

**THE MANAGEMENT OF MENTALLY IMPAIRED OFFENDERS WITHIN THE  
SOUTH AUSTRALIAN CRIMINAL JUSTICE SYSTEM**

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This article describes the Magistrates Court Diversion Program for mentally impaired offenders, an initiative within the South Australian judicial system. It also discusses some of the findings from an independent evaluation. The focus is on the pilot phase of the program, which operated between July 1999 and June 2000. The article examines the rationale for and operational aspects of the program and identifies some of the issues to emerge in the pilot phase. It will be of interest to both scholars and practitioners working with mentally impaired persons in the criminal justice system.

## **Introduction**

In recent decades there has been a growing awareness of the need to provide alternative methods within the criminal justice system for dealing with persons in the community who suffer from a mental impairment, and who find themselves before the criminal courts. One Australian study estimated that the proportion of persons sentenced or remanded in custody with a mental impairment to be in the order of 20% (Jones and Coombes, 1990). In recognition that the criminal justice system needed to deal more effectively with these individuals the South Australian government endorsed the establishment of the pilot Magistrates Court Diversion Program.

Operation of the pilot program was based on facilitating the engagement of eligible defendants with interventions aimed at contributing to a reduction in offending behaviour. While not supported by specific legislation, the intention of the program was to allow for the diversion of offenders from the criminal justice system, through the withdrawal of charges following successful completion of the requirements. Eligible defendants included those with a mental illness, intellectual disability, personality disorder, acquired brain injury or neurological disorder such as dementia. Only adults charged with minor, non-violent offences were entitled to participate.

Participation enabled alleged offenders to voluntarily engage in a program that could facilitate access to appropriate treatment and/or support services. In turn, the program was intended to improve the management of mentally impaired persons within the criminal courts, with a focus on therapeutic as well as legal outcomes.

## **Background**

In the majority of Western jurisdictions, those persons who find themselves before the criminal courts, and who suffer from a mental impairment, have had legal options for their defense available to them for over a century. Historically such legal avenues have been described under the rubric of an "insanity defence", and have as their basis the McNaghten Rules. The principles of McNaghten have generally served to exculpate an accused from criminal responsibility because of the establishment of the accused's inability, at the time of the act, to know the nature and quality of the conduct, or that the conduct was wrong (McSherry, 1999). A number of derivations of this theme have emerged in the Australian criminal justice system.

In South Australia, impacts arising from recent legislative reforms of the relevant "Mental Impairment" Acts contributed to the inception of the Magistrates Court Diversion Program. The *Criminal Law Consolidation (Mental Impairment) Amendment Act 1995* (CLCA) represented a significant reform of the options available to persons with a mental impairment who came before the criminal courts. Prior to the 1995 amendments, the "insanity defence" was essentially limited to those who had a severe mental illness, and who satisfied the 'nature and quality' and 'wrongfulness' criteria under McNaghten. In addition, those found "not guilty by reason of insanity" were declared by the courts as being liable to detention for indeterminate periods "at the Governor's pleasure". As a consequence, the use of this defence was almost exclusively restricted to serious

offences, such as homicide and was effectively unworkable for persons coming before the lower courts charged with minor offences.<sup>1</sup>

Following the CLCA (*Mental Impairment*) Amendments 1995, the options for persons appearing before the lower (Magistrates) courts increased substantially. The key elements in relation to the present discussion were threefold. Firstly, the McNaghten principles were extended to include a volitional component, recognising circumstances in which the defendant is "unable to control the conduct". This allowed for situations where the "nature and quality" and "wrongfulness" were known to the defendant, but by virtue of a mental impairment he/she could not refrain from the act.

The second key area of amendment related to the definition of a mental impairment, which was broadened in focus to include persons with an intellectual disability, and those with degenerative neurological disorders such as dementia, in addition to the mentally ill. Significantly, the amended definition of mental impairment was not exclusive, in that other categories of defendant such as those with a severe personality disorder were open to argue their case under the legislation.

The final change of interest to this discussion was the abolition of the "Governor's pleasure" principle. Instead, persons with a mental impairment who were deemed by the courts to have been "mentally incompetent at the time of the offence" were to be "subject to licence". This could be either in detention or under supervision in the community, with the period not to exceed the time a person convicted of that offence may have been expected to have received as a sanction.

