

Proposals for a Mental Health Court/Mental Impairment List in Victoria

**Response by Mental Health Legal Centre Inc
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1. Introduction

The Mental Health Legal Centre Inc is a Community Legal Centre which has for 17 years specialised in legal advice, advocacy and promotion of the rights of people experiencing a psychiatric disability. We have considerable experience working with and representing people with psychiatric disability who are defendants in criminal matters, as well as working in many other areas of the law which impact on our clients. This submission is based on our own client's experiences, as well as consultation with a number of other legal practitioners with experience representing defendants with psychiatric disability.

We are keen to consult fully with people with a mental impairment on any proposed changes or new sentencing options - to allow them the opportunity to raise any issues of concern with the proposed process and identify areas which may impact on their lives. We are in the process of obtaining ethics approval from Department of Justice to conduct a series of focus groups with people within prisons, community corrections and at Thomas Embling Hospital, to focus on sentencing issues and identify problems as experienced by those dependent on treatment and support services.

With any proposed changes to the Courts or dispositions it is crucial to evaluate present sentencing options on the basis of what is and isn't working and preserve rights and optimise choices in developing new and creative sentencing options for people with a disability in the criminal justice system.

Given the prevalence of mental impairment amongst those appearing in the courts, and the inadequacy of current processes and dispositions we are certainly pleased the Government has identified this group as requiring attention. We are concerned, however, that a specialist problem solving court not be established without careful consideration of its consequences. The fact that such an approach works in relation to other groups does not necessarily mean it will be the best approach for this one – though some variation of it may well be. It is crucial that separate processes not result in second rate justice in terms of people's rights. It would be most concerning if people who would benefit from these specialist processes were excluded because the list is so segregated and/or stigmatising from the perspective of offenders. The stigma, which many people experience as attached to a label of mental illness is immense, and the fact that other specialist jurisdictions have not resulted in stigma does not mean this one, will not.

It must also be questioned whether compelling mental health treatment can properly be a function of the courts. In terms of accountability, expertise and the important processes for protection of involuntary patient rights under the Mental Health Act 1986, it possibly cannot. The Mental Health Act recognises that involuntary treatment is a serious infringement on people's rights and sets up a regime designed to protect against abuses. Criminal justice system dispositions must not implement de facto involuntary treatment without the corresponding protections. Reviews of mental health dispositions should include reviews of the necessity of treatment.

Without a proper evaluation of the failures of the present system, we are opposed to the introduction and the language of 'problem solving' Courts. We are concerned that people with psychiatric disability are perceived as 'a problem'. In fact what exists is a problem with disability and or mental health services, in their inability to provide adequately and appropriately for people with disability and prevent their involvement with the criminal justice system. Marginalizing justice to people with disabilities is no answer.

Ideally any magistrate or judge should be equipped to apply processes and dispositions most likely to prevent further involvement with the criminal justice system and best serve people's therapeutic needs. However, we do see the value from a practical perspective of a separate list and are generally supportive of the proposal that a specialist list, rather than a separate court, be carefully trialed.

We comment below on the specific issues relevant to such a list.

2. Prevalence

Any guess as to the numbers of this population can only be conservative. We know anecdotally of many clients who have never been assessed by the criminal justice system as having special needs, although known to mental health services, and in receipt of treatment. Often people will not disclose their illness because of shame or a real fear of victimisation and discrimination. In encounters with the criminal justice system we know that this discrimination may manifest as humiliation, ridicule or cruelty. It is of great concern to us that we don't create a system that involves a higher level of commitment and surveillance of people with disability, indeed a discriminatory system.

Professor Patrick McGorry, Professor of Psychiatry at Melbourne University argues the ubiquity of mental health in Australia is not known, that the statistic of one in five for people meeting the criteria for a mental health disorder or substance use disorder that has been used for many years is a substantial underestimate.

With more than a quarter of the prison population diagnosed with a psychiatric disability at some point in their lives, and the figure being much higher, around 70%, if mental disorder more generally is taken into account, psychiatric disability must have a reasonably high prevalence amongst those who are charged.

