mind at ease, because I was scared out of my wits.” - **Rupert***

*“[I feel that Magistrates]...should be friendlier and they should say, “How do feel?”, and things like that. I mean, I had a couple that were friendly, but most of them were very sort of impersonal and distant...and most of them never said a word to me. They should try and be more personal and try and communicate more with the defendant who is mentally ill....” - **Rupert***

Views of advocates

As well as reporting similar experiences to those of participants, many advocates made mention of the failings of the mental health system which appeared to be the catalyst for intervention through the criminal justice system. There was concern expressed about the appropriateness of courts taking on assessment and treatment roles, especially when the public mental health system is limited in its capacity.

“...people's identity ought to be protected. There's no reason why the media can't report on court proceedings without identifying a person.

If there is a public interest in people knowing generally what's going on and what shortcomings there might be in the support systems or whatever, they don't have to know who a person is, so those things aren't inconsistent anyway.

I mean it certainly seems if it's good enough and important enough in matters under the Crimes Mental Impairment and Unfitness to be Tried Act for people to have suppression orders in the interests of their rehabilitation and treatment, logically it seems just as important in the Magistrates' Court where a person has a significant mental illness, their rehabilitation needs are just as significant, so there's just as strong an argument there for protection of their identity.

But that doesn't mean the media can't report about what's happened generally anyway if there is a public interest in knowing what's going on.”- Julie (Lawyer)

“...if we had a good Mental Health Service you probably wouldn't need...Magistrates trying to be psychiatric services, assessment services... “. – Cathy (Lawyer)

“...there's no way that we can give the Magistrates the power to divert people from the system back to the mental health system, because the mental health system won't pick them up and that's the problem...and...DHS don't want the Court saying, "You've got to provide this person with treatment" ... “. – Amelia (Lawyer)

“[Magistrates] ...are just efficiency machines. They just want you to get...in, get them out, giving as brief a synopsis as possible and shunt them off.

And...some of...[them] are terrible...They don't seem to understand that for these people, and for everybody who appears in court, it's a big deal...it might be just ho-hum for them...but if they just ram them through, then all the impact is lost.”

“The process itself, I imagine, is just completely bewildering and scary...they get their lawyer, and they're still just another sort of cog in the wheel...on the conveyor belt of being churned in and spat out.” – Cathy (Lawyer)

How mental illness is accounted for by the Courts - experiences of Magistrates and Judges

Of those interviewed all were sensitive to people with a psychiatric disability appearing in Court, but were perplexed by limited options for them as decision makers

Magistrates and judges commonly spoke of frustration in their role of dealing with offenders with a mental illness. Many referred to the lack of services available, and the fact that many offenders were repeatedly imprisoned due to the lack of other viable alternatives. This supports the proposition that the result of de institutionalisation has been an increase of prisoners with mental illness, and points to an increasing role of prisons in ‘warehousing’ mentally ill offenders.

Again, the relationship between the legal system and the mental health system is brought into question, with courts viewing their role as dealing with people with a mental illness when the person does something wrong.

In speaking with magistrates and judges we also return to the question of whether police are acting appropriately in charging some offenders, and bringing them into the criminal justice system.

*“...when you talk to most Judges or Magistrates, I think what they would say about...[the Mental Health system] is that the reason they...don't have faith in it...[is due to it not]...being resourced as well as it should be.
...I've heard a particular psychiatrist speak, who...said, “Well, you know, this whole area is just so badly under resourced that you have to wonder whether we are doing it properly”.” - Christopher (Judge)*

*“...I've had people on Community Treatment Orders (CTOs) who've come before the court, and they're actually not getting any treatment...And one case I was just so frustrated by the lack of – I mean she was a very difficult, difficult, difficult defendant, there's no doubt about that, and needed lots of help in a variety of areas....
...I was told that she was not that seriously ill that she would satisfy a requirement for any bed anywhere, and so she was just out in the community...
...She has ended up in prison in the past. I mean she's had adjourned undertakings, there's no way she could comply with a Community Based Order and Intensive Corrections Order. She's had suspended terms, she breaches them immediately, there are no exceptional circumstances, she's gone into custody...
...the impression I got from the whole process was that, "There's no bed available for her, so there is no place we can put her, so we're just going to leave her on the streets not complying with her Community Treatment Order. And what we kind of hope will happen is that you just lock her up and put her in jail where we can medicate her for a period of time and then she'll be well and she can go back onto the streets". “ - Meredith (Magistrate)*

“I think the difficulty that we've had up until now is the reluctance of mental health services to assist in the process.” – Sharon (Magistrate)

“I think that this whole area is very very difficult, because the courts have become the organisation that is responsible in a way for dealing with people who are doing wrong things even though they're ill. And the courts will think, “Well, we do have an obligation towards the community of protection, and we also feel great sympathy for

this particular person who is suffering a mental illness. How do we structure meaningful orders in these sort of cases?"

...And some of the people that come into the court are in fact dangerous...So, somewhere along the line that has to be managed, and if it's not being managed in any sensible way through the psychiatric institutions or psychiatric supports, then it's going to end up inevitably in the criminal justice setting...[Further], because of the repetition of the misbehaviour and the escalation of the seriousness of the offending, the person is going to be at risk of longer and longer jail terms.

They're not frequent, but they're the sort of cases that...burn everyone's fingers....

And, so, everybody does err on the side of caution because of these sorts of cases that people know about...

*...I've heard all sorts of different criticisms made of the system and why it's not working, but people say we haven't got a good [psychiatric] system and that's why the criminal justice system has had to step into the breach." **Christopher (Judge)***

"...I don't know what it's like to be mentally ill and go to court...I just try and treat them with dignity and a bit of compassion, but still try and maintain the solemnity of the court proceedings.

...I can imagine how scary it is and particularly if you've got a distorted reality and you are trying to cope with what's happening in your head and what people have put things in your head are telling you is happening, trying to manage all of those issues - I think would be extremely difficult...

*...there's a difference between treating people with mental illness with dignity and compassion but not letting them get off scot-free." – **Sharon (Magistrate)***

*"...[should not the] Department [of Human Services], and all the others who are critical of the criminal justice intervention...lobby vigorously for more resources to make the service more effective?" - **Christopher (Judge)***

*"...sometimes, if you're going to impose any sort of condition, the most effective condition is that the person continue what they're required to do under say an Order like a Community Treatment Order ("CTO"). A couple of times I've been asked to put someone on a bond, and I've been told, "Look, you don't have to worry about conditions, because they're on a CTO"."- **Christopher (Judge)***

*"I've formed the very simple view that people with mental illness will have to be dealt [with] very mercifully, and I make no apologies to anybody [about] doing that, because I've always said that they have to be treated - the State has treated them badly. What happens here, the police have to charge them, bring [them] to court, and the court is asked to warehouse them - to put them in prison." - **Frank (Magistrate)***

*"...what I try to do is defer sentencing to see what's in place; and, if I am satisfied that things are in place then I might dismiss a charge if it's a minor type thing." "- **Meredith (Magistrate)***

Diversion scheme

Magistrates revisited the fundamental issue of whether people with a mental illness should be charged and brought before the courts, or whether it is more appropriate to divert them away from the criminal justice system. Frustration was expressed at the need for police approval for diversion, and the lack of discretion of Magistrates.

“...one of the...most important reforms I think which should be made to the diversion system is that it's not subject to police approval: that Magistrates have the capacity to divert charges irrespective of what the police view is...linked to that is a need for Magistrates to be able to effectively just dismiss charges without diversion, rather than having to rely on police to withdraw them...

*...I think the fundamental thing really is appropriately broad discretion for decision-makers. A system where people can be genuinely diverted before the court's even involved; and, absolute discretion in the hands of decision-makers.” - **Julie (Lawyer)***

*“...diversion should allow people with mental health issues to actually utilise it again and again and again.” **Meredith (Magistrate)***

CHAPTER 5 – SPECIALIST MENTAL IMPAIRMENT COURT

The Assessment and Referral Court List (“ARC”) is a specialist court which commenced as a pilot in the Melbourne Magistrates’ Court in 2010. It is a specialist court which is specifically designed to meet the needs of people with a mental illness or cognitive impairment.

At the time that this study was conducted the ARC List was being proposed, and had yet to be established. What follows is the views of participants when questioned about their views of the proposed court.

There was a presumption amongst participants that a person would first have to identify with having a mental illness, or be willing to divulge that they have a mental illness in order to have their matter heard in a separate list. Disclosure of this nature is necessary to satisfy the eligibility criteria of the ARC List.

A common theme amongst participants was the stigma attached to a specialist list.

“...People are scared to say that they've got - you know, don't tell their lawyers, don't tell the Judge, don't tell anyone about the mental illness, because it's not going to get nowhere, and people are scared that they're going to have to do more time.” Ahmed

“[I think that there would be a lot of young people who would not go near the] ...mental health courts, because of the stigma attached to it.”- Abdul

“...in all honesty, the potential of a “Mental Defective List”...it really appals me...What worries me is the ultimate potential of what that List [could do], and who would have access to it...How far down the track do we know what it's going to be used for in five, ten years time?” - Albert

“ultimately in the eyes of the beholder and the beholder will be the people high up in the courts, the justice system and ultimately the gaols, it is a “Mental Defectives List”.”- Albert

“[Lots of people] ...don't feel comfortable when they've got to go and sit in the waiting room and speak to a psychiatrist, so why would they feel comfortable having to go sit in the court room and speak to a Judge that knows a little bit more about it than maybe they do?” - Jim

“Well, I guess the person has got to make a decision whether they want to bare their soul, basically, and say, “I didn't do it”, or “I did do it, and this is why I did it and this is a contributing factor”.

There are certain defences to many crimes that are committed, and mental illness can be one of them. But, it's not necessarily an easy road for them to go down either, because they've got to make other choices...one of those choices is about self-identification which, I think, everybody agrees is a pretty big call for them in the first place.”- Wes (Police)

Numerous participants raised concerns that there would be a requirement that they plead guilty in order to have their matter dealt with by a specialist court.

“[In relation to the precondition that you must plead guilty]: well, actually, when you're ill you do do it, that's the reality. But it might be differently to how they perceive what you're actually doing, to what they think you're doing...

...But see [if you plead guilty] ...they're trying to put it back on the patient that it's their fault...Where[as] a lot of times, if the psychiatric systems were a lot better, you wouldn't fall into doing this all the time...when a client or a patient has an illness, they're not functioning the same as everybody else...So, your thinking is irrational...Where[as], when you're well, your thinking is rational. You can see it's breaking the law; but when you're ill, it's different.” – Theresa

“The idea of pleading guilty doesn't sound right but who knows.”- David

“...I don't think a person who is mentally ill and is charged with something should be forced to plead guilty, especially if they haven't done it. I believe in a fair trial for everyone...Everyone's got a right to plead not guilty. If, in their own selves they know they didn't do it, [or] if they are mentally ill and can't remember [whether] they did it or not, they've still got a right to plead not guilty.” - Janet

Yes [it's]...a major difficulty [that to appear in the List you have to plead guilty] ...I don't understand why they'd have to plead guilty for that List to operate...I mean, why is it so restricted that it can only deal with people who have a mental illness and are pleading guilty? That's just again designed to pressure people into pleading guilty.

Everything in the friggin' court is designed to make people plead guilty, because it's expedient. And so, again, you're going to have - when you're explaining to clients about their options - you've got this nice comfortable List where you'll be considered, especially if you plead guilty or, even though we clearly can see you've got a defence, it's going to be a much harder longer road and you have to make the decision right now before you go anywhere. I mean, it's just not fair.. – Cathy (lawyer)

“Well, yeah, [I would feel differently if I was before a Mental Impairment List in the Magistrates' Court], because they'd sort of know what's going on.

Now you have to try and talk to the Judge, you've got to try and make him believe about what you're going through. But if they had one already there then he'd sort of know what's going on. Now you've got to try and tell them and it's up to them to

believe you or not. And he might say, "Yeah, OK, you're ill", or, "No, I think you're lying".

Yeah, I suppose for small offences it would be all right. You can't put everyone in gaol for everything." - **Drew**

One the benefits identified by some participants was that those working in a specialist list would have a greater understanding of mental illness.

"I suppose [that people with mental illness could better understand the Court system with]: a lawyer that understood mental illness; doctors who understood mental illness; and, Judges who understood mental illness." - **Eliza**

"...I reckon they should have a Court for mental impairment or psychosis or whatever, and then rehabilitation. Not just thrown in gaol. [The Judges]...need to know how to get people to get treatment before they do something...

...[In relation to the Drug Court],. I don't like sitting there and [having] everyone in there listening to what's going on. - **Phillip**

"[...the "Mental Impairment Court" should be"]...recognising mental impairments...[each] individual person's needs. That would be a good step in the right direction." - **Richard**

"[A "Mental Impairment List"]...sounds like a good idea; but when I was ill, I wouldn't have wanted to have anything to do with it because I thought that I was fine and everyone else was, you know, deranged. You know it's really hard, when you're ill part of the illness is you think you're fine, so that sort of thing is pretty useless unfortunately, unless your solicitor can do it on your behalf, put your name down or something." - **Rupert**

"I sort of think that sometimes people with mental illnesses don't know what's good for them. So, sometimes they need to be told what's good for them and...if they're not prepared to go along with that...they need someone to say, "No, this is what you need, you have to do this"...So to have something like that there for them, and so that they can be recognised as somebody with a mental illness, is a smart thing to do...

I don't see myself as somebody with a mental illness purely and simply because I can cope day-to-day, but because every now and then I just fly off the deep end, I just call them my "off days". Everyone has off days. Mine [are]...a little bit worse...I don't think I would be accepted onto that List purely and simply because I don't have a diagnosed illness. It's who decides that I go on that List or not. Obviously, you'd have to see a psychiatrist, and the psychiatrist is going to say, "What's wrong with you?" "I don't know, it's this, but they can't give it a name." - **Jim**

Yes, the "Mental Impairment List" ...- they [Magistrates] think they can specialise and give specialist consideration, and maybe it's more they're trying to be more hands on. I mean that's the down side of it, more of that interfering with people's lives, and the court sort of getting a finger on things and being another controlling aspect...

But I suppose, and the positive side is that they're trying to have Magistrates who are sympathetic, who do understand, who have some kind of specialist training, or specialist understanding, of the situation of people with mental impairment.

So, I mean that's at its best; and, at its worse, I suppose wanting to make sure that [for] people with mental illness that they keep a tight rein on them and that they're not committing crimes because they're all, you know, violent, and trying to commit crimes.

*...[further], you have to be very careful that they don't start interfering, that they don't become an added [agency of control], and you don't have orders where it's conditional that they [defendants] take medication and all that sort of stuff.” - **Cathy (lawyer)***

“...if it's a situation of having access to a range of other things that you couldn't in Court One or...if you're going to have a situation where it's going to happen once a fortnight...[and] you're going to have all the support services...yeah, [then] it makes great sense...

I don't see the point in having a List just for...the sake of a List, and I think...if you then start to have a Koori Court, then a Mental Impairment Court, and then you've got the street workers' [List], and...well then you start to think well, where does everyone sort of fit?

...I understand with the Koori Court because the Elders play a very big part [in the proceedings]...And, I see the value again...with the street workers, because they're coming from the same sort of catchment area and...you've got not only just your workers but Council and all the rest...

*...look, it doesn't have any great impact on police, but if you're asking me what the benefits are [of having a Mental Impairment List], I don't see what the benefit is.”- **Sam (Police)***

Some participants identified significant issues relating to the public perception of the list – that it may be viewed as a ‘soft’ option.

“...what is likely to happen with...[the establishment of a Mental Impairment List] is that the automatic response and assumption of [having the List will]...be, “Well, if someone's been involved in allegedly criminal conduct, it has to go to court”...and so you're going to lose the potential for matters to be...genuinely diverted at the earliest opportunity, and not get into court at all, and that's a very significant concern.

*...that's where a lot of energy and resources have to go: into avoiding matters getting into court in the first place. Like either avoiding people being charged, or diverting them very soon after they have been charged...I think [that] once there's a Mental Impairment List the automatic response is going to be, “Well, let's put it into the List and not worry about some creative, efficient, cheap, genuine diversion before matters even get into court. It will cost money.” I mean the money will have to go into establishing this structure and this process [being the Mental Impairment List] when there's no evidence that it's going to achieve anything particularly useful.”- **Julie (lawyer)***

“...for some people with a mental illness, they'll be not wanting to be on the List because of the way they feel identified by the List. But, you'll have other people who may have a much milder mental impairment of some description who might see it as very useful to be on the List, and may be they're genuine cases and may be they're not. But there could be people out there who think, “Well, this is potentially the avenue to a softer sentence of some sort, if I'm seen to be disadvantaged in some form”. So I suspect there's always a possibility of that happening, and that puts an onus back on to the courts.

But I think the bit that really concerns me is that it's got the potential...to devalue the List, because you could have an enormous swelling. I don't think any of us know how many people with [a] mental disability of whatever description are actually in the criminal justice system. We all suspect it's high, but as I said there would be plenty of people who have been around the courts long enough to know that if you can put yourself into a special category for some reason then you might get some preferential treatment.” – Wes (Police)

But the thing is that if you go into the Mental Impairment Court and you plead guilty, you'll still get some sort of a penalty, won't you?...it's not a get out of gaol free card? There'll still be some sort of penalty imposed? I mean every career criminal in Melbourne will start seeing a shrink and get on that List. I mean that's a dangerous possibility. I mean a career criminal might think right, I take bigger risks and commit bigger crimes, get on this Mental Impairment List and go to court and get a slap on the wrist.”- Charles

A considerable issue identified by participants was that of confidentiality. There is no confidentiality in the court process, and sensitive information that would otherwise be confidential can become public.

“...within the health system...[medical] information is dealt with in the strictest of confidence within the confines of treatment...and you are explained carefully that this information will be divulged upon your permission. ...[however], in order just to get off a series of parking fines, you have to divulge [medical information] to that court...[which] is recorded and also available [to be heard by] ...other members of the public, that in any other circumstances within a treatment regime would be considered to be the most confidential of information to be contained...strictly within the confines of what you actually sign when you go and gain employment on behalf of clinicians or treating team or treating doctors. So it's very difficult to walk around a court room and say, "Look by the way, what I've just told you, can you sign off a confidentiality agreement and give me an undertaking that you won't ever tell anyone about me today in this Court?" – Wayne

“...[the Mental Impairment List may be useful] if the court has the ability to clearly state to those that appear before that...List that the court views a person with a mental illness with total compassion and understanding in terms of the way in which these type of episodes can occur. [In addition, that]...these types of offences can

*occur within this particular setting, and that...[they] understand that you may or may not have insight into wanting to divulge your mental illness as such.
...[consumers should know] that [the List]...is completely confidential, that it won't be publicised, that...others that you don't wish to find out about this particular experience [won't obtain]...knowledge about [it]. ” - Jordan (Consumer Consultant)*

There is a considerable need that has been identified in this report, which is that the criminal justice system needs to more accommodating of people with a mental illness. The existence of a specialist list however does not necessarily work in a positive manner in addressing this issue. People with a mental illness will appear in other courts lists, and also through out the criminal justice system. A more significant issue which needs to be addressed is the manner in which the entire criminal justice system can be better placed to deal with mental illness.

*“The risks associated with a List...[include] the stigmatisation of the clients who are going there,...another very significant concern I have...is that it is a poorly thought through juggernaut that is rolling through the justice system in Victoria generally...
...[I'm concerned that it] will become a jurisdiction that doesn't get adequately resourced, where perhaps decision-makers who aren't seen to be qualified or appropriate in a whole range of other jurisdictions just get sent there so you're not getting...necessarily the best qualified most competent decision makers working in the List.*

...essentially...what needs to happen is that Magistrates, Judges right across all jurisdictions have the right sort of training but, more importantly, access to the right sorts of dispositions and diversion options. Because...people with psychiatric disability are going to be coming up everywhere...[so] that way there's not that risk that you're going to exclude a whole group of people who aren't going to want to access...[the Mental Impairment List].”- Julie (lawyer)

“The way I look at it, these days people who don't even use drugs...go to court and they say...they've got a heroin problem [and] that's why they do armed robbery...And the courts take under consideration that this person has been sticking a needle in his arm and he is hanging out, he's sick, so they take that under consideration. And that's a short term sickness, like 5 days, 6 days, where[as] ours [people with a mental illness] is for life...

The courts have to take this very seriously because everybody who is coming into prison these days has got mental health issues and the thing is, the judges don't know about it, the cops don't want to know about it - they don't care, they just want to put every kid in gaol because they've done a burglary or done this or done that. But, really, speaking to some of these younger kids in gaol, they haven't got an idea where they are or what's going on...They shouldn't be in prison.”- Ahmed

CHAPTER 6 – POST HEARING

A significant proportion of people in prison experience mental illness. As mentioned earlier in this report, it is estimated the 70% of people in prison have experienced mental illness. This can be unrecognised and undiagnosed, adding to the distress experienced. Participants gave accounts of their experiences in the prison system. What follows is a record of the experience of participants in the prison system.

Unrecognised mental illness in prison

“I've been in here [Port Phillip Prison for] 2 years, and I've seen a lot of people go to Thomas Embling; fair enough they got there, may have talked to a counsellor. But, I've seen other people that I thought should have gone there and haven't gone there. There's a big breakdown in the system, not only the court system, just the prison system alone. It's only going to get worse”- Abdul

I've noticed all these years that I used to get myself into trouble in prison so I could go to the slot and be left alone, because I couldn't handle my sickness. I couldn't handle the paranoia of other people...[and] the screws. I couldn't handle the paranoia and my illness in gaol...there is no help for you for your mental illness.

And, you know...I was bashing people to be left alone, to be put in a little cell on my own 23 hours a day for 2 years straight. I've done this for a year and a half 2 years straight in there and It's made me worse. In [many] ways, it's made my mental health worse...I'm a person with a psychiatric history, and I've been put in prison...I've been told, “No, don't try to go to Thomas Embling, because if you go there they're going to keep injecting you...if you go there, well your sentence is going to get bigger”.

And I've been put in gaol to deal with all this stuff, and all my mental health stuff. And, as people know...after spending a year and a half in the slot, a person's not there anymore. I mean I was thinking about suicide in the slot. I never got to the stage of suicide in my illness, I only got to the stage where [I had] paranoia, hearing voices and depression. When I was in the slot for a year and a half I started thinking about suicide, homicidal things, suicidal things, all these things and it's made my illness worse.

And when people come from the outside to visit me they go, “In some ways you have become worse, but in some ways you have become good”. If I wasn't in the slot, if I was in Thomas Embling, I would be getting the help I need. It's too late now. It's too late now, they've put me in prison and I've been in the harshest environments and it's hard for someone who's got a mental illness to go through these things and the system doesn't want to understand, they don't care.”- Ahmed

“I'd say probably 80% of the people in there [Boggo Road, Brisbane, 1992] had psychiatric illnesses; it's just that they're not in hospital. So what can you say? But actually on medications, I can't say that I saw a lot, because you don't see it anyway because you're in the cell when they're giving out the medications...”

But I mean nowadays when it comes to the mental health side of things in prison they don't seem to have, or they should have, a section where people are that have a mental illness. The only thing I know about is Ararat as far as this end of the world. I don't know how much better it's got over the years.” - Joseph

“Yeah, [during the 5 weeks that I spent in remand I was becoming more and more unwell].....No, [that wasn't picked up on]. They put me in the Acute Assessment Unit, and that was only because I'd been in there before...when I was being interviewed at the gaol I said, “Oh, the last time I was here, I was in the AAU”, and she said, “Okay, we'll put you in there again.”

Part of my illness was that I thought that the Police and the doctors were all sort of colluding against me...The Courts and the Magistrates and everyone, I thought they were all against me.”- Rupert

First diagnosis in prison

“[I was first diagnosed with schizophrenia in] 2000. [It happened] here, in St Paul's...prior to that, I'd spent nearly 20 years in custody without... anything. I was in “X” prison and I came back here [Port Phillip Prison] for a medical thing, and one of the psychiatric nurses was asking me questions at the Admissions, and he suggested that I go to St Paul's. I only had three months to go. I came here, and they pointed out that I'm probably schizophrenic...”- Billy

“Yeah, well...[I wasn't diagnosed until after I was sentenced]. I had a really rough time when I was first locked up. I tried everything to kill myself. I burned myself and cutting, and so forth...I was just in regular gaol, and I asked to see the psychiatrist and he saw me, and put me in here [St Paul's Unit], so I've been here for about 18 months. -Danny

“...I was suffering from severe depression, and I think I didn't...raise that in court...[It was picked up]...when I went to Melbourne Assessment Prison...because of my history, they knew about it.

...Because I was suffering from depression, and I had a work accident; and, then on top, I was suffering I think schizophrenia, I'm not sure. That's what I was told I was diagnosed [with] when I was in here.

Yes, [I think I was acting a little strangely, so then the people at MAP investigated things].

No, [when I first went to the Magistrates' Court, I didn't think to tell them that I suffered from a mental illness].” - Giovanni

Punishment

The placement of mentally unwell people in observation or protection cells can further add to distress, and is often described as punishment. It is of note that this correlates with the experience of those receiving involuntary treatment, who often relate to the experience as punishment (as described earlier in this report).

“...And the trouble is the system punishes you – you know whenever I feel really sick and think about killing myself – if you talk about it they put you straight in the observation cell.

*[That makes me] feel like I'm being punished. I came back from court and...the court rang here to say, “He's going to commit suicide”, and I come back and straight in the observation cell...it sort of doesn't make you want to be honest, and other prisoners...they want you to hurt yourself, they tell you how to do it.” - **Danny***

Personality disorder

“...not all people who have personality disorders are clinically sane when they're committing crimes. Because there's other things about a personality disorder – like I have other illness attached to the personality disorder. I have psychosis and depression. So, if I became really psychotic and I end[ed] up doing a rampage down the street or something, I'm still legally responsible because I've got a personality disorder...I fall between the gap and it's very annoying and I reckon it happens to a lot of personality disorder people as well.

... There's a lot of people going into gaols now who have personality disorders, and the gaols can't cope with them. They just don't have the facilities and even Thomas Embling, that's a female unit with 10 beds and the rest are male, there's not enough space there.

And, they don't really like taking borderlines in the first place in Thomas Embling, anyway; because they know it's a disorder that will last for years and years and years and they just can't make them well overnight. So, they don't really like taking people like that...I know, because I've tried to get in there when I was an inmate in the prison.”

*...I think the counsellors who are employed at the gaol should do more for the girls who have just come back from the gaol and going to the gaol, or the nurses or something. Something needs to be done. And they don't need to be punished by putting them in a wet cell. I mean if they clearly say to the nurse, they're going to commit suicide because of what time they copped from the court, then yes, maybe the wet cell. But if they're crying and really upset, that's no reason to put them in a wet cell...They're just really emotionally upset - and I wouldn't blame them.” - **Janet***

Criminal behaviour, and a link to lack of treatment

*“So, what I've heard [is that] a lot of people [are] ending up in gaol because if...[the psychiatric hospitals] didn't release them when they were ill and took them in when they were really ill, you wouldn't have so many going to courts and then gaol. Because...they let people escalate with their illnesses, and don't listen to carers and families, and leave them out...then they end up – half the gaols are full with patients that have got illnesses, because they've let it go so long, they get in trouble with the law, and end up in there.”- **Theresa***

“...when I got into the Melbourne Assessment Prison, I received better help than actually the services in town here...The help I received in the acute area was superb, compared to anything I've experienced [elsewhere]...

I found it safe upstairs, at the Acute Assessment Unit... We had nurses to interact with. Actually, the prison wardens were good, they interacted well; the doctors; ...the craft ladies who come in [the occupational therapists].”- David

Differences between prison and Forensicare (Thomas Embling Hospital)

“I've been in here [Port Phillip Prison for] 2 years, and I've seen a lot of people go to Thomas Embling; fair enough they got there, may have talked to a counsellor. But, I've seen other people that I thought should have gone there and haven't gone there. There's a big breakdown in the system, not only the court system, just the prison system alone. It's only going to get worse... In prison, yeah [lots of people manage to hide the fact that they are very unwell]. I don't know so much about outside, because I've been here for so long, but I think it boils down to money too and budgets and finances.”- Abdul

“I [am on remand and will] plead mental impairment... I'm hoping that [I will go to Thomas Embling]. I'm crossing my fingers, my toes, my eyes. They're all crossed...My lawyer really thinks that it's a good idea that I go to Thomas Embling because it is, but isn't, outside the gaol as such. He thinks that in that environment I would be more comfortable... I suffer [from] paranoid delusions and schizophrenia, and I hide myself away even when new people come onto the ward. I get scared, and...[my lawyer] thinks that environment would be a lot easier than staying in the gaol system...there's more freedom after you've been there for a while. There's outings and there's things and places you can go, and programs outside the system. And it's not just that. I think you get the pension there, which is fantastic, and that would give me a chance to save...I figure that could get me back to work or, upon release, I could have bond money for a residence. It would really give me a chance.”- Antonio

“I was remanded back to Dame Phyllis Frost, and I was there for 3½ weeks [for breaching bail]. ...I saw a psychiatrist [at Dame Phyllis Frost]...the first day I was in there. And they wanted me at Thomas Embling Hospital. So, about a week later, I was packed to go to Thomas Embling Hospital. ...A6 is the...special needs [area at Dame Phyllis Frost]. Thomas Embling is more relaxed. You do your own thing, and so it's just easier that you...[don't] have a cell to be locked into...[don't] have any muster, so you...[don't] have to worry about that, you could just relax there and look after yourself. And the people there, psychiatric nurses there were...they actually pulled up with you and had a chat with you...[to] see how you were going...I was able to do art work. There was craft there. If I was there longer I would have got into woodwork. That would have been good.” – Debra

*“[Thomas Embling is] ...more like a hospital-type feel; that's why my daughter is able to come along. Because she knows it as a hospital, she's seen me in hospital before and she knows mummy gets sick; so she was able to come and visit me, which was a real big help, a big support.” - **Debra***

“[When I was in court recently, my lawyer entered some material about my mental impairment] ...my lawyer has looked at it all...hundreds of pages starting from early [on] to where I am today mentally, and he...has read through these files regarding various different hospital systems...

I was very unwell [when I committed the present offence, so the defence of mental impairment was submitted] ...it means that I can be detained until such...time as they think that I'm ready to be back in the community. Yeah, basically, I still have rights, but depending on where I end up will decide on how much time...

I cope more in the hospital system than in a gaol system. I'm really uncomfortable in mainstream. [I've been told that my sentence] could be very much the same [whether I go to prison or to Thomas Embling]...it could be up to 25 years.

*...I was told that, if I am accepted to go through to Thomas Embling, they will not let me go until they were 100% sure that I'm going to be okay back in the community. And that's a good thing because they're not cutting corners, they're serious about helping.” - **Frederico***

*Thomas Embling is still an institution. It is not necessarily a nice place. People with mental illness should not be locked up but if we have to [be in such places, then Thomas Embling]...is better. It was better than the prison. We were still observed frequently ...this depended on our mental state.” - **Madeleine***

Chapter 7 - Conclusion

This project sought to explore the experiences of people with a mental illness in the criminal justice system. The research gathered from interviews with people with a mental illness as well as other stakeholders clearly indicates that people with a mental illness often found their interactions with the criminal justice system to be stressful. Individuals often describe themselves as feeling scared, daunted, and not understanding the process in which they find themselves. It is an experience which is more often than not characterised as negative.

It can be concluded that the approach that therapeutic jurisprudence aims to promote is not reflected in the experiences of people with a mental illness. People with a mental illness experience alienation from the criminal justice system, an alienation that we believe is greater than that experienced by other court users. People with a mental illness are particularly vulnerable as they may be unwell when they have their first encounter with the criminal justice system (which is usually with the police), and they may have been unable to access appropriate mental health services for some time.

Summary of findings

There is a lack of adequate knowledge surrounding mental illness among many in the criminal justice system, including some police, Independent Third Persons, lawyers, barristers and Magistrates, which results in:

- people with a mental illness not being recognised as having (including presently experiencing/being affected by) a mental illness;
- the undue attribution of individual blame for the alleged offending conduct, rather than recognising the lack of support services as a cause of such conduct;
- a reluctance on behalf of police to withdraw charges and a preference that matters go before the Courts;
- a reluctance to apply for diversion, or other programs outside the criminal justice system, where the defendant has a number of prior convictions;
- a reluctance by lawyers and barristers to use the defence of mental impairment, which is a complete defence in the Magistrates' Court, and accordingly should always be explored;
- the process of making a defence of mental impairment being unnecessarily protracted, expensive and traumatic to the person.

In addition to a lack of knowledge amongst professionals, the experiences of defendants with a mental illness can very often be negative;

- The present Court room experience is not designed to take into account the specific needs of people with a mental illness, with participants frequently finding the Court experience daunting.
- There can be a reluctance of participants to disclose their illness, or to recognise that they are unwell.

- A significant proportion of people interviewed (both consumers/defendants and others) did not view the proposed Mental Impairment List as being a necessary reform.
- Those who are acutely unwell are often easily identified by police and other professionals. However, there are numerous others who are not easily identifiable, and may still be experiencing significant distress, or are suitable for diversion, treatment, or a defence of not guilty on the grounds of mental impairment.

Issues regarding legal representation include:

- the inadequate availability and resourcing of Grants of Legal Aid and “second opinion” clinicians at Forensicare that in many cases effectively prohibits assessment of a person’s mental state;
- the lack of time for lawyers/barristers to see their clients to prepare the case and to explain the Court process;
- the lack of consistency of legal representation between Court dates;
- the lack of knowledge of mental illness on the part of lawyers and barristers.

These problems can result in multiple unnecessary adjournments

Increasing and improving training provided to service providers is essential in improving the criminal justice system, in order to improve basic understandings of the issues faced by people with a mental illness. However, effective changes can not be made by training alone. It is necessary to make fundamental changes to the criminal justice system, resulting in the diversion of people with a mental illness away from the criminal justice system. This can be done through the increased use of the diversion scheme in the Magistrates’ Court, and also through the increased use of police discretion not to lay charges. We believe that central to improving the experience of people with a mental illness in the criminal justice system, is diverting such people away from the criminal justice system in the first instance. We believe that it is essential that people with a mental illness are recognised as unwell when appropriate, rather than their behaviour being criminalised. The recommendations which follow support this conclusion.

Recommendations

Recommendations regarding police;

- Police need to receive ongoing training and support for dealing with people with mental illness. This is to enable them to assess a crisis situation involving a person with mental health issues and to seek guidance and intervention by specialist mental health workers.
- Police need to be encouraged to withdraw charges when there is evidence that the alleged offender was unwell at the time of the offence.
- There needs to be increased support and co operation between police and mental health service providers. The aim of such co operation can be for mental health practitioners to be called to emergency situations, rather than police being required to deal with people who are acutely unwell.

Recommendations regarding awareness and training of advocates and Magistrates;

- Lawyers, barristers and Magistrates need to be aware of the gaps in support and treatment in the mental health system. A lack of services can have the consequence of an individual failing to meet the conditions of a Court Order.
- There is a requirement for greater training to increase awareness of the defence of mental impairment among lawyers and barristers.

Recommendations regarding diversion, the defence of mental impairment and other pre-sentencing options:

- The establishment of a process whereby an application for diversion can be made by the defendant's legal representative. The appropriateness of such an application should then be assessed by the Magistrate with the Diversion Co-ordinator ensuring that all evidence is present and the matter is ready to proceed. The matter may be dismissed at this point or if not proceed as a diversion application. Further, unlike the current system of diversion, a plea of guilty should not be a necessary pre-requisite to a defendant accessing this system. Finally, the defendant having prior convictions should not necessarily preclude him/her from making such an application. If the matter is not resolved as a diversion then the option for entering a defence of not guilty on the grounds of mental impairment remains available to the defendant.
- Specialist legal advocacy must be available for pleas of mental impairment. Further, Legal Aid must be available, including to cover the cost of psychiatrist's reports, and appearing at Court.
- It should be recognised by Magistrates that, as the *Mental Health Act 1986 (Vic)* presently stands, it is neither their role to make orders as to the involuntary treatment nor the detention of defendants in relation to mental health treatment.

Recommendations regarding the person's experience of court process and preparation:

- The experience of the criminal justice system by a defendant with a mental illness needs to incorporate the following elements:
 - a quiet place at Court for lawyers and barristers to consult with their clients;
 - the Magistrate needs to evoke a semi-informal setting within the Court, ensuring that eye contact, expressions of respect and encouragement, and clear interest in the case are displayed to the defendant; and,
 - lawyers, barristers and Magistrates must have a particular awareness/training vis-à-vis mental illness, in order to ensure that the defendant has Court procedures explained to him/her in full; is properly able to give instructions; and, that all relevant medical and Case Manager reports are available.

Recommendations regarding further research:

- The ARC List needs to be assessed in light of the issues raised in this reports, including the requirement to plead guilty, the lack of confidentiality, the requirement to disclose a mental illness/diagnosis.

- An exploration of whether accused people/defendants believe that they have all options and their ramifications fully explained to them, including the defence of mental impairment and entry into the ARC List.

Recommendations regarding people with a mental illness in Victorian prisons

One of the more striking findings of this study was the prevalence and experience of people with a mental illness in the prison system. It has long been the experience of this Centre that people with a mental illness are over represented in the prison system.

The findings of this report indicated the following;

- Many people are first diagnosed with a mental illness after entering the prison system.
- There is a lack of proper provision of services for people with mental illness.
- Lack of awareness of the issues surrounding mental illness of services providers such as corrections officers.

It was beyond the scope of this study to fully explore the experiences of people with a mental illness in the prison system. As the project progressed it became apparent that the issues faced by people with a mental illness in prison were significant, and warranted their own investigation.

However, the findings of this project in relation to this issue have greatly influenced staff and the services provided at the MHLC. The Centre now auspices ‘Inside Access,’ a project which provides a civil law advice and casework service to people with a mental illness in two Melbourne prisons. The project also aims to expand into other prisons, and to conduct community legal education and policy work.

It is hoped that this study will strengthen the Centre’s work in advocating for those with a mental illness in the prison system, and lay the foundations for further policy work. It is anticipated that policy work will focus on the principles of decarceration, which is inherently concerned with the reduction of prison numbers, by addressing the causes of crime and recidivism.