An immediate consequence of the changes to the mental impairment legislation was a dramatic increase in the number of persons seeking a defence pursuant to the Act who were facing minor charges, able to be heard in the Magistrates Courts. An operational review of the amendments (Justice Strategy Unit, 2000) concluded that the often cumbersome, costly and time-consuming nature of mounting such a defence raised the question of its utility in dealing with minor matters. To utilize this defence, an initial assessment is required, followed by three subsequent assessments of the defendant by appropriate experts. In addition, interviews with the victim(s) of the offence and the next of kin of the defendant may be undertaken. This process could result in the production of up to seven reports. A key recommendation from the review was the establishment of a "Diversion Program" within the Magistrates Court to provide an alternative for persons with impaired mental functioning facing minor charges.

Providing further impetus for the establishment of a diversion program has been a change in the attitude of the South Australian judiciary in relation to particular offender populations. Recent comments by the Chief Justice of South Australia attest to such a shift... "There may be some types of crime as to which it is in the interests of society to put the main emphasis on assisting the victims, and on reforming the offender, and less on proof of guilt and formal punishment. There may be some types of crime which would be better dealt with outside the existing judicial system" (Australian Institute of Justice Studies, Oration 2000). This shift in approach has typically involved a move away from a concentration on criminal conduct and sanction, to a focus upon solutions to offenders' problems, paving the way for the emergence of 'problem solving courts' (sometime referred to as restorative justice). A number of these specialist courts have emerged in South Australia in recent years in addition to the Magistrates Court Diversion Program, including a Drug Court, a court related Violence Intervention Program and a court specifically for Indigenous offenders.

### **Program aims**

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<sup>1</sup> The Magistrates' or lower courts deal with summary and minor indictable offences (see Magistrates Court Act 1991). In South Australia, the District and Supreme Courts (higher courts) deal with more serious offences, while the Youth Court hears offences involving juveniles.

The pilot Magistrates Court Diversion Program recognized that people with a mental impairment may be especially vulnerable at the time of arrest and as they move through the court process. It endeavoured to make use of contact with the criminal justice system to effect early intervention through referral to appropriate treatment and rehabilitation services, while the formal legal process was adjourned. While not a service provider in its own right, the program aimed to ensure that services were put into place to assist individuals to address their mental health, disability and offending difficulties, rather than being penalised or returned to the community with their need for support or treatment unidentified.

In addition to seeking to reduce re-offending behaviour, the diversion program was implemented in order to:

- provide assistance to the court in the identification of defendants with mental health and disability needs, and to advise on the suitability of particular individuals for the diversionary process, and in relation to their management through the court;
- facilities effective interventions by health, disability and other community and support services, in an effort to address the offending behaviours as well as the mental health and disability needs of defendants; ) and
- reduce the use of a defence under the provisions of the CLCA (*Mental Impairment*) Amendments 1995 by minor offenders within the Magistrates Court jurisdiction.

## **The Program Model**

### **Implementation**

The program commenced on a trial basis in the Adelaide Magistrates Court in 1999, with referrals taken only from that court.<sup>2</sup> During the pilot phase, defendants appearing in other South Australian country and suburban Magistrates Courts were not eligible for participation.

A Coordinator, with a background in mental health assessment and disability issues, oversaw the operation of the pilot program. Support for this position was provided by a clinical psychologist, responsible for conducting assessments and offering a clinical advisory service, and a mental health Liaison Officer. These three key positions were court-based, although the Liaison officer was funded through the health sector rather than the courts.

The model also called for the appointment of a single Magistrate to preside within the court, along with two designated police prosecutors, and the availability of a publicly funded solicitor to assist defendants without their own legal representation.

### **Eligibility and referral**

The pilot program criteria stipulated that an adult charged with a minor indictable or summary offence<sup>3</sup> who showed signs of having impaired mental or intellectual functioning could elect to be diverted to the specialist court. Offences of a violent nature or those falling into the regulatory category (such as traffic matters, which have a standard penalty upon a finding of guilt), generally excluded a defendant from participation in the program.

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<sup>2</sup> This court is located in the central business district of Adelaide, the capital city of South Australia.

<sup>3</sup> A "summary offence" is an offence which must be heard and finally determined in the Magistrates' Court and for which a maximum fine of \$A2,000, or a maximum sentence of two years imprisonment can be imposed. A "minor indictable offence" is an offence for which a maximum fine of \$A120,000 or a maximum sentence of five years imprisonment can be imposed by a superior court, but which may be heard in the Magistrates' Court, in which circumstance, a maximum penalty of only two years imprisonment may be imposed.

