



Mental Health Law Centre (WA) Inc
Annual General Meeting 2012

The WA Mental Health Court

Address by

The Honourable Wayne Martin AC
Chief Justice of Western Australia

Alexander Library Theatre
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Introduction

It is a great pleasure and an honour to have been invited to address the Annual General Meeting of the Mental Health Law Centre (WA) Inc, not least because it provides me with the opportunity to acknowledge and pay tribute to all who work in and with the centre and all who support the important work of the centre. As I am sure all here would know, the centre provides invaluable assistance for the surprisingly large number of Western Australians who, by reason of mental illness or disability, find themselves through no fault of their own at an enormous disadvantage in almost all aspects of contemporary life, especially the more complex aspects of contemporary life such as the legal system and the courts. For obvious reasons, those who suffer from mental illness are more likely to intersect the legal system and the courts than other members of our community, thereby creating an enormous challenge not only for this centre, but for the courts and the various associated agencies of government responsible for providing services to this sector of our community.

Before going any further I would like to acknowledge the traditional owners of the land on which we meet, the Wadjuk people, who are of course part of the great Nyungar clan of south-western Australia, and pay my respects to their Elders past and present.

The WA Mental Health Court

The topic I will be addressing this evening is the Mental Health Court which is expected to start operation in early 2013. I have had the benefit of a meeting with those responsible for the establishment and operation of that court. In this paper I will relay to you the information which I was given with respect to its method of operation, and place that methodology

in the context of the methodological approach which has been taken by similar courts in other jurisdictions. I will also address some of the issues which have arisen in those jurisdictions.

Improving our Response to Mental Illness

Recent years have seen a significant improvement in general community awareness of the issues associated with mental illness and disability, in part because of the important work done by prominent speakers in the field, including Professor Patrick McGorry, Professor of Youth Mental Health at the University of Melbourne, and the Hon Jeff Kennett. Happily, governments have responded to increasing community awareness by increasing the resources allocated to dealing with these issues, and by creating specific portfolios and departments focused on mental health issues at both state and federal level. In Western Australia, the Minister for Mental Health, the Hon Helen Morton MLC, and the Mental Health Commission under the energetic chairmanship of Eddie Bartnik have successfully raised levels of community awareness of, and government responses to these important issues. I have been advised that the long-awaited Mental Health Bill is nearing completion and is likely to be tabled in Parliament later this year. Although the Bill is not expected to pass through the Parliament before it is prorogued prior to the election to be held next March, the apolitical nature of the Bill suggests that it is likely to receive parliamentary attention early in the life of the next Parliament, whatever happens at the next election.

The WA Mental Health Court is one of a number of initiatives that have been taken to respond to mental illness. The government is to be commended for taking this initiative and for providing the resources that

will be needed to ensure the effective operation of the court and associated services.

Solution Focused Courts

Mental Health Courts are a species of a more general class of courts which have emerged over the last 20 years or so. No single term or descriptor for this class of court has yet acquired universal acceptance. The principles applied in these courts are often grouped under the heading of 'therapeutic jurisprudence', but the courts themselves are sometimes variously described as 'problem oriented', or 'problem solving' courts. For my part, I prefer the expression 'solution focused', because of its emphasis upon the positive rather than the negative. I suspect a similar philosophy motivated the WA Law Reform Commission to rebadge its project in this area in terms of 'court intervention programmes' in its Report No 96, instead of using the language of the reference to the Commission, which referred to 'problem oriented courts'.

The philosophical underpinning of this class of courts is not complicated. Perhaps the only surprising thing about the recent emergence of this class of courts is that it has taken so long for the concept to be recognised and acted upon. The basic concept recognises a fact obvious to anyone who has spent even a small amount of time in our criminal courts. Much offending behaviour is a symptom of an underlying cause or condition. If we are serious about protecting our community from crime, the best way of achieving that objective is to address the underlying cause of the offending behaviour rather than the symptom. To use a medical analogy, the appropriate medical response to a cough is to identify and treat the cause of the cough, rather than the symptom. For example, if the cause of offending behaviour is drug addiction or substance abuse, unless and until

the drug addiction or substance abuse is addressed and resolved, the offending behaviour is likely to continue. Similarly, if the cause of the offending behaviour is mental illness, the most effective way of reducing the risk of further offending is by treating the mental illness.

