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The Victorian Aboriginal Legal Service Co-operative Limited's response to the *Magistrates' Court Amendment (Mental Health List) Bill 2009*

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Introduction

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) is pleased to comment on the *Magistrates' Court Amendment (Mental Health List) Bill* 2009. It is hoped that if the framework and operation of a Mental Health List is done thoroughly, thoughtfully, sensitively, and with consideration for all members of the Victorian community, there is great potential to deliver more appropriate justice to those suffering from a mental illness. VALS hopes that a Mental Health List can avoid the inappropriate incarceration of Aboriginal and Torres Strait Islander Peoples suffering from mental illness.

VALS does not believe that a person's offending behaviour as a result of their mental illness should necessarily bring them into contact with the criminal justice system. The criminalisation of certain behaviours, especially those of the minor/public order variety, draws attention to certain groups within the community. It is commonplace that this attention is focused on the most visible, most marginalised, and most disenfranchised within the community. Aboriginal and Torres Strait Islanders and people suffering a mental illness fall clearly into these categories.

While contact with the criminal justice system is almost always viewed as having a negative impact on peoples lives, it can simultaneously be argued that the criminal justice system is capable of providing an opportunity to identify people who suffer mental illness, and can therefore be a way that mental illness needs and issues can be dealt with. That being said, VALS is mindful of the argument that the role of the court is not to solve social problems and that having a Mental Health List (or court) would be fusing the justice system with the welfare system. Some argue that the two should be kept separate and that having a better mental health system would be a better option than a Mental Health List/court (Topp 2002, in Pickering et al 2004). While there is merit to this argument, VALS believes the potential benefits of a Mental Health List, including a reduction in inappropriate incarceration and the overrepresentation of mentally ill/impaired people in the justice system, far outweighs the above concerns.

The Victorian Magistrates' Court has developed a number of problem-solving approaches in an attempt to provide appropriate outcomes for the individuals who appear before it, including:

- Court Based Programs;
- Specialised Lists;
- Diversion;
- Specialist Courts; and
- Protocols for individual offences.

According to Ms Jelena Popovic (Deputy Chief Magistrate, Victoria), 'the Magistrates' Court considers problem solving approaches to be an effective process to achieve appropriate sentencing outcomes by bringing to bear less adversarial and more managed or supervised sentencing solutions. The decisions incorporate inputs and solutions focused around individual problems' (2006:10). Popovic argues that the Court sees the implementation of specialist problem solving "lists" (in contradistinction to stand-alone courts) as an effective, accessible and cost efficient innovation. While the Magistrates' Court has been advocating for the implementation of a specialist list to meet the justice needs of the mentally ill, what has become evident from the existing specialist lists is that:

- treating professionals can become involved in their patient's court issues and can make significant contributions to court outcomes;
- a non-adversarial approach is not only warranted but is very effective;

- there is a genuine shifting of responsibility for inappropriate or unlawful behaviour through these processes whereby the community and the individual are given a sense of ownership of the issues; and
- individuals generally respond more favorably to a process which treats them with dignity and accords them a 'voice' (Popovic 2006).

The following table is a good demonstration of the differences between traditional courts and problem-oriented courts (R.K Warren 1998 in Freiberg 2001).

Traditional Process	**Transformed process**
Dispute resolution	Problem solving dispute avoidance
Legal outcome	Therapeutic outcome
Adversarial process	Collaborative process
Claim or case oriented	People oriented
Rights based	Interest or needs based
Emphasis based on adjudication	Emphasis placed on no-adjudication and alternative dispute resolution
Judge/magistrate as arbiter	Judge/magistrate as coach
Backward looking	Forward looking
Precedent based	Planning based
Few participants and stakeholder	Wide range of participants & stakeholders
Individualistic	Interdependent
Legalistic	Common-sensical
Formal	Informal
Efficient	Effective

Endorsing initiatives akin to problem-oriented courts, this submission will consider issues, definitions, and perspectives concerning the mental health and wellbeing of Aboriginal and Torres Strait Islander people (both in terms of mental illness and disability); the effect of mental illness in the Aboriginal and Torres Strait Islander community in relation to legal issues; initiatives that exist in other jurisdictions that aim to address the offending of those with a mental illness through the courts; and address the Bill itself.

Aboriginal and Torres Strait Islander Perspective

VALS considers that defendants with moderate to severe mental impairments need to be considered in terms of their complex needs. VALS considers the establishment of a Metal Health List in the Victorian Magistrates' Court a step towards appropriately assessing and addressing some of these needs. It is important to note, however, that the needs of a defendant should not only be addressed through medical considerations and treatment. Criminogenic and non-criminogenic needs of defendants with a mental illness must be addressed for the Mental Health List to be of true value. In order for this to be achieved, the compounded complexity inherent in the circumstances experienced by some members of the Aboriginal and Torres Strait Islander community participating in the criminal justice system must be addressed.

According to the Steering Committee for the Review of Government Service Provision's *Report on Government Services 2010: Volume 2*, data on service use by the Aboriginal and Torres Strait Islander status of mental health patients are available, but comparisons are difficult because Aboriginal and Torres Strait Islander mental health patients are not always correctly identified. Differences in rates of service use could also reflect other factors, including the range of social and physical infrastructure services available to Aboriginal and Torres Strait Islander people, and differences in the complexity, incidence and prevalence of illnesses.

Combined data of Australian jurisdictions, for which data are available, showed that Aboriginal and Torres Strait Islander people were 1.8 times more likely to receive specialised psychiatric care in hospitals, 1.5 times more likely to have an episode of community residential care, and 2.2 times more likely to have a community mental health contact than non-Aboriginal and Torres Strait Islander people (Steering Committee for the Review of Government Service Provision 2010).