It is crucial that any specialist system itself recognises and addresses the full extent of prevalence. It is perhaps instructive that an analysis of the South Australian mental health diversion system found that 95.1% of participants were already listed as having involvement with a service provider or practitioner. Any system must pick up those who are undiagnosed or not receiving services at the time of offending, as it seems to us that there are a significant number of people whose disability is only first recognised (or the opportunity for its recognition presents itself) at the time of offending. This is further reason to avoid a system with strong formal segregation.

3. Definition of Mental Impairment

Any definition of mental impairment ought to be broad and flexible. It ought to include cognitive impairments such as intellectual disability and acquired brain injury, and personality disorder. For the purposes of involuntary treatment under the Mental Health Act 1986, it is

arguable whether personality disorders are covered by the definition of mental illness.¹ In our view, however, such disorders can be very closely connected to offending behaviour and such people should be entitled to the benefit of an approach focussed on treatment and support rather than criminalisation, provided, as we would advocate, involvement in the system is voluntary.

We appreciate the difficulties in determining eligibility for the list in terms of a connection between the event and the illness. However we suggest that appropriate evidence of a mental impairment and the associated difficulties should be sufficient. This is the approach taken in relation to the Enforcement Review Project Special Circumstances List which applies to PERIN Court fines. Our experience is that this list has set an exemplary standard for threshold requirements of evidence, non-intrusive assessment and diagnosis and a functional assessment in the context of case management with follow up support.

A mental impairment, although not necessarily florid at the time of the offence brings with it life style challenges which contribute to offending behaviour and must be understood as mitigating factors, eg homelessness, poverty, hunger, poor budgeting skills, inability to care for oneself, to cook or to maintain supportive relationships.

In light of the need to include those who are previously undiagnosed or untreated we would be concerned if the definition or eligibility criteria are unduly narrow – for example, requiring any previous contact with mental health services or relatively recent receipt of services. As well as newly diagnosed people, the system must recognise that it is not uncommon for a person to manage their illness and remain well for long periods, and many people have difficulty accessing any services at all.

There is also a difficulty in identifying some people because they are self medicating their otherwise undiagnosed illness with legal and illegal drugs. While we don't see any easy solutions, we raise these issues as arguments in favour of the list being as broad and inclusive as possible.

4. Inadequacy of Current Dispositions

4.1 General Dispositions

Possibly the most crucial issue, in our view, is the adequacy of dispositions available. Any magistrate or judge should have access to a range of outcomes which best recognise the role of impairment in offending and the impact any disposition will have on the person's future.

Diversion is always an option; police should be encouraged not to charge people or to withdraw charges when it is clear that their behaviour is symptomatic of their illness. The DHS practice of calling police to assist staff in supported accommodation settings needs review – these situations often result in charges. In our view in many of these circumstances particular when there has been property damage, staff have a duty to manage the situation, calling police only when they need such intervention.

Dismissal of charges, with or without conviction will sometimes be an appropriate disposition, given the relative lack of culpability, and inapplicability of deterrence, punishment or denunciation. Adjournments, with or without conviction, are often used appropriately, with treatment conditions attached. For example, we know of two cases in which a custodial

¹ MHRB Decision of P 03-130

sentence would have been utterly inappropriate. In both cases the defendants pleaded guilty. One involved a person who while experiencing either a toxic psychosis stemming from drug use, or a stress related reactive psychosis, killed his father². Another concerned a former Vietnam Veteran whose post traumatic stress disorder meant he suffered from a temporary belief that he was fighting for his life against an acquaintance he believed to be the enemy, and struck him repeatedly with a machete³. Despite the seriousness of the acts involved, the Court in these cases acknowledged that these people, though found guilty, did not act criminally but due to mental condition. Both people were placed on five year adjournments, with conditions that they receive regular psychiatric treatment. The reality, however, is that in many cases simply imposing a condition that a person obtain, or continue to receive psychiatric treatment, is not enough. Whilst the two cases referred to above are not necessarily examples, without adequate support, resources, and more holistic services, people may find themselves in a similar situation to that which brought them before the court in the first place.

As well as often failing to provide adequate support and rehabilitation, conditional CBOs and adjournments/bonds are often not ordered in the first place, and people are detained either in prison or hospital even though non-custodial orders would be preferable. One possible reason is that practitioners or sentencers may not be aware of the connection between the offending behaviour and the illness, or the sorts of conditions which may be attached to the orders which would be of benefit to the offender. Another is that there may not be sufficient confidence that the conditions attached will meet the objectives of rehabilitation and community protection if the latter is relevant.