Drug courts are perhaps the best known example of this type of court. Experience in Western Australia and elsewhere has shown that a court-based regime which focuses upon resolving an offender's drug dependence is more effective in reducing the prospects of reoffending (and significantly cheaper) than a regime focused entirely upon punishment of the offending behaviour. This is, of course, not to say that reducing recidivism is the only measure of success of this class of court. That is a topic to which I will return.

The WA Mental Health Court will bear a number of similarities to the WA Drug Court. The magistrate who will take initial responsibility for the court, Magistrate Vicki Stewart, is presently the magistrate responsible for the Drug Court. It will also have a number of the features recommended by the WA Law Reform Commission in chapter 4 of its 2009 report dealing with court intervention programmes (Report No 96).

Mental Health Courts Generally

Like Drug Courts, Mental Health Courts originated in the United States. They followed in the footsteps of the Drug Courts, and were first seen around 1997. Since then they have been developed enthusiastically, to the point where there are now more than 300 such courts around the world. They are seen in many jurisdictions, correctly in my view, as an important mechanism whereby people with mental illness or disability

can be dealt with more humanely and more effectively when their behaviour brings them into contact with the criminal justice system.

As might be expected, there are significant differences in the methodologies adopted by Mental Health Courts in different jurisdictions. Most Australian jurisdictions now have a form of Mental Health Court, although apparently funding is to be withdrawn from the Queensland form of that court as part of a general approach to budgetary restraint in that State. The approach taken in the various Australian jurisdictions varies quite significantly, with some being more focused upon diversion from the court system, while others are more focused upon the engagement of a therapeutic alliance, with the court and its officers forming part of a multi-disciplinary team, including health professionals and social workers.

Despite their differences, Mental Health Courts tend to have a number of common characteristics:

- a specialised list
- a dedicated court team
- a non-adversarial approach
- access to community treatment
- continuing supervision
- systems of rewards and sanctions
- voluntary participation.¹

The WA Mental Health Court will have all of these features.

¹ New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report 135 (2012) 298

The WA Mental Health Court

The WA Mental Health Court is expected to start operation in February or March 2013. Initially it will be conducted as a pilot project, operating from a courtroom and associated facilities in the Central Law Courts building in St George's Tce, Perth. Referral to the court will be limited to those resident within the metropolitan region, and although the possibility of referrals from suburban courts will not necessarily be excluded, for reasons which I will develop, it is likely that referrals from those attending Perth Magistrates Court will consume all of the limited resources of the court and its associated team.

Like the Drug Court, the Mental Health Court will operate without specific legislative backing. The primary legislative vehicle for the operation of the court will be the grant of conditional bail under the provisions of the *Bail Act*.

The Mental Health Court will comprise a multi-disciplinary team with clinical expertise in the field of psychiatry, (provided by the Forensic Mental Health Service) and including mental health nurses and social workers with drug and alcohol experience. The team attached to the court will enlist the assistance of non-government agencies and organisations capable of providing support and assistance to individuals admitted to the programme administered by the court. Although final decisions remain to be made with respect to the precise composition of the team, it is expected that the team will comprise around 10 people, including clinicians, mental health workers, and associated support workers.

The primary objective of the court will be to establish an appropriate regime of treatment and medication for those whose mental illness has resulted in offending behaviour. Because the focus is upon the establishment of an appropriate regime which will often continue indefinitely, it is anticipated that an offender's contact with the court will be maintained over a shorter period than is the case with the Drug Court, where the objective is somewhat different, being removal from drug dependence. Generally speaking, it is anticipated that offenders will maintain contact with the Mental Health Court for a period of around four months, compared to the 12-month programme administered by the Drug Court.

Mental Illness v Cognitive Impairment

Because the objective of the Mental Health Court is the establishment of an appropriate regime of treatment and medication, it is suitable for those with a diagnosed mental illness that is susceptible to treatment. It is not suitable for those with irremediable cognitive impairment, such as intellectual disability. Less serious offenders with that characteristic can now be dealt with through the Intellectual Disability Diversion Programme. As I understand it, it is proposed that that programme will continue, and will be quite separate from the Mental Health Court.

Voluntary Participation

An essential component of the Mental Health Court is that it will only deal with those who volunteer to participate in the programme. This means that those who come before the court must have the capacity to provide informed consent. The nature of the work done by and in association with the court does not lend itself to a coercive regime.

Referrals

Referrals can come from a number of sources, including self-referrals, referrals from police, family, friends and carers, lawyers, including both defence or prosecution, other courts (if resources permit) and from mental health or other services. Consideration is also being given to conducting a screening process, whereby persons coming before the Magistrates Court might be screened against the database maintained by Mental Health Services to identify previous and current users of mental health services.