Referrals could come from a wide range of sources, including lawyers, Magistrates and health service providers. It was intended that referral should occur as early as possible, ideally at the time charges were laid.

### **Consent and assessment**

Involvement in the pilot diversion program was voluntary, with consideration given to ensuring that defendants had an adequate understanding of the implications of their participation and were able to provide informed consent. An assessment of the ability of the defendant to do so, and to make a commitment to participation, was made by the Senior Clinical Advisor (program psychologist). Defendants referred to the specialist court could opt to have their legal representative present during the assessment interview if requested. At this point, issues regarding suitability for the program, and any suggested service or treatment options, were discussed with the prospective participant. If the preliminary assessment did not indicate impaired mental or intellectual functioning, or consent was not obtained, the defendant was returned to the normal court process following their first appearance in the specialist court.

For those candidates considered suitable for the program on the basis of the initial assessment, consent was also obtained to facilitate the exchange of information between the court and treatment and service providers, initially in relation to matters such as past mental health history, and then as necessary throughout the participant's involvement with the program. If consent to access this information was not given, again, the outcome would be that the defendant returned to the normal court process, where the option of a defence under the provisions of the *CLCA (Mental Impairment) Amendments 1995* was still available.

Information obtained during and subsequent to assessment could be disclosed to the court. Hence, it was important that defendants understood the limitations of confidentiality inherent in the process. Predicated on the need for open exchanges of information, protocols were developed during the pilot to protect defendants against unguarded admissions, and to ensure that information obtained over the course of their participation could not prejudice future hearings.

### **The Program Plan**

Subsequent to the assessment process, recommendations regarding access to treatment or services were incorporated into a tailored program plan, which outlined a strategy for the management of each participant. The plan was developed in consultation with the program staff and any service providers with whom the defendant may have been engaged at the time. The plan was activated following formal acceptance onto the program at the defendant's first hearing in the specialist court.

Program plans could include suggestions for involvement by recommended 'new' service providers, or ongoing interventions by existing providers. Plans were formulated with the objective of maximizing positive outcomes for the participant and the community by attempting to take account of any link between the offending and the functional impairment. Program plans also included dates for progress reviews and a scheduled date for the finalisation of matters in the court.

The pilot program was not intended to be a service provider, nor was it funded to purchase services for participants. It relied on the availability of existing resources from the mental health, disability and welfare sector. Participants were not ordered by the court to attend services, nor were agencies compelled to provide services to participants. Instead, the program aimed to capitalize on the opportunity brought about by the defendant's interface with the justice system to encourage engagement with appropriate services, and to improve motivation and treatment compliance. It was expected that the diversion program would provide an avenue to assist in the identification of individuals with previously undiagnosed conditions who appeared before the court.

It is important to emphasise that the recommendations made by program staff in terms of the professional assistance defendants should be accessing were generally broad in nature. Such recommendations could include psychiatric assessment and case management, drug and alcohol services, or assistance with financial or accommodation needs. Program staff did not become involved with treatment protocols or case management, which remained the sphere of the professionals managing the care of the defendant within the community or hospital setting.

## **The Court Process**

During the pilot, one half-day court session per fortnight was designated to deal with both new matters referred to the Magistrates Court Diversion Program, and those involving defendants currently participating in the program. In essence, the court operated in much the same way as general list hearings within the Adelaide Magistrates Court. However, in recognition of the special needs of many of the defendants within the client group, some provisions were made to render the process slightly less formal, such as modifying language used in order that defendants could more readily understand proceedings. Although sessions were conducted in an open court, the disclosure of sensitive material relating to the defendant or their circumstances was limited as much as possible. Other minor changes to court procedures, such as allowing defendants to stand in the body of the court rather than in the dock, were introduced during the course of the pilot. Having the same staff assigned to the court was important in allowing for the development of specialist skills to assist in dealing with this group of defendants.

### *The first court hearing*

At the time of the first appearance in the diversion court, the assessment report and a proposed program plan were provided to the Magistrate, the defendant, their legal representative and the police prosecutor. Even if the defendant met the eligibility criteria, acceptance for participation was contingent on admission of the objective elements of the offence. In part, this was to prevent delays in trial preparations for those who wished to enter a not guilty plea and for whom it was more appropriate that they be immediately allocated a trial date within the normal court process.

