Law and Mental Health:
The Challenge for Therapeutic Jurisprudence
Contents

Introduction .........................................................................................................................3

Defining Therapeutic Jurisprudence ..................................................................................4

Mental Illness in New South Wales Prisons .................................................................4

NSW Mental Health (Forensic Provisions) Act 1990 .....................................................6

Advantages of the current diversion model in NSW .....................................................8

Issues faced by Diversion Programs in Australia

(i) The need for Culturally Sensitive Diversion Programs ........................................9
(ii) Intellectual Disability Diversion Programs ...........................................................10
(iii) Lack of evidence-based research about effectiveness of Mental Courts 10
(iv) Inadequate support and resources for mental health facilities .........................12
(v) Addressing the stigma of Mental Illness and Offenders ..................................13

Conclusion ....................................................................................................................17

Bibliography ................................................................................................................18
The problem inherent in attempting to evaluate the functioning of a policy of diversion... is that there is a dense and complex weave of medical and criminological ideas.¹

Introduction

The need for a Mental Court in New South Wales (NSW) has been an issue of debate amongst not only law practitioners, enforcements and theorists, but also between medical practitioners, psychiatrists and community health care providers. Accordingly, therapeutic jurisprudence, as a multidisciplinary examination of how law and mental health interact, is challenged by arguments for and against the need for a Mental Court. This paper examines how therapeutic jurisprudence is challenged, firstly by defining therapeutic jurisprudence and examining the rates of mental illness in NSW prisons. Subsequently an analysis of the current diversion model in NSW local courts under section 32 and 33 of the Mental Health (Forensic Provisions) Act 1990 (NSW) (MHFPA) is conducted. Following this analysis, this paper delves into various issues highlighted by legal theorists concerning the establishment of a Mental Court in NSW, and the factors that are argued to be considered if NSW decides to establish a Mental Court. Some of the factors addressed in this paper include Indigenous offenders and the need for a culturally sensitive court, the problems associated with offenders who have an intellectual disability and the lack of evaluation and evidence-based. The paper concludes by examining the social stigma of setting up a mental health court, its effect on the lives of past offenders and the underlying cause of unresolved issues within the therapeutic jurisprudence definition.

¹ Peter Bartlett and Ralph Sandland, Mental Health Law: Policy and Practice, (Oxford University Press, 2nd Ed, 2003), 238.
Defining Therapeutic Jurisprudence

Therapeutic Jurisprudence has been defined as the study of the effects of law and the legal system on the mental health of people\(^2\). This early, modern multidisciplinary examination of how law and mental health interact originated in the late 1980s as an academic approach to mental health law\(^3\). According to Diesfeld & Freckleton (2003) the ‘therapeutic jurisprudence lens’ is applied to processes of decision-making by law reform bodies to maximize the potential for therapeutically positive outcomes.\(^4\)

Therapeutic jurisprudence attempts to prevent ‘juridogenic harm’ by finding the balance between the rights of patients from a legal perspective, and the risk of paternalist decision-making about welfare and well-being from a medical perspective if the focus is upon what is said to be in “patients’ best interests”.\(^5\) However, the challenge for therapeutic jurisprudence has been witnessed internationally, with almost one-third of Australian prisoners entering jail with a mental illness.\(^6\) Accordingly, it appears this ‘balance’ between the rights of an individual and their welfare remains caught in the criminal legal system.

Mental Illness in New South Wales Prisons

The high rate of mental illness in prisons exacerbates arguments for the need to establish a Mental Court in NSW. Based on an adult prison population of 10,000 in NSW, Howard and Westmore (2010) calculate that there are approximately 4860

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\(^3\) Ibid.
\(^4\) Kate Diesfeld and Ian Freckleton (eds), Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment, (Ashgate Publishing Limited, 2003), 294.
\(^5\) Ibid.
inmates in custody with ‘any psychiatric disorder’.\textsuperscript{7} The statistics below provided by the NSW Inmate Health Survey (2009) further emphasize this drastically high rate of mental disorders in prisons.\textsuperscript{8}

