
EQUAL JUSTICE REQUIRES A DISABILITY LIST

**Why the proposed Mental Health List in the Magistrates Court is
not the place for intellectual disability, acquired brain injury,
autism spectrum disorder and neurological impairment**

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INTRODUCTION

In the Parliament of Victoria on 10 December 2009 the Attorney-General tabled the Magistrates' Court Amendment (Mental Health List) Bill 2009. The Bill proposes to amend the Magistrates' Court Act 1989 and set up a Mental Health List within the Magistrates' Court of Victoria as a three-year pilot project.

The program enabled by this List is meant to assist courts to appropriately address at a pre-plea, pre-sentencing stage the issues associated with the defendant's offending behaviour. If the Court is satisfied that the person has successfully completed or participated in an individual support plan it has approved, the court has the discretion to discharge the accused without making a finding of guilt against them.

Although it is called a Mental Health List, four of the five eligibility diagnostic criteria are related to disability, not mental health.

This paper is written:

- to highlight problems with the proposed legislation to establish a Mental Health List in Victoria's Magistrates Court; and
- to provide a solution to the problems.

A. CONCERNS ABOUT THE PROPOSED LEGISLATION

1. The Mental Health List as proposed is wrong

To be eligible for a criminal proceeding to enter the Mental Health List, an accused must meet (a) diagnostic criteria and (b) functional criteria and (c) needs criteria.

The diagnostic criteria are that the accused person need have only one of:

- a mental illness
- an intellectual disability
- an acquired brain injury
- autism spectrum disorder
- a neurological impairment including but not limited to dementia.

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So, even though the Attorney-General's human rights statement of compatibility and second reading speech talk about "*accused persons with mental illness and co-occurring impairments*" "*limits the jurisdiction of the List to accused with a mental illness*" "*defendants who experience mental illness or co-existing impairments*" "...*focus on those defendants whose risk of re-offending is related to their mental health issues*", the legislation does not require:

- an intellectual disability co-existing or co-occurring with a mental illness
- an acquired brain injury co-existing or co-occurring with a mental illness
- autism spectrum disorder co-existing or co-occurring with a mental illness
- a neurological impairment co-existing or co-occurring with a mental illness

Further, if a person has more than one of the diagnostic criteria, the legislation does not require recognition of the primary diagnosis.

The establishment of a Mental Health List with the 'only one' criteria promotes the sense that each of intellectual disability, acquired brain injury, autism spectrum disorder, neurological impairment is included in the field of mental health along with mental illness. This is a significant conceptual flaw which must be rejected as it undermines the progress which has been made for impaired intellectual functioning to be recognised as being different and distinct from mental illness.

While modern conceptual thinking around health conditions, disability and functioning recognises that mental illness conditions are within the disability framework – for example, the grouping *psychiatric disability* includes the conditions of schizophrenia, depression, mental and behavioral disorders - it does not hold that intellectual disability, acquired brain injury, autism spectrum disorder, and neurological impairment are within the mental health framework.

Of course, persons living with these conditions may also have a co-existing or co-occurring mental illness as a secondary diagnosis. Equally, intellectual disability, acquired brain injury, autism spectrum disorder and neurological impairment may occur in combination; for example, there is a high incidence of intellectual disability and an autism spectrum disorder. Nonetheless, the primary condition must be the condition which determines the options available for an accused person.

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As is acknowledged on the Victorian Government website

Acquired brain injury is not a mental illness and requires very different specialist skills from those offered by mental health services.

Intellectual disability is not a mental illness and requires very different specialist skills from those offered by mental health services.

<http://www.health.vic.gov.au/mentalhealth/terminology.htm> downloaded 10 January 2010

Even though the Victorian Government acknowledges that very different specialist skills are required from those offered by mental health services, the Attorney-General's second reading speech and the Bill's Explanatory Memorandum under Clause 5 set down that mental health practitioners will undertake comprehensive assessments of defendants, prepare individual support plans, and advise the court of the defendant's treatment, progress and provide some time-limited psychological interventions.

This serves to emphasise that the foundation concept of the proposed Mental Health List is that the five listed criteria all - of themselves, as 'one only' - belong to the field of mental health with specialist support being provided by mental health practitioners.

