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Mental Health and the Judicial System

Arafmi Breakthrough Series

by

The Honourable Wayne Martin
Chief Justice of Western Australia

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Introduction

It is a particular pleasure to have been invited by Arafmi to address the topic of mental health and the judicial system. There are two reasons for this. The first is that the topic is not only of vital importance, for reasons which I will develop, but also has a contemporary resonance, as a result of increased public awareness. A number of factors have contributed to this increased public awareness. They include the creation in this State of the Department for Mental Health, and the appointment of a Commissioner and a Minister for Mental Health, the latter with Cabinet status, and the appointment of a Federal Minister for Health. All sides of politics have come, perhaps belatedly, to recognise the importance of mental health issues in our community, and the resources available to address those issues have been substantially increased in both State and Federal budgets. The advocacy of organisations like Arafmi and some articulate and influential Australians including most notably last year's Australian of the Year, Professor Patrick McGorry, have also increased public awareness. And on a less positive note, earlier this year in this State public attention was drawn to a case in which our systems failed to deal fairly and justly with an Indigenous man with intellectual disability who came into contact with the criminal justice system.

Arafmi

The other reason why it is a particular pleasure to address this topic at Arafmi's request is that I have been proud to be the Patron of Arafmi WA for more than five years now. Arafmi WA supports over 2,000 carers in Western Australia with counselling, self-help support groups, education, information and advocacy. Carers are a vital component of our systems of support for people with mental impairment. The significance of carers within that system has been recognised by the *Carers Recognition Act 2004* (WA), which incorporates the Western Australia Carers Charter and requires key organisations to take all practicable measures in order to comply with the provisions of that Charter. Those provisions include the requirement that carers must be treated with respect and dignity, and their role recognised by including carers in the assessment, planning, delivery and review of services

that impact upon them and their role. The Act also establishes a Carers Advisory Council which has a range of functions, including working to advance the interests of carers and promoting compliance with the Charter. This legislation was the first of its kind in Australia and has encouraged other Australian jurisdictions to follow suit. Through my role with Arafmi I have come into regular contact with those who have shouldered the enormous responsibility of caring for a person or persons with mental impairment. They have made me very aware of their grave concerns about the possibility that the persons for whom they care might come into contact with the justice system. In this paper I hope to identify some of those concerns, and to address the ways in which they might be alleviated.

Traditional owners

Before proceeding to address these important issues, it is appropriate that I acknowledge the traditional owners of the land upon which we meet, the Wajuk People who form part of the Noongar people who are the traditional owners of the south-western part of Australia. I wish to pay my respects to their Elders, past and present and to acknowledge their custodianship of the land. As we will see, unfortunately Indigenous people are over-represented amongst those with mental impairment and who intersect with the justice system.

Mental Impairment

It is appropriate to commence by identifying the various conditions which I will group within the expression 'mental impairment' for the purposes of this paper. First, I would include intellectual disability. Because of the complexity of court processes and the issues that arise in our court system, I would take a slightly more expansive approach to the notion of intellectual disability and include within that expression anybody with an IQ of 80 or less (rather than 70 or less, which is more generally adopted for a variety of other purposes). I would also include the various other forms of cognitive impairment, including dementia, Alzheimer's disease, neurological conditions resulting in disability, and the various conditions associated with Foetal Alcohol Spectrum Disorder (FASD). I would also include the various forms of mental and psychiatric illness

including schizophrenia, psychosis, bi-polar disorder, paranoia, and depression, including post-natal depression. For criminal justice purposes, the significance of these conditions is that unlike intellectual disability or cognitive impairment, psychiatric illnesses can often be treated or at least their symptoms contained by forms of treatment including medication.

Under-diagnosis

One of the major problems faced by the criminal justice system in dealing with offenders with mental impairment is the lack of any generally applicable screening mechanism likely to identify those who suffer from any of the conditions to which I have referred at their point of entry into the criminal justice system. It is inevitable that many who suffer from these conditions are not recognised as such by our justice system. The phenomenon of under-diagnosis of these conditions is also well recognised in the literature. As an example, the anecdotal information provided to me by our regional magistrates and by medical practitioners in some of the regions of our State is to the effect that FASD is likely to be suffered to some greater or lesser extent by a significant number of those, particularly younger people, who are coming before the courts in those parts of our State, although there is seldom a formal diagnosis (indeed diagnosis of FASD is problematic in the most ideal clinical conditions). One of the symptoms often associated with FASD is impaired decision-making ability, including in particular an inability to foresee the likely consequences of one's actions. That is of course a characteristic which is inherently likely to predispose a person to offending behaviour, and to bring them into contact with the justice system.

Over-representation

Because of the lack of any general screening mechanism at the point of entry into the criminal justice system, and the issue of under-diagnosis to which I have referred, it is difficult to make any accurate estimate of the extent to which those with mental impairment intersect with the justice system. However, such evidence as we do have points strongly, and inexorably, to the conclusion that those with one or other of the conditions to which I have referred are significantly over-represented within our criminal justice system.