At the first hearing an intimation regarding the likely outcome in respect to prosecution of the charges was generally sought by the Magistrate. An indication that charges were likely to be withdrawn if the defendant successfully engaged with program requirements could provide incentive for the defendant to comply with the therapeutic process. In cases where the police prosecutor was unable to intimate a withdrawal, due to the nature of the offending or the defendant's antecedents, participants who completed the program could expect to receive a reduction in the sentence that may have been imposed through the normal court process.

If accepted for participation by the Magistrate, court proceedings were adjourned to allow the defendant to enter into the program. Those who were not accepted, subsequently opted out or were removed from the program due to non-compliance, had their matters returned to the normal court process. Under these circumstances, the judicial process continued as if the defendant had not been part of the Magistrates Court Diversion Program.

### *Monitoring and Review*

Throughout a defendant's involvement with the diversion program, staff maintained regular contact with the participant and their service providers in order to monitor progress in accordance with the program plan. As a result, plans could be reviewed and updated over time due to changing needs of the participant, in order to affect referral to a more appropriate service, or to allow the inclusion of additional services to supplement the original program plan.

Information gathered through the monitoring undertaken by program staff was incorporated into progress reports presented to the Magistrate at specified court review hearings. Defendants could be excused from attending these hearings if they remained compliant with program requirements. Issues surrounding non-compliance and/or further offending while on the program were considered by the Magistrate, police prosecutors and defence lawyers in consultation with program staff. A decision was then made regarding the continuation or removal of a participant from the program. In circumstances where non-compliance was an issue, the options of extending an individual's involvement or facilitating the provision of additional assistance were also available. In making such decisions, each individual's circumstances were taken into account, including the nature of their impairment, additional stresses they may have been facing, or difficulties with the provision of services.

#### *Final determination of matters before the court*

At the completion of a defendant's participation in the program, a final report was presented to the court summarising the progress made. There were a number of options open to the court for those who successfully completed the program, ranging from all charges being withdrawn, to the imposition of a sentence of imprisonment.

Under existing state legislation the decision on whether or not to withdraw charges rested with the police prosecutor, who took into account the participant's progress and compliance with the program, and factors such as the offences charged, the offending history, and the nature and level of functional impairment. Where the offence involved a direct victim, their views regarding the appropriate resolution of the matter were also taken into account. If charges were not withdrawn, pleas were taken, and the final report from program staff was considered in the determination of the case outcome by the Magistrate.

#### **Findings from the evaluation**

An independent evaluation of the pilot phase of the program was undertaken by the Office of Crime Statistics, South Australian Attorney-General's Department. A number of methodologies were used to collect qualitative and quantitative data for the evaluation. These included the analysis of statistics contained on the Diversion Program Information Management System (a database maintained by program staff), interviews with key stakeholders and program clients, observations of the court in session, and a survey of all Magistrates sitting in South Australian courts of summary jurisdiction. Some of the findings from the evaluation are presented in the following section.

#### **Referrals received**

Between July 1999 and the end of June 2000 the program received 201 referrals.<sup>4</sup> Nearly three quarters of those referred during the pilot phase were male (146 out of 201). The age range spanned 55 years, with the youngest aged 18 years at the time of their referral, and the oldest aged 73 years. The average (mean) age at referral was 34.5 years. The average age for males was 32.9 years, compared to 38.5 years for females. This difference was statistically significant

Only seven (3.5%) of those referred to the diversion program during the pilot period were identified as Indigenous, of whom six were male. A number of stakeholders consulted as part of the evaluation expressed concern over the low level of involvement with the program by Indigenous offenders, given that as a group, they are over-represented within the criminal justice system as a whole. No single factor was identified to explain this situation. However, possible explanations included a reluctance among the Indigenous population to acknowledge mental illness and access services, stereotyping of defendants as intoxicated

<sup>4</sup> By May 2003, 907 referrals had been received.

rather than mentally ill, and a preference by some Indigenous persons to have matters finalised quickly or to have their cases heard in a specialist court for Indigenous offenders.<sup>5</sup>

### *Referring agent*

The majority of referrals to the diversion program were initiated by Magistrates (104 or 51.7%) or solicitors (40.9%). Only a small proportion (4.0%) came from police, and all of these were from prosecutors rather than operational police. However, information obtained via stakeholder interviews suggested that, in fact, many clients were identified as possible candidates for the program by their defence counsel or police prosecutions. Relevant details regarding the defendant's circumstances were then brought to the attention of the Magistrate, who would make the formal referral. During the pilot period, mental health service providers referred six clients to the program (3.0% of referrals), while one person was referred by the Department for Correctional Services. There were no referrals received from guardians and there were no self referrals. This pattern was somewhat contrary to the original intention that persons would generally be referred to the program at the time charges were laid by police. In practice, this did not occur, most likely because of the difficulties experienced by police in identifying persons with a mental impairment, particularly in those circumstances where they had limited contact with the alleged offender.

