SPEECH FOR AIJA SEMINAR

13TH September, 2002

MENTAL HEALTH AND THE CRIMINAL JUSTICE SYSTEM - *A NSW LOCAL COURT PERSPECTIVE*

Thank you for the opportunity to contribute to your discussions today. Originally, the former Chief Magistrate, Patricia Staunton, was asked to speak to you, but as many of you may know, she has proceeded to a different field of endeavour. I acknowledge her contribution to this speech and indeed acknowledge her contribution to many of the initiatives that have been undertaken in the NSW Local Court over the last three years.

Looking at the functioning of the Local Court from a Public Health Perspective is useful and I believe fruitful in terms of the ability of the courts to contribute to a properly functioning community. It is this aim to a holistic approach that can produce our most innovative attempts to solve problems but can also produce great pessimism as we see only the slowest in overall change. That is, by adopting this approach, we are attempting to address the greater issues of mental health in a Public Health setting, rather than just solve issues from the courts perspective.

Mental Health is important to us all. Its presence is critical in allowing each of us to function within the context of what is seen as normal behaviour in our dealings and relationships with others in the community. When a person's mental health is impaired in any way by a supervening mental illness such as the person may become mentally ill, it raises special legal problems. As those involved with the legal system well know, an ability to understand the nature and effect of one's actions and the ability to knowingly do a particular act and/or intentionally do so, is critical to grounding criminal culpability.

When intellectual functioning is impaired by mental illness, the legal system is required to address the problem as a threshold issue to determine whether the person should be dealt with according to law or diverted into more appropriate care and treatment within the health system. The procedure for doing so, at least as far as the New South Wales Local Court is concerned, is encompassed within the *Mental Health (Criminal Procedure) Act* which has regard to the provisions of the *Mental Health Act* {See Annexures A and B - s32 and s33 of the *Mental Health Act*}

It is obvious that when considering how best to deal with people with a mental illness who come before our courts, we must start from the primary objective of ensuring that, wherever possible, the criminal justice system is not their first

port of call. Wherever possible, they should be diverted into a therapeutic environment within the health system with appropriate support services. One of the reasons why this discussion is occurring today is because, in many cases, this is not happening.

People with underlying mental illness are being caught in the criminal justice system. Not only is that system dehumanising and inappropriate for those with an underlying mental illness, it is also ill-equipped to deal with such people and on many occasions can significantly exacerbate the problem. Therefore, it appears obvious that the best way to ensure that such people are properly diverted from the criminal justice system is by the provision of adequate health services including institutional and community services.

In order to convey the size and complexity of the problem, I'd like to refer to a few specific and general statistics. The prevalence of mental disorders in Australian men and women has been reported in the National Mental Health Survey published this year. Approximately one in five (17.7%) of the adult population had an anxiety, affective or substance abuse disorder. This is not including mental disorders such as schizophrenia, dementia or personality disorders, which will add a further 3% to that figure. These figures are probably underestimates as they do not include the homeless or prison inmates.

In the general population it is considered that approximately 1% are able to be diagnosed has having schizophrenia, whereas approximately 10% of the NSW male prison population is diagnosed with this illness.

A NSW Inmate Mental Health Survey conducted this year resulted in findings that more than 50% of the female population and 39% of the male population reported a diagnosis of mental illness at some time in their lives.

Of the females, 73% had been admitted to a psychiatric or mental health unit. 39% had attempted suicide and 23% were on psychotropic medication while in custody.
Where males are concerned, 63% have a substance abuse disorder and over 50% have a mental health disorder.

It is little wonder then, that some commentators have referred to prisons as mental hospitals for the poor. Clearly the present situation is intolerable - both for those with a mental illness and for society as a whole.
Policy decisions some years ago in NSW resulted in action being taken to significantly reconfigure the mental health and developmental disability services in New South Wales.

The overriding objective was to separate the care of the mentally ill from developmental disability services and to remove as many people as

possible, in both sectors, from the constraints of large scale institutional care to an environment of community based places based on the principle of normalisation and the fostering of independent living.

It was then and still is an objective that appears to be based on good reason, sound policy and sensible argument. It is and was a logical and humane objective to pursue. To pursue the objective properly considerable financial and human cost is required.

The adequacy of government funding to provide proper services is a topic that others are better equipped to comment on than I.

The Chair of the Legislative Council's Select Committee on Mental Health said:

" The interim report illustrates that the major issues facing mental health service provision in NSW are by no means a recent phenomenon. The report identifies the main issues facing mental health services in NSW, such as treatment and care, community care, homelessness and housing, and forensic issues.

In submissions to the inquiry and in evidence before the Committee, it has been repeatedly stated that community care, both government services and those provided by the non-government sector, are inadequately funded in NSW. Beds are

not available, recruiting and retaining qualified staff is difficult, while rural and regional services are inadequate and in some areas non-existent." [1]

Where inadequate services are provided, the consequences are readily visible from a court bench.

