



Victorian Ombudsman
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By email only: investigation@ombudsman.vic.gov.au

Re: Ombudsman investigates treatment of a woman found unfit to stand trial

Mental Health Legal Centre (MHLC) thanks the Ombudsman for the opportunity to provide this submission.

MHLC strives to provide high quality legal services to people experiencing co-occurring mental health and legal problems. Our purpose is to advance the rights of vulnerable Victorians with, or labelled with psychiatric disability through provision of legal services, community legal education and policy and law reform activities.

Inside access is a unique legal service of MHLC which provides free civil legal services to people with mental health issues in correctional and forensic facilities across Victoria. Inside Access seeks to contribute to an improved justice system for people with a mental illness by delivering legal assistance while our clients are incarcerated.

The Scope of the Investigation

The Ombudsman's investigation was initiated in response to the treatment of a woman with a significant developmental disorder who spent 18 months in jail awaiting final orders.

The MHLC believes that rather than being an isolated issue, this story is reflective of a broader failure of the criminal justice system to recognise and respond to people with mental health issues. The prevalence of mental health issues amongst the prison population is well documented. Demand exceeds supply and only the most acutely unwell prisoners are afforded appropriate accommodation and care.

Further, MHLC believes this investigation should not be limited to the treatment of people with mental impairment who have been found unfit to stand trial. This is because the vast majority of prisoners with acute mental health issues will not raise the mental impairment defence even when it is available to them. People in custody who have been found unfit to stand trial are therefore just the tip of the iceberg.

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Punishment is based on the notion of the offender as a ‘rational and responsible’ agent’ yet too often MHLC has observed the justice system punish those who ‘cannot understand what is being done to them, why it is being done or how it relates to a past offence.’¹

The treatment of people in custody with mental illness is a complex issue. Time does not permit MHLC to address all aspects of the Ombudsman’s investigation. Our concerns are therefore limited to just two main submissions: (1) that the prevalence of mental illness in Victorian prisons is a systemic issue and (2) that the processes for assessing fitness should be improved to support people with mental illness as they progress through the criminal justice system.

To assist the Ombudsman with her investigation, we have tried to include case studies that demonstrate the particular challenges faced by prisoners with mental health issues. The case studies included in this submission are typical stories from prisoners MHLC has worked with as part of our *Inside Access* Program or heard anecdotally from clients post release. Names and minor details been changed to protect the prisoner's identity.

The prevalence of Mental Illness in Victorian prisons

People with cognitive and mental health impairments are vastly over-represented at all stages of the criminal justice system.² In MHLC’s experiences mentally ill prisoners are less likely to be released on parole and may have limited ability to comply with bail conditions and/or sentencing orders.

Case Example

Phil has an intellectual disability. He is charged with stalking and granted bail. A short time after his bail hearing he gets on a bus to Sydney with other members of the Collingwood cheer squad to support the Magpies during their away game at the Sydney Cricket Ground. Shortly after returning to Melbourne he is arrested for breaching his bail conditions. He is returned to custody and spends six months in a medium security prison awaiting trial.

MHLC is not aware that there has ever haven been a *comprehensive* mental health assessment of prisoners in Victoria, however the following studies indicate the size of the problem:

¹ Arlie Loughnan, ‘Contemporary Comment: Reforming the Criminal Law on Mental Incapacity’ (2013) 25 *Current Issues in Criminal Justice* 703, 706, quoting R A Duff, *Trials and Punishments* (Cambridge University Press, 1986) 27.

² Law Reform Committee, Parliament of Victoria, *Inquiry into Access to an Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013) 11.

- The Australian Institute of Health and Welfare reported in 2012 that one half of entrants and 44 per cent of discharges reported ever having been told they had a mental health disorder.³
- A study conducted in Melbourne Assessment Prison (MAP) in 2009 found that of the 4229 prisoners received at MAP, 1632 (39%) were assessed as having a lifetime psychiatric condition.⁴ This included 19% with a current acute mental illness and 20% with a mental illness history.⁵ It also found that 23% of those who identified as acutely mentally ill were not referred following their reception assessment.⁶
- The Victorian Department of Justice reported that 42 per cent of male prisoners and 33 per cent of female prisoners had an acquired brain injury, compared with just 2.2 per cent of the general population.⁷

Despite these numbers only a very small proportion (<1%) of acutely mentally ill prisoners were directly admitted to the Acute Assessment Unit⁸ and due to bed shortages even fewer admissions are made to Thomas Embling Hospital.

It is clear that the demands on the Acute Assessment Unit are well in excess of its current capacity. As a result it is common for acutely unwell prisoners to spend their entire sentence in remand as they wait for a bed to become available.

Case Example

Sam was arrested and charged with assault. He recalls spending about two weeks locked in a police station before he could be transferred to Melbourne Assessment Prison. At MAP he presented as elevated and delusional and he was observed stripping off his clothing, washing himself in the toilet bowl and referring to trees as people. On the advice of his lawyer he pled guilty and was released on a Community Corrections Order. He spent a total of three months in police stations and MAP before he was referred to his local mental health hospital upon release.

Improving the processes for assessing fitness

Another aspect of the problem is the limited powers of the courts to respond effectively when the defence of mental impairment is (or could otherwise) be raised.

³Ingrid Johnston and Jenna Pickles, *The Health of Australia's Prisoners 2012* (Australian Institute of Health and Welfare, 2013) 37.