### *Referral outcomes*

Defendants referred to the program were classified as participants if they had been: (i) assessed as eligible; (ii) consented to take part; and (iii) were formally accepted on to the program by the Magistrate at their first hearing in the diversion court following assessment. Of the 201 referrals to the diversion program received by 30 June 2000, 123 subsequently became program participants. The remaining 78 did not participate in the program.

The main reason for non-participation was 'ineligibility', with approximately half of all non participants falling within this category. This included defendants assessed as having no identifiable mental impairment, as well as those for whom the nature of the offending was outside the program criteria. Twenty-two program referrals did not participate because, for various reasons (such as continued failure to attend assessment appointments), they could not be successfully engaged in the process. Another person, who was recommended for participation following assessment and had an intervention plan formulated, failed to appear in court for his first hearing, at which time a warrant was issued.

Twelve of the 78 non-participants refused to be involved with the program, opting instead for their cases to be handled through the normal court processes. A further two defendants who had initially consented and were assessed as eligible subsequently withdrew consent and decided to have their matters finalized rather than enter into the program.

These statistics highlight a number of issues relating to the referral and assessment phases of the process. Firstly, although there were individuals excluded from participation because they failed to meet the eligibility criteria, it should be noted that there was some leeway in the application of the criteria surrounding the types of offences included, with decisions made on a case by case basis. This flexible interpretation of the guidelines arose out of a concern that persons who may benefit from participation in the program could be excluded on the basis of a particular offence committed. However, it was acknowledged that the inclusion of certain offences had implications for police prosecutions in deciding whether to withdraw the charges once a defendant had successfully completed the program. A more inclusive approach in relation to the types of offences accepted increased the likelihood that the program would function more as a sentencing aid, moving away from the original intention that defendants with a mental impairment would be diverted away from the criminal justice system through the withdrawal of charges.

<sup>5</sup> Since June 1999, a day has been set aside in a suburban Magistrates' Court to sentence adult indigenous offenders.

As previously noted, only a relatively small proportion of persons referred to the program and who were assessed as eligible, refused to participate. The voluntary nature of the program was an important feature in the conception of the model, and there was strong support from stakeholders that this approach be maintained. It was argued that to succeed on the program, individuals needed to be motivated and that this would be most likely to occur when involvement was voluntary. However, there was also recognition that the requirement to obtain consent excluded some persons who could potentially benefit. While it was not thought advisable to alter the voluntary nature of the program, stakeholders interviewed acknowledged the difficulty of balancing the concern not to infringe people's civil liberties with the desire to intervene in the person's best interests.

There was also some concern expressed by stakeholders as to how voluntary participation in the program really was, given that participants were generally aware that they were likely to receive a better court outcome through completion of the program than through the normal court process. This notion of 'coercion' has also been identified in other studies of mental health courts (see Goldkamp and Irons-Guynn, 2000) and was an issue canvassed with clients interviewed as part of the evaluation. While those interviewed indicated that their involvement had been voluntary and that they had not felt pressured to participate, some acknowledged that their reason for taking part was the desire to avoid jail. For some individuals it was a case of weighing up involvement in the program with the alternative of having their case finalised more quickly in the normal court process and possibly receiving a more severe penalty, such as imprisonment.

### **Program participants**

Of the 123 referrals that resulted in acceptance onto the program, 87 were male and 36 were female. Although the number of females in some age categories is small, it can be seen that half were aged between 35 and 49 years at the time of their referral to the program compared with just over one quarter of male participants. Approximately one third of male participants were aged 18-24 years, compared with only two of the 36 female participants.

On average, program participants had completed 10.45 years of formal education. Over two thirds (67.0%) were in receipt of a disability pension as their main source of income at the time they were referred. The other main income category was unemployment benefits, which were received by 16.1% of participants. Almost one in three (31.4%) were living in government subsidised rental accommodation, while 4.1% were listed as having no fixed abode. Four program participants were identified as Indigenous.