The personal cost of deinstitutionalisation is dependent on the support structure within families. This support can make the difference between a person with a mental illness or a developmental disability being able to function independently and free of offending behaviour in the community or failing to do so. These are the same supports that help us all to cope with the ups and downs of daily life. When a person is vulnerable and alone it is often overwhelmingly hard for them to cope with the normal stresses of daily living. When their mental health is impaired, it becomes well nigh impossible to do so. Not every person with a mental illness or developmental disability has a family based support structure. Equally, not every person with a mental illness or disability has adequate resources provided for their care.

Unless these two areas of support are forthcoming, people will fail. When they do, they

[1] Media Release, The Hon Dr Brian Pezzutti RFD MLC, Chair, Select Committee on Mental Health, 3rd September, 2002.

invariably fall through the cracks and into the criminal justice system.

When a person with a mental illness is left largely unsupported within an isolated community environment, he or she will often try to cope in inappropriate ways, frequently by anti-social and criminally offending behaviour. If their illness is compounded by a poly-substance abuse problem, as is frequently the case, the offending behaviour intensifies and there will inevitably come to the attention of the police, as the enforcement arm of law and order in the community.

For the police the problem is a difficult one. If a person's behaviour is simply one that indicates that the person needs care and protection for their own sake or for the protection of others, then they can divert that person at that point, to the health system. That is, attempt a referral via the local hospital or clinic via the *Mental Health Act.* It has been suggested that better training for police in dealing with people with a mental illness would assist. It is a proposition one could readily agree with, however, the police responsibility is simply an intermediate one and not a solution to the problem.

If the person's behaviour involves criminally offending activity, they have no choice but to treat it as such. That person then becomes a

problem for the court as to how best to deal with him or her.

Judicial officers are not health professionals expert at assessing a person's state of mental health or illness. However, their experience in observing people on a daily basis makes them alert to indications in person's behaviour that all is not well or normal, as the case may be. Every judicial officer would be concerned to ensure that a person who comes before them is legally competent, and if not, or suspected of not being, they should be psychiatrically assessed as quickly as possible, and where necessary, dealt with by diversion to a therapeutic service.

I'd like to speak briefly about the Diversion for Court that is available in NSW. Diversion can occur pursuant to the *Mental Health (Criminal Procedure) Act*. The provisions apply to summary offences or indictable offences triable summarily. They do not apply and the Local Court has no jurisdiction under the *Mental Health Act*, to deal with offenders charged with seriously indictable matters. These matters, after committal go to either the Supreme or District Court where defendants are able to call on the defence of insanity if they wish to do so.

Presently, a defence of Mental Illness simply does not apply in the Local Court. The charge would require more than allowing Part 4 of the

Mental Health (Criminal Procedure) Act to apply. As the NSW Law Reform Commission stated in their Report Number 80:

" If the defence succeeded, the magistrate would not be able to make orders which can be made by Supreme and District Court judges under the Mental Health (Criminal Procedure) Act, nor would the detailed review system, involving the Tribunal be available."

Sections 32 and s33 of the *Mental Health (Criminal Procedure) Act* require the Magistrate to have regard to the matters placed before the Court, which can include a summary of the alleged facts, any psychiatric reports or assessments, and an assessment from the clinical nurse if the court is lucky enough to have one.

Section 32 allows for the Magistrate to deal with the charge other than according to law, if he or she is satisfied that the defendant is developmentally disabled or is suffering from a mental illness, or is suffering from a mental condition for which treatment is available in a hospital. The Magistrate may dismiss with or without conditions. Conditions may include attendance at certain clinics, support centres or doctors. There is no sanction available for a failure of those dismissed pursuant to s32 to comply with the conditions of dismissal.

Section 33 allows the magistrate to either discharge a person unconditionally or conditionally if it appears they are suffering from a mental illness as defined by the *Mental Health Act*. This section also allows the court to require the police to take a defendant to a hospital for assessment. It is hoped that if a person comes within the *Mental Health Act*, they ought to be scheduled pursuant to the *Mental Health Act*, there and then.

The court therefore has procedures available to it for diversion of those with mental illness or developmental disability from the court system. It is not a perfect procedure and it is true that some minor amendment to the wording of s32 and s33 may assist the process.

It is an unfortunate reality that patients who seem to be obviously disturbed will often be returned to court after a s33 assessment with a finding that they are not mentally ill or capable of being scheduled. There is a deep suspicion at court level that these referrals back to court are more to do with hospitals feeling themselves unable to handle potentially disruptive mentally ill persons and their position is that they would rather they be in custody. Often this finding will appear to defy common sense, but there is little else a court can do other than refer the matter for assessment while in custody.

Up until 1998 this was a fairly unsatisfactory system, with defendants languishing in custody facilities while awaiting psychiatric assessment. Delays and frustration eventually led to a trial of locating a Mental Health Professional within the Local Court precincts. This process commenced in 1998 in Newcastle Local Court with the cooperation of the Hunter Area Health Service. The trial was an overwhelming success and the next year, with the cooperation of Corrections Health Services and the strong support of the then Chief Magistrate, Mental Health Professionals were located in a further eight courts.

