



Mental Health and Criminal Charges: Variation in Diversion Pathways in Australia

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Mental health and criminal justice legislation must provide the appropriate mechanisms for ensuring the assessment and care of mentally ill individuals. It must also balance the right to justice of these individuals with the rights of the community. In Australia, each jurisdiction has its own legislative provisions related to mental health, criminal legislation and sentencing, with variation in the mental health diversion options that are available. This article uses a national survey of court liaison services and mental health courts in Australia and a review of the relevant legislative frameworks to compare jurisdictional approaches to mental health diversion. Despite calls from the National Mental Health Commission for consistency, the Australian approach to the provision of mental health services to people in the criminal justice system is heterogeneous and piecemeal. Variation in the diversion pathways available to individuals with mental illness exists across Australia. The presence of problem-solving courts in some, but not all, jurisdictions results in differences in access to legal and treatment options.

Key words: court diversion; court liaison; fitness to plead; mental health defence; mental health legislation; problem-solving court.

Introduction

Internationally the prevalence of mental disorder is markedly higher in the offender population than in the general population (Fazel & Seewald, 2012; James, 2006). In Australia, there is evidence to support this assertion at all stages of the criminal justice procedure: at the time of police contact (pre-arrest; Ogloff, Davis, Rivers, & Ross, 2007), in police custody (Baksheev, Thomas, & Ogloff, 2010), and in prisons (Butler et al., 2006). The prevalence of mental disorder in custodial populations has been estimated to between three and

twenty times greater amongst those in custody depending on the type of disorder and the cohort, with the highest differentials found amongst remanded populations, women, and Indigenous Australians (Butler et al., 2006; Heffernan, Andersen, Dev, & Kinner, 2012; Ogloff et al., 2007). It is therefore critical that the criminal justice system has diversionary methods to address the high prevalence of mental disorder.

Definitions of mental health diversion differ in the literature. Mental health court diversion has been described as the process

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whereby individuals are transferred from the criminal justice system to treatment that is provided by the mental health system (Greenberg & Nielsen, 2002). In situations where diversion is not possible, individuals with mental illness are referred to mental health care within custodial settings. Court diversion does not necessarily equate with the discontinuation of criminal prosecution; rather it enables the processes of treatment and criminal justice to coexist (Greenberg & Nielsen, 2002). A broad definition has been developed by the National Justice Mental Health Initiative Working Group, which states:

Mental health diversion and support aims to improve wellbeing and reduce recidivism in people whose mental illness significantly contributes to offending behaviour. The aim is to provide interventions and support targeted to their illness and related problems in place of, alongside, or integrated with other criminal justice system processes. (Thomas, 2010, p. 17).

Diversion Pathways in Australia

In 2013, the Australian National Mental Health Commissioner described prisons as the ‘dumping ground’ for the mentally ill (Dunlevy, 2013), echoing the views of others who have described prisons as the ‘mental health institutions of the 21st century’ (White & Whiteford, 2006, p. 302). Inconsistent approaches to the identification and provision of specialised mental health care for people with mental illness in contact with the criminal justice sector was identified in 2005 as a priority for change (Mental Health Council of Australia, 2005). Subsequently Australian jurisdictions have implemented a range of responses to address the needs of these individuals, including the development of court liaison services, specialised problem-solving mental health courts, and legislative approaches to support the diversion of people with mental disorder from the criminal justice sector to the health sector.

Court Liaison Services

In Australia, court liaison services are specialised clinical teams that aim to intervene early in the criminal justice process by identifying mentally ill individuals at the pre-trial stage of the court process, before conviction and incarceration. Court liaison services aim to provide timely advice to courts and linkage with treatment providers. Therefore, these services have been described as a ‘gateway’ for access to mental health services for the criminal justice system (Australian Institute of Criminology, 2012).

