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**SENTENCING AND DEALING WITH MENTALLY
IMPAIRED OFFENDERS**

The Hon Justice Murray, Senior Judge, Supreme Court of WA

In this paper I propose to focus on the challenges presented to Judges in relation to the sentencing and post-sentencing disposition of mentally disordered offenders. I do not propose to say anything about the challenges posed to Judges in dealing with issues of fitness to plead and mental impairment affecting criminal responsibility.

In this context, by "mental impairment" I mean mental illness, a recognised psychiatric or psychological disorder, no matter what may be the degree of severity of the impact of the disorder upon the offender. In addition, I include intellectual disability of any degree. So far as mental impairment, in this sense, is concerned, I think it is generally accepted that it matters not that the mental illness or psychological disorder is contracted or its symptoms are brought on by the voluntary consumption (usually to excess over a considerable period) of alcohol and/or drugs.

In my opinion, where that is the case, the important thing is not how the illness or disorder was acquired, but that it bears a causal relationship to the offending behaviour or to the severity of custodial detention which might otherwise be called for. In this sense, a sufficient causal relationship will not necessarily be a legal cause of the commission of an offence, but a causal relationship in the sense that the presence of the impairment provides an explanation for the commission of the offence.

The relevance of mental impairment in sentencing

It is often said that sentencing is the most challenging function of a Judge. If so, it may be said that to sentence a mentally impaired offender adds a significant layer of complexity to the task. Particularly is that so when one appreciates that the task may often need to be performed against the background of often contrived and generally ill-informed public hysteria about the dangerousness of the offender and the leniency of the sentence, whipped up by the popular press as a promotional exercise.

I suggest, however, that the Judge may perform the task confident in the rightness of the process of sentencing and the outcome, when the task is performed by the application of proper sentencing principle.

Within the sentencing framework provided by statute, the Judge must perform the difficult task of the exercise of sentencing discretion by balancing and weighing factual matters, whether mitigating or aggravating in their tendency, and whether concerned with the seriousness of the offence committed, or the personal circumstances of the offender, to give effect to the overlapping purposes for which sentence is to be passed:

- (1) The protection of the community.
- (2) The deterrence of the offender.
- (3) The deterrence of others who might so offend.
- (4) Retribution for, or the denunciation of, the offending.
- (5) The reform or rehabilitation of the offender¹.

In my opinion, the sentencing task may be said to be one directed towards achieving an acceptable measure of protection for the community by punishing the offender, by deterring the offender and others, and by achieving the rehabilitation of the offender so that he/she may not offend again. The aim of the court should be to achieve a disposition which is best calculated to protect the community by stopping the offending behaviour occurring in future.

It is here that giving an appropriate effect to the mental impairment of the offender takes its place in the application of sentencing principle, generally by way of mitigation of sentence, but, in some cases, by way of aggravation of sentence, provided always that the final outcome is properly proportionate to the seriousness of the offence in the circumstances of its commission, and having regard to the personal circumstances of the offender.

In that regard, reference is often made to the case of *Clarke*², a case of a young woman, mentally impaired (probably resulting from encephalitis suffered as a child), who maliciously broke a flowerpot valued at £1, and was sentenced to 18 months imprisonment. In the Court of Appeal, Lawton LJ said:

Her Majesty's Courts are not dustbins into which the social services can sweep difficult members of the public. Still less should Her Majesty's judges use their sentencing powers to dispose of those who are socially inconvenient. If the Courts become disposers of those who are socially inconvenient the road ahead would lead to the destruction of liberty. It should be clearly understood that Her Majesty's judges stand on that road barring the way. The Courts exist to punish according to the law those convicted of offences. Sentences should fit the crimes.

A more challenging case, also often referred to, is that of *Roadley*³. The decision is that of the Vic CCA. It involved an intellectually disabled man with the mental and functional age of a 5 or a 6-year-old child who had been convicted of sodomising an 8-year-old boy. The case highlighted what seems to

me to be the obvious point, that the court's response to sentencing a mentally impaired person cannot be dictated by the incapacity to identify a viable alternative to imprisonment. That is the responsibility of politicians, corrective services agencies and agencies concerned with the placement, treatment and education of mentally impaired persons who commit criminal offences.

The Judge should be clear about the circumstances in which mental impairment will mitigate sentence because it reduces the offender's culpability, eg, his ability to exercise appropriate judgment was impaired, his ability to think clearly was impaired, he was disinhibited, he had reduced notions of the wrongness of his conduct, or he was inclined to act impulsively⁴. The courts are, in such circumstances, moving, in relation to mentally impaired offenders, to sentencing dispositions which emphasise the desire to achieve an appropriate measure of protection for the community by a sentencing disposition which, whether or not it involves a custodial element, is calculated to cure the relevant illness, treat the disorder, and at least to educate the offender and arm him with the means of control which may prevent recidivism, rather than by simply incapacitating the offender from further offending by the imposition of a long term of imprisonment.