The qualifications and job descriptions for the clinical nurses were settled after discussion with Magistrates. A copy is contained in Annexure C. A magistrate sat on the selection panel. It can be seen they are qualified health professionals with the ability to diagnose mental illness. There is also the added advantage that they act as a conduit between the court and the health system.

Since we started collecting proper statistics, only a few months ago, 11% of all persons in custody have been seen by the mental health nurses (amounting to 377 in the first 10 weeks). Of those seen, 60.2% had an identifiable mental illness.

Following discussions with the Department of Health, further funding will be provided for a further five clinical nurses to be placed in courts. The locations will be the subject of further discussion, however, the need for psychiatric assistance in country areas is well recognised and will be addressed.

The creation of the court based psychiatric services has created a real opportunity for therapeutic alternatives to custody to be offered to the court as well as seeking to address the high number of mentally ill offenders remanded in custody. The success of the service has been evidenced in a number of ways:

- it allows for immediate identification of persons in an acute stage of mental illness;
- it provides for the possibility of alternatives to custodial treatment;
- direct communication with Corrections Health Services at correctional facilities allows for immediate identification, treatment and follow up of persons who are to remain in custody;
- better communication between Corrections Health Services at the court and community based health carers assists in the support of persons released;
- allows for immediate assessment of persons being considered pursuant to s32 and s33 of the *Mental Health (Criminal Procedure) Act;*

- is able to quickly exclude persons who are not suffering from a mental illness;
- identifies situations where a person's mental illness has no relevance to the offence charged.

When I first commenced preparation of this paper I was feeling relatively optimistic about the position adopted by the NSW Local Courts and the steps being undertaken to deal with those who come before our courts while suffering a mental illness. In taking small steps to address a problem you can be fooled into believing that just because we are doing something the problem will go away.

In the face of the statistics of the number of mentally ill in custody, however, it is hard to remain optimistic for long.
Clearly other strategies are needed. I have some suggestions which I might raise. They are in no particular order and not all of the ideas are mine:

RECEPTION SCREENING PROGRAMS
The first step towards reforming our prisons should be to establish far more effective and continuous screening programs to identify who has mental illness, whether they are suicidal, whether they have a drug addiction and to set in train a regime for medical treatment. Such programs should facilitate proper case management, get the medication right and avoid

deaths in custody. It would undoubtedly greatly improve the conduct of forensic prisoners.

ASSESSMENT INTERVENTION SERVICE

All Australians are entitled to have access to medical care no matter what the service setting and even if their current address is a gaol.

There is no point in assessing prisoners for a mental illness if our health system does not follow up that process.

IN GAOL PYSCHIATRIC UNIT

There are of course forensic wards in our larger gaols but the forensic patients are few and the mentally ill prisoners are many. There should be within each gaol a psychiatric unit to treat the general prison population in the same manner as the units under Area Health Boards. They should provide 24 hour care.

SUICIDE MINIMISATION PROGRAMS

Since the Royal Commission into Aboriginal deaths in custody a lot has been done in the field of suicide minimisation. I strongly believe this should be a function independent of the health programs I have been discussing because the onus should be on the prison administration to provide an environment conducive to suicide minimisation.

REFORMING THE MENTAL HEALTH SYSTEM

Improving the quality of life for mentally ill folk in prison is important. However, a better approach is to remove as many as possible form the prison environment. If such an approach does nothing else it might make our prisons less violent and far more manageable places.

SECURE MENTAL HEALTH SYSTEM

The first step in such a plan would be to provide more secure and medium secure mental health facilities around the State. Other States provide them. NSW closed several during deinstituitionalisation several years ago. Such facilities could support prison based services and accept forensic patients diverted by our Courts. Such facilities could also play a vital role in the transition from prison into community.

A SPECIALIST FORENSIC SERVICE

If we are to help overcome the tensions between the criminal justice and health systems we need to establish a specialist forensic service to cope with violent patients. Suggestions have been made by a multi-disciplined team of specially selected and trained police officers, health care and social workers. Experience has shown that where police psychiatrists or even senior police officers are present at siege situations on most occasions the crisis is resolved without violence. Even better results would be achieved by a specialised squad trained to deliver a non-violent outcome.

MENTAL HEALTH COURTS

There has been speculation from time to time as to the advisability of setting up separate Mental Health Courts for defendants with a mental illness. At this time there do not appear to be compelling reasons to embrace this policy, although I am aware that some jurisdictions have done so. They appear satisfied with their choice. However, the difficulties I see with this approach include:

- Firstly, the potential for community stigma that follows from being dealt with in such courts. At present quite some effort is made to ensure that those with a mental illness are not labelled as such and suffer as little discrimination as possible associated with such stigma. Being dealt with in a " Mental Health Court" creates a double burden for these people.

- Secondly, the logistical difficulties of requiring those people suspected of having a mental illness, being assessed and then being required to attend a court that would not necessarily be located proximate to their residence. There is sufficient difficulty already in having people with a mental illness keep court appointments without adding an extra appearance at a different location to their requirements.

- But most importantly, the setting up of such a court would suggest we have given up in achieving our overriding objective of keeping people with mental illnesses out of the Criminal Justice System rather than setting up their own special courts within it.

In summary, any 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.

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