### *Charge profiles of program participants*

At the beginning of their involvement with the program the 123 participants faced a total of 687 charges, an average of 5.6 charges per person.<sup>6</sup> Around one quarter of participants (26.8%) had only one charge at their first diversion court hearing. A further 43.9% faced between two and five charges. At the other end of the spectrum there were three participants with twenty or more charges at the beginning of their involvement with the program, including one person with 97 charges and another with 71 charges.

The 687 charges faced by program participants included 653 criminal offences and 34 non offence matters.<sup>7</sup> As indicated in Figure 2, almost one half of all charges laid against program participants were *against property*<sup>8</sup> (47.0%) while just over one quarter involved an *offence*

<sup>6</sup> Further charges, apart from those for which the defendant was initially referred, were sometimes brought into the diversion court during a defendant's involvement with the program either because the person had re-offended while on the program or it was decided to consolidate files in the one court. These charges are not included in this count.

<sup>7</sup> Non-offence matters include issuance of restraining orders, warrants and other orders.

<sup>8</sup> Included in the category of 'against property' are offences such as burglary, break and enter, illegal use of a motor vehicle, larceny, property damage, receiving/unlawful possession, fraud, forgery and false pretences.

against good order<sup>9</sup> (27.9%). Driving offences<sup>10</sup> accounted for about 10% of all charges laid. Only a very small proportion of program participants were charged with a sexual offence<sup>11</sup> a drug offence<sup>12</sup> or an other offence.<sup>13</sup>

While all charges laid provides a comprehensive picture of the range of offences allegedly committed by program participants, the major or most serious charge<sup>14</sup> per participant gives a more accurate picture of the charge profile for discrete individuals. Of the 123 program participants, 74 (60.2%) had an offence against property listed as the most serious charge (for 42 of the 74 the charge involved was larceny). Just under one in five program participants had a major charge of an offence against the person, excluding a sexual offence<sup>15</sup> (17.9%).

#### *Primary mental impairment identified at the time of assessment*

That a majority of defendants who participated in the diversion program (72.3%) were assessed as having a major diagnosis (primary mental impairment) of some form of mental illness (as opposed to an intellectual disability or other form of mental impairment). Four out of 10 program participants (40.6%) had a major diagnosis of an alternative affective disorder<sup>16</sup> or schizophrenia, with an additional 19.8% diagnosed as having a bipolar disorder or major depression. A further one in ten had an alternative psychotic disorder.<sup>17</sup> The next most prevalent impairment category was that of a disability, with 10.6% of participants having an intellectual disability and 5.7% having acquired/organic brain dysfunction.

A small proportion of program participants (8.1%) presented with a personality disorder as their primary mental impairment. This is significant in that the inclusion of 'personality disorder' in the eligibility criteria for the program had been the subject of considerable deliberation during the planning stages, in part because of the difficulties inherent in the diagnosis and treatment of this condition, and also due to debate regarding the criminal responsibility of such persons.

While substance abuse in isolation was outside the criteria for inclusion in the program, this type of impairment was accepted in conjunction with another form of impaired mental or intellectual functioning. Substance abuse disorder was the primary diagnosis for 3.3% of participants. However, a further 35.3% of clients were assessed as having this type of disorder in addition to their primary diagnosis. The high number of clients assessed as having a substance abuse disorder is noteworthy given that such dual diagnosis clients were considered by stakeholders consulted during the evaluation as likely to encounter difficulties in accessing services.

#### **Implementation of the program plan**

<sup>9</sup> The category of 'offences against good order' include breach of bail/court order, breach of restraining order, disorderly/offensive behaviour, indecent/offensive language, resist police, graffiti and trespass.

<sup>10</sup> Examples of 'driving offences' are dangerous, reckless or negligent driving, drink driving offences and driving without a licence.

<sup>11</sup> A 'sexual offence' likely to be heard in the Magistrates' Court would be indecent behaviour/exposure, as cases involving the more serious sexual crimes, such as rape, would be heard in the higher courts.

<sup>12</sup> 'Drug offences' include possession and/or use of drugs (including cannabis, opiates, amphetamines, etc.), production or manufacture of drugs and fraudulent prescription offences.

<sup>13</sup> Examples of 'other' offences are electoral offences, animal cruelty offences and breaches of by-laws.

<sup>14</sup> The major or most serious charge is the offence carrying the highest maximum statutory penalty.

<sup>15</sup> Examples of 'offences against the person, excluding sexual offences' are common assault, assault police, stalking and threat to injure person. While offences such as murder would also be included in this category, these offences would be outside the jurisdiction of the Magistrates' Court and hence the diversion program.

<sup>16</sup> 'Alternative Affective Disorder' includes Dysthymic Disorder, Cyclothymic Disorder, Mood Disorder due to a (specified) medical condition, Substance-induced Mood Disorder, Mood Disorder – not otherwise specified.

<sup>17</sup> 'Alternative Psychotic Disorder' includes Schizophreniform Disorder, Schizoaffective Disorder, Delusional Disorder, Brief Psychotic Disorder, Psychotic Disorder due to a general medical condition, Substance-induced Psychotic Disorder and Psychotic Disorder – not otherwise specified.

### *Agency involvement*

One of the original aims of the diversion program was to identify and assist defendants who may not previously have been involved with mental health or other service agencies. Despite this objective, there were very few 'new entrants' to the mental health/welfare and social support systems linked to service agencies through their involvement with the pilot program. In fact, 95.1% of those accepted on to the diversion program during the first 12 months of operation were already involved with service agencies or practitioners at the time of their referral, although in some cases, this may have been with a general practitioner rather than a specialist service provider. There were six clients listed as having no current service involvement. However, it is possible that these individuals had accessed a service agency in the past. Overall then, there were very few clients who were not involved with health/welfare services to some extent at the time of referral.

While the number of 'new entrants' to the mental health/welfare system identified through the program was comparatively small, many participants were referred to new agencies or services, which they had not previously accessed, as a direct result of their involvement with the program. One in three individuals had contact initiated with at least one 'new' agency as part of their intervention plan. For the remaining two thirds, participation in the diversion program consisted of maintaining existing links to services, and the monitoring of compliance with current treatment and support by program staff through periodic reviews.

The issues identified for particular clients at the time of assessment influenced the type of services with which they were linked. As the needs of participants were often complex, they typically required assistance with a range of issues and thus agencies accessed included accommodation, employment, education and other services. In linking clients to appropriate service providers it was recognised that some clients, such as those with an intellectual disability, were not 'treatable' and therefore the focus for these individuals was on engagement with appropriate support services.

Prior to the commencement of the program there was concern by some agencies that they might be overwhelmed by new referrals initiated by the diversion court. When interviewed, service providers noted that this had not eventuated during the pilot period. New contacts initiated through the diversion program were spread across a range of services rather than a substantial number of clients being directed to any specific agency.

A continuing concern, also raised prior to the commencement of the program, was that appropriate services might not always be available for participants. In particular, clients with a dual diagnosis (such as a brain injury and a substance abuse disorder), those with a personality disorder and those who were itinerant were highlighted as potentially problematic client populations. The main concern expressed in relation to the inclusion of these clients in the program was that if suitable services were not available, the likelihood of successful involvement by these individuals would be minimal. As noted by one of the stakeholders interviewed, "We risk setting them up to fail". However, despite some debate over the inclusion of certain client groups because they were 'difficult' it was generally felt that individuals should not be excluded on that basis. Further, it was recognised that gaps in service delivery were a feature of the structure of the mental health and associated systems and therefore beyond the control of the program.

### *Monitoring compliance*

The regular reviews undertaken by program staff focused mainly on monitoring the client's overall progress in areas such as mental functioning or management of their particular condition. However, they also tracked changes in regard to any other health and welfare issues considered relevant, and were used to make an overall assessment of compliance. Measurement of compliance was very much influenced by individual

circumstances, with program staff required weigh an individual's adherence with the requirements of the program plan against the particular difficulties facing that client.

Although the vast majority of participants were assessed as being compliant with the requirements of their program plan (approximately 90% at each review stage), like many other special interest courts (see Goldkamp and Irons-Guynn, 2000) the diversion program grappled with the issue of how to respond to non-compliance. During a client's involvement there was often some flexibility shown, with individuals given several chances to improve their level of engagement with services. In the event of doubtful compliance, individuals were more likely to have their participation extended, in order to maximize engagement, rather than their involvement with the program being terminated. As clients would often have records of previous poor compliance with treatment services, the role of the program in many instances was to promote improvement in this area. Consequently, even clients not totally compliant with the program may have made some progress in this respect, compared with their past history.

### **Program length**

When clients were admitted to the program, the program plan developed for each individual specified an expected completion (final determination) date. In determining the length of the program, the primary factor taken into consideration was the nature and complexity of the difficulties experienced by the client and the likely amount of time needed to allow a particular individual to become well engaged with services to meet their needs. However, there were also some complicating factors that impacted on the actual program length; for example, clients who were considered to be non-compliant might have their program extended. In general, individual programs ranged from three to eight months. For the clients who completed the program by 30 June 2000, the mean actual time spent on the program was 134 days (or just over four months).

There was some debate amongst stakeholders interviewed as to the length of time clients should be involved with the program. It was generally agreed that there needed to be a balance between ensuring that the program was not too onerous and disproportionate to the seriousness of the offence, and allowing the individual sufficient time to be linked into appropriate services. It was recognised that this would vary on a case by case basis.

### **Outcomes and penalties**

#### **Court outcomes**

When the program was established it was anticipated that most defendants who successfully completed the program would have their charges withdrawn. However, as the following figures indicate, in practice, approximately two thirds of participants left court with a criminal record.

As at 30 June 2000, 58 persons (19 females and 39 males) had had a final determination hearing. Of the 340 offences dealt with at final determination, just over 70% resulted in a finding of guilt, with or without conviction.

In 17.3% of matters, the offence was not proceeded with, either because the police withdrew the charge, or it was dismissed for want of prosecution.

Table 3 also provides a breakdown of the outcomes for the most serious charge per case considered at the final determination hearing. As shown, of the 58 defendants who had a final determination hearing during the pilot period, almost six in ten were found guilty of their major charge. For 46.6% of defendants a conviction was recorded. Conversely, 34.4% had the major charge either withdrawn or dismissed, or no action was taken. However, in two of these cases a finding of guilt was recorded for a second or lesser charge. There were three cases where the major charge was not finalised within the diversion court. These

were cases where the offences were not admitted to and were therefore referred back to the 'normal' Magistrates Court for adjudication.

Overall, 38 defendants were found guilty (with or without conviction) of a total of 241 separate offences. This gives an average of 6.3 'proven' charges per individual. At one end of the spectrum, just over four in ten defendants were found guilty of either one or two offences. At the other end of the scale, there were three defendants with more than 10 charges proved against them, including one defendant who had 90 charges, all involving breaches of restraining orders.

#### *Major penalties imposed per individual*

Overall, the most frequently imposed major penalty<sup>18</sup> received by those who completed the program was that of a good behaviour bond, either supervised or unsupervised (refer to Table 4). Of the 31 defendants who received a penalty at their final determination hearing, 15 received a bond. While none of those who completed the program received an immediate custodial term, 10 defendants were given a suspended term of imprisonment. No penalty was imposed on seven defendants. Only two defendants received a fine, while another received a Community Service Order.

#### **Conclusion**

On the basis of the evaluation findings, the Magistrates Court Diversion Program received funding to allow it to continue beyond the pilot phase. Initially restricted to the Adelaide Magistrates Court, geographic coverage has recently been expanded to include several suburban and country Magistrates Court jurisdictions.

There were a number of key factors in the decision to continue the program. Firstly, the evaluation findings indicated that despite some initial teething problems, the program had received support from a wide range of stakeholders as a mechanism for improving the management of mentally impaired offenders within the criminal justice system. It was viewed as an innovative approach in terms of its focus on therapeutic outcomes within the traditional justice framework. Stakeholders consulted during the evaluation saw the program as having the potential to achieve positive outcomes both for individual defendants and the wider community. In part, this was attributed to the collaborative approach adopted and the application of specialist skills from a range of disciplines. However, it also recognised that at the time the evaluation of the pilot was conducted it was too early to assess the longer term impacts of the program, such as any reduction in offending by graduates.

Stakeholders consulted during the evaluation supported both the continuation of the program and its expansion to other locations. This is now occurring and represents the next key challenge for those associated with the specialist court. South Australia has a landmass of 984,377 square kilometres and a population of almost 1.5 million people, of whom 73% live in Adelaide (Australian Bureau of Statistics 2000). There is a paucity of services in country and outback South Australia due to its size and low population density. This has significant implications for the program, given its reliance on utilizing existing community resources as well as the logistical issues associated with travelling to distant locations and serving isolated populations.

While this article has described the operation of the Magistrates Court Diversion Program during the pilot period and outlined some results from the evaluation of the first twelve months, it should be noted that the program will be subject to ongoing evaluation. Future studies will have a greater focus on outcome

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<sup>18</sup> 'Major penalty' is the most serious penalty handed down per case, with immediate imprisonment ranked as the most serious penalty and no penalty as the least serious.

measures, such as the level of recidivism by participants, while impacts of the expansion will also be assessed.

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