As my colleague Justice Michael Murray pointed out in a recent paper,¹ at any given time, a little over one-third of all those incarcerated within Australia and New Zealand will have been diagnosed as suffering from one or more of the various conditions which I have grouped under the heading 'mental impairment'. Because of the under-diagnosis to which I have referred, various commentators opine that the percentage of those actually suffering from one or more of such conditions is likely to be 50% or more of the prison population.

That view is reinforced by research carried out in New South Wales 10 years ago by Butler & Allnut². In their study, approximately 1,500 prisoners were assessed by mental health professionals using formal psychiatric screening instruments. The sample of prisoners was drawn from both the sentenced and remanded populations. The study found that 74% of those assessed suffered from at least one psychiatric disorder in the previous 12 months compared to a prevalence of 22% in the general population for the same period.

Turning to intellectual disability in particular, Kenny et al³ observed that in 2003, the Australian Institute of Health and Welfare estimated the prevalence of intellectual disability in the general Australian community to be 2.7% whereas in contrast, another study from the same year found that 17% of young offenders in New South Wales youth correctional centres had an IQ below 70. Doctor Effie Zafirakis⁴ notes that New South Wales data indicates that intellectually disabled offenders comprise at least 13% of the New South Wales prison population, which is four times that of the general population. Kenny's study showed that Aboriginal young offenders were significantly more

¹ Sentencing and Dealing with Mentally Impaired Offenders - paper delivered to Supreme and Federal Court Judges' Conference, Wellington, New Zealand, January 2011 - Justice Michael Murray, Supreme Court of Western Australia.

² Butler A & Allnut S, *Mental Illness Among NSW Prisoners* (Corrections Health Service 2003).

³ Kenny T and Frize, 'Intellectual Disability, Aboriginal Status and Risk of Re-offending in Young Offenders on Community Orders' (May/June 2010) 7 (18) *Indigenous Law Bulletin* 14 - 18.

⁴ 'Curbing the Revolving Door Phenomenon with Mentally Impaired Offenders: Applying a Therapeutic Jurisprudence Lens' (2010) 20 *Journal of Judicial Administration* 81.

likely to have an IQ below 70 than those who were non-Aboriginal. Richards⁵ notes that a recent study of 800 young offenders on community-based orders in New South Wales found that the over-representation of intellectual disabilities was particularly high among indigenous juveniles, and that juveniles with an intellectual disability are at a significantly higher risk of recidivism than other juveniles.

Is there a causal connection or simply the product of disadvantage?

There is a live debate in the academic literature on the question of whether there is a causal relationship between mental impairment and offending behaviour, or whether mental impairment is associated with other factors which are in turn associated with increased offending. As Edgley⁶ observed, the mentally impaired suffer from increased incidence of child sexual abuse, poor educational outcomes, unemployment and poverty. These factors are significantly correlated with offending behaviour. A similar observation has been made by Steele⁷ to the effect that people with intellectual disability are disproportionately represented in the legal system due their vulnerability to factors such as poverty, violence, social isolation, discrimination and exploitation. Vanny et al⁸ observe:

Social skills deficits, communication difficulties and common factors such as homelessness, poverty, unemployment, alienation, drug and alcohol abuse, sexual victimisation and dysfunctional childhood experiences may exacerbate the susceptibility of a person with intellectual disability to exploitation and offending behaviour (Cockram, 2005). Factors associated with offending among people with intellectual disability are poor judgment or impulse control, difficulties with interpersonal relationships, attention seeking behaviour, inadequate day to day management skills, general functioning and interpersonal difficulties exacerbated by substance abuse, levels of poverty and disadvantage, peer pressure exacerbating impulsive behaviour, and boredom.

⁵ *What Makes Juvenile Offenders Different from Adult Offenders?* (Trends and Issues in Crime and Criminal Justice No 409) Canberra, Australian Institute of Criminology, February 2011.

⁶ *'Common Law Sentencing of Mentally Impaired Offenders in Australian Courts: A Call for Coherence and Consistency'* (2009) 16:2 *Psychiatry, Psychology & The Law*, 240.

⁷ Steele L, *'Representing Clients with Intellectual Disability'* (November/December 2007) 83 *Precedent*, 10 - 14.

⁸ Vanny K, Levy M and Hayes S, *'People with an Intellectual Disability in the Australian Criminal Justice System'* (2008) 15 *Psychiatry, Psychology & The Law*, 261 - 271.

Other factors have been suggested by Gray et al⁹. People with an intellectual disability may be more likely than other people to appear in the criminal justice system as:

- they may be more easily caught in the act or left 'holding the bag';
- they may be susceptible to being exploited by others as an accomplice;
- their intentions may be misunderstood;
- they may express sexuality in a naïve and unacceptable way;
- intellectual disability may be associated with other organic disorders which result in impulsive and unpredictable behaviour.

In addition to their predisposition to factors which are often associated with offending behaviour, it seems very likely that people with mental impairment are at such a disadvantage in the criminal justice system that outcomes are more likely to be unfavourable. In a report published by the New South Wales Ombudsman¹⁰, it was observed that:

Research and inquiries over many years have established that people with an intellectual disability are over-represented as offenders in all aspects of the criminal justice system. They are more likely to be arrested, questioned and detained for minor public order offences. They are more likely to receive harsher penalties and have less access to sentencing options available to other offenders. They may experience disadvantage when interviewed by police or when in contact with court because they don't understand what is happening and what is being said. They are often highly vulnerable in prisons because of their disability. They have higher rates of recidivism than the general prison population.