There may also be a perception that dispositions so relatively low in the sentencing hierarchy are not appropriate if the physical acts committed by the offender are considered very serious by the general community. To meet these concerns, we believe there is a need for a specifically tailored disposition to fill the gap between the existing non-custodial dispositions and the only orders catering for people with psychiatric disability - Hospital and Hospital Security Orders. This disposition should be non-custodial and have as its objective rehabilitation and the prevention of re-offending behaviour, and be sufficiently resourced to actually achieve those objectives.

A particularly complex issue relates to the length of time for which it is appropriate for a court to mandate treatment. We agree with the view expressed in the discussion paper produced by the Office of the Public Advocate that careful consideration needs to be given to balancing the nature of the offence with the appropriate length of treatment or support program⁴. The order imposed must clearly be proportionate to the offence, and must be lawfully applied.⁵ However, where the objective is to avoid incarceration, it may be that it is a legitimate trade off for a person to be required to comply with treatment. In devising a new non-custodial order, or varying those that exist, scope for treatment conditions may give courts greater confidence to opt for a non-custodial option even in relation to very serious offences.

² R v Bryan Rutherford Lysk, Supreme Court of Victoria, Unreported 17 November 1995.

³ R v John Frederick Sandars, Supreme Court of Victoria, Unreported, 13 August 1996.

⁴ Office of the Public Advocate "Disability and the Courts: An Analysis of Problem Solving Courts and Existing Dispositional Options: The search for improved methods of processing defendants with a mental impairment through the criminal courts" pages 8, 39.

⁵ These sentencing principles for people with a mental illness are flexible and fair, as applied in Tsiaras [1996] 1 VR 398

Suspended sentences are generally considered to be an inappropriate disposition for offenders with psychiatric disability, as the threat of impending activation of the sentence is not generally an effective deterrent, and does not accommodate for offending behaviour which occurs whilst the person is mentally impaired. Accordingly, we believe little would be gained for people with psychiatric disability by tailoring suspended sentences, for example, by providing for a conditional suspended sentence akin to section 28 which deals with drug and alcohol provisions. The likelihood of clients breaching an order is high unless the mental health system is committed to providing them with a service.

The expanded use of deferred sentencing under Section 83A of the Sentencing Act may well be an appropriate model for a "post guilt finding" parallel of the modified diversion mechanisms we would advocate below.

What is most lacking from the current range of dispositions, however, is the capacity to appropriately divert people from the criminal justice system without a finding of guilt. It has long concerned us that Magistrates and Judges do not have the power to dismiss charges of their own volition before a finding of guilt, but have to rely on withdrawal by the police or prosecutor. Of course, the Criminal Justice Diversion Program approaches this position, and we consider it should be a crucial option for any mental impairment list or system.

Crimes (Mental Impairment and Unfitness to be Tried) Act 1997

In our experience the defence of "not guilty on the grounds of mental impairment" is not as widely used as it could be. This may be due to a combination of poor understanding by advocates, concern about the onerousness of achieving this finding (especially for less serious offences and where diversion is available) and reluctance on the part of defendants to have such a finding on their record. We have certainly had clients who have not wished to pursue that outcome, even though it would result in dismissal, for fear of the damage caused by the record of such a finding. It also appears that both the police and magistrates have difficulty accepting the final outcome, namely dismissal with no orders.

We are aware of the debate around amending the Act such that Magistrates can place people found not guilty on supervision orders in the same way the County and Supreme Courts can. In our view no such change should be made. It is clear that the legislature has decided for good reason that the defence of mental impairment is such that the Magistrate must discharge the person and cannot impose supervision orders. To ensure certainty in these matters s5 was amended under Forensic Health Legislation (Amendment) Act (July 2002). Given that any indictable charges can and invariably are elevated to the higher courts where a magistrate is concerned about the person's supervision and treatment, it is only summary offences which are of concern. Given that the finding is a defence, that minor offences only are relevant, and that the Mental Health Act 1986 provides a regime for involuntary treatment of people whose mental illness poses risk, the current position seems entirely legitimate. We would argue that the prosecution policy of applying to have all schedule 4 matters lifted to the County Court or indictable charges laid only after the mental impairment defence is proposed, is clearly aimed at subverting the legislation and ought to be prevented. It is also, in our view, a form of direct discrimination i.e. the charges are moved to the higher court only when a person with a mental illness wants to raise a defence of mental impairment.