In considering the mental health needs of Aboriginal and Torres Strait Islander offenders in Victoria's criminal justice system, we are immediately positioning ourselves at a complex and often fraught intersection of services and interests (Jones & Day 2008). Howells, Thomas-Peter and Day (2004) suggest that although the criminal justice system and the health care system have fundamentally different social functions, there are areas of common purpose and interest. Both hold a responsibility to protect *all* members of the community from harm. The criminal justice system, from initial points of contact with police through to Correctional Services and release, holds an obligation to provide adequate health and mental health services to offenders. It is therefore crucial for VALS to comment on these areas.

People with a mental illness are overrepresented in Victorian prisons with 40% of prisoners experiencing serious mental illness and the proportion increases when other types of mental and psychiatric disabilities, such as personality disorders, are also considered (Deloitte Consulting 2003). More recent research rates major mental illnesses, such as schizophrenia and depression, as being between three and five times higher in the offender population than in the general community (Ogloff et al. 2007). Social disadvantage and inadequate treatment of mental health in the community inevitably equates to too many people with untreated illness ending up in prison:

> *Ill health and marginalisation, not criminality, are the drivers, but this goes unacknowledged by a justice system which often only serves to exacerbate illness, and may increase reoffending* (Smart Justice 2009).

Social disadvantage and inadequate access to services being linked to negative contact with the justice system is an all too common theme for Aboriginal and Torres Strait Islander community. Misunderstandings and misdealings with mental health matters acts as an additional contributor towards marginalisation for the disadvantaged and the disempowered. For these reasons and more, it is critical that the operation of, and the services connected to, the Victorian Mental Health List considers the unique and distinct needs of the Aboriginal and Torres Strait Islander population if successful diversion from inappropriate incarceration is to be achieved. To do so in an ad hoc manner would be exposing Aboriginal and Torres Strait Islanders with a mental illness to further risk of overrepresentation in the Victorian prison system.

Defining Mental Health

In VALS' submission to the Community Consultation Panel: *Mental Health Act 1986* Review (submitted 16 March 2009), the seriousness of mental health issues that can be identified through extreme negative outcomes in the Aboriginal and Torres Strait Islander community was explored. Looking at behaviours linked to mental illness such as suicide, the prevalence in Indigenous Australian communities has been shown to be significantly higher than that for non-Indigenous Australian populations; 'yet Aboriginal and Torres Strait Islander understandings and definitions of suicide and self-harming behaviours remain under-researched, undervalued and under-utilised'(Suicide Prevention Australia).

An inherent problem with understanding the relationship between mental illness and imprisonment are the competing and contradictory definitions of mental illness found within the law and in the fields of psychiatry and psychology (Pickering et al 2004). VALS notes that the Bill considers "mental illness" as having the same meaning as it has in the *Mental Health Act 1986* (Vic). VALS' submission for the review of the *Mental Health Act* 1986 highlighted the unique conception of what Aboriginal and Torres Strait Islander communities consider constitutes mental health and wellbeing, as well as what is considered mental illness.

There are some common threads that run through different conceptions and definitions of what is considered "mental health", "mentally ill" and "mentally disabled". There is not, however strong consensus on any one definition of any of these terms. Not only are definitions of mental illness and wellbeing influenced by personal experience, but conceptions and learnings about mental health, mental illness and/or wellbeing evolve with time, place, and culture - as do their respective definitions. When conceptions of mental health evolve decisions about patients should be reviewed to ensure that the measures put in place continue to be relevant and appropriate.

This is of critical note when you consider that it is how we perceive and define mental health, illness and wellbeing that direct the way we approach better avenues to deal with such issues. An imperative tool in guiding the future of mental health matters in Australia is of course the respective legislation. VALS argues for a broader scope of what is considered under definitions of mental health or mental illness in order for the prospective legislation to attempt to be as inclusive as possible.

According to the World Health Organisation, mental illness refers to 'the existence of a clinically recognisable set of symptoms or behaviour associated in most cases with distress and with interference with personal functions' (1992:3). While this definition is convenient in its succinct form, VALS finds the following definitions more appropriate in relation to what should be included in local conceptions.

The National Mental Health Plan 2003-2008 defines

> Mental health as: *A state of emotional and social wellbeing in which the individual can cope with the normal stresses of life and achieve his or her potential*; and
>
> Mental illness as: *A clinically diagnosable disorder that significantly interferes with an individual's cognitive, emotional or social abilities*

The above conceptualisation of mental health resonates with the notion of 'social and emotional wellbeing' – a term which is now widely accepted in Australia as one which significantly aids current understandings of the association between mental health, physical health, and social disadvantage (Jones & Day 2008). Further, the central role of family, culture and community in mental health is highlighted. The term 'well-being' has broader scope than the term 'mental health'.

Another broadening of considerations of mental health matters is included in the *Victorian Department of Justice Mental Health Strategy Project 2008* that reflects a behavioural rather than a diagnostic definition of 'cognitive impairment'. The adoption of this broader scope of focus on mental illness than what is provided in the *Mental Health Act 1986* is important as it includes intellectual abilities, personality disorders and other impairments that influence and affect people and the aspects of the justice system they come in contact with. This definitional and conceptual broadening of mental health matters represents a positive step towards a more holistic view of the role of mental health and interaction with the justice system.

Considering intellectual disability and mental health data on Aboriginal and Torres Strait Islander people

National data suggests intellectual disability is more than three times as prevalent for Aboriginal and Torres Strait Islander (7.5%) than for non- Aboriginal and Torres Strait Islander (2%) members of the general population. Also, when the rates of any disability or long term health condition that limits core activities were measured, Victorian data revealed an Aboriginal and Torres Strait Islander rate of 25% - double that observed for non- Aboriginal and Torres Strait Islander members of the population (Jones & Day 2008).