Mental illness and intellectual disability

Particularly, the mingling of mental illness and intellectual disability as Mental Health must be rejected as outmoded, out of keeping with modern thinking and professional acceptance about these completely different disabilities.

A clear point of distinction between the two is that intellectual disability is not an illness, is not episodic and is not, as the underlying condition, usually treated by medication. A person could recover from a mental illness as a result of treatment, but intellectual disability is fairly constant throughout a person's life.

In Victoria the distinction between mental illness and intellectual disability has been well accepted in law and in the separation of service systems for over 20 years. The Intellectually Disabled Persons' Services Act 1986 (IDPS Act), which preceded the Disability Act 2006, resulted from a reference made by the Minister for Health in

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1983 on the need for an Act to replace those sections of the Mental Health Act [1959] which dealt with mentally retarded persons bearing in mind that the new Mental Health Act will deal only with mentally ill persons and will not refer to mentally retarded persons.

In its report to the Minister for Health (*Report of the Committee on a Legislative Framework for services to intellectually disabled persons, 1984*) it was noted that the Lunacy Act 1928 was introduced at a time when mentally ill and intellectually disabled persons were placed in the same institutions and the category 'lunatic' was defined to include both mentally ill persons and intellectually disabled persons; and that even in 1923 there was a strong lobby arguing for the separation of these two groups. (p 7)

Well over 80 years later, in 2010, it could be considered that this Mental Health List mingling mental illness and intellectual disability in the same structure is an act of lunacy which undermines the achievements and progress made during the last two to three decades. It harks back to the days when intellectually disabled persons – then described as *mentally retarded* – occupied what were referred to as the 'back wards' of mental hospitals. (Judge, Cliff 1987, *Civilization and Mental Retardation* p 19)

Mental Health and Disability are separate and distinct

The establishment of a Mental Health List with eligibility based on 'one only' of these diagnostic criteria is at odds with the well-established basis for the separate and distinct directions of Mental Health and Disability in Victoria, a separation which has been affirmed by this government. For example:

- **Separate and distinct legislation**

- There is the Mental Health Act 1986, which is currently under review.
- There is the Disability Act 2006, which in 2006 specifically excluded psychiatric disability from its scope - psychiatric disability was included in the Disability Services Act 1991 - and included acquired brain injury; and since December 2008 has included autism spectrum disorder in the neurological group (Media Release, Minister for Community Services, 12 December 2008).

- **Separate and distinct plans**

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- There is the Victorian Mental Health Reform Strategy 2009–2019.
- There is the Victorian State Disability Plan 2002-2012 (which acknowledges psychiatric disability in the context of dual disability, where it must occur in combination with one or more of intellectual, physical, sensory disability, acquired brain injury or neurological impairment).
- **Separate and distinct administration**
 - In the Department of Health there is the Mental Health Division.
 - In the Department of Human Services there is the Disability Services Division.

There were two separate divisions in the Department of Human Services prior to the August 2009 restructure into these two departments.

Regarding the separate legislation, when intellectual disability was separated from the Mental Health Act 1959 the committee said:

Separate legislation has great value (both practical and symbolic) for intellectually disabled people who have too often been treated as if they were mentally ill. We believe that the public attitude to intellectually disabled people is largely influenced by an inability to distinguish between mentally ill and intellectually disabled people. Similarly, service providing agencies often take for granted an illness model of intellectual disability. Separate legislation would have an important role in changing these perspectives and their practical consequences for the treatment of intellectually disabled people. (Report of the Committee on a Legislative Framework for services to Intellectually disabled persons, February 1984, p 11)

This holds true today, and underscores the importance of the separation of mental illness and intellectual disability.

No doubt there will be people who consider that the 'means justifies the end', that it doesn't matter why a person gets onto the Mental Health list, being on the list means some kind of support is provided. However, there is a dearth of evidence to support repeating the mistakes of the past.

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In short, it is socially and morally wrong to bring intellectual impairments back into the mental health sector.