Dr Judith Cockram, of Edith Cowan University, has conducted significant research into these issues in Western Australia, and has published extensively in this field. In a longitudinal study which compared imprisonment rates and profiles of prisoners with intellectual disability compared to other offenders, she concluded that more than one-third of all individuals with an intellectual disability who were charged with a criminal offence were given a custodial sentence, compared with only 13% of the non-disabled arrestees. In

⁹ Gray A, Forell S and Clarke S, *Cognitive Impairment, Legal Need and Access to Justice* (March 2009) Paper 10 Justice Issues Law and Justice Foundation of NSW.

¹⁰ NSW Ombudsman, *Supporting People with an Intellectual Disability in the Criminal Justice System: Progress Report* (August 2008)

addition, her research revealed that 16% of individuals with intellectual disability arrested for the first time were given a custodial sentence compared to 7% of offenders from the general population. Her review of other Western Australian studies caused her to conclude that:

While people with an intellectual disability are no more likely to be arrested than others in the population, at first arrest, they are more likely to be charged with more serious offences, receive disproportionately more severe sentences, are four times more likely to be sent to prison, and are significantly more likely to be rearrested than cognitively unimpaired offenders.¹¹

Other aspects of disadvantage suffered by the mentally impaired within the criminal justice system have been identified by Hayes¹² who observed that the over-representation of people with intellectual disability in prisons may occur as a result of the following factors:

- (1) The rate of offending in this group may be higher than for non-disabled peers.
- (2) A greater proportion of the group with intellectual disability may be found guilty, owing to inability to understand the right to silence, false confessions or vulnerability during police interrogation.
- (3) Individuals with intellectual disability may be known to police and may be charged more frequently by police.
- (4) This group may reoffend more frequently, so that over-representation may be 'boosted' by short repeat sentences.
- (5) These offenders may receive custodial sentences more frequently because of the nature of the offence, their presentation in court, the misapprehension that they are likely to be violent and dangerous, or the lack of alternative dispositional placements in community based sentences.
- (6) This group may be more likely to be remanded in custody, perhaps as a result of previous breaches of bail conditions, or lack of resources (financial and residential) and community ties enabling them to obtain bail, or inadequate supervisory arrangements which do not satisfy the court's requirements for security and protection of the community.

¹¹ Cockram J, 'People with an Intellectual Disability in the Prisons' (2005) 12(1) *Psychiatry, Psychology & The Law*, 163

¹² Hayes S, 'Intellectual Disability' in Freckelton and Selby (eds) *Expert Evidence* (2010)

- (7) The higher prevalence of mental illness among accused persons and offenders with intellectual disability may be a factor in recidivism and longer sentences.

Over-representation of victims

A number of writers have pointed to the over-representation of people suffering from mental impairment within the group who are victims of crime, although there is, unfortunately, limited data available on this topic¹³. According to the Disability Council of New South Wales:

It is widely reported that people with disabilities are over-represented as victims of crime, especially as victims of violence, fraud and sexual assault.¹⁴

Other authors have attributed this over-representation as victims to the vulnerability of those suffering disability, and their dependence on other people and services¹⁵.

Disadvantage within the court system

In attempting to assess the factors contributing to the over-representation of people suffering mental impairment in the criminal justice system, I have already referred to a number of aspects of the disadvantage which such people suffer within the court system. It is, however, necessary to return to that topic in order to assess the adequacy of the current systems intended to address those aspects of disadvantage.

Mental impairment is likely to place a person at significant disadvantage at virtually every step in the criminal justice process. As has already been noted, such persons are more likely to be known to, or to come to the attention of police. When interrogated by police, significant questions may arise in relation to the fairness of any admissions that might be obtained in the course

¹³ Hayes, above

¹⁴ Cited in Gray *et al*, above

¹⁵ Goodfellow J and Camilleri M (2003) *'Beyond Belief, Beyond Justice: the difficulties for victims/survivors with disabilities when reporting sexual assault and seeking justice'*

of such an interrogation. If arrested, people with mental impairment are likely to be at a disadvantage when the issue of bail arises because of instability of accommodation and employment, and perhaps because of prior breach of bail conditions. Such persons are also likely to be at a disadvantage when obtaining legal advice, initially in securing legal representation, then if representation is secured, in providing adequate instructions to the legal advisor, and then in comprehending the advice given. Although I do not diminish in any way the great work done by the Mental Health Law Centre, its primary focus is upon the provision of legal advice and representation to involuntary patients, and it lacks the resources to represent the thousands of mentally impaired accused brought before courts across our large State. When called upon to enter a plea, a mentally impaired accused may have difficulty comprehending precisely what is involved, and the consequences of the adoption of a particular position. And in the course of any trial or sentencing hearing, such persons are also likely to be at a significant disadvantage comprehending the complex practices and procedures which are often involved in the court process. These difficulties can be as basic as difficulties in remembering the times of appointments with legal advisers, or in remembering court dates and times, which may predispose such persons to inadvertent breach of bail. And if required to give evidence in their own defence, mentally impaired people are at an obvious disadvantage.