Problem-solving Mental Health Courts

An alternative approach to diversion is problem-solving mental health courts. These operate according to the principle of ‘therapeutic jurisprudence’, which seeks to use the law as a therapeutic agent (Lim & Day, 2013). Payne (2006) provides the following definition: ‘Specialty courts [...] are typically defined as new criminal court structures and procedures, developed to manage and deal with specific offender populations, where it is recognised that traditional criminal justice procedures have not been effective’ (p. 1). The procedural features of problem-solving courts include a level of judicial monitoring, cross-agency collaboration, the use of sanctions and rewards, and voluntary participation.

Legislative approaches to the nexus between mental health and criminal justice face the challenging task of providing appropriate mechanisms for enabling the assessment and care of mentally ill individuals while also balancing the right to justice of this population with the concerns of the community. The approach to the provision of mental health services to people in the criminal justice system in Australia has been described as heterogeneous, largely inadequate and often piecemeal (National Mental Health Commission, 2013; Richardson & McSherry, 2010). The National Mental Health Commission

(2013) has called for consistency in the legal provisions related to mental illness across jurisdictions in order to ensure equitable mental health treatment and criminal justice outcomes. However, each Australian state and territory has its own court system and all have magistrates' courts (sometimes referred to as local courts), which are the lowest level of state courts charged with attending to summary matters (cases that can be heard by a magistrate instead of a jury).

For the present study, a national survey of court liaison services and mental health court programmes in Australia was undertaken in order to provide an overview of the diversionary options available to people with mental disorder charged with a criminal offence that can be dealt with in magistrates' courts. Analysis of the survey identified variability in the options for individuals with mental illness who are charged with a criminal offence that can be dealt with in a magistrates' court in Australia. This study describes how adults (aged over 18 years) with mental illness who have been charged with an offence are identified in each jurisdiction, the diversion options available for less serious criminal charges including the various court-mandated mental health programmes, and the various approaches within different Australian jurisdictions. Additionally, court liaison services in each jurisdiction are described and reviewed, a summary of which is also described in another study (Davidson, Heffernan, Greenberg, Butler, & Burgess, 2016).

Method

Key representatives (clinical directors and team leaders) of services in each jurisdiction were contacted by the lead author and surveyed with respect to the types of programmes and services that support mental health diversion in their jurisdiction for individuals who are charged with a criminal offence that can be dealt with in a magistrates' court. Eligibility criteria, processes and structure of programmes, relevant legislation and the range of

legal outcomes were explored. Participants were asked to describe all diversion options and services that were available in their state or territory. A three-phase process was employed:

- (1) A written survey;
- (2) A 90-minute face-to-face or telephone interview; and
- (3) A desktop audit and summary of relevant legislation.

Ethical approval for the study was provided by the University of Queensland's Human Research Ethics Committee.

Participants

A total of 12 programmes that provided either a court liaison service or a mental health problem-solving court in Australia were identified. In one jurisdiction, Tasmania (Tas), a single representative was nominated for both the court liaison service and the mental health court diversion list, as this person performed a role within both service types. A total of 11 individuals were invited to participate in the survey and all consented, resulting in a 100% response rate.

Results

Addressing the Needs of Individuals Experiencing Mental Illness in Police Cells and at Court Proceedings – Court Liaison Services

People with mental illness who enter into the criminal justice system need to be identified and provided access to mental health treatment agencies. In Australia, legislative options exist in each state and territory to ensure that the immediate mental health needs of people with serious mental disorders (and in some cases cognitive impairment) who have been charged with an offence are evaluated by a mental health professional and that, where required, treatment is made available. The meeting of these legislative

requirements in most jurisdictions is the responsibility of the public health system through the provision of clinical mental health (court liaison) services to the courts, police cells and prisons.