Research further indicates the overrepresentation of people with a cognitive disability in the criminal justice system, with difficulties in identifying such cognitive disability in offenders being further compounded for those who are Aboriginal and Torres Strait Islander:

> *The problem of disability being masked by other factors of disadvantage is perhaps most evident when it comes to contact with the criminal justice system. If a brain injury is acquired early in life, and is never properly assessed, there is the potential that behaviours that are a consequence of that brain injury will never be properly attributed. During contact with police, behaviour is much more likely to be connected with the immediate influence of drugs and alcohol, or perhaps implicitly linked to the fact of Aboriginality rather than a brain injury. A lack of response to questions may be viewed as being the consequence of language and cultural barriers, rather than reflecting a lack of understanding* (Simpson & Sotiri 2004: 11).

It is broadly accepted that at least a significant minority of all prisoners would meet the criteria for a diagnosis of a major mental disorder. Further, given the levels of overrepresentation of Aboriginal and Torres Strait Islanders in the prison system, it is logical to assume that rates of mental disorder that are currently being reported for the general prison population will significantly *underestimate* the rates of mental illness for Indigenous prisoners (Jones & Day 2008). Therefore the levels of mental illness in the Aboriginal and Torres Strait Islander prison population are likely to exist at even higher rates than what is known of at present.

Corrections Victoria's *Victoria Prisoner Health Study* (2003) concluded:

> *The overwhelming impression conveyed by the data is that the prisoner population is far less mentally healthy than the wider Victorian population. The overall pattern of findings reflects a greater prevalence of all the major mental illnesses than is found in the general population. Moreover, a very high percentage of prisoners have attempted suicide or otherwise engaged in acts of self-harm. The prevalence of addictive behaviour is also extraordinarily high. This situation is serious enough to require that careful attention be paid to the provision of broad-based mental health services to prisoners* (Deloitte Consulting 2003).

Aboriginal and Torres Strait Islander's experience of the traditional mental health system is that it does not take a holistic approach and hence is limited in its scope to assist Aboriginal and Torres Strait Islanders. According to 2009 research, there is a need for renewed focus on the wellbeing of Aboriginal and Torres Strait Islanders, as results (based on data from the *2002 National Aboriginal and Torres Strait Islander Survey)* found that those with strong cultural attachment have significantly better self-assessed health, are more likely to be employed and are least likely to have been arrested in the past five years:

> *The findings also support the view that there are other means by which Indigenous disadvantage can be addressed and that restoration of Indigenous attachment to their culture may be an integral part of the solution* (Dockery in ScienceAlert Australia & New Zealand 2009).

Importance of wellbeing

There is an increasing focus on mental health and wellbeing in correctional facilities and how they are addressed in and through corrections processes. The present Victorian Corrections Regulations 2009 Regulatory Impact Statement highlights the need for increased attention on a wide range of mental health issues in Corrections regulations. VALS is concerned by claims of the following:

> *Our involvement with Indigenous Australian women in prison would indicate that often mental health issues are responded to punitively. Lashing out at prison officers, aggressive behaviour, verbal abuse and non-compliance with prison rules or direct orders, often result in breaches of prison rules. A 'smart' approach to prisoner behaviour is better than a 'tough' or punitive approach. Where the prisoner involved has a known mental health issue, it would be worth discovering whether this status bears on the presented behaviour. We submit that it does and so warrants a culturally specific response, the absence of which leads to the over-representation of Indigenous Australian women in the management unit* (Cerveri et al 2005:19, 33-34).

The data also revealed that mental health problems of Aboriginal and Torres Strait Islander prisoners are less likely to have been identified either in the prison itself or previously whilst in the community. From this, a clear pattern of under-diagnosis or misdiagnosis can be considered to be occurring in likely conjunction with a dearth of accessible and culturally appropriate services in existence for Indigenous Australian persons. Attention to identification and diagnosis of mental illness should be considered critical in correctional settings if the role of corrections is to be, as it claims, an avenue for rehabilitation and reintegration back into society.

Ways Forward

When looking to consider appropriate measures for mental health that focuses on Aboriginal and Torres Strait Islanders, the *Ways Forward* report (1995) remains one of the most significant. This report set the policy agenda for the development of Aboriginal and Torres Strait Islander mental health services across Australia, identifying high levels of unmet need for mental health services and promoting culturally sensitive and appropriate mental health services (Jones & Day 2008). The state of affairs at the time of *Ways Forward* writing was described as follows:

> *Where there was contact with or use of mainstream health services they were frequently seen as unhelpful, non-responsive, inaccessible or unavailable, and totally failing to respond to the needs of Aboriginal people with mental illness. Misdiagnosis, the inappropriateness of Western models, failure to recognise language differences, ignorance of Aboriginal culture and history, and racism complicated the picture. On occasion there were helpful individuals or models of service, but the overall picture is one of gross inadequacy and perceived need* (Swann & Raphael 1995:44).

The report identified a wide range of unmet service needs for Aboriginal and Torres Strait Islander people with mental health problems, including a lack of:

- Aboriginal and Torres Strait Islanders places of care/healing and access to traditional healers;
- crisis teams;
- culturally appropriate early intervention, inpatient mental health and rehabilitation and recovery programs;
- direct involvement of consumers and carers in service development;
- appropriate supportive accommodation options for the chronically mentally ill; and
- alignment of mental health legislation with Aboriginal and Torres Strait Islander people's human rights and cultural needs.