\midrule
\textbf{Self-reported mental health conditions} & \textbf{Men} & \textbf{Women} & \textbf{Total} \\
\hline
(Multiple response) & n & \% & n & \% & n & \% \\
Depression & 259 & 33.1 & 86 & 44.8 & 345 & 35.4 \\
Anxiety & 175 & 22.3 & 65 & 33.9 & 240 & 24.6 \\
Drug dependence & 158 & 20.2 & 49 & 25.5 & 207 & 21.3 \\
Alcohol dependence & 100 & 12.8 & 19 & 10.0 & 119 & 12.2 \\
Personality disorder & 70 & 9.0 & 29 & 15.3 & 99 & 10.2 \\
ADD / ADHD & 93 & 11.8 & 6 & 3.1 & 99 & 10.1 \\
Manic depressive psychosis & 65 & 8.3 & 24 & 12.6 & 89 & 9.2 \\
Schizophrenia & 69 & 8.8 & 17 & 8.9 & 86 & 8.8 \\
Other & 62 & 7.9 & 24 & 12.6 & 86 & 8.8 \\
None of the above & 417 & 52.8 & 89 & 45.6 & 506 & 51.4 \\
\end{longtable}

As an initial process, if an offender is impaired by mental illness, the legal system is required to determine whether the person should be dealt with according to law or diverted into more appropriate care and treatment within the health system. Mental health courts and diversion programs for offenders with mental illnesses are a relatively recent innovation in Australia. The push for needing more mental health courts and diversion programs seems to be increasing as more Australian States, such as South Australia’s Magistrates Court Diversion Program and Queensland’s Mental Health Courts.

\textsuperscript{7} D. Howard and B. Westmore,\textit{ Crime and Mental Health Law in New South Wales: A Practical Guide for Lawyers and Health Care Professionals}, (LexisNexis Butterworths, 2\textsuperscript{nd} Ed. 2010), 761.

Health Court are being established. The judiciary has seen growing interest in developing more mental health courts in other Australian States, with Tasmania the first state to follow suit with the Hobart Diversion List.9

**NSW Mental Health (Forensic Provisions) Act 1990**

Currently in New South Wales, instead of a Mental Court magistrates have been provided with specific legislative powers under sections 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) (MHFPA) to divert mentally ill and intellectually impaired offenders from the criminal justice system. The provisions apply to summary offences or indictable offences triable summarily heard by a magistrate.10

Section 32 of the MHFPA grants a magistrate powers in relation to offenders who are, or were at the time the alleged offence, mentally ill, developmentally disabled or suffering from a mental condition for which treatment is available in a mental health facility but is not a mentally ill person.11 A magistrate also has power to adjourn the proceedings, grant bail or make any other order that the magistrate considers appropriate when dealing with these classes of offenders.12

Furthermore, the Magistrate may also make an order dismissing the charge and discharge the defendant into the care of a responsible person or on the condition that

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the offender attend on a person or at a place specified by the magistrate for assessment of the defendant’s mental condition or treatment. If the magistrate makes an order under s 32(3) and suspects that the person is not complying with the conditions of the order the magistrate has powers to call on the offender to appear in Court within six months of the order being made.

Magistrates also have power under s 33 of the Mental Health (Criminal Procedure) Act 1990 (NSW) to order that mentally ill persons be:

a) taken to, and detained in, a mental health facility for assessment

b) taken to, and detained in, a mental health facility for assessment and, if the defendant is found on assessment not to be a mentally ill person or mentally disordered person, to be brought back before a Magistrate or an authorized officer

c) discharged, unconditionally, or subject to conditions, into the care or a responsible person

Evidently, ss 32 and 33 MHFPA gives to magistrates a very wide discretion to deal with mentally ill offenders. According to Howard and Westmore, the diversion model in NSW acts as a ‘relief’ valve’ through the exercise of humane disposition of appropriate cases within the section instead of imposing the rigours of a full hearing of the charges in accordance with criminal procedures, which may arise as an issue for offenders being heard in a Mental Court.

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13 Mental Health (Forensic Provisions) Act 1990 (NSW) s 32(3).
14 Mental Health (Forensic Provisions) Act 1990 (NSW) s 32(3A).
15 Mental Health (Forensic Provisions) Act 1990 (NSW) s 33(1).
16 Howard & Westmore, above n 6, 718.
Advantages of the current diversion model in NSW

One advantage of the current diversion program in NSW, and an argument against the need for a Mental Court, is that it applies to all summary charges dealt with in any Local Court. There are currently 157 Local Courts in NSW\(^\text{17}\) hence the diversionary legislation has a very wide reach. According to Richardson & McSherry (2010), ss 32 and ss 33 MHFPA provide an example of powers of diversion being incorporated into the mainstream system without the need to refer a person to a specific list.\(^\text{18}\) It may be argued this is a more beneficial option compared to mental health courts because the ability to divert offenders is more widely available to any magistrate sitting on any day. It has also been contended that there is a significant body of magistrates who have experience in making decisions under the legislation.\(^\text{19}\)

Furthermore, it has been argued that the current diversion program has created a real opportunity for therapeutic alternatives to be offered to the court as well as seeking to address the high number of mentally ill offenders remanded in custody.\(^\text{20}\) It has also been contended that the program is successful in that it allows for immediate identification of persons in an acute stage of mental illness; allows for immediate identification by Correctional Health Services; ss32 and ss33 MHFPA allows for immediate assessment of persons being considered and is able to quickly exclude persons who are not suffering from a mental illness; ss32 and s33 MHFPA identifies situations where a person’s mental illness has no relevance to the offence charged.