Court liaison services perform a consultation and liaison role within criminal justice system settings. In all jurisdictions, this role is described as involving a broad range of referring agencies, including legal representatives, the police, magistrates, family, other mental health providers and self-referral. In addition to referrals to services for assessment, the cross checking of custody and court lists with mental health databases to identify individuals with current and past mental health treatment access who may be subject to mental health legislative provisions or have mental health needs is employed in some jurisdictions: Queensland (Qld), Western Australia (WA), Victoria (Vic), Australian Capital Territory (ACT) and New South Wales (NSW). Brief structured clinical assessments are undertaken by clinicians in both court and police cell environments. In the Northern Territory (NT), a dedicated court liaison service did not exist at the time of the survey; instead a small number of forensic mental health staff met this need in addition to a broader clinical role. As a result, in the NT there was a reliance on police contacting local mental health services to seek examinations. Following the release of the report of the national survey conducted for this study, two court-based mental health clinical roles have now been established in the NT.

Access to Court Liaison Services – Geographic Coverage

It is important to note that court liaison clinicians are outnumbered by the number of magistrates' courts and police cells in Australia, and that geographical impediments can limit access to mental health assessment. While three of the jurisdictions (WA, Tas and the ACT) describe an ability

to provide mental health assessments in all magistrates' court locations, the remainder were not able to meet this need, with metropolitan courts tending to have greater access than those in regional or remote areas. In WA, the use of videoconference linkage provides access to court liaison for regional and remote courts.

Comprehensive Mental Health Assessment Following Court Liaison Contact

All Australian jurisdictions have legislative provisions that permit magistrates to authorise the transfer of individuals who are believed to be experiencing mental illness to a mental health service for the purpose of comprehensive mental health assessment and treatment (if indicated). The mechanisms by which this process takes place vary, as do the mental health settings and methods for the disposal of charges. [Table 1](#) provides a brief summary of the relevant legislation in each Australian jurisdiction, which is further described below.

In NSW (Mental Health Forensic Provisions Act 1990), Qld (Mental Health Act 2000 and Mental Health Act 2016), Vic (Mental Health Act 2014), WA (Mental Health Act 2014), South Australia (SA; Mental Health Act 2009), Tas (Mental Health Act 2013), the ACT (Crimes Act 1900) and the NT (Mental Health Act 1998), there are provisions for the transfer of an individual before the court or in the police cells to authorised inpatient assessment centres for the purpose of psychiatric assessment. While transfer to mainstream acute inpatient mental health settings for further assessment is permitted in the majority of jurisdictions, in WA, the person must be detained in the state's secure forensic hospital by a court issuing a hospital order under section 5 of the Criminal Law (Mentally Impaired Accused) Act 1996 (WA) where the accused may later become subject to the provisions of the Mental Health Act 2014 (WA). In some jurisdictions (e.g., Vic, NSW, Qld and Tas), bail may be issued to

Table 1. Legislative provisions related to individuals charged with offences that can be heard at a magistrates' courts.

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Magistrates can authorise the transfer of individuals in custody to an authorised mental health inpatient service for assessment (without bail)	Yes, as per s. 33 (1) (a) of the Mental Health (Forensic Provisions) Act 1990 (NSW)	Yes, as per s. 10(d) of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic), the court can make an order for assessment	Yes, as a 'classified patient', as defined in s. 64–65 of the Mental Health Act 2016 (Qld), while s. 66 outlines a similar process for someone in custody who is under a treatment authority	Yes, as per s. 24 of the Criminal Law (Mentally Impaired Accused) Act 1996 (WA), transfer to forensic mental health inpatient facility	Yes, as per s. 269F of the Criminal Law Consolidation Act 1935 (SA)	Yes, as per s. 36A of the Corrections Act (Tas), transfer to a secure mental health unit can take place, and magistrates can also remand to the secure mental health unit	Yes, s. 309 of the Crimes Act 1900 (ACT) allows diversion into a mental health facility for assessment and care directly from magistrates' court, by the magistrate.	Yes, as per s. 74A & s. 75 of the Mental Health Services Act 1998 (NT)
Magistrates can authorise the transfer of individuals in custody to a community mental health service for assessment	Bail is not required under the Mental Health (Forensic Provisions) Act 1990 (NSW), part 3 s. 31–36 describes how a mentally ill person in custody on summary offences is dealt with, specifically, as per s. 32(3)(a) &(b), the magistrate can release the person on the condition that they go for a mental health assessment	If bail is permitted, the community assessment provisions of the Mental Health Act 2014 (Vic) apply	If bail is permitted, the community assessment provisions of the Mental Health Act 2016 (Qld) apply	If bail is permitted, the community assessment provisions of the Mental Health Act 2014 (WA) apply	If bail is permitted, the community assessment provisions of the Mental Health Act 2009 (SA) apply	If bail is permitted, the community assessment provisions of the Mental Health Act 2013 (Tas) apply	If bail is permitted, the community assessment provisions of the Mental Health Act 2014 (ACT) apply	Bail is not required according to s. 74A (1) of the Mental Health and Related Services Act 1998 (NT)
Continuation of charges depends on determination regarding fitness for trial and/or soundness of mind	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes

allow this evaluation to take place. In Tasmania individuals requiring transfer are placed in protective custody. Remand in custody in a correctional centre may also take place, followed by a transfer via the Corrections Act 1997 (Tas) to the secure mental health inpatient facility. Magistrates in two Australian jurisdictions (NSW and ACT) are able to order mental health assessments in non-inpatient settings for individuals charged with an offence without issuing bail.

Following transfer to a mental health inpatient service, in all Australian jurisdictions with the exception of NSW, charges are held over (essentially put on hold) by the courts during the period of the mental health assessment. If it is determined that mental disorder is not relevant to the legislative requirements under consideration with respect to unsoundness of mind at the time of offence and fitness for trial, the person is returned to custody or court and the charges proceed according to law. In the NT, magistrates also have an option to dismiss charges on the advice of the chief health officer following an examination by a psychiatrist if legal requirements are met with respect to soundness of mind at the time of the offence.

Unique Legislation in Two Australian Jurisdictions

The legislative provisions in both NSW and Qld include diversionary features that are not replicated in other Australian jurisdictions. NSW has unique provisions to support diversion from the criminal justice system for non-indictable (summary) offences. These provisions allow for early diversion to treatment providers for individuals with mental illness to either community or inpatient care. Legislation in NSW includes three relevant definitions in its Mental Health Act 2007: mental illness, mentally ill persons and mental disorder. It defines a mentally ill person as someone who is suffering from a mental illness and for whom there are reasonable grounds for believing that care, treatment or control of this person is necessary. Mental illness is

defined as a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence of any one or more of the following symptoms: delusions, hallucinations, serious disorders of thought form, severe disturbance of mood, and/or sustained or repeated irrational behaviour indicating the presence of any one or more of these symptoms. A 'mentally disordered person' under the act is described as 'someone whose behaviour is so irrational that there are reasonable grounds for deciding that the temporary care, treatment or control of the person is necessary to protect them or others from serious physical harm' (Mental Health Act 2007). Under section 33 of the Mental Health (Forensic Provisions) Act 1990 (NSW, p. 18), if during the course of proceedings it appears that a defendant is a mentally ill person then the magistrate may order that the defendant be taken to and detained in a mental health facility for assessment. Alternatively, the magistrate may discharge the defendant unconditionally or subject to conditions into the care of a responsible person. In circumstances where the defendant is assessed as not being mentally ill or a 'mentally disordered person' then he or she may be brought back before a magistrate. Under section 32 of the same act, if it appears to the magistrate that the person is (or was at the time of the offence) developmentally disabled, suffering from a mental illness or suffering from a mental condition for which treatment is available, but is not a mentally ill person, the magistrate may adjourn proceedings, grant bail, or make an order dismissing the charge either with or without conditions. NSW legislation is unique in that the disposal of criminal charges at the level of the magistrates' court is not dependant on the concepts of unsoundness of mind at the time of the offence or fitness for trial, as is the case in other jurisdictions.

Qld's Mental Health Act 2016 was recently passed by parliament, with plans for the act to be commenced in 2017. The act will provide magistrates with a range of

powers in relation to individuals with mental illness that they have not previously had available to them. In matters concerned with simple offences (any offence – indictable or not – that can be dealt with summarily), magistrates will be permitted to dismiss charges under section 172 if they are reasonably satisfied that the person was unsound of mind at the time of the offence or is unfit for trial at present. Provisions will permit proceedings in magistrates' courts to be adjourned for up to six months in cases where the person is considered to be unfit but is likely to become fit within six months (section 173). Diversion options will be available to magistrates, who will be able to issue involuntary examination orders (inpatient setting) under section 177 in situations where they consider an examination by a doctor is needed.

Qld is the only jurisdiction with specific provisions related to persons on (or who become subject to) involuntary treatment (including forensic) orders who are charged with an offence. These provisions relate to outstanding charges for any offence. In this situation, the current Mental Health Act 2000 (Qld) mandatorily requires an examination and completion of a psychiatric report of the issues related to unsoundness of mind and fitness for trial. Following completion of the report, the Director of Mental Health decides whether to refer the matter to Qld's unique mental health court for a hearing, or to the Director of Public Prosecutions. Currently, individuals under involuntary mental health treatment orders are unable to opt to have their charges dealt with according to law, as the process of assessment and psychiatric report is mandatory. While these provisions are intended to act as a safeguard for individuals with mental illness who have been charged with a criminal offence, it has been asserted that this mandatory process has resulted in significant delays by unduly prolonging the resolution of criminal proceedings (Fanelli, Fouhy, & Wu, 2013). This process has been revised in the Mental Health Act 2016

(Qld), which removes the mandatory requirement for a psychiatric report and gives individuals the right to decide how to pursue their legal defence.

Mental Health Courts

Mental health courts exist in five Australian jurisdictions (Vic, Qld, WA, SA and Tas). The Qld mental health court varies significantly in its purpose to those in other jurisdictions (the determination of unsoundness or mind and fitness for trial) and is not considered to meet the definition of a problem-solving mental health court (Scott, 2007). Specialist problem-solving mental health courts exist in the remaining four Australian jurisdictions, providing a different diversion option for those individuals with mental illness who meet eligibility criteria. A number of Australian problem-solving mental health courts are established under their own statute (the Victorian Courts and Other Justice Legislation Amendment Act 2013 and the Magistrates Court Act 1989); others are based on bail powers (SA, WA, and Tas). Eligibility and exclusion criteria for mental health courts in Australia are linked with diagnostic criteria and the seriousness of the charges. Programme eligibility and duration varies across jurisdictions (Table 2).

Mental health courts provide an additional option for some individuals with mental disorders who have been charged with less serious offences in four Australian jurisdictions. The presence of such courts in only four Australian jurisdictions is indicative of the debate concerning the effectiveness of this approach and varied political and community perceptions. Eligibility for mental health court programmes is dependent on the location of the court in which the charge will be heard in all jurisdictions. As a result, mental health court programmes are not available to all people with a mental disorder who meet other eligibility criteria with programmes predominantly located in metropolitan rather than rural or remote areas.

Table 2. Mental health problem-solving courts in Australia.

Jurisdiction	Programme name (commencement)	Eligible diagnoses	Eligibility criteria	Exclusions	Programme duration
Victoria	Assessment and Referral Court (2010)	Mental illness, intellectual disability, acquired brain injury, autism spectrum disorder, neurological impairment (including dementia)	Charged with a criminal offence listed at Melbourne Magistrates' Court (based on geographical area within Victoria), guilty plea required	Offences that involve serious violence or sexual assault; a sex offences list is conducted first and the magistrate presiding determines whether referral to ARC is appropriate	Up to 12 months
Western Australia	Start Court (2014)	Mental illness (primary diagnoses of intellectual disability or drug use are excluded, as other specialist courts target these)	Eligible for bail, guilty plea required.	Serious charges that require immediate remand in custody; individuals deemed to pose a high risk to self or community	Approximately 6 months
South Australia	Treatment Intervention Court (1991)	Programme has three streams: mental impairment, including mental illness, intellectual disability, personality disorder, acquired brain injury and neurological disorder (including dementia); co-occurring mental impairment and substance use; substance dependence	Summary offence or minor indictable offence; a link between the offending behaviour and mental impairment and/or substance dependence must exist; those with mental impairment may only be required to agree to the objective elements of the charges; defendants with substance abuse as the primary issue must be prepared to plead guilty to their most serious offences.	Major indictable offences	Approximately 6 months, or 12 months for a separate drug court programme
Tasmania	Diversion List (2007)	Mental illness, intellectual disability, acquired brain injury, autism spectrum disorder and/or a neurological impairment (including dementia)	Summary offence or indictable offence triable summarily, guilty plea not required but must agree to objective facts of the offence	Offences that involve serious violence or sexual assault, unless the court considers the harm to be minor	Approximately 6 months