From this very short analysis it can be seen that the aspects of disadvantage suffered by mentally impaired persons within the judicial system are both multifaceted and profound. The over-representation of such people within the justice system means that this disadvantage is not rare and occasional, but is an every day occurrence in many courts across Western Australia. Further, because of the lack of any general screening mechanisms and the phenomenon of under-diagnosis to which I have referred, it is also likely that on many occasions, the disadvantage will not be detected, and therefore not addressed in any way.

The *Criminal Law (Mentally Impaired Accused) Act*

Apart from the limited diversionary programmes to which I will shortly refer, the only arrangements that exist within our State dealing with these problems are those made pursuant to the provisions of the *Criminal Law (Mentally Impaired Accused) Act 1996*. However, that Act only applies to a tiny proportion of mentally impaired accused coming before the courts, being those who are not mentally fit to stand trial, or who are found not guilty on account of unsoundness of mind, or who are found by a court considering the question of bail to be suffering from a mental illness which requires treatment in order to protect the health or safety of the accused or any other person, or to prevent the accused doing serious damage to any property. And because of the draconian consequences of a finding of mental impairment, the Act is usually only invoked in the most serious cases.

As I and others have previously pointed out, there are a number of problems with this legislation which should receive the attention of government. First, the Act provides that where a court makes a custody order in respect of a mentally impaired accused, that person is to be detained in either an authorised hospital, a declared place, a detention centre or a prison, as determined by the Mentally Impaired Accused Review Board. However, placement of a mentally impaired accused in an authorised hospital will only be appropriate if the person has a treatable mental illness. In the case of intellectual disability or cognitive impairment which is not susceptible to treatment, placement in a hospital would not be appropriate and, because no place has ever been 'declared' under the Act, the only alternative is prison. Although attention has been drawn to the lack of a declared place by agencies, including the Commissioner for Children and Young People, the Mentally Impaired Accused Review Board itself, and by me in a decision which I made (*The State of Western Australia v Tax* [2010] WASC 208), there is still no place declared under the Act to which mentally impaired accused can be sent as an alternative to prison, although I understand that active consideration is being given to the declaration of an appropriate place.

Second, if a court decides that an accused person is not mentally fit to stand trial and is not likely to become mentally fit to stand trial within six months after that finding, the court has only two options available to it under the Act. The first is to make a custody order which will, in almost all cases, mean that the accused person will be imprisoned indefinitely. The only other option is to make an order dismissing the charge and releasing the accused person. As I observed in *State v Tax*, there will be cases in which it would be highly desirable for the court to have other alternatives available to it, including a release order subject to conditions - for example, requiring the accused to undertake treatment, or to reside at a particular place where support might be provided, or perhaps refrain from attending places at which the accused person may be at greater risk of offending behaviour. The choice between indefinite imprisonment on the one hand or unconditional release on the other is a particularly blunt instrument for dealing with the variety of circumstances and the variety of conditions with which a court may have to deal under the Act.

Third, because the effect of a custody order under the Act is to place the accused person in indefinite detention, there is a very real prospect that such a person might remain in custody for longer than if they had been convicted of the offence or offences with which they have been charged. Regrettably, this prospect is not fanciful - it has happened. Earlier this year, the case of Mr Marlon Noble received appropriate public attention after it was revealed that he had remained in prison, pursuant to an order made under the Act, for a significantly longer period than he would have been incarcerated if convicted of the offences with which he had been charged. The Holman Review of the Act recommended a legislative provision to the effect that a person could not be detained in custody pursuant to an order made under the Act for any longer than the maximum period applicable to the offence with which they had been charged. Given the sometimes high maximum penalties for offences which in many cases would never realistically be imposed, for my own part, I would have thought it preferable to have a provision to the effect that a person could not be detained pursuant to a custody order made under the Act for any longer than the period to which they would likely have been sentenced if

convicted of the relevant offence. The judicial officer making the custody order could fix a maximum period for the order by reference to an estimate of the sentence that would have been imposed if the person had been convicted. Unless some procedure like this is introduced, there is a very real risk that people like Mr Noble will be imprisoned because they are intellectually disabled or mentally ill. People whose mental illness renders them a risk to the safety of the community or themselves can be detained as involuntary patients under the *Mental Health Act 1996 (WA)*, with appropriate safeguards including mechanisms for review. In my view it is inappropriate that they be detained under the Act as criminals, without conviction, for longer periods than would have been justified if they had been convicted.

Sentencing mentally impaired offenders

As Justice Murray has observed, given that sentencing is generally recognised as one of the most challenging functions which confronts a judge, sentencing a mentally impaired offender adds a significant layer of complexity to an already difficult task. Of course, that difficulty will only be appreciated in cases in which mental impairment of the offender has been identified, which will only be a portion of the cases coming before the courts. If the possibility of mental impairment has been detected, a sentencing court can require the provision of a psychiatric or psychological report prior to sentence. However, commonly, those reports will be unable to suggest a therapeutic solution to the diagnosed condition. This may be for a number of reasons. First, the condition may be untreatable. Second, even if treatments are theoretically available, treatment may not be available, as a practical reality, to a particular offender because of resource limitations. These issues are particularly acute in regional and remote Western Australia.

The mental impairment of an offender has a profound impact upon the application of the normal principles of sentencing. Pursuant to those principles, a number of factors are taken into account at the time of passing sentence including:

- punishment (or retribution)
- deterrence (both specific and general)
- rehabilitation
- incapacitation

Dealing firstly with punishment (sometimes referred to as retribution), there is a legitimate community expectation that the punishment imposed by a court will reflect the seriousness of the offence and the culpability of the offender. In Western Australia, that expectation is expressly embodied in the *Sentencing Act*. However, most reasonable members of the community would accept that the mental impairment of an offender is relevant to the assessment of culpability. At a fairly basic moral level it is easy to understand why the conduct of a person whose capacity to comprehend the consequences of their actions, or to rationally evaluate the options and choices available to them is impaired as a consequence of mental impairment should be regarded as less culpable than the conduct of a person who suffered no such constraint.

Punishment is also imposed so as to emphasise to an offender that their conduct is unacceptable. However, that objective will be impeded if the offender has difficulty making the intellectual connection between the punishment and the offending behaviour. At a level of principle therefore, the imposition of punishment would seem to be of less significance in at least some cases involving mentally impaired offenders. This is, of course, not to say that mentally impaired members of our community have licence to offend against our laws with impunity, but merely to point out the different impact which some of the principles of sentencing may have where such offenders are concerned.

Specific deterrence refers to that aspect of the sentencing process which is designed to discourage re-offending behaviour, as a consequence of the imposition of punishment. As I have already noted, that process is not likely to be effective if the offender lacks the capacity to make the intellectual

connection between the imposition of the punishment and the offending behaviour, or if the offender lacks the intellectual capacity to evaluate the likely consequences of their conduct in the future. Accordingly, again at the level of principle, specific deterrence is another factor that may have less significance in the sentencing of some mentally impaired offenders.

Rehabilitation is another recognised objective of sentencing. However, if the offending behaviour was causally connected to the offender's mental impairment, and that mental impairment is not treatable, it is inherently unlikely that the sentencing process will be capable of reducing the risk of reoffending. In such cases, rehabilitation is another factor which would appear to have diminished significance. In this context, it is important to distinguish between treatment in the medical sense, and programmes aimed at modifying behaviour. The fact that a condition may not be susceptible to treatment in the medical sense does not mean that the prospects of rehabilitation cannot be improved by programmes aimed at reducing the risk of offending behaviour.

Incapacitation describes the process whereby offenders are incapacitated from committing further offences (at least against the general community) while incarcerated. Because this is the inexorable consequence of physically removing an offender from society, this objective will be achieved whatever the mental characteristics of the offender. However, obviously the benefit of incapacitation only endures for so long as the offender is imprisoned. In the case of minor or 'nuisance' offences of the kind commonly committed by mentally impaired offenders, it is a very expensive and arguably inhumane way of dealing with behaviour which is sometimes more of an inconvenience than a threat. However, in the case of more serious offending by mentally impaired offenders, the protection of the community may require their segregation from society for a lengthy period.

This analysis suggests that in at least some cases involving mentally impaired offenders, conventional principles of sentencing would support the conclusion that the sentence to be imposed should be somewhat less than the sentence

that might be imposed upon an offender who is not mentally impaired. However, as I have already noted, that conclusion is not supported by the evidence of sentencing outcomes, which suggests that mentally impaired offenders tend to be dealt with more severely than offenders who are not impaired. It seems to me that this apparent discrepancy between principle and practice merits further empirical investigation and analysis.

There are, of course, a range of sentencing alternatives open to the courts of Western Australia. At the risk of over-simplification, they can be loosely grouped into three categories which reflect the most common sentences imposed, namely:

- fines
- community-based orders
- imprisonment

Fines

The imposition of fines on mentally impaired offenders can be problematic. In some cases their disability will render them unemployable, with the result that they lack the capacity to pay any significant fine imposed. In other cases, offenders may lack the functional capacity to organise payment of the fine from the resources which they have. In both cases, offenders may lack the functional capacity to organise for payment of the fines to be deferred or waived or converted into a work order, with the consequence that other forms of fine enforcement may follow, such as loss of driver's licence and ultimately imprisonment, perhaps for driving while disqualified. We need systems within the processes relating to fine enforcement which are capable of identifying and addressing the practical problems faced by many mentally impaired persons ordered to pay a fine.

Community-based orders

Community-based orders can be the most effective sentencing disposition in some cases involving mentally impaired offenders. They can be used to

provide opportunities for supervision within the community, aimed at reducing the risk of reoffending. However, they also are not without their pitfalls, particularly to the extent that they involve the imposition of obligations upon offenders to attend appointments, contact supervisors and so on. If the offender lacks the support and assistance of a carer, they may have difficulty in meeting their obligations, which can in turn lead to proceedings for breach and the imposition of a more severe sentence, including imprisonment.

Imprisonment

Imprisonment also carries significant disadvantage for those suffering from mental impairment. Dealing firstly with those with mental illness, almost invariably, the consequence of imprisonment will be withdrawal from any medication which they may have been taking until such time as prison medical authorities have had the opportunity to diagnose the condition and prescribe medication which can be monitored. Whilst one can understand the need for prison authorities to ensure the integrity of procedures by which those within their care take medication, the consequence can be that persons who have become habituated to medication are deprived of that medication for several weeks, with the result that their condition deteriorates significantly, and at a time when they are suffering the stress of incarceration. In addition, treatment opportunities for mental illness within the prison system are limited by the limitations upon available resources, and can also result in offenders being less satisfactorily treated than whilst in the community.

Turning specifically to those with intellectual disability, a number of commentators have written of the difficulties which such persons face within the prison system. Vanny *et al* observed¹⁶:

In the prison environment, difficulties experienced by people with intellectual disability may include a difficulty complying with rigid rules and regulations, vulnerability to abuse and exploitation from other inmates, feelings of isolation, and difficulty in participating in treatment programmes provided by the prison that do not cater for prisoners with intellectual disability. The prison environment may provide structure and predictability, which for some people with intellectual disability is

¹⁶ Vanny, above, 263

more favourable than the complex and demanding world on the outside. But adapting well to the prison environment does not equate to coping well in the community. A further difficulty is that some offenders with a borderline IQ, that is, IQ between 70 and 79, are not eligible for disability services provided in the prison environment because they do not meet the criteria for a diagnosis of intellectual disability. Offenders with intellectual disability may not be recognised in the prison as having a disability and therefore do not receive disability services provided in prison. Furthermore, unidentified offenders with intellectual disability in the criminal justice system are at risk of continued offending because their needs are not met, and they lack support services upon release.

Dr Cockram has observed¹⁷:

Offenders with an intellectual disability often suffer from practices of exploitation and degradation whilst incarcerated on two fronts. Firstly, prisons are poorly equipped with the necessary resources to respond to treatment or the supportive services required to meet the needs of these offenders ... Furthermore, fellow inmates also mistreat prisoners with disabilities, often making them the target of assault, exploitation, extortion and sexual abuse.

Dr Cockram has also referred to the increased likelihood of mentally impaired offenders reoffending following their release from prison¹⁸:

When discharged from prison, the negative effects of imprisonment combined with a lack of adequate monitoring and support services required to assist the person's transition back into the community, often exacerbates reoffending and thereby increasing exposure to the criminal justice system.

Mandatory imprisonment

My discussions with carers of those with mental illness associated with Arafmi has revealed profound concerns arising from the legislation which imposes mandatory terms of imprisonment upon those convicted of assaulting a public officer and causing actual bodily harm. Unfortunately, it is not uncommon for those carers to be placed in a threatening situation as a result of the mental disturbance of those for whom they are caring. In the past, if the situation escalated to the point where safety was at risk, the police would be called.

¹⁷ Cockram, above, 76

¹⁸ *ibid*

Now, however, following the passage of the legislation to which I have referred, there is great reluctance to involve the police because of the prospect that the person for whom they care (who may well be a family member) might commit an assault upon the police officer who is called to the scene, resulting in mandatory imprisonment. For this reason, carers are now reluctant to seek the assistance of authorities even in situations in which their personal safety is jeopardised. This appears to be an unfortunate and unintended consequence of the passage of this legislation. One might expect that prosecutorial discretion would be exercised to prevent this effect of the legislation in inappropriate cases, but the uncertainty as to whether the discretion would be favourably exercised in any particular case does little to quell the fears to which I have referred.

The future

My review of the issues which arise when the mentally impaired intersect with the criminal justice system has painted a rather gloomy and depressing picture of over-representation, multi-faceted disadvantage and limited opportunity for beneficial intervention. However, I believe that there is room for cautious optimism about the way in which these important issues will be addressed in the future.

The response of government

The first cause for such optimism is the attention and resources which governments at both State and Federal level are now directing to these issues. In the most recent Federal budget, \$2.2 billion was allocated for mental health services (over five years), with \$1.5 billion earmarked for new initiatives and the establishment of a national Mental Health Commission charged with the responsibility of driving future reforms and a Federal Minister for Mental Health has been appointed. At a State level, the most recent budget provided for an increase of \$50 million in the funds available for mental health services, taking the total budget allocation to \$531 million, intended to deliver major investment in social housing and individualised support packages for those in need. The State government has recorded its commitment to the provision of mental health services which will enable

people to remain within their community, which is a very positive commitment. It has also committed to the introduction of a new Mental Health Bill. The State's first Mental Health Advisory Council has been appointed to provide independent advice to the mental health Commissioner, who in turn provides advice to the Minister for Mental Health. And, most significantly for the purposes of the topic addressed in this paper, the Minister, the Hon Helen Morton MLC, has adopted the decriminalisation of mental illness as a key strategy, and is working hard to implement that strategy. This is a very significant reason for optimism in relation to the way mentally impaired people will be treated when they intersect with the justice system.

These issues are receiving active attention in other jurisdictions. The Victorian Law Reform Committee is conducting an inquiry into the interaction between the justice system and those with mental impairment and their families and carers, and the Law Reform Commission of New South Wales is undertaking a similar inquiry, and has released a number of discussion papers on the topic. In addition, the Australasian Institute of Judicial Administration hosted a conference focused upon these issues which was held in Auckland last year.

An ounce of prevention

There is an old saying that an ounce of prevention is worth a pound of cure. Nowhere is that saying more true than in the criminal justice system. Very often offending behaviour is the symptom of a more fundamental underlying disorder, such as substance abuse, social dysfunction or mental impairment. Focusing the provision of public resources upon the imposition of punishment upon those who manifest their underlying disorder by committing offences is extremely expensive and not a particularly efficient way of protecting society, given the limited impact which punishment is likely to have upon the underlying cause. Although there is an incapacitation effect arising from the imprisonment of mentally impaired offenders, which in the case of serious offences may be a dominant sentencing consideration, in the case of less serious offences, as I have suggested, imprisonment may be seen as expensive, ineffective and inhumane. The application of resources to the

provision of programmes which identify and support those who are mentally impaired within our community, and address problematic behaviours, are, in my view, a much more effective way of enhancing the safety and security of our community.

Identification and education

I have already referred a number of times to the lack of any general screening mechanism aimed at identifying the mentally impaired at the time of their intersection with the criminal justice system. While it is perhaps unrealistic to suggest that a diagnostic screening tool will be applied to every prospective offender identified by the criminal justice system, identification of those who suffer mental impairment would be significantly enhanced by a greater awareness of these issues on the part of those who work within the system, such as police officers, lawyers, court staff, judicial officers and corrections officers. That awareness could be significantly enhanced by education programmes targeted at justice system professionals, and which form part of their continuing professional development programmes. These education and training programmes should address the characteristics likely to be observed in people who suffer from mental impairment, and the particular difficulties which such persons are likely to face when they intersect with the criminal justice system, including the ways in which those difficulties might be alleviated.

Diversification

In this paper I have already addressed the disadvantages faced by mentally impaired offenders within the court system, and the limited impact which conventional punishments are likely to have upon their offending behaviour. Those observations strongly support the desirability of programmes which will divert mentally impaired offenders away from the conventional court system.

But if diversionary programmes are to have any success, there must be a range of facilities and programmes to which mentally impaired offenders can be diverted. Resources must be provided to support diversionary programmes by the provision of such things as stable long-term

accommodation, including both bail hostels and secure units, therapeutic intervention such as behaviour programmes, family therapy and individual therapy, work preparation programmes and vocational training, including the development and enhancement of basic daily living skills including communication and social skills, together with programmes targeted at specific offending behaviours such as substance abuse programmes and sex offending programmes. Because of the over-representation of indigenous offenders who are mentally impaired, programmes which are culturally appropriate for such offenders must also be provided. And because the benefits derived from programmes focussed upon mentally impaired youth are likely to be more profound, and longer term, particular attention should be given to such programmes. These facilities and programmes are much more likely to be effective if delivered on an holistic and multi-agency basis, so that all the individual needs of any particular person can be addressed without constraints imposed by artificial boundaries arising from a 'silo mentality' within the agencies responsible for the provision of these facilities and programmes. These facilities and programmes are expensive, but not nearly as expensive as imprisonment (which, in very rough terms, costs approximately \$100,000 per person per year in recurrent costs, and \$1 million per person in capital costs for the provision of prison infrastructure).

Net widening

When consideration is given to processes intended to reduce interaction with the criminal justice system, it is very important to pay attention to the phenomenon that criminologists describe as 'net widening'. This is the process whereby procedures intended to reduce the extent of interaction with the criminal justice system have precisely the opposite effect, by widening the net and bringing more people within the justice system. So, if attention is focused upon a court-based diversion programme, where facilities and programmes are only provided to those who have been brought before a court and then diverted toward those facilities and programmes, there is a very real risk that the number of people brought before the courts will increase, rather than decrease. If court-based diversionary programmes are not available, or are available through a process other than going to court, there will be a

greater likelihood that attending police officers may exercise their discretion to resolve the situation in a way which does not involve arrest and charge. And there are very real dangers in programmes which might encourage arresting officers to bring offenders before courts, even if they are likely to be diverted. Bringing a person before the court is likely to result in a criminal record, which can be an impediment to future employment prospects. Most court-based diversion programmes involve sanctions for non-compliance with court orders, such as orders which require offenders to attend appointments with corrections officers or to participate in programmes. Failure to comply with such orders can result in a more significant sentence being imposed than might have been imposed through a more conventional court process.

It follows that when consideration is being given to diversionary programmes, emphasis must also be placed upon pre-court diversion programmes, in order to avoid the 'net widening' which can be associated with court-based programmes. Indeed because of the dangers to which I have referred, in my view, greater emphasis should be based on pre-court diversion (in appropriate cases), thus keeping mentally impaired persons out of the court system altogether.

Pre-court diversion

This seminar is to be addressed by the Commissioner of Police, Dr Karl O'Callaghan APM, who is much better equipped than I to identify steps that might be taken by police to enhance the diversion of mentally impaired offenders away from our criminal courts. Those programmes can be implemented prior to arrest, and also after arrest but prior to presentation to a court. Implementation of those procedures will be enhanced by police awareness of the symptoms and characteristics of mentally impaired offenders, and of the possible ways in which their offending behaviour might be addressed other than through the court system. Other than to reiterate the point I have already made in relation to the advantages which pre-court diversion programmes have over court-based diversion programmes, and the vital need to support all diversion with appropriate facilities and programmes, I

will leave any further comment on those matters to Commissioner O'Callaghan.

Court-based diversion programmes

In one sense, the procedures available under the *Criminal Law (Mentally Impaired Defendants) Act* are a form of court-based diversion programmes. However, as I have already pointed out, in another sense they are not, because in practical reality, offenders who come within the scope of that legislation are not diverted to any other therapeutic environment, but are either imprisoned indefinitely or unconditionally released. And as I have noted, because of the serious consequences which flow from a custody order made under the terms of that Act, its application tends to be reserved to more serious cases.

Less serious cases can be dealt with by the Intellectual Disabilities Diversion Programme which is available through the Perth Magistrates Court. Minor cases involving persons who have been identified as suffering from intellectual disability can be referred to the programme co-ordinator who, following assessment, can provide recommendations to the court aimed at diverting people with intellectual disability out of the criminal justice system and toward more appropriate community-based services. However, the programme is informal in character, without legislative backing, and because of limited resources, is of limited application. It is focused upon intellectual disability, and does not cover the broader field of mental impairment (as I use that term in this paper).

As part of the policy of decriminalisation of mental illness which the Minister for Mental Health has embraced, active consideration is being given to a more structured and better resourced court diversion programme applicable in the Magistrates Court. This is a commendable initiative which I am pleased to support provided that it is accompanied by effective pre-court diversionary programmes so as to avoid 'net widening'.

Court-based diversion programmes for mentally impaired offenders are not new, and have been developed in many comparable jurisdictions. Experience in those jurisdictions, and our own limited experience in Western Australia, suggests that there are a number of vital components if such programmes are to be successful.

First and perhaps most important, any diversionary programme must be supported by the range of community-based facilities and therapeutic programmes to which I have already referred. Offenders must be diverted into an environment in which all their needs, including accommodation, social and treatment needs can be addressed in a package designed specifically for that offender.

Another vital component of any effective court-based diversion programme is clearly defined and realistic eligibility criteria for entry into the programme. Those criteria must take account of the resources available both within the court programme itself, and in the various facilities and programmes associated with the court-based programme, and must also address the extent to which any offender is likely to derive benefit from diversion. It is neither necessary nor appropriate to limit the programme to those who suffer from conditions which can be treated, in a medical sense, as there are other ranges of therapeutic intervention which can be of assistance, such as behavioural modification programmes, and programmes directed at particular forms of offending, such as substance abuse, violence and so on. However, it must be accepted that there will be some mentally impaired offenders whose condition is such that the prospect of behavioural modification through therapeutic intervention is limited. In the real world of constrained public resources, it is desirable to design eligibility criteria which focus those resources where they are likely to have the most benefit. Those criteria must also provide appropriate lines of demarcation between eligibility for other solution focussed courts, being drug courts, domestic violence courts, and Aboriginal community courts. I can foresee a day in which we may have a more general solution focussed approach to much offending, which is not

compartmentalised into particular causes of offending behaviour, but that day has not arrived yet.

Associated with the eligibility criteria is the need for systems for the identification of those who might benefit from entry into the programme. Those systems need to be implemented in a context in which there is no general screening system currently in use which is likely to identify such offenders.

The programme needs to be properly resourced with strong leadership in the form of a programme director and co-ordinator, supported by a team of court staff who are appropriately trained in the identification and management of a broad range of mental health issues. Those staff must be supported by appropriately trained judicial officers, responsible for progress of those diverted under the programme.

Because of the therapeutic component of any such programme, client consent and confidentiality are essential components of any court-based diversion programme.

The sustainability of any court-based diversion programme must be justified by regular evaluation of outcomes. Such evaluations have proven to be problematic in other solution-focused courts, such as domestic violence courts and indigenous community courts. There is an understandable tendency for evaluations to focus upon rates of reoffending. The inadequacy of such a limited approach is a detailed and complex topic which is beyond the scope of this paper. It is sufficient to observe that the benefits likely to be derived from a court-based diversion programme for mentally impaired offenders are not limited to possible reduction of rates of reoffending, but include a more humane and just process for dealing with such offenders, which will improve their quality of life and that of their family and carers.

If these various requirements can be met, and matched in a well resourced pre-court diversion programme, the court-based diversion programme which

is presently under active consideration would significantly enhance the way in which the criminal justice system deals with mentally impaired offenders.

Conclusion

In this paper I have addressed the over-representation of mentally impaired offenders within our criminal justice system, the multi-faceted disadvantages which those offenders face within that system, and the limited opportunities for beneficial intervention currently available within that system. However, there is room for cautious optimism in relation to the future. That optimism will be justified if we can provide the facilities and programmes necessary to support:

- therapeutic intervention and behavioural modification aimed at reducing the risk of offending behaviour;
- pre-court diversion programmes; and
- court-based diversion programmes.

The successful provision of those facilities and programmes would address many of the aspects of disadvantage which I have identified in our current arrangements, and enable our community to fairly say that we are dealing justly with those members of our community who suffer mental impairment.