It is not a matter of abandoning specific aims of the sentencing process. Rather, the discretion is to be exercised by giving greater weight to a treatment or rehabilitation orientation by which, when dealing with a mentally impaired offender, the ultimate aim of his correction and the consequent protection of the community may have the best chance of achievement⁵.

Mental impairment which is causally related to the commission of an offence, in the wider sense to which I have referred, may, in my view, justify more weight being given to a treatment oriented approach -

- (1) If the moral culpability for the offence is reduced, it would not be appropriate to give much, if any, weight to denunciation and punishment.
- (2) Nor, if that was the case, would it be appropriate to give much, if any, weight to general deterrence.
- (3) The offender's impairment may mean that it will not be appropriate to give much, if any, weight to the punishment of the offender to deter him from offending again.
- (4) In such circumstances, the aim of the sentencing, within the bounds of proportionality, as that concept is to be understood, should be to devise a sentencing disposition in terms appropriate to provide a remedy for that which is producing the offending.

The magnitude of the problem

It is difficult to draw firm conclusions from the variety of empirical studies carried out from time to time, particularly by corrective services agencies. But it would seem that both in Australia and New Zealand, at any given time about a third of all prisoners have a diagnosed mental illness, and perhaps up to 60% of prisoners suffer from such an illness and/or a personality disorder. That is perhaps unsurprising, given that perhaps up to 90% of all prisoners have drug and/or alcohol substance abuse problems. All of you will be familiar with the way in which poverty and social and cultural disadvantage predispose people towards the commission of a whole gamut of offences.

A good fit into that picture are the figures which reveal, both in Australia and New Zealand, gross over-representation in the prison system of indigenous persons. In Australia, the rate of indigenous imprisonment continues to rise. It is now 14 times that of non-indigenous imprisonment⁶. In New Zealand, I am given to understand that at any given time, more than half those in prison will be Maori.

All of this will confirm what those of us who work in the field would think was likely to be the case (most particularly in respect of crimes of violence, eg, homicide, armed robbery, serious home invasion burglary, stalking, sexual assault, grievous bodily harm, etc). However, it is also undoubtedly the case that offending which is causally related (in the wide sense) to mental impairment, often linked to drug and alcohol abuse, is encountered across the whole spectrum of offences (eg, major fraud, corporate and tax offences, major property crime including arson, etc). Personally, I think that proper investigation would confirm the anecdotal evidence that a lot of the mental health problems encountered by a sentencing court are of long standing.

I do not comment on the wisdom of it, but I think there is evidence to support the widely held view that the policy disinclination of the civil mental health system to commit to a hospital or other institution, whether voluntarily or involuntarily, for treatment purposes has had a bearing upon the increase in the rate of offending behaviour by persons suffering from mental impairment of one kind or another.

The increasing numbers of mentally impaired offenders impact upon the effectiveness and costliness of sentencing for serious crime. Appropriate mental health services must be provided to a far greater extent than is now the case, because to do so reduces the tendency to simply warehouse prisoners for longer periods, increases the efficiency of imprisonment as a correctional process, and

improves the capacity of parole to achieve a transition back into the community, which is not simply an opportunity to resume a life of crime.

The Hon Murray Kellam AO recently said:

It is commonplace to find persons with previously untreated schizophrenia making rapid progress after the provision of appropriate medication and therapeutic services. The positive response of such persons and the demonstration by them of insight into the necessity of maintaining their medication are, without doubt, positive predictors towards successful parole. However, if insufficient resources are applied to the treatment of such persons during the course of their prison term, then what confidence can the parole authority have that the persons will not present a danger to the community upon release? On the other hand, leaving such persons in prison for the whole of their term and releasing them without parole in the hope that community mental health services will cope with them is hardly in the interests of community safety⁷.

The sentencing disposition of mentally impaired offenders

The same problem of providing sufficient expertise and available therapeutic processes has been encountered in what seems to me to be a successful program of diversion from ordinary sentencing processes into a process of therapeutic jurisprudence applicable in SA under the Magistrates Court Diversion Program. The program has been running in the Adelaide Magistrates Court, four suburban courts and four regional courts in SA, effectively for 10 years. Much effort has, during that period, been put into the provision of therapeutic services. The program is applied in relation to a wide range of offences and in respect of a wide range of mental health issues related to offending behaviour.