We know of many situations where the police 'load up' charges against people with a possible mental impairment defence, with them being charged with indictable offences many months after initial summary and/or Schedule 4 charges. This is done in order to usurp the jurisdiction of the Magistrates Court and to avoid the consequences of s5 of the C(MIUT) Act. In negotiating matters with the Prosecution we are aware of the pervading view that 'these

people must be held accountable, they can't get away with it'. It is a bizarre situation when police are called to assess a person with a psychiatric disability, an incident occurs, the police transport the person to hospital for treatment, subsequently charge them with criminal offences arising from the incident and then oppose a mental impairment defence. This is a frequent occurrence and often results in the person being encouraged to apply for diversion, rather than a defence of mental impairment. For many clients it is a preferred option to returning to Court more than once to contest the charges. Often, however, diversion is not available if the person has had similar charges in the past.

We are deeply concerned by the prosecution's approach to mental impairment defences in the Magistrate's Court. The prosecution has no role in defining treatment for mentally impaired offenders. It is a high threshold for a person to successfully raise a mental impairment defence, particularly with the adverse approach by the DPP. In order to succeed evidence must be produced, this incorporates evidence of a CTO, a treatment plan, GSP or IPP, with these documents the Court can also be satisfied that on-going treatment will be imposed. In our view the criteria and definitions in the *Mental Health Act* are the appropriate place for these matters to be dealt with and it is for this reason that the legislation makes it not possible for the Magistrate's Court to add a further layer of control on a person who is essentially not guilty of any crime.

A major challenge of the C(MIUT) Act defence is how difficult it is to establish. Because it is such a very high threshold for people to meet, requiring extensive expert evidence, usually aggressively challenged by the prosecution, and the attendant cost and time. There are many situations where a person's mental state at the time of offending was such that this defence may have been met, but the difficulties involved in establishing it and the stigma of such a finding deter them from pursuing it. In our view an appropriately modified diversion scheme has great potential to provide a much more accessible, appropriate and therapeutic mechanism for such cases, as well as those where that onerous defence may not be able to be made out but the impairment is still highly relevant.

A further matter which needs to be addressed relates to findings that a person is not fit to plead in the Magistrates Court under the C(MIUT) Act. In the absence of a comparable provision for dismissal, the current approach on such a finding is to adjourn sine die. In our view this is most counter-therapeutic for people with precarious mental health, placing them in a position of considerable uncertainty. Express provision should be made for dismissal in these cases in the Magistrates Court also.

4.3 Bail

We are aware of the many difficulties arising for people with psychiatric disabilities in obtaining bail - because of limitations in terms of their understanding of the criminal justice system, the practical difficulties in being able to organize themselves to attend Court and the lack of supports available to them to ensure that criminal justice issues are properly addressed. (see comments below re need for specialist advocacy services)

Failure to appear may not be a deliberate attempt to obstruct the legal process but rather result from an inadequate appreciation of the necessity to attend, or inability to attend due to impact of disability. Reasons may include: poverty, transient accommodation, delusional thinking and thought disorder or chaotic thinking and planning, confusion about whether conditions are imposed by the criminal justice system or the mental health system and thus uncertainty about conditions.

We are appalled by the tendency of some courts to try to use bail conditions to mandate treatment and other matters. It is completely inappropriate for the court to require a person to receive treatment even before there are any findings against them. The Mental

Health Act is the appropriate place for such requirements. The Courts are often not aware of the limits of some services.. We are aware of a case, for example, in which the Court bailed a person with conditions that he attend an Area Mental Health Service for treatment for drug and alcohol dependence. The support workers did not believe this was their role and the person was breached on their bail conditions.

People with a psychiatric illness are further disadvantaged if they are unwell at the time of arrest, they are unable to instruct in a bail application and automatically denied bail. Incarceration of the person has extraordinary detrimental effects, it does not allow for proper assessment and treatment when immediate medical attention is required.

5. Criminal Justice Diversion Program

With some important modifications the current diversion system could provide a basis for the most useful of the dispositions the list, or indeed any magistrate or judge, would have access to. Its value lies in the fact that it recognises how destructive and inappropriate it is for many people to have a criminal record or any extensive involvement with the criminal justice system, and it allows the Court to refer the person to appropriate support and treatment and require compliance.

Much can also be learned from the Enforcement Review Project Special Circumstances List dealing with PERIN Court matters. This system has proven most accessible to service providers. Family members, case managers and medical practitioners are encouraged to make application and there is no cross examination with most evidence being produced well before the hearing. The coordinator takes hands on responsibility for the progress of each matter. Clients report that their experience in this list is positive and hearings are conducted in a courteous patient and respectful manner.

The modifications required to the Diversion scheme if it is to be optimally useful in a mental impairment list are as follows:

- Participation must not be dependent on the agreement of police or prosecution. Our experience is that many police have little or no understanding of disability, and are often of the view that these people need to be taught a lesson. We acknowledge the important role of police and prosecutors in the process, and the fact that they very often embrace and enhance the more therapeutic approach of this process. However, we have experienced situations where police have unreasonably and inconsistently refused diversion, in some cases where we believe the Court would approve it. Prosecutors and indeed magistrates are inconsistent in refusing or granting a diversion even when the police have said it is suitable. Another inconsistency is that while police may approve a magistrate may refuse which is correct, but if police refuse a magistrate cannot approve. The ultimate discretion must lie with the Court as it does now. Related to this is the need to give discretion over the content of conditions to magistrates, not prosecutors. Both the defendant and police should be able to suggest conditions, but the Magistrate makes the final determination.
- The general approach of the scheme, that it only applies to first offences, must be changed. We acknowledge that in some cases diversion has been achieved even though the person has prior convictions or cautions. However, it would be crucial that this be a more generally available option if the needs of people with mental impairment are to be met. The reality of a person's impairment may be that it leads to offending behaviour at more than one time in their life, but on each occasion the

impairment is just as relevant, and significant involvement in the criminal justice system or a criminal record are just as likely to cause their situation to deteriorate. In a very real sense the series of offences can be regarded as one offence with the same cause. When, as is usually the case, there can be no real benefit to the community or individual in a finding of guilt and conventional penalty, there is no reason why repeat offenders with mental impairment should not have access to full diversion.

- The option should not be limited to minor matters but include more serious offences that are triable summarily. We are not suggesting that any offence, no matter how serious, should be diverted. We are confident that magistrates and judges will exercise discretion consistently with general community expectations. But they should have complete discretion to apply the most appropriate remedy even if those cases are exceedingly rare. In this regard we support the recommendation in the Discussion Paper “Disability and the Courts” produced by the Office of the Public Advocate that, if public safety can be maintained, violent offenders should be eligible to participate on a case by case basis⁶.

6. Features of a Mental Impairment List

A crucial consideration is the name of any list. It is our view that “Mental Impairment List” may in fact be counter productive. We suggest focus testing the name of the list with those who may be eligible. We are acutely aware of the alienation of labelling and know from our own clients that some people will simply not enter a defence of mental impairment as they are concerned about the implications of that finding and the label. It is quite likely that ‘mental impairment’ list, if so named, is likely to turn people away. Though it may lack specific clarity, something such as “Special Circumstances List” may well be less stigmatising and accordingly more effective.

We believe a trial list should have the following features:

1. Voluntary opting in to the system.
2. Broad definition of mental impairment as discussed above.
3. The police or prosecution’s consent should not be required for eligibility to enter the list.
4. What might be described as a “pre and post plea” Model. This is in the sense that the list can make orders before or after a plea is made, and with or without a finding of guilt. It is not “post-plea” in the sense that the present diversion list requires a plea of guilty before a person can enter the list, (United States model) but in the sense that the list can apply its tailored processes and dispositions with or without a plea or finding of guilt. Alternatively the list may be entered pre plea and then the processes of the court are used to clarify the issues involved in each case e.g., whether a crime mental impairment defense is available, whether there is a substantial dispute as to facts and so the need for a contested hearing, acceptance of facts and diversion disposition, diversion not appropriate and so another disposition. This means that the decision about whether to go into the list is not predicated on outcomes. It means that the sole determinate for the list is whether there is a mental impairment. It

⁶ Office of the Public Advocate “Disability and the Courts: An Analysis of Problem Solving Courts and Existing Dispositional Options: The search for improved methods of processing defendants with a mental impairment through the criminal courts” pages 5, 23.

increases the likelihood of the right outcome for each case and the effectiveness of the process generally.