Discussion

Currently, most jurisdictions have processes for identifying individuals with immediate mental health needs who are in police custody or involved in court proceedings. This article has identified that variation exists not only in the legislative provisions but also in the range of services that are available for identifying arrestees and court attendees with mental illness and to then provide linkage with the treatment providers and social support that may be required. Differences in access to service exist both between jurisdictions and within jurisdictions, particularly where geographical challenges exist. This may be a significant issue for those court liaison services that are unable to provide an equal level of service to all courts. As a result, in the majority of Australian states and territories (with the exception of Tas, the ACT and WA), individuals arrested and attending court in areas without court liaison services do not have access to this specialised service.

For the criminal justice sector, access to appropriate advice regarding defendants with mental illness reduces the time spent ascertaining the complex needs of this population and then providing determinations. The majority of Australian jurisdictions have legislative options for magistrates to make a variety of dispositions, including orders for mental health assessment or treatment. A strength of the NSW legislative approach is that it provides magistrates with options to divert people who have been charged with summary offences to either community or inpatient treatment. The NSW model thus provides a less restrictive option that does not appear to be a regular feature of the approach currently taken in other states and territories. Qld's Mental Health Act 2016 will introduce new powers for magistrates to address this issue.

The current problem-solving mental health courts in four Australian jurisdictions offer an alternative treatment pathway for mentally ill offenders. In the jurisdictions where mental health court programmes and court liaison services coexist, the relationship

between the two types of court-based mental health service and their degree of integration is an area that warrants further investigation. The mental health court and court liaison services in Tas are staffed by the same team, thus providing a level of integration that is less evident in other jurisdictions.

This article focuses specifically on mental illness, and does not include consideration of cognitive disability, although it is important to acknowledge that mental illness and cognitive (including intellectual) disability can be comorbid diagnoses. The area of legislative options and available supports for people who come to the attention of the criminal justice sector with intellectual or cognitive disability is one which warrants its own specific focus and has been identified as an area of need in Australia (National Mental Health Commission, 2013).

Future Directions

The outcomes of diversion from the criminal justice system to the health care sector are reliant on the ability of the mental health and social support systems to not only meet mental health treatment needs but to also ensure that criminogenic issues and socio-economic needs such as social inclusion, housing and employment are met. Given the varied legislative approaches and service models used throughout Australia, a comparison of the mental health, social and criminal justice outcomes of mentally ill offenders in each jurisdiction, while challenging, is an area that warrants further research and may yield evidence for best practice in this area. An assessment of the views of mentally ill people who have had contact with the criminal justice system is another important area of further exploration.

Conclusion

To date, there has been limited comparison of the various legislative approaches to mental health diversion within Australia. This article addresses a gap in existing knowledge by

providing an overview of the different pathways related to mental illness in the criminal justice system. While it is legislation that provides the framework for the various pathways that individuals with mental illness who are charged with a criminal offence may have available to them, access to these options requires that such individuals are accurately and systematically identified. Mental health court liaison services are charged with this responsibility. In Australia, each of the existing court liaison services has been formed as a component of a broader forensic mental health system. A comprehensive study of the structure, function and outcomes of court liaison services, which act as a gateway to mental health care for people with mental illness who are charged with a criminal offence in Australia is needed.

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