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19 Howard & Westmore, above n 6, 714.
20 Deputy Chief Magistrate Helen Syme, ‘Local Court procedure and sentencing of offenders with mental illness’ (Paper presented at The Mental Health Act – Issues and Consequences Professional Development Course, University of Technology Sydney, 28 March 2008).
However the diversion model in NSW is far from ideal and many issues are required to be addressed before a Mental Court in NSW, or any other diversion model should be considered in Australia.\textsuperscript{21}

**Issues faced by Diversion Programs in Australia**

Whether establishing a Mental Court or any other form of diversion program, many issues still need to be considered by Australian courts of governments. Before these outstanding issues are combated, one cannot firmly argue the necessity of establishing a Mental Court in NSW.

(i) **The need for Culturally Sensitive Diversion Programs**

According to Richardson (2008), amongst Indigenous offenders there is a low rate of participation within the South Australian Diversion Program. Richardson speculates this may be the outcome of reluctance by indigenous offenders to acknowledge mental illness and access services, or alternatively due to a desire by indigenous offenders to have their matters resolved in the Nunga court (a specialist court for indigenous offenders).\textsuperscript{22} Recent research also reveals low rates of indigenous offenders accessing many drug diversion programs.\textsuperscript{23} Richardson proposes there may be a need for culturally specific programs in mental court or diversion programs, as well as governance of diversion programs to maintain cultural sensitiveness.\textsuperscript{24}

\textsuperscript{21} Ibid.
\textsuperscript{22} Indig et al, above n 8, 18.
\textsuperscript{24} Indig et al, above n 8, 18.
(ii) Intellectual Disability Diversion Programs

Intellectually disabled offenders face similar issues as mentally ill offenders in the criminal system. According to Richardson, there are high rates of prisoners with intellectual disabilities, which have led to several calls by law reform bodies to ensure measures are introduced to divert intellectually disabled offenders from prison.25

Currently, there exists an Intellectual Disability Diversion Program in Western Australia. This program diverts offenders with intellectual disabilities who plead guilty to offences to return to Court on a regular basis to report their progress to a magistrate.26 These offences are generally minor offences as nuisance offences, possession of cannabis, less serious indecent assaults and burglaries.27

If NSW decides to establish a Mental Court, Richardson argues that it would also need to consider whether to include intellectually disabled or other mentally impaired persons within the court.28 However, as one can imagine, finding and accessing treatment for intellectually disabled offenders can pose difficulties and hence a greater burden on having to establish a new Mental Court in NSW.

(iii) Lack of evidence-based research about effectiveness of Mental Courts

The push for establishing a Mental Court in NSW, or any other form of diversion program, needs to be assessed and considered in light of quality evidence-based

25 Indig et al, above n8 , 19.
26 Ibid.
27 Michael S. King, ‘Problem-Solving Court Programs in Western Australia’ (Paper presented at the Sentencing Principles, Perspectives and Possibilities Conference, Canberra, 10-12 February 2006), 8.
28 Indig et al, above n 8 at 19.
research. However, information about the results and effects of mental health courts and diversion programs in Australia are extremely limited.\textsuperscript{29}

In \textit{Lauritsen v The Queen}, Malcolm CJ [at 78] highlighted that;

There is scant evidence that special measures can properly be taken within the prison system to deal with such persons without an unnecessary drain on resources. The consequence is that there is a risk of further degeneration by the offender and there is a risk to the other inmates and staff.\textsuperscript{30}

Although Australia has witnessed a rapid expansion of diversion programs and mental health courts, it has been argued that the process has moved ahead of any evidence and research demonstrating their effectiveness.\textsuperscript{31} Richardson & McSherry emphasize this need for empirical research to justify the continued expansion of mental health courts;

Experimentation is not inherently a ‘social good’, however. Experimentation can make situations worse rather than better, and can serve as a smokescreen: masking true impacts on affected individuals, or society in general. The policy experiment must be ethical, it must be well planned, and – above all – it must be evaluated and the subsequent continuance of policies must be justified.\textsuperscript{32}

Furthermore, McSherry & Richardson highlight the importance of conducting evidence-based evaluations over a long period of time, and not simply as a one-off

\textsuperscript{29} Richardson & McSherry, above n 18, 253.
\textsuperscript{30} \textit{Lauritsen v The Queen} [2000] WSCA 203 at para [78], Malcolm CJ of the Supreme Court of Western Australia
\textsuperscript{31} Howard & Westmore, above n 6, 253.
\textsuperscript{32} Howard & Westmore, above n 6, quoting Carney (2000, 319).
evaluation during the initial process of establishing the diversion program or Mental Court.

Methods of evaluation suggested by Roberts and Indermaur (2006) include locating appropriate comparison groups when control groups are not feasible/have not been used; measuring recidivism; and determining the particular component(s) of a therapeutic jurisprudence initiative that are active in producing any observed results.\textsuperscript{33} If the effectiveness of such programs is not assessed, McSherry & Richardson point out that the evidence base will continue to remain shallow and ultimately undermine the operation and expansion of mental health courts and diversion programs.\textsuperscript{34}

(iv) Inadequate support and resources for mental health facilities

The availability of adequate resources and support for mental health facilities from the community, courts and government is essential for diversionary programs and Mental Courts. However, Syme (2002) highlights the issue concerning hospitals being unable to handle potentially disruptive mentally ill persons, and choosing to provide an unsuccessful finding to the court under s33 to place mentally ill offenders back in custody.\textsuperscript{35} Although this is obviously unfair for mentally ill offenders, the courts are limited under s33 to take action unless they refer the matter for assessment while in custody.\textsuperscript{36}

This issue highlights the importance of providing adequate support and resources for mental health facilities. As Deputy Chief Magistrate Helen Syme emphasized as a

\begin{itemize}
  \item \textsuperscript{33} Lynne Roberts & David Indermaur, \textit{Key Challenges in Evaluating Therapeutic Jurisprudence Initiatives}, 3\textsuperscript{rd} International Conference on Therapeutic Jurisprudence, 2006, 2.
  \item \textsuperscript{34} Howard & Westmore, above n 6, 253.
  \item \textsuperscript{35} Syme, above n 20, 10.
  \item \textsuperscript{36} Ibid.
\end{itemize}
concluding remark: “[a]ny solution that deals with a public health problem and a court administration or justice problem requires interaction between Courts, Police, Corrective Services, Psychiatric Hospitals and Community Health Care Providers.”

Further, mental health courts should facilitate a team approach between the courts, mental health agencies and other social service providers, to make mental health agencies and providers more accountable to the court for the provision of services.37 However, the lack of cooperation between different political, medical and health sectors may reveal a deeper underlying problem concerning therapeutic jurisprudence.

(v) Addressing the stigma of Mental Illness and Offenders

As examined above, Howard and Westmore point out that ss32 and ss33 MHFPA are most effective when both the courts and the mental health system approach their application cooperatively. Accordingly, these sections are a form of therapeutic jurisprudence whereby a legal decision, formulated by both law and health services, influence a therapeutic outcome.38 However, the high number of prisoners suffering from mental illnesses, as well as the high rate of prisoners entering prisons with mental illnesses, highlights the issue that the system is far from a therapeutic outcome.

Syme (2002) states that offenders with mental illness are being caught in the criminal justice system39, or what Bartlett & Sandland (2003) define as the ‘deep end’ of the system wherein offenders who have been transferred to a special hospital for treatment from prison will be returned to prison, rather than be transferred into

37 Howard & Westmore, above n 6, 253.
38 Howard & Westmore, above n 6, 715.
39 Syme, above n 20, 16.
hospital conditions of lesser security if treatment in hospital proves successful or is shown to be fruitless.\textsuperscript{40}

The following experience of an offender suffering from a mental illness reveals the tragic position mentally ill offenders are placed in when caught between the criminal law system and mental health system.\textsuperscript{41} Larry suffered from schizophrenia, but had been criminally charged for his violent misconduct against another man. Larry had been incarcerated numerous times previously, but his accumulations of criminal charges, along with the factor of inadequate inpatient psychiatric treatment, resulted in long-term confinement on a forensic unit of a correctional facility. Larry’s frustrating experience as being socially labeled as both the “mad” and “bad” offender is reflected in the interview:

They put me away, man. It’s not right. That’s all I mean to them. I’m someone to put away to rot. I’m not an animal, no sir… Sure I get upset. Everybody gets upset …and then the lock me up in the jail. I’m \textit{not} a criminal? I get upset. I get upset, that’s all…They don’t understand. I’m just a little sick but you can’t tell me I’m crazy, and I’m not someone who, like, robs a bank or something. That’s not me.”\textsuperscript{42}

Although many issues of diversion programs and mental health courts have been discussed above, one may argue there is an underlying factor causing the stagnation of therapeutic outcomes – social constructs and the stigmatization of mentally ill persons and offenders. The process of mentally ill offenders consistently find themselves

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{40} Bartlett & Sandland, above n 1, 73.
\item \textsuperscript{41} Bruce A. Arrigo, \textit{Punishing the Mentally Ill: A Critical Analysis of Law and Psychiatry}, (State University of New York Press, 2002), 113.
\item \textsuperscript{42} Arrigo, above n 41, quoting Larry at 118, 113.
\end{itemize}
\end{footnotesize}
caught in between the criminal justice system and the mental health system is what Arrigo terms to be ‘transcarceration’;

When persons with psychiatric disabilities are perpetually and alternately house in the civil and criminal systems of institutional control (e.g. hospitals, jails), they become prisoners of confinement; that is, the process of transcarceration substantially restricts the capacity…to vary their role performances or to renegotiate their identities. They live out their lives defined (i.e. ‘mad’ or ‘bad’) statuses and are largely powerless to alter them. Mentally ill offenders, then, are ‘silenced’ through the activity of transcarceration, and they assume their oppressive position as a marginalized and captive group.43

This defined ‘mad’ or ‘bad’ status is constructed by both the mental health community and the criminal justice community, demonstrating the challenge for therapeutic jurisprudence. Evidently, this underlying social construct is far from a therapeutic outcome as it labels offenders with mental illnesses as both diseased and dangerous. As Bartlett & Sandland state;

[I]t is only, and precisely, the construction of the mentally disordered as ‘other’ that allows the imposition of legal controls that do not apply to other sections of the community, and the mentally disordered as such are similarly situated alongside the ‘criminal other’ by any world view that divides society into the normal and the deviant.” 44

43 Arrigo, above n 43, 106.
44 Bartlett & Sandland, above n 1, 239.
Hence there is the possibility that establishing a Mental Court in NSW may have a negative impact on the lives of offenders with mental illnesses as it carries negative connotations from political, economic and social constructs. Roberts & Indermaur argue that a Mental Court can increase a person's involvement with the criminal justice system during the life of the program, for longer periods of time.\(^{45}\)

Furthermore, in light of these negative connotations distinguishing those with mental illnesses for special programs may be seen as discriminatory.\(^{46}\)

Helen Syme (2002) also voiced her wariness of establishing a Mental Court in NSW due to the potential 'stigma' that attaches to the offender by being dealt with by such a court.\(^{47}\) This reflects the argument that taking offenders with mental illnesses “out of the regular court system into a special court serves to further marginalize and stigmatize” those persons.

If NSW were to establish a Mental Court, McSherry & Richardson have suggested not labeling the court as a “mental court” or over-formalising the diversion scheme to help reduce any negative connotations associated with offenders with mental illnesses.\(^{48}\) Furthermore, if a Mental Court were to be established in NSW it should be founded on values that promote recovery of the offender as it would encouraged offenders to leave the diversion program having made progress and to face society without discrimination.\(^{49}\)

\(^{45}\) Roberts & Indermaur, above n 33, 220.
\(^{46}\) Ibid.
\(^{47}\) Syme, above n 20, 16.
\(^{48}\) Ibid.
\(^{49}\) Ibid.
Conclusion

The diversionary options available under ss 32 and 33 MHFPA are appropriate, and workable, provided they are properly understood and acted upon in cooperation between the court and mental health services. However, the high rate of mentally ill prisoners within and entering into prisons in Australia is evidence that there is a large disparity between legal and medical concepts that have been socially, politically and economically constructed over decades that need to be unraveled. This is the challenge for therapeutic jurisprudence. Before these constructs are resolved and more evaluated evidence of the effects of Mental Courts in other States are provided, the question of the need for a Mental Court in NSW will remain unresolved. Like the mentally ill offender, this question remains caught in the cracks between the criminal law system and the mental health system.

As Howard and Westmore state;

The essential ingredient required for [diversionary] innovations to work is the availability of adequate and appropriate resources in the community to divert persons to, including agencies that can work effectively with the court to back up and monitor the dispositions made. The lack of sufficient provision of such resources will imperil even the best-designed legislative provisions.

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50 Howard & Westmore, above n 6 at 715.
51 Howard & Westmore, above n 7 at 714.
Books


Journal Articles/Websites


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The Local Court of NSW website

Cases/Legislation

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