Perhaps the biggest issue confronting the court is the likelihood that demand for its services will exceed its capacity to supply them, thereby disappointing community expectations.

In order to test the likely demand for the services of the Mental Health Court, a process of screening against the Mental Health Services database was undertaken over the course of one week in the Perth Magistrates Court. During that week, 1173 people were dealt with by that court. Forty of those people were identified as being in current receipt of mental health services. If all of those people were referred to the court, an annual case load of 2000 would be generated - a case load well beyond the capacity of the court.

If screening is extended to include those coming before the court who were known to have previously been in receipt of mental health services, in the trial week to which I referred, 240 people were identified. If all of those were referred to the Mental Health Court, an annual case load of 12,000 persons would be generated. Obviously there is simply no way in

which resources could be made available to deal with that number of people.

These figures indicate that one of the major challenges confronting the court will be the identification of methodologies and screening processes which will enable its limited resources to be supplied to those who will derive the most benefit from them. These figures also reveal that the places available in the pilot programme are likely to fall well short of demand for places in that programme, with the result that many, and the family, friends and carers of many, will be disappointed. However, every programme has to start somewhere, and it is to be hoped that the success of the programme will justify the allocation of additional resources in the future.

The figures established in the week's trial to which I have referred are consistent with the fact that around one-third of the prisoners within the WA prison system have a history of mental illness or disability noted on their file.² It is likely that the proportion of prisoners suffering such conditions is higher, given the likelihood of under-diagnosis. The magnitude of the issue and the prospect that demand for the services of the court will exceed supply should not dampen our enthusiasm for a new approach. On the contrary, it should reinforce our resolve to establish more effective ways of dealing with these offenders, in their interest and in the interest of community safety.

² If disabilities such as intellectual disability or other cognitive impairments are excluded and only mental illness is taken into account, the figures are lower: 16% for all adults, made up by 25% for female prisoners and 15% for male prisoners. Western Australia, *Parliamentary Debates*, Legislative Council, 1 May 2012, 1803 (Hon SM O'Brien).

Assessment

Once referred to the court, prospective admittees will be assessed by the Mental Health Court team. Assessment will include an evaluation of the circumstances of the alleged offender, his or her current mental state, risk, fitness to stand trial and to plead, and an evaluation of his or her needs. The precise form of assessment is still under consideration. Whatever form is ultimately adopted, it will result in a report to the court covering at least the issues which I have identified.

Exclusion Criteria

Another common feature of Mental Health Courts is the adoption of criteria which exclude certain offenders from participation in the court programmes. Sometimes those criteria include particular types of offending behaviour such as sexual offences. Other courts require offenders to plead guilty as a condition of entry to the programme. Neither of those exclusion criteria will be adopted by the WA Mental Health Court, although those charged with serious offending, or who are considered to pose a high risk to the community will not ordinarily be admitted to the programme. Entry to the programme is not conditioned upon a plea of guilty, because in many instances the programme will be applied prior to entry of the plea.

Because the programme is based on the Perth Magistrates Court, it will be available only to adults who are resident in the metropolitan area. A primary condition of entry into the programme is a diagnosis of mental illness. Those with a primary diagnosis of intellectual disability, drug misuse, or personality disorder will not be admitted into the programme. This is not to say that those who have a history of self-medication which might include illegal drugs will be excluded from the programme, but

those whose primary issue is drug dependence will be assessed as more suitable for the Drug Court programme, and referred to that court.

The primary focus of the court will be upon alleged offenders likely to receive a non-custodial penalty in the event that an appropriate regime of treatment and medication can be established. This is not to say that alleged offenders who might be subject to a mandatory sentence of imprisonment will be excluded from the programme because of the nature of their offence. I know that many friends, family and carers of people who suffer mental illness are very concerned about the possible impact of the mandatory sentencing regime which has been created with respect to those convicted of assaulting a public officer causing bodily harm. Happily, at least so far, the relatively small number of people convicted of that offence suggests that these concerns have not yet come to pass. I expect that this is largely due to the sensible exercise of prosecutorial discretion by police. People charged with an offence of that character will not be excluded from the operation of the court. It could reasonably be hoped that the establishment of a successful medication and treatment regime would encourage the police to exercise their discretion to modify the charge brought so as to take it outside the category for which imprisonment is a mandatory outcome.