5. The Court should have the capacity to divert/dismiss without the person having to plead guilty (though they may agree to the facts), deal with an ordinary plea of not guilty and then impose appropriate mental health orders if a finding of guilt is made, deal with a plea of not guilty on the grounds of mental impairment, deal with a finding that someone is unable to plead due to impairment or deal with a plea of guilty. On findings of guilt, they should have access to all the sentencing options discussed above.
6. The defendant should maintain the right to negotiate charges, to have any charges set aside where the facts are not agreed upon, essentially a contest mention diversion hearing, as part of the process of a pre plea model.
7. The person's right to plead not guilty should be preserved if they fail to meet the conditions of a diversion or deferral disposition. We see no reason why the list cannot also conduct not guilty hearings, either on basis of facts or mental impairment or each in the alternative, so long as it is a different magistrate who conducts the hearings (as occurs with the contest mention system). Also if they elect to plead guilty on failure of diversion or deferral, they should have the option of remaining in the specialist list, as there may be considerable advantages in terms of a speedier more familiar process.
8. As discussed above, the diversion/dismissal options should not be limited to people with no priors or offences triable summarily.
9. People should be able to plead in the alternative if applications for diversion without a finding of guilt are unsuccessful. For example, they should be able to plead not guilty, or, in the alternative, not guilty on the grounds of mental impairment.
10. Practices must be adopted to ensure that records of determinations are not prejudicial to defendants. We understand that no accessible record is produced on diversion, but are concerned, for example, about the accessibility on a record of a finding of not guilty due to mental impairment. We suggest that nothing should appear on a person's record in such a case.
11. Failure to comply with conditions should never result in an outcome which is disproportionate to the severity of the offence, as recommended in the discussion paper of the Office of the Public Advocate⁷.
12. Anyone appearing in the list must have access to specialist state funded legal representation if unable to afford representation. In terms of the eligibility criteria usually applied by Victoria Legal Aid means should be the only consideration – the type of offence or “merits” in the usual sense should be irrelevant. Where participation is voluntary but the range of possible orders is complex and may include compulsory treatment for a period of time, and where impairment will always to some extent impede ability to self represent, this is crucial.

⁷ Office of the Public Advocate “Disability and the Courts: An Analysis of Problem Solving Courts and Existing Dispositional Options: The search for improved methods of processing defendants with a mental impairment through the criminal courts” pages 9, 29.

13. Advocates acting for people with disabilities must be fully informed and aware of the interface between service agencies to ensure that clients are not set conditions as part of any disposition and to alert the Court to gaps in service provision so that clients don't fall between these gaps and suffer consequences for inaction through no fault of their own.
14. Expert legal advocacy is essential with a consistent advocate available to assist the person throughout the court proceedings, thus if possible avoiding "fail to appear" charges and breaches of bail and other conditions. In our view, people would be greatly assisted in the criminal justice proceedings if the same specialist legal practitioner was able to act for them with all encounters with the criminal justice system arising from the charges. For example, a practitioner acting in a bail application may not act for the person in the next appearance. Bail conditions may not be properly explained to the person and those involved with the treatment of the person may be unaware of the conditions, and thus unable to assist the person to comply.
 - a. Police need to better communicate to lawyers the prevailing mental health condition of the person in custody, especially where the CAT team has been called. Frequently, there is contact between the police and defence lawyers when s464 rights are being upheld but limited information is disclosed, unless the lawyer is aware of the client's psychiatric history and adduces the information from the police, then they cannot properly advise the client.
 - b. Applications before the ERP, include evidence of a persons psychiatric disability attached to an application made by the defendant or their behalf by a legal representative, parent or guardian, social worker, case worker or disability worker, this evidence serves to assess the persons eligibility for the list. The Court ought refer the person to an appropriate advocate if assistance in making such an application is necessary (consistent with criminal matters now being referred to VLA or MHLC or other legal advocates).
 - c. All participants must also be funded to obtain adequate expert assessments and have those experts attend if required. The relevance of people's impairment may often not be put fully before the court due to lack of access to assessments by sufficiently experienced mental health professionals or specialist lawyers experienced in requesting reports.
15. There should be at least the same power to impose suppression orders as exists under the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997. Consideration should also be given to automatic suppression of identifying information – there have been a number of cases where there has been damaging identification of people under that Act before an application has been made by defendant's counsel for suppression. Identification is invariably stigmatising and anti-therapeutic and justifies a blanket exception to the principle of open justice. After all, reports of cases may still be made without identification. It is likely that the media will be unduly harsh on those they perceive as getting a lesser sentence, which will be counterproductive both to the person and towards people with disabilities more generally.
16. The list and services linked to orders must be adequately resourced. Mental health services are stretched, and people with a psychiatric disability have enormous difficulty accessing services they need. Anecdotally we are aware that risk of harm to

others is more likely to get a response from a CATT. Resources ought be directed towards maintaining mental health of people with psychiatric disabilities rather than only intervening at crisis point or point of offending. Unless support and treatment is adequately resourced to address the issues that are causing criminal behaviour then people will be in the untenable position of breaching conditions through no fault of their own. In this context we support the recommendation in the OPA paper that any failure to comply with a disposition should consider the role of the service provider⁸, as well as any other mitigating factors.

17. The Court itself will clearly need additional resources. This may be particularly in terms of expert knowledge of service availability, capacity to effectively assess ability of service providers to support a person, and, should legal aid funding for assessments not be universally available, access to specialists who can assess people not already receiving services or unable to pay.
18. Any reviews of condition compliance ordered by the Court must generally be minimal and recognise the responsibility of the service provider to ensure appropriate treatment and support is available. There is a very substantial risk that requirements to reattend court will be counter-therapeutic. As identified in the Office of the Public Advocate discussion paper, an approach based more on positive rewards than sanctions would have significant benefit. Reviews must also focus equally on the responsibilities of service providers as the compliance of defendants.
19. Reviews must include opportunity to challenge the need for ongoing treatment or to seek a change of treatment, comparably with the role of the Mental Health Review Board. Consideration could also be given to giving the Board jurisdiction to review treatment, though it probably makes more sense that this function remains with the court which has required compliance.
20. Any conditions must allow for the person to go off treatment for a psychiatric disability, to appeal against such treatment if it is no longer deemed appropriate and to complain against inappropriate care and treatment. Conditions must allow for the person to become voluntary participants in the care of their illness if they no longer satisfy the criteria of involuntary detention under the Mental Health Act. It is crucial for all participants to have a clear understanding of the interaction between the mental health act and any disposition of the court, their rights under the Mental Health Act and the processes for detention and revocation under a Mental Health Act order.
21. Processes need to be established which minimize delays and unnecessary court appearances, both of which can be extremely counter-therapeutic. For example, the prosecution's right to cross examine has caused matters to be adjourned to arrange the attendance of the authors of the report; this at the expense of a client's liberty. The problem arises because defense usually provides the prosecution with a report on the day of the hearing. Reports ought be obtained at the earliest possible time and provided to prosecutors within a reasonable time prior to the hearing of the matter with a cover letter seeking advice as to whether cross examination is required.

8. Conclusion

⁸ Office of the Public Advocate “Disability and the Courts: An Analysis of Problem Solving Courts and Existing Dispositional Options: The search for improved methods of processing defendants with a mental impairment through the criminal courts” pages 8, 38.

Whilst broadly supportive of the trial of a specialist mental impairment “list”, we also believe that, if it is not accompanied by appropriate dispositions, resources and legal advocacy it will fail. It is also crucial that measures be introduced to ensure it does not become a ghettoized or sub-standard form of justice, or a form of involuntary mental health treatment without the necessary safeguards of people’s rights.

Crucial is the process and resourcing of any trial. It is important that a sufficiently qualified and representative steering group have oversight. Members of such a group must include Consumers, experienced advocates and representatives of service providers, police and the courts.

If its true focus is diversion from the criminal justice system of people whose issues are of health and service access, not criminality, it will be of immense benefit. We look forward to participating in its development.