Jones and Day (2008) point out the way in which the *Ways Forward* report demonstrated the criminal justice and mental health systems exacerbate mental health concerns for Aboriginal and Torres Strait Islander people in many instances. Examples include forced separation or the imposing of treatment and management regimes that are culturally inappropriate or not discussed sufficiently with the patient or family. The report overall recommended Aboriginal and Torres Strait Islander forensic services be added to current mainstream structures staffed by specialist teams with expertise and knowledge of Aboriginal and Torres Strait Islanders culture.

The *Ways Forward* report importantly also noted the following[1]:

- It is important to consider mental health and substance abuse issues together rather than rather than separately. The structure of mainstream services generally separates them.
- It is of vital importance to build Aboriginal and Torres Strait Islander-appropriate models of counselling. 'Talking' was repeatedly seen as being a powerful avenue for healing.
- Workforce development requires cultural competency training for non-Aboriginal and Torres Strait Islander and Aboriginal and Torres Strait Islander approaches to mental health.
- Aboriginal and Torres Strait Islanders people and communities need to build capacity so that such services can be delivered more effectively.
- Consistent data collection, research and evaluation is needed to establish a reliable baseline of information on Aboriginal and Torres Strait Islander people's health.

While significant, it must be kept in mind that the *Ways Forward* report was written over a decade ago. However, subsequent policy frameworks have used some of its key elements. Examples include the *National Mental Health Plan 2003-2008*, the *National Strategic Framework for Aboriginal and Torres Strait Islander Peoples Mental Health and Social and Emotional Wellbeing 2004-2009*, and of course the Department of Human Services' 2008 *Because Mental Health Matters.*

Legal Issues for Aboriginal and Torres Strait Islander People with a Mental Illness

Consultations undertaken by Karras et al (2006) through the Law and Justice Foundation of NSW indicated that people with a mental illness experience particular legal issues. Such issues often reflect their financial and social disadvantage, as well as their incapacity that may be caused by their illness. The consultations for this same project also revealed that people with a mental illness face a number of barriers to accessing legal assistance, including:

- A **lack of awareness of their legal rights** – individuals do not realise that their problem has a legal element and a potential remedy.
- **Being overwhelmed**, and therefore too frightened, or lacking the motivation, to seek legal assistance.
- **Being mistrustful**, or frightened of, divulging personal information to Legal Service Providers which may prevent the service provider from adequately assisting the client.
- **Difficult behaviour** – some individuals with mental illness may exhibit difficult behaviour that makes it challenging for service providers to assist them.
- **Lack of mental health care and treatment**, in the absence of which, can result in the exacerbation of the above barriers (Karras 2006).

In addition to these individual barriers, those that were interviewed in this research project argued that there are also systemic barriers experienced by people with mental illness accessing legal services. These include:

- **The limited availability of affordable legal services**

  Given that people with a mental illness tend to have lower levels of income, they are likely to be reliant on increasingly stretched services such as Legal Aid, Community Legal Centres (CLCs), Aboriginal Legal Services and pro bono legal service provision.

[1] As noted in Jones and Day 2008:14.

- **Time constraints placed on legal service provision**

  Stakeholders argued that while people with a mental illness often require longer appointment times with lawyers, the limited resourcing of CLCs, Legal Aid and Aboriginal Legal Services make this extremely difficult.

- **Remote, rural and regional issues**

  Stakeholders suggested that the lack of affordable legal services is even more pronounced in rural in regional areas. The organisation and cost to travel long distances to access services can create additional barriers.

- **Difficulties in identifying mental illness**

  Legal service providers may not always be able to identify that a client has a mental illness. This may result in a person not receiving the time, assistance and understanding they need to resolve a legal issue.

- **A perceived lack of credibility**

  Stakeholders observed that some lawyers find people with mental illness less credible, and are less inclined to believe what they say, and more ready to dismiss their claims (Karras 2006: xix-xx).

Barriers to participating in the legal system

The Karras (2006) study also identified a number of barriers that prevent people from accessing and participating in the legal system. It was noted that while cognitive impairment is not always a symptom of mental illness, this can create barriers in understanding legal documents and their terminology and understanding legal processes within the broader justice system. In addition, features of the courtroom environment, in terms of their structure and formalities, can intimidate people with a mental illness and this has the potential to exacerbate their symptoms. VALS is therefore strongly supportive of the Bill's mention that the Court must exercise its jurisdiction with as little formality and technicality as this Act (and the Sentencing Act 1991) permit.

Criminal Legal Issues

Research indicates instances where people with a mental illness may be charged with offences relating to behaviour arising from their illness such as offensive language and conduct, assault, resisting arrest and assaulting police:

> *As a general rule it's usually public disorder …where they bring themselves under notice due to their actions.*[2]
>
> *A lot of our clients with mental health issues or alcohol problems get pulled up on offensive language. If they are walking a bit strangely or they look like they are under the influence, a police officer will pull them up.*[3]

[2] Consultation with NSW police inspector in Karras et al 2006:58.
[3] Consultation with CLC workers in October 2004 in Karras et al 2006:59.

Addressing Offending Behaviour of those with Mental Illness: Other Jurisdictions

It has been reported that screening and assessment for mental illness in justice agencies remains inconsistent across Australia (Ogloff, Davis, Rivers and Ross 2007). There are, however, some positive initiatives operating in various Australian jurisdictions that warrant mention.

Tasmania

An Evaluation Report of the Magistrates' Court of Tasmania's Mental Health Diversion List, released in May 2009 (Newitt and Stojcevski), provides some relevant information on the operation of a Mental Health Court List. VALS notes these areas of relevance below in reference to the proposed Victorian Mental Health List Bill.

The Mental Health Diversion List (MHDL) commenced operation as a pilot program in 2007. The MDHL is not a separate or distinct court and is not subject to any unique legislation but instead operates as a specialist list[4] to 'divert mentally ill participants away from the regular criminal justice system and into appropriate treatment' (Newitt and Stojcevski 2009:4). The List differs from other court diversion programs in Tasmania in that it is presided over by two dedicated magistrates twice a month and operates without a distinct budget allocation or human (or other) resources. Like other problem solving courts, the MDHL aims to address the reasons for the offending behaviour, rather than simply addressing and punishing the behaviour. VALS is strongly supportive of such aims.

One of the main objectives of the List is to address the mental health issues and other factors and needs contributing to the offending behaviour of defendants. Of the 137 defendants referred to the MDHL[5], 88 participants (64.2%) have successfully completed the program, and 24 are still participating in the List (at the time of evaluation reporting). The remaining 25 defendants have been removed from the List for reasons such as ineligibility (48%) and non-compliance (28%) and were therefore referred back to the general list.

The majority of the mentally ill defendants offend in a nuisance-type manner such as shoplifting or disorderly conduct and other minor public order offences (Senate Select Committee on Mental Health 2006 in Newitt and Stojcevski 2009). Due to repeat offending and being prone to offences of failing to appear before court, they also tend to come before the courts with disproportionate frequency and with their cases taking longer to resolve (Newitt and Stojcevski 2009).

Operation

Defendants can be referred to the List at any time prior to finalisation of a matter by a number of different parties, including: their defence solicitor; the prosecutor; police; magistrates; Forensic Mental Health Court Liaison Officer (FMHCLO); case manager/other service provider; or any other person with interest in the defendant's welfare – this includes the defendant themselves. Once referred, the defendant is then required to undertake formal assessment by a FMHCLO.[6] The magistrate will usually adjourn the matter for a couple of months and release the defendant on bail. During this period on bail, a treatment plan is devised by the defendant, Forensic Mental Health Services staff and other relevant parties.

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[4] Using the provisions under the *Bail Act 1994* (Tas) and the *Sentencing Act 1997* (Tas).
[5] The majority of referrals were made by lawyers (43.1%) or Forensic Mental Health Service Officers (32.1%).
[6] If the defendant is deemed not to meet the requisite criteria, they are returned to the general list of the Magistrates Court. The defendant still retains the right of making an application that they are unfit to stand trial or pleading not guilty by reason of insanity under the *Criminal Justice (Mental Impairment) Act 1999* (Tas).

The defendant must also **consent voluntarily** to participation in the MHDL program and this consent may be revoked at any point during proceedings. Defendants who participate in the List are also generally required to plead guilty to give an indication that there is no contest to the facts in the charges (Newitt and Stojcevski 2009).

The Therapeutic Jurisprudence Approach

VALS agrees with the aim of adopting problem solving approaches of justice. The MDHL aims to achieve this through the incorporation of therapeutic jurisprudence concepts when encountering offenders with a mental illness. Therapeutic jurisprudence is 'the study of the law as a therapeutic agent' (Wexler 1999 in Newitt and Stojcevski 2009). Alternatively, therapeutic jurisprudence can be defined as 'an interdisciplinary approach to law that asks how the law itself might serve as a therapeutic agent without displacing due process (Wexler and Winick eds. 1991 in Hartley and Petrucci 2004:137).

It recognises that the law and the way it is implemented and operates can have either negative, positive or neutral effects on the psychological wellbeing of participants (Newitt and Stojcevski 2009). Therefore, anti-therapeutic consequences should be avoided where possible. One major difference between a therapeutic jurisprudence approach and traditional litigation is that therapeutic jurisprudence is collaborative and mostly non-adversarial.

Strongly related to the concept of therapeutic jurisprudence is the theory and practice of problem solving courts, that according to Freiberg:

> *…represent a move away from a focus on individuals and their criminal conduct to offenders' problems and their solutions. Their attempt to deal with the problems which may contribute to an offender's criminal behaviour reflects a realisation by courts and legislators that social problems may require social, rather than legal, solutions* (2001:3).

VALS is aligned with the following therapeutic jurisprudence elements that deviate away from conventional adjudication:

- a collaborative approach is favoured over a purely adversarial approach;
- aims are people-oriented rather than case-oriented;
- it is needs focused;
- it is common-sensical rather than legalistic; and
- it is forward-looking and planned-based (rather than relying on precedents) (Newitt and Stojcevski 2009).

Role of the offender

The role of the offender is significant in any therapeutic jurisprudence approach to a court proceeding. The offender must understand their role as well as the roles of other key players in the process (Newitt and Stojcevski 2009). VALS is supportive of this move away from the offender acting in a passive role, and into a more active role. This is conducive to a problem-solving environment.

VALS is also supportive of the active role offenders' play in therapeutic jurisprudence approaches to court proceedings because the importance of self-determination is emphasised. King (2006, in Newitt and Stojcevski 2009) describe the principles behind self-determination as being promoted in a number of ways, including:

- giving the offender the option of participating in a diversion program (coercion-free);
- encouraging the participant to contribute to the setting of goals and treatment strategies; and
- allowing the participant the opportunity to report on their own progress.

VALS would like to add to this list, arguing that:

- self-determination is an essential part in achieving successful justice outcomes for Aboriginal and Torres Strait Islander people;
- until commitments to self-determination, any approach to Aboriginal and Torres Strait Islander justice are dominating and paternalistic, even in the most imperceptible way (McAsey 2005);
- self-determination should not be used as an administrative policy by governments, but rather a recognition of an inherent right (Cunneen 2001 in McAsey 2005); and
- for self-determination to be achieved for Aboriginal and Torres Strait Islanders in the Victorian Mental Health List, formal involvement by Elders/Respected Persons and/or other members of the Koori community must be present in the development of the Lists framework and operation.

Outcomes

A survey of health care and service providers from southern Tasmania was conducted as part of the evaluation. The survey indicated that the MDHL is generally seen by care and service providers as a positive development that is providing participants with the opportunity to engage in treatment and avoid inappropriate incarceration (Newitt and Stojcevski 2009). According to Newitt and Stojcevski (2009) the MDHL has overall been successful and in achieving the following objectives and outcomes:

- Offering a more therapeutic approach to the criminal justice system for mentally ill defendants;
- reducing the reoffending rates of participants;
- improving the coordination between criminal justice agencies and health service providers; and
- reportedly saving court resources and time.[7]

The evaluation also sited research indicating that participants in problem solving courts are more compliant with orders that they receive from the court, as well as benefiting from the whole process, if they are encouraged to view the process as entering into a kind of ‘social contract’ which they have made a public commitment to comply with.

Recommendations

The evaluation report for the MHDL recommended that the List should continue (either as a second phase pilot program or as a permanent function of the Magistrates’ Court) and with regard to its operation and management are, inter alia, as follows:

1. That there be two MHDL per month, held at set times.
2. That pre-court MHDL meetings be formalised and held at set times.

[7] With respect to the avoidance of special hearings under s 15 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas).

3. That MHDL be recognised as a court diversion program based on therapeutic jurisprudence principles that can effectively grow and coordinate with the Government's other diversion programs.
4. That private and newly admitted lawyers are educated about the operation of the MDHL.
5. That data collection needs and processes need to be reconsidered in order to develop a more effective and robust reporting system.

Unfortunately the evaluation team were unable to look at the ethnic origins of offenders who participated in the MHDL. The data provided to them was quite limited in this regards as the Magistrates' Court does not collect data on the any offender's ethnicity.[8] The participation and completion of programs attached to the MDHL by Aboriginal and Torres Strait Islanders is therefore unavailable.

<u>South Australia</u>

The Magistrates Court Diversion Program (MCDP) in South Australia was the first mental health diversion program established in Australia in 1999. Similar to the Tasmanian MDHL approach, the South Australia Diversion Program is a collaborative approach not based on specific legislation but instead relies on bail and sentencing powers under existing legislation. This is used to get eligible offenders onto a plan with access to treatment and support services while their case is adjourned (Richardson 2008 in Newitt and Stojcevski 2009).

Unlike Tasmania and South Australia, Victoria has not yet had a separate diversion program for offenders with mental illness problems. The Magistrates Court of Victoria does, however, have access to the Mental Health Liaison Services who assess mentally ill offenders and can offer advice to the court about an offender's situation as well as refer them to treatment in both community and correctional settings. Newitt and Stojcevski (2009) highlight, however, that these Mental Health Court Liaison Services do not have any kind of ongoing supervision over the defendants.

<u>Queensland</u>

Queensland has a separate Mental Health Court that was established specifically to determine issues relating to defendants' capacity to plead or to be tried and held criminally responsible for their alleged offending behaviour (Richardson 2008 in Newitt and Stojcevski 2009).[9] Focusing on the relationship between the offender's mental illness and their alleged criminal behaviour, the Mental Health Court can then make a determination about:

- the offender's mental fitness;
- whether a forensic order should be made and the offender detained for treatment;
- whether a 'no contact' order should be made; or
- whether the case should be returned to a criminal court (Newitt and Stojcevski 2009).

<u>New South Wales</u>

New South Wales in unique in that there are specific legislative powers under ss 32 and 33 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) to divert mentally ill and intellectually disabled offenders away from the criminal justice system. Under ss 32 and 33 the defendant is not required to be referred to

[8] Per email correspondence with Newitt, 27th January 2010
[9] The Mental Health Court can also hear appeals from decisions from the Mental Health Review Tribunal.

a separate list. Therefore any magistrate sitting on any day had the facility to make an order that mentally ill persons be taken to a mental health facility for assessment and then detained or discharged (conditionally or unconditionally) into the care of a responsible person (Newitt and Stojcevski 2009).

Role of the Magistrate

Popovic (2003) highlights the need for the magistrate (as well as the prosecution and defence lawyers) to be able to understand the offender's view of the world. The magistrate may therefore need to make direct enquiries as to the offender's personal circumstances to establish and understand the motivation for the offender's actions.

Similar to the structure of Tasmania's MHDL, the Bill describes ongoing monitoring through periodic hearings. Therefore, successful participation with the Mental Health List may *increase* (rather than minimise) the amount and frequency of contact that a participant has with the criminal justice system. Newitt and Stojcevski (2009) warn that in some circumstances this will include greater intrusion to participants' personal lives than they would have had experienced if their matters had been dealt with in an 'ordinary manner'.

Language

Newitt and Stojcevski's evaluation of the Tasmanian MDHL (2009) noted that studies and reports reveal that how a magistrate behaves at a hearing can affect whether an offender complies with a particular order handed down. Wexler argues that the level of language the magistrate uses and the amount of direct dialogue they use when engaging with the offender can have a direct impact on the offender's understanding of, and compliance with, any order made against them (1999 in Newitt and Stojcevski 2009).

> *Open and inclusive communication is one of the key principles in a problem solving court system. Speaking in simple terms, including the offender in discussions about their case and ensuring the comfort of all parties are some of the simple, yet essential, therapeutic jurisprudence approaches that out to be adopted by magistrates in problem solving courts* (Newitt and Stojcevski 2009:29-30 per Popovic 2003).

Equally as important is the ability to not only understand the defendant, but effectively *communicate* with the defendant. This is critical in order to establish what the correct circumstances of the matter are. For example, Aboriginal English (AE) has been recognised as a form of English which differs from Standard Australian English (SAE) in a number of significant ways. VALS employed a Project Worker under the Access to Justice Program and she produced the Aboriginal English in the Courts Kit in 2008 to investigate this area.

The report conveyed the following:

- A report by Aboriginal and Torres Strait Islander Social Justice Commissioner Calma (2007) investigates the common communication difficulties facing Aboriginal and Torres Strait Islanders within the court setting. The Report illustrates some of the potential complexities faced by Aboriginal and Torres Strait Islanders. It noted that legal issues are often conveyed in an impersonal way, or even in the third person in some cases. In contrast, AE and other Aboriginal languages do not use this depersonalised approach; instead an individual's relationship with the speaker will affect the way in which ideas are communicated and

understood. Importantly, it recommends that interpreters should be available for Aboriginal and Torres Strait Islanders to assist during the court process if required.

- Some of the common types of questions which create communication difficulties for Indigenous Australians in the court system. These include: ‘either/or’ questions; hypothetical questions; negative questions; and questions that include the use of double negatives, figurative speech or abstract concepts or references.

- Furthermore, Calma posits that culturally, communication difficulties can arise in several ways. For example, the use of direct questioning is generally considered rude in Indigenous Australian culture and may lead to the defendant answering ‘I don’t know’, regardless of the their actual knowledge, because they consider the method of questioning inappropriate. The consequent level of embarrassment felt by Indigenous Australians when faced with this form of questioning can make them appear visibly uncomfortable. This can have a detrimental effect as it may be misinterpreted as a sign of guilt or as avoidance of the question.

- A further cultural issue which Calma highlights is that of ‘gratuitous concurrence’. This occurs when an Indigenous Australian agrees with a question because they wish to keep the person asking the question happy.

- A further point in relation to questions which require specific information pertaining to times, dates and quantities, is that Indigenous Australians are not as familiar with the concept of providing a specific response. As a result, at first Aboriginal and Torres Strait Islander peoples often provide responses that are non-specific or are framed in relation to something else. For example, in answer to the question “how many drinks did you have?” an Indigenous Australian could offer a reply such as “oh, must have been quite a few”.

Rewarding certain behaviour

Newitt and Stojcevski (2009) argue that sanctioning or rewarding particular behaviour is another important part of the therapeutic jurisprudence approach to particular offenders. They argue that magistrates, as well as other officers of the court, need to be aware that paying too much attention to non-compliant offenders may reinforce or encourage such behaviour. Simultaneously, paying too little attention to cooperative behaviour may discourage positive behaviour that is being sought from offenders.

Bail and Treatment

Bail

Freiberg and Morgan (2004) have expressed reservations about bail conditions being used to facilitate treatment in place of the stated purpose of bail, that is, to ensure attendance at court (i.e. bail being used a punitive *and* rehabilitative regime; in Popovic 2006). However, Popovic (2006) sights Victoria’s CREDIT and New South Wale’s MERIT bail programs as being designed to <u>not</u> be punitive, but instead promote programs that require the ‘readiness to change’ which is fundamental to a therapeutic intervention.

Treatment

The Mental Health Legal Centre, in their submission in review of the *Mental Health Act 1986* (Vic), communicates a strong position that each consumer knows best about the lived experience of their 'illness'. Therefore decisions made by others on their behalf will never act adequately as a substitute for the decisions people make for themselves when it concerns their own life. This position points to considerations of self-determination. Far from being a simple catch phrase used in political circles used to give impressions of Aboriginal and Torres Strait Islander consideration, self-determination is a crucially important issue to anybody's ongoing wellbeing. The current number of mental health workers and mental health services that are accessible to Aboriginal and Torres Strait Islanders is too small. Further, more mental health workers who are Aboriginal and Torres Strait Islander, or who have cultural awareness, are required. This needs to be formally recognised.

The **criminogenic needs** of participants in the Mental Health List go well beyond the mental health workers and the attached medical treatments themselves. Criminogenic needs are dynamic and need to addresses an offender's criminal behaviour (including values and attitudes) *in addition to* other elements that factor into the likelihood of recidivism. Based basic criminogenic needs provided by Newitt and Stojcevski (2009) these include:

- Employment – obtaining and retaining employment;
- Substance abuse – addressing any alcohol and other substance abuse (or misuse – this can evolve from prescription medication dependence and/or self medication);
- Housing – securing stable housing;
- The ability to manage finances/ be financially secure;
- Relationships – repairing and/or maintaining meaningful familial and marital relationships. For members of the Aboriginal and Torres Strait Islander community, repairing of relationships may be in relation to the wider community also;
- Social interaction – the capacity to socialise with positive peers;
- Personal and emotional functioning – including cognitive and/or behavioural problems and non-severe/treatable mental health problems; and
- Other factors – such as the ability to maintain hygiene, for example.

Non-criminogenic needs also need to be addressed in order to achieve success which many or may not contribute to reducing criminality. These include elements such as: literacy and numeracy; emotional and/or personal problems such as self-esteem, etc.

Including the offender in the development and formulation of bail conditions in the Victorian Mental Health List is one way to achieve meaningful delivery of treatment that makes sense to them. Accessing treatment to address their mental health needs as well as having the opportunity to engage with other social services (addressing housing and financial issues etc) is step towards a holistic and targeted approach.

The Tasmanian MDHL evaluation report notes that there was general agreement among respondents that while the List helps to improve the co-ordination between justice agencies and health service providers, there is an inadequate number of treatment options for MDHL participants and this lack of services in the community is a major impediment to the operation to the MDHL. VALS considers this a crucial area of concern, as Aboriginal and Torres Strait Islander specific services are few and far between. For a Victorian Mental Health List to be successful, there needs to be supported Aboriginal and Torres Strait Islander oriented and run services available as part of a defendant's treatment plan.

Koori positions for Koori solutions

VALS has previously applied for funding for a Koori Healing Access Project Worker who will be employed to provide support to people using the services of VALS to more effectively access the mental health system. It is envisaged that similar roles, or objectives sought through this role, be considered when orchestrating the Mental Health List's operations and services.

It was argued that the Koori Healing Access Project Worker help develop mental health related community education prevention messages and use action research methodology to enhance referral effectiveness to key mental health services relevant to pre and post-court needs of clients. The Koori Healing Access Worker would also use the data collected to engage with other services, including mainstream services and professionals, to identity good practice and more culturally inclusive service provision. The Koori Healing Access Worker will organise functions of an Advisory Committee which will provide advice about how best to improve VALS' links with mental health and mental health related services and engage these organisations with the project.

This kind of role could serve many of the objectives of the present areas of concern under review. They include:

- *Research and evaluation* - the project is an action research model which analyses case studies and in doing so evaluates the effectiveness of the mental health system.
- *Access* - the project is attempting to improve access to mental health services by improving the cultural appropriateness of such services (i.e. cultural inclusion tool) and educating Indigenous Australians about their options.
- *Increased charter compliance* - the project is an attempt to protect the human rights of Indigenous Australians with a mental illness.

VALS' continual application for this, or a similar position, will be sought in order to create a role to fulfil the following:

- **Objective:** to provide a culturally inclusive service delivery model to promote awareness around mental health issues and early intervention.

- **Related objectives:** enhance access to justice and service providers and reduce offending and recidivism.

- **Context/need***:* The project recognises the context of Indigenous Australian mental health issues and responds to need. The context and consequent needs are as follows:

  - Many of VALS' clients seem unable to access mental health services due to one or more factors such as: distance, economic status, interpersonal issues, family responsibilities and cultural barriers. VALS is keen to encourage clients to look at both their legal and health problems together as they are often interconnected.

  - Access to mental health assistance is a key issue in resolving legal and other problems. There is need to prevent legal problems being compounded by mental health issues. Workers who provide assistance can reduce the onset of illness by ameliorating crisis and stress in client's lives. There is need to build bridges between the legal and health sector.

- Lack of an adequate cultural inclusion and a cultural security framework means that many mental health workers are either not being accessed, or if they are accessed the workers are insufficiently aware of cultural factors which are necessary to engage the client in further assistance.

- There is need to recognise and promote Aboriginal concepts of holistic healing and cultural respect. The project is needed because as according to Denis McDermott a narrow mental health approach will fail as it ignores the beliefs of Indigenous Australians as to the connectedness of physical health, culture and history to the idea of mental health.[10] Application of traditional mental health practice to Koori people has resulted in misdiagnosis, an emphasis on deficit models and overlooking of resilience factors. McDermott highlights the term Indigenous Social, Spiritual and Emotional Well-Being is more inclusive and culturally appropriate than using the term mental health.

- **Actions:** The actions of the project are to:

  - Conduct action research;
  - Assist lawyers in their work with clients with mental health issues;
  - Attend appointments with clients who need support in accessing mental health professionals;
  - Create effective referral pathways to mental health services;
  - Build on VALS' knowledgebase about the use of "Aboriginal English in Courts" and mental health services;
  - Incorporate Aboriginal understanding of mental health;
  - Build improved networks between the legal and mental health systems;
  - Collate case studies;
  - Conduct systemic advocacy and training to assist mainstream agencies and their staff to become more culturally inclusive in their assessment of individuals and in program delivery;
  - Promote best practice in relation to culturally inclusive practice; and
  - Deliver community education messages which will highlight the need to seek help, where to go and discourage stigma.

- **Outcomes:**

  - Help reduce Aboriginal and Torres Strait Islanders' adverse contact with the justice system, such as by assisting mainstream services to meet the mental health needs of Indigenous Australians which may reduce the chances of offending.
  - Culturally appropriate program for all Indigenous Australians lessens the need for legal aid.
  - Accessible and culturally appropriate services to Indigenous Australians in the metropolitan region regardless of gender, sexual preference, family relationship, location, disability, literacy or language.
  - Enhance cultural knowledge and identity by drawing on Indigenous Australian's conceptualisation of mental health/well-being and how to meet needs.

[10] Denis McDermott (Koori psychologist from the Murru Marri School of Public Health and Community Medicine, University of New South Wales,) 'The political *is* the clinical: comfort zones, cultural safety and Indigenous mental health', 2005.

Restorative Justice

Restorative Justice Models have championed above mentioned goals through the recognition that outdated, increasingly irrelevant, culturally inappropriate, ineffective and adversarial processes in the Justice System fail to serve victims, offenders and the community. Restorative Justice has been shown to take various forms however all show the necessity of involving *real* stakeholders that are affected. In a nutshell, the restorative objective is a shift away from 'punishment and the infliction of pain' to 'repairing the harm' (Gabbay 2005:357). This kind of thinking is very relevant when considering the possibility of wrongful or inappropriate incarceration of the mentally ill. As Restorative Justice Models have been adapted nationwide over the years, additional advantages have been reported to include:

- The use of age appropriate dynamics in line with behaviour and thinking patterns of specific groups (e.g. young persons);
- Avoids excessive long-tern interventions;
- Facilitates reintegration within the community;
- Shares the responsibility for supporting the young person with members of his/her support network;
- Consults victims in a respectful and non-adversarial manner; and
- Promotes the community's trust in the system (Polak 2007).

It is not a stretch at all to see how the above advantages, while designed for a separate and specific purpose away from mental health issues, could be applied to conceptualisations of the way mental illness issues could be deal with in the future.

The Bill: Miscellaneous

In response other specifics to the *Magistrates' Court Amendment (Mental Health List) Bill*, VALS would like to add the following:

- The "needs criteria" in section **4 (a) – (h)**, are that the accused would derive benefit from receiving