Initial Court Assessment

Following the process of assessment and report to which I have referred, the case will be assessed by the court. Generally speaking, following the initial assessment, a decision will be made to deal with the alleged offender in one of four main ways:

- referral to primary care (that is, to the care of a general practitioner);

- referral to mental health services - either residential or community-based services;
- hospitalisation pursuant to an order made under s 5 of the Criminal Law (Mentally Impaired Accused) Act 1996, resulting in admission to the Frankland Centre;
- referral to the intervention programme conducted through the Mental Health Court.

Those who fall within the last category will continue to be supervised by the court, and addressed by the multi-disciplinary team to which I have referred. In many cases, initial assessment will reveal basic needs which will need to be met as a priority, including accommodation. In at least some cases, ready access to crisis accommodation will be essential.

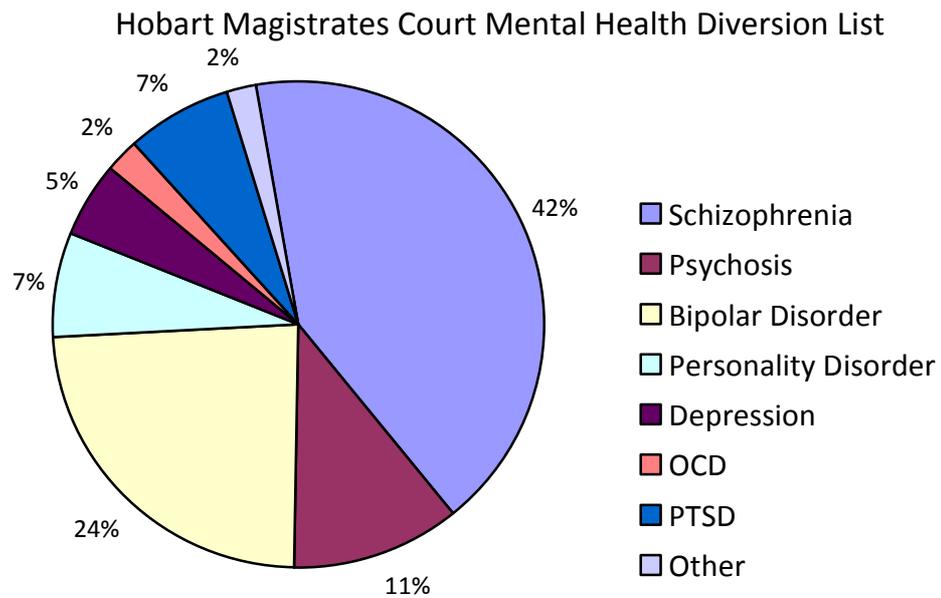
It remains to be seen what forms of mental illness will be identified through the assessment process. Figures available from the Hobart Magistrates Court Mental Health Diversion List show that within that list, 42% had a diagnosis of schizophrenia, 24% bipolar disorder, 11% with psychosis not otherwise specified, 7% post-traumatic stress disorder, 7% personality disorder, 5% depression, 2% obsessive compulsive disorder and 2% 'other'.³

A somewhat different pattern was observed in relation to those dealt with by the Mental Health Court Liaison Service in Newcastle, New South Wales. Of those referred to that service, 23% were given a primary diagnosis of drug and alcohol disorder, 19% psychotic, 10% depression,

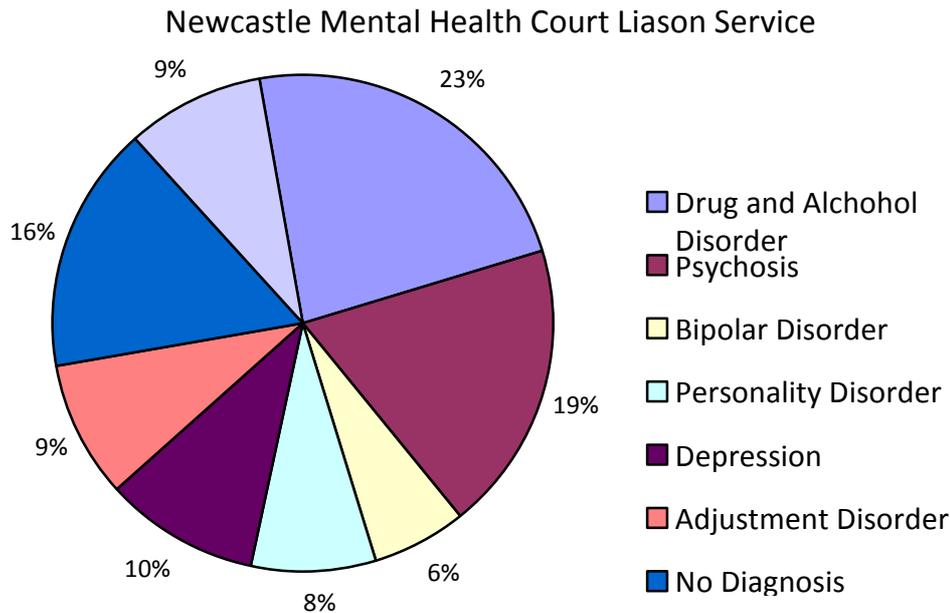
³ Hill M, - Hobart Magistrates Court's Mental Health Diversion List (2009) 18 *JJA* 178, 181.

8% personality disorder, 6% bipolar disorder, 16% no diagnosis and 9% 'other'.⁴

These figures can be depicted diagrammatically:



⁴ Sharples J et al, 'Offending Behaviour and Mental Illness: Characteristics of a Mental Health Court Liaison Service' (2003) 10 *PPL* 300, 306.



The characteristics of the offence types allegedly committed by those who will be admitted to the Mental Health Court also remain to be seen. Some indication might be provided by an assessment of those referred to the Brisbane Special Circumstances Court. 37% of the people dealt with by that court were charged with some form of theft offence, 28% minor drug offences, 22% public nuisance, 15% failure to comply with a police direction, 13% wilful damage, 10% breach of probation or bail with a variety of other offence types representing lesser proportions.⁵

The Nature of the Court Process

As with the Drug Court, the court process will be focused toward collegiality and away from adversarialism. It is expected that a dedicated police prosecutor will be made available to the court, together with a dedicated Legal Aid lawyer representing defendants who qualify for that representation. I would also expect that lawyers from the Mental Health

⁵ Walsh T, 'Defendants and Criminal Justice Professionals' Views on the Brisbane Special Circumstances Court' (2011) 21 *JJA* 93, 100. Note that the total exceeds 100% because some were charged with multiple offences.

Law Centre would be significantly involved. The allocation of dedicated professional personnel to the court helps build collegiality and expertise.

Doctor-Patient Confidentiality

Doctor-patient confidentiality is a significant issue which is under consideration by the team involved in establishing the court. It is presently thought likely that it will be made clear to all those referred to the court that the clinicians attached to the court are acting for and on behalf of the court, and can pass on to the court or to other authorities such as police any information provided by the individual before the court.

Liaison with Prisons

Although it is expected that the programme will focus upon alleged offenders who are unlikely to receive a custodial penalty, inevitably there will be occasions upon which people within the programme are, for one reason or another, taken into custody. In those circumstances it is expected that the team will liaise closely with prison authorities in relation to the appropriate treatment programme within the prison system. Through this way, it is possible that the problems associated with the maintenance of an appropriate medication regime upon admission to the prison system may be alleviated to some extent. As will be well known to this audience, there is a problem in relation to persons receiving medication for mental illness upon their admission to prison. Because of the understandable need to closely scrutinise the prescription drugs used by inmates within the prison system, very often medication will be taken from persons admitted to prison, until such time as they can be seen by a psychiatrist within the prison, and a prescription provided by that psychiatrist. Because of the time that takes, medication will be suddenly

suspended, often with detrimental effect upon the mental health of the prisoner and the treatment regime generally. However, it must be recognised that primary responsibility for treatment within the prison system rests with the Department of Corrective Services, not the court.

Suspension and Termination

There may be circumstances in which a person's participation in the intervention programme must be suspended or terminated. For example, if a participant suffers a serious deterioration in mental or physical health requiring hospitalisation, the programme may be suspended. Similarly, if the patient wishes to withdraw from the programme, or repeatedly fails to conform to the requirements of the programme, or is arrested for further offences which make him or her unsuitable for the programme, their participation in the programme will be terminated.

Net Widening

I have previously expressed concern at the possibility that the creation of a Mental Health Court might have the effect known as 'net widening'. By this I refer to the risk that people with mental illness who might otherwise have been diverted away from the court system altogether, are brought within the court system because it is thought to offer a humane regime whereby they can obtain treatment for their illness. Plainly, the limited resources available to the court will mean that there will inevitably be a significant number of mentally ill offenders who will not be dealt with through the pilot court. The danger is that this group will include people who might otherwise have been diverted away from the court system altogether but for the existence of the Mental Health Court.