2. "Best practice" and Interstate programs

The government asserts that the model proposed by the Bill is based on a number of successful interstate and international programs, adopting the "best practice" features of each of those models, while also taking into account the particular characteristics of the existing health services and associated infrastructure in Victoria. (Parliament of Victoria, Magistrates' Court Amendment (Mental Health List) Bill, Second Reading speech, 10 December 2009)

While there is of course evidence to demonstrate there is merit in diversion or intervention programs, this assertion about the Mental Health List is not underpinned by there having been any public presentation of a discussion paper in relation to its establishment, presenting evidence as to interstate and international programs, and establishing the rationale for the proposed legislation and its target group.

Set out below is a consideration of some interstate diversion/intervention programs: Western Australia, Tasmania, South Australia, NSW. It is clear that the proposed Mental Health List is not adopting the "best practice" features of each of those models, it is also not taking into account the experience of each of those models.

Western Australia

The Law Reform Commission of Western Australia (LRCWA) in June 2008 released a consultation paper on *Court Intervention Programs* and in June 2009 released its Final Report. (LRCWA, *Court Intervention Programs*, Project No. 96, <http://www.lrc.justice.wa.gov.au/096g.html>)

Of particular relevance are the LRCWA's considerations regarding Mental Impairment Court Intervention Programs:

The review of programs and relevant literature outlined in the Commission's Consultation Paper highlighted a significant difference

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between the management needs of mentally ill offenders and cognitively impaired offenders. For example, it became apparent that cognitively impaired offenders require far more intensive hands-on case management and often longer-term supervision or support than mentally ill offenders. While many mentally ill offenders may be treated effectively in the short term by medication and counselling, cognitively impaired offenders must learn skills to manage a lifelong disability. Cognitively impaired offenders also present more often with severe functional disabilities (especially those people who have degenerative brain injury or acquired brain injury) and sometimes require supported accommodation with assistance in all aspects of daily living from toileting to decision making. (p82)

Western Australia has an existing Intellectual Disability Diversion Program (IDDP) and the LRC recommended that the program be retained as a specialist list and expanded; and *to include offenders with all types of cognitive impairment including acquired or organic brain injury, intellectual disability, dementia and other degenerative brain disorders. The level of cognitive impairment that a participant must have is a matter of policy for the court. (p 83)*

The Commission also recommended:

For the reasons set out in its Consultation Paper, and with which the submissions agreed, the Commission recommends that the program should have inclusive psychiatric diagnostic criteria that include personality disorders and dual diagnosis substance abuse. However, the Commission recommends that offenders with a primary diagnosis of intellectual disability or other recognised cognitive dysfunction be dealt with under an expanded version of the existing IDDP and therefore should not be specified in the diagnostic criteria of the proposed mental impairment court intervention program. Nonetheless, those offenders whose primary diagnosis is of a mental illness or personality disorder with a secondary diagnosis of intellectual disability or other cognitive dysfunction may apply to participate in the mental impairment court intervention program. (p 84)

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As is apparent, the LRCWA has decided that the "best practice" feature of its system is to separate programs where there is a primary diagnosis of a psychiatric condition from those of an intellectual disability or other cognitive dysfunction. But the proposed Victorian legislation is the antithesis of this.

Tasmania

In Tasmania, a Mental Health Diversion List Program (MHDL) operates with a dedicated Magistrate in the Hobart registry of the Tasmanian Magistrates Court (http://www.magistratescourt.tas.gov.au/divisions/criminal_and_general/mental_health_diversion)

This was established in May 2007 and there is a May 2009 Evaluation Report which indicates the program is being successful. http://www.magistratescourt.tas.gov.au/_data/assets/pdf_file/0003/127029/Mental_Health_Diversion_List_-_Evaluation_Report_-_May_2009.pdf

Eligibility for participation in the MHDL is limited to adult defendants with impaired intellectual or mental functioning as a result of a mental illness, as defined in Tasmania's *Mental Health Act 1996*. For the purposes of eligibility for the MHDL program the definition of mental illness is as defined in section 4 of the *Mental Health Act 1996*. This definition is:

4. Meaning of "mental illness"

- (1)** A mental illness is a mental condition resulting in –
- (a)** serious distortion of perception or thought; or
 - (b)** serious impairment or disturbance of the capacity for rational thought; or
 - (c)** serious mood disorder; or
 - (d)** involuntary behaviour or serious impairment of the capacity to control behaviour.
- (2)** A diagnosis of mental illness may not be based solely on –
- (a)** antisocial behaviour; or
 - (b)** intellectual or behavioural nonconformity; or
 - (c)** intellectual disability; or
 - (d)** intoxication by reason of alcohol or a drug.

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The eligibility of the Tasmanian program does not support the eligibility diagnostic criteria proposed for Victoria. Of particular note in the Tasmanian Mental Health Act is that a diagnosis of mental illness may not be based solely on intellectual disability.

South Australia

The South Australian Magistrates Court Diversion Program has been operating since June 1999. It commenced as a pilot and in June 2001 the Government made a commitment to fund the program on a recurrent basis following an independent evaluation by the Office and Crime Statistics and Research that found that the program was having a positive impact on reducing re-offending. A more recent report on the *Magistrates Court Diversion Program, An Analysis of post-program offending, Evaluation Findings* of July 2004 is available at http://www.ocsar.sa.gov.au/docs/evaluation_reports/MCDP2.pdf

(The LRCWA Final Report has more current comment on the SA Diversion Program.)

The SA Court was initially called the Mental Impairment Court but over time this name has been used less and less and both the Court and the Program are now known simply as the Magistrates Court Diversion Program. The 2004 Evaluation Report notes that *the decision to call it the Magistrates Court Diversion Program rather than a Mental Impairment Court was a deliberate one, designed to avoid any form of stigma that may attach to the term "mental impairment"*. (p 14)

Eligible individuals are adults who have been charged with certain minor or summary offences to be heard in the Magistrates Court of South Australia, and who have impaired intellectual or mental functioning arising from:

- mental illness
- intellectual disability
- a personality disorder
- acquired brain injury, or
- a neurological disorder including dementia.

<http://www.courts.sa.gov.au/courts/magistrates/index.html>

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It must be noted that the SA program does not use the terminology of "Mental Health" to encompass the persons eligible for the program. And it is also noteworthy that the eligibility listing has strong similarities to the proposed Victorian listing, the exception being that it does not encompass autism spectrum disorder. (The 2004 Evaluation Report comments on the inclusion of personality disorder in the target group.)

NSW

The New South Wales Law Reform Commission has a current reference on people with cognitive and mental health impairments in the criminal justice system. http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref120

The LRC is undertaking a general review of the criminal law and procedure applying to people with cognitive and mental health impairments, with particular regard to:

1. s 32 and s 33 of the *Mental Health (Criminal Procedure) Act 1990*;
2. fitness to be tried;
3. the defence of "mental illness";
4. the consequences of being dealt with via the above mechanisms on the operation of Part 10 of the Crimes (Forensic Procedures) Act 2000; and
5. sentencing.

A May 2009 conference paper *People with cognitive and mental health impairments in the criminal justice system* gives an overview of the current law in NSW (http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_am02). The paper specifies that:

The phrase "cognitive and mental health impairments" is intended as a "catch-all" expression which includes pretty much everything except for substance use disorders. So it includes the major mental illnesses, personality disorders, and other mental health problems such as anxiety disorders and post-traumatic stress disorders. The reference to cognitive impairments includes intellectual disability, autistic spectrum disorders, acquired brain injury, neurodegenerative diseases such as Alzheimer's condition, etc.

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As is apparent, the NSWLRC is differentiating between mental health and what it classifies as cognitive impairments.

This paper also explains that in NSW:

... Local Court has something the District and Supreme Courts don't have – two diversion mechanisms. The key provisions are sections 32 and 33 of the Mental Health (Forensic Provisions) Act. Section 33 applies only to a person who is "mentally ill" at the time of hearing so as to be a danger to him- or herself or others and to require treatment. The magistrate can refer the person to a hospital for assessment and or treatment, or may make a community treatment order. Section 32 applies to a person who has a mental illness, developmental disability or "mental condition", either at the time of the offence or the time of the hearing.

There is a May 2008 NSW Intellectual Disability Rights Service paper *Enabling justice: a report on the problems and solutions in relation to diversion of alleged offenders with intellectual disability from the New South Wales local courts system. With particular reference to the practical operation of s 32 of the Mental Health (Criminal Procedure) Act 1990 (NSW)* which has identified that what is required is clarification of s 32, particularly its application to persons with intellectual disability and other cognitive disabilities.