⁴Michelle Renee Schilders & James R.P. Ogloff (2014) Review of point-of-reception mental health screening outcomes in an Australian Prison, *The Journal of Forensic Psychiatry & Psychology*, 25:4 480-494, 488.

⁵ Ibid.

⁶ Ibid.

⁷ Law Reform Committee, Parliament of Victoria, above n 2, 14.

⁸ Michelle Renee Schilders & James R.P. Ogloff, above n 4, 489.

MHLC notes significant amendments to the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 ('CMIA'), will come into effect between now and 1 July 2018⁹ and that these changes will adopt some of the recommendations put forward by Victorian Law Reform Commission's 2014 Review.¹⁰

It is hoped that some of these amendments (such as transferring assessment of fitness from the jury to the judge) will help to reduce unnecessary delays and lead to a process that is less distressing for accused persons who are unfit to plead.

Nevertheless the MHLC is concerned that ordinary court processes will continue to be quicker and less stressful for an accused person who may otherwise be unfit. This is particularly relevant for the vast majority of accused persons who are facing summary offences and indictable offences tried summarily in the Magistrates Court.

In an extra judicial comment Martin CJ of the Supreme Court of Western Australia observed that:

Lawyers do not invoke the legislation, even in cases in which it would be appropriate because of the concern that their client, might end up in detention, in custody, in prison, for a lot longer period than they would if the simply plead guilty to the charge brought before the court.¹¹

As a result the majority of acutely unwell prisoners, particularly those on remand or serving shorter sentences, will continue to be managed in mainstream prisons that are not equipped to provide appropriate mental health services.

Case example

Cameron has schizophrenia and has spent a significant amount of his adult life in prison. In August he was charged with breaching an IVO after sending text messages to his ex-partner during a period of non-compliance with his medication. Shortly after the breach and just before he was arrested he tried to take his own life.

In prison he was assessed at reception and provided with the wrong medication. When he asked the prison officers for the anti-psychotic medication he was previously taking they told him that it was classified as "consumer item and (was therefore) not allowed."

Cameron does not feel well in himself. He would like to talk to a health professional about the medication he is taking and ways he can ensure that he remembers to take it when he is released but since his initial reception he has had no follow up interviews with anyone regarding his mental health. He has been on remand for four months.

⁹ Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016, Clause 2.

¹⁰ Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014) ('VLRC Unfitness Report').

¹¹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 73 [3.45]

A process for determining unfitness in the Magistrates' Court

MHLC supports the VLRC recommendation that the operation of the CMIA should be extended to the Magistrates' Court and is disappointed this change was not implemented by the *Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016*.

At present there is no power in the Magistrates' Court to conduct a fitness hearing and no mechanism to determine an accused's fitness to be tried.¹² If the Magistrates' Court finds a person not guilty because of mental impairment, it must discharge the person.¹³ This is a reasonable outcome for the vast majority of summary offences. However when an accused is considered not guilty because of mental impairment of an indictable offence being tried summarily, prosecutors will often oppose the application on the basis that it would be inappropriate to simply discharge the accused.

The lack of flexibility means proceeding to a plea of guilty will often lead to more favourable sentencing outcomes than raising the defence of mental impairment. Victorian Legal Aid has observed that:

- prosecutors will often oppose the mental impairment defence even where the evidence clearly demonstrates mental impairment;
- prosecutors oppose summary jurisdiction for indictable offences triable summarily where the defence of mental impairment is raised;
- accused clients feel discouraged from contesting charges and instead plead guilty to avoid the onerous process of having their fitness investigated and/or have their matter heard in the County Court.¹⁴

Extending the operation of the CMIA to the Magistrates' court would allow Magistrates to make orders that could achieve more therapeutic outcomes such as behaviour support plans and supervised treatment orders

Concluding Comments

Prisons are generally poorly equipped to support prisoners with mental health issues, particularly while serving long periods on remand. By the time a hearing can be arranged to determine whether an appellant is fit to stand trial they will often have spent considerable time in a mainstream prison.

Prison should be an opportunity for rehabilitation. For many prisoners, jail is the first time they've ever received regular medical attention. Yet the majority of prisoners find prison to be a highly stressful experience. Aggression and violence are common

¹² CL (A Minor) v Lee (2010) 29 VR 570.

¹³ Crimes (Mental Impairment and Unfitness to be Tried Act) 1997 s 5 (2).

¹⁴ Victorian Legal Aid, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, Submission to the Victorian Law Reform Commission* (2013), 15.

place and without access to the Pharmaceutical Benefits Scheme prisons can exacerbate underlying mental illness through the lack of appropriate medication.

While the MHLC welcome the Ombudsman's investigation we also note that repeated expert inquiries and numerous reports on this subject have failed to significantly improve mental health services in Victoria's prisons.¹⁵

It is MHLCs view that often the only people with a complete view of the system are the prisoners themselves. We therefore commend the Ombudsman for seeking out and directly asking for the views of those who are most affected by the current approach to mental health issues in the Criminal Justice System.

MHLC hope this submission assists the Ombudsman with her investigation. We are available to respond to any queries or requests for clarification or additional information.

Yours sincerely

Charlotte Jones

¹⁵ See, eg, Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014); ALRC *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014), Law Reform Committee, Parliament of Victoria, *Inquiry into Access to the Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers* (2013).