The benefits to be derived from the successful implementation of such a program for dealing with mentally impaired offenders for relatively minor offences are self-evident. A measure of the success of the program is that of those who are described as successfully completing the program, nearly 80% showed a measurable reduction in the rate of recidivism over varying periods immediately after their participation and final sentencing (if any). However, I am unclear, on the figures provided to me, to what extent that benefit may be translated into a benefit to the community having a degree of permanence.

In relation to serious offences, in my opinion the sentencing disposition which would provide to the court a capacity to make a hospital order for the

placement of the offender in an institution separate from a prison, where appropriate treatment for mental illness and/or a relevant psychological disorder might be provided as required, is a useful option to deal with those cases where it is considered to be inappropriate that treatment programs be provided while in prison.

The need for such a capacity has long been appreciated in my court⁸. The power to make such orders is provided to a sentencing Judge in different forms in a number of jurisdictions. As I understand the position in New Zealand, there is a capacity to transfer the offender back to prison when treatment in the approved hospital is no longer required, and in addition, capacity to control the type of restrictions while the offender is subject to hospital detention, and from there to transfer the prisoner to a psychiatric institution without restrictions related to the criminal process⁹.

In relation to Federal offences, in Australia, there is a relatively flexible process of diversion by a sentencing court from prison to a hospital, and into the community under specialised probation orders¹⁰. A limited power of this sort appears to be available in Tasmania¹¹.

In Victoria, for a range of offences, including serious offences, the sentencing court has powers of diversion into the civil system under the *Mental Health Act 1986* (Vic) instead of passing sentence for less serious offences. If a hospital security order is made as part of the sentencing process for any offence, it involves the court directly in the decision-making about the risk factors applicable to the particular offender and the treatment options which should be employed. A psychiatric report must be provided, informing the court that facilities and services relevant to the needs of the offender are available¹².

In commenting on these provisions, Professor McSherry, Professor of Law and Australian Research Council Federation Fellow, Monash University, made two observations as to the effectiveness of such processes. She said:

There is little evidence available as to the effectiveness of treatment imposed under hospital orders where the person has refused such treatment and it would seem that the safest course is for such orders to be made with consent whenever possible.

The treatment of offenders with mental illnesses is considered a high priority by many. In particular, there is concern to ensure that individuals with mental health issues receive appropriate treatment and are not subject to the risks of deterioration in their condition which may be associated with a prison sentence.

Hospital orders provide one sentencing option that is worth considering as a way of enabling treatment while still providing some restrictions on the liberty of the offender. However, there are a number of difficulties associated with how well they can work in practice, with the lack of resources for proper treatment and services an ever-present issue¹³.

Establishing mental impairment

It is important now, and will be more important in future, that the orders of the sentencing Judge are soundly evidence-based. For sentencing purposes, as well as in those jurisdictions where controls may be imposed after service of a term of imprisonment, the admission into evidence of psychiatric and psychological reports and reports of other appropriately qualified correctional officers is secured, either directly by statute or by sections which provide that the Judge is not bound by ordinary rules of evidence, but may be informed as to relevant matters as he or she thinks fit.

As I understand it, in some jurisdictions the adversarial process is modified by enabling the Judge to control, by a process of the grant or refusal of leave, the capacity of the parties to adduce evidence of this kind by calling experts of their own choice.

It seems to me that the capacity of the court to nominate and commission expert evidence has cost benefits from the point of view of the party, and benefits to the court in that, in my experience, an expert report commissioned by the court is more likely to be thoroughly prepared, will address issues relevant to the sentencing process, and be more objective. The relevant professional making the report is inclined to be free of the bias involved in the perceived need, perhaps subconsciously felt, to provide a report and express an opinion favourable to the party commissioning the work.

One thing that must be said is that in dealing with a perceived risk of reoffending, either generally or by the commission of offences of a particular type (eg, sexual offences), the opinion of the expert psychiatrist and/or psychologist will most usefully not be so much based upon static predictors or historical variables, but upon dynamic predictors such as sexual preferences and cognitive distortions, acutely enhanced by intoxication by drugs and alcohol, habitually or on a particular occasion, and by emotional stressors¹⁴. Although this is often referred to as prognostication about future risk, it is, I think, in reality the expression of an opinion about the risk currently presented by the offender.

In relation to the need to have a reliable prediction about the danger of recidivism, in WA we have held that psychiatric and psychological reports may rely, in this regard, not only upon their clinical assessment of risk, but upon accepted risk assessment tools, although in relation to the latter, concern has been expressed in our court about the applicability to indigenous offenders of risk assessment tools devised in respect of Caucasoid races¹⁵.