Those responsible for the establishment of the court have assured me that they are very alive to this problem, and that only those whose offending behaviour is such that they should be dealt with by a court will be admitted to the court administered programme.

I have also been advised that consideration is being given to the possible provision of trained mental health workers to assist police in frontline services, along the line of systems that operate in Europe. For my part, I have no doubt that the provision of such assistance would be of enormous value to police, and would enable mentally ill offenders to be identified very early in the process and hopefully for appropriate cases to be diverted away from the criminal justice system altogether, and into an appropriate treatment regime. It is important to emphasise that diversion away from the court process does not undermine or subvert the rule of law or the administration of justice. Rather, it enhances our criminal justice system by applying its punitive processes to those who are morally culpable, while focusing a treatment regime upon those whose mental illness reduces or even perhaps eliminates their moral culpability. I would hope that the resources might be found to provide what I am sure would be a very valuable service.

Evaluation

As I have mentioned, the Mental Health Court is considered to be a pilot programme. Accordingly, a process of evaluation will be built into its activities from inception, with a view to undertaking a review after a period of established operation.

Many of the published evaluations of courts of this type have been severely compromised by methodological problems.⁶ There is a tendency to measure the success of solution-focused courts by measuring recidivism rates, and comparing those rates to a group processed by mainstream courts. The validity of that form of evaluation depends upon ensuring that the cohort dealt with by the specialist court is comparable in all material respects to the cohort dealt with by the mainstream court. That is often very difficult without qualitative assessment of each individual member of that cohort.

Plainly, one of the objectives of the Mental Health Court is to reduce reoffending by establishing an appropriate treatment regime for the mental illness which has contributed to past offending behaviour. It follows that assessment of recidivism is an appropriate indicator of success. However, in my view, it would be a mistake to place too much emphasis upon recidivism as determinative of the success or failure of courts of this character. That is because there are many other advantages in adopting a therapeutic and collegiate multi-disciplinary approach to offenders who suffer from mental illness. Under conventional court systems, it is difficult, if not impossible, for such offenders, their friends, families and carers to engage in the court process. Very often those people feel, with justification, that the court system is ignoring the fundamental issues which confront the offender, with the result that those issues are often exacerbated rather than alleviated by the court process.

The Mental Health Court will provide an opportunity for the alleged offender, and his or her friends, family and carers to engage, in a

⁶ Lim L and Day A, 'Mental Health Diversion Courts: Some Directions for Further Development', (2011) 18 *PPL* 1, 2

collegiate environment, with the court and a multi-disciplinary alliance of professionals who are focused upon the real issues in the alleged offender's life, and not just their offending behaviour. In my view, such a process is demonstrably more just than a superficial process which ignores the underlying cause of offending behaviour, and which administers punishment without regard to that cause or the mental condition of the offender. Although it is difficult to quantitatively measure the improvement in the quality of justice provided to mentally ill offenders by courts of this kind, it is nevertheless real and tangible, and must be given appropriate weight in any evaluation of courts of this character.

Children

Because the pilot court operates within the Perth Magistrates Court, it will not be available to children. A very different model has been developed for use within the Children's Court, in consultation with the President and Magistrates of that court. The approach will not involve a specialist court, but rather the provision of a clinical support service available to all who come before the Perth Children's Court. The focus of that service will be upon the coordination of services for a child thought to be suffering mental illness, including the organisation of prompt treatment for that child. It is also proposed to involve the Department of Child Protection in the implementation of an appropriate treatment regime. This is, of course, not to suggest that the prevalence of mental illness or disability among juvenile offenders is any lower than among adult offenders. The proportion of juveniles in detention diagnosed with

mental illness is about the same as for adult offenders (17%)⁷, and as with adults is very likely to be an under-diagnosis.

Conclusion

The establishment of the WA Mental Health Court is an important milestone in the recognition of the needs of persons suffering from mental illness within our community. The government is to be commended for providing the resources to enable the court to be established. The methodologies and procedures to be adopted by the court will no doubt be refined with the benefit of experience, and to that extent the court should be regarded, in its early years at least, as a work in progress. In my view, there is every reason to think that the court will improve both the quality of justice and outcomes for those referred to it.

⁷ Western Australia, *Parliamentary Debates*, Legislative Council, 1 May 2012, 1803
(Hon SM O'Brien)