The report highlights the disadvantages which are experienced as a consequence of intellectual disability being included in Mental Health legislation.

The report also highlights that being included in the Mental Health framework creates significant difficulties for people with intellectual disabilities as there is ongoing confusion amongst criminal justice personnel about the distinction between intellectual disability and mental illness. The report suggests:

... this confusion between mental illness and intellectual disability could be attributed partly to the Act itself. Although 'developmental disability' is listed in s 32(1)(a) as a disability distinct from mental illness, the Act is mainly focused on mental illness. For example, the very name of the Act only mentions 'mental health' and the long title

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of the Act refers specifically only to mental illness: 'An Act with respect to criminal proceedings involving persons affected by mental illness and other mental conditions'.(p 31)

The report also sounds a cautionary note regarding therapeutic jurisprudence:

Whilst therapeutic jurisprudence offers some positive ways to address the issues faced by offenders with intellectual disability in the criminal justice system, it also has limitations that should be considered carefully before incorporating it into approaches to addressing intellectual disability criminal justice matters. These can be summarized in three points. If not applied carefully it could be inconsistent with the interactional model of disability adopted by this report because in some circumstances 'therapeutic jurisprudence' is focussed on 'therapeutic', that is on health-based, interventions which concentrate on the internal, psychological causes of offending to the detriment of a thorough consideration of the role of environmental factors. Second, therapeutic jurisprudence sees the law as a positive, therapeutic tool and hence can fail to consider how the law itself can be a source of disempowerment. Third, it has the potential to have a 'net widening' effect of drawing people with intellectual disability into and maintaining them in the criminal justice system insofar as it sees court as the moment for addressing an offender's issues. For example, there is a risk that the creation of specialist courts and diversionary mechanisms translates a social issue which should be the responsibility of the community and be addressed through human services into an individualised, legal and criminal issue. (p 18)

It is readily apparent that the proposed legislation for Victoria's Mental Health List is going down the same path which is identified as being problem-causing in NSW, rather than problem-solving.

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Overall

There is a body of evidence from interstate programs to demonstrate that Victoria's proposed Mental Health List is not informed by the experience of those other jurisdictions. The experience in those jurisdictions does not support a Mental Health List which extends beyond mental illness to intellectual disability, acquired brain injury, autism spectrum disorder, neurological impairment.

B. A SOLUTION TO THE PROBLEMS

The proposed legislation contradicts the well-established and recognised modern day separation of mental health and disability in legislation, in ten year plans, and in administration. It contravenes the entitlement without any discrimination of a person living with disability to the equal protection and equal benefit of the law. Taking into account the concerns raised around its presentation as a Mental Health List, and the concerns raised by the interstate experience, this List as it stands is socially and morally indefensible.

To ensure there is equal justice without discrimination for persons living with a mental illness and those living with intellectual disability, acquired brain injury, autism spectrum disorder, a neurological impairment, two separate and distinct lists are required. One would be a Mental Health List, the other would be a Disability List.

The proposed legislation must be amended so the Mental Health List is for people whose primary diagnosis is mental illness; and a separate Disability List must be created for people whose primary diagnosis is an intellectual disability or an acquired brain injury or autism spectrum disorder or a neurological impairment, including but not limited to dementia.

Mental Health List

The Mental Health List would be established by amending the proposed legislation where necessary, particularly the Eligibility criteria. The diagnostic criteria would be amended to read:

The diagnostic criteria is that the accused has a primary diagnosis of mental illness.

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Disability List

A Magistrates' Court (Disability List) Bill would need to be drafted, modelled on the Mental Health List, replacing the words Mental Health with the word Disability and with other appropriate changes where necessary.

The Eligibility criteria would specify that:

The diagnostic criteria are that the accused has a primary diagnosis of -

- (a) an intellectual disability; or
- (b) an acquired brain injury; or
- (c) autism spectrum disorder; or
- (d) a neurological impairment, including but not limited to dementia.

CONCLUSION

The Magistrates' Court Amendment (Mental Health List) Bill 2009 is listed for resumption of debate on Tuesday, 2 February 2010.

The government must defer debate on this Bill pending (a) the tabling of legislation for an amended Mental Health List and (b) commitment to the tabling no later than end May 2010 legislation for a Disability List.

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