Post-sentencing controls

For me, there remains a certain novelty in the legislative response to a perceived danger of the commission of serious sexual offences, which enables, and indeed, in some cases, requires a court to make orders for the continuing detention of offenders after they have served their sentences, or for their supervision in the community on the ground established by expert psychiatric and psychological evidence, that the court is persuaded by cogent evidence to a high degree of probability that there is an unacceptable risk that the offender will commit a serious sexual offence if released¹⁶.

The New Zealand response, upon the enactment of the *Parole (Extended Supervision) Amendment Act 2004*, was to introduce more limited provisions into the *Parole Act*, enabling the extension of supervision for up to 10 years, with regular reviews and rights of appeal, on the ground that the offender has been convicted of serious sexual offences and may so offend again.

While the power upon sentencing to make an indeterminate sentence order remains on the statute book, its exercise must involve the prediction of future danger of further offending, particularly where such an order is combined with a fixed term of imprisonment. The difficulty of making such an order, because of the requirement for cogent evidence to establish the ground for doing so beyond reasonable doubt will, I think, lead to such a power falling into desuetude.

On the other hand, the making of a continuing detention order or an extended supervision order under legislation of the type previously mentioned does not involve evidence of or the reliance of the court upon the prediction of future dangerousness. The judgment of the court is to be based upon the conclusion that the offender represents a present danger, if unconfined or not subject to a supervision order, that he or she will commit a serious sexual offence.

In my opinion, the precedent established by dangerous sexual offenders legislation shows that such legislation has a useful part to play in securing an appropriate degree of protection for the community. The one-off character of the exercise of sentencing discretion need not be the start and finish of the

judicial process. The court can and should be asked to revisit its involvement with an offender who has committed a crime or crimes of a serious nature in circumstances where the history of the offending and the mental impairment of the offender, whether represented by a psychiatric illness or psychological disorder, indicates that there may be reason to suppose that upon release from the sentence, even after what may have been done by way of rehabilitative processes, there remains a danger to the community of the commission of further offences.

A pragmatic restriction upon such a process of revisiting the danger presented by the offender would restrict that capacity to the danger of the commission of serious offences (appropriately defined), established by cogent evidence to a high standard of proof. But I see no reason to suppose that the operation of such legislation should be restricted to the danger of the commission of serious sexual offences. It should be equally available where there is a present, well-established danger of the commission of serious crimes of violence or against property.

¹ *Veen v R [No 2]* (1988) 164 CLR 465, 476.

² *R v Clarke* (1975) 61 Cr App R 320, 323.

³ *R v Roadley* (1990) 51 A Crim R 336.

⁴ *Krijestorac v WA* [2010] WASCA 35 [18], Wheeler JA; following a decision of the Vic CA in *R v Verdins* (2007) 16 VR 269.

⁵ The relevant decisions, in my view, authorise the adoption of this approach, albeit on occasions by the use of different terminology: eg, *Thompson v The Queen* (2005) 157 A Crim R 385 [52], Steytler P, following *R v Tsiaras* [1996] 1 VR 398, 400.

⁶ Australian Bureau of Statistics, 4517.0, Prisoners in Australia, 2009.

⁷ M Kellam, "Mental Health Issues in Parole", AIJA Annual Conference, 18-20 February 2010, Auckland, New Zealand.

⁸ *Lauritsen v The Queen* [2000] WASCA 203; (2000) 22 WAR 442, 465 - 466 [73] - [80], Malcolm CJ, Wallwork and Murray JJ agreeing.

⁹ *Criminal Procedure (Mentally Impaired Persons) Act 2003* (NZ), s 34(1).

¹⁰ *Crimes Act 1914* (Cth), ss 20BS, 20BY.

¹¹ *Sentencing Act 1997* (Tas), s 75 et seq.

¹² *Sentencing Act 1991* (Vic), s 93, following amendments made in 2005.

¹³ B McSherry, "Hospital Orders for Offenders with Mental Illnesses: An Appropriate Diversionary Option?" (2009) 16 JLM 568, 573; Prof S Hayes, "Sentencing People with Mental Disorders", (2005) Reform, Issue 86, 26.

¹⁴ J McCarthy, (2001), "Risk Assessment of Sexual Offenders", 8 Psychiatry, Psychology and Law, 56-64.

¹⁵ *DPP (WA) v GTR* [2008] WASCA 187; (2008) 38 WAR 307 [162], Murray AJA, Steytler P and Buss JA agreeing.

¹⁶ *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), *Dangerous Sexual Offenders Act 2006* (WA), *Crimes (Serious Sex Offenders) Act 2006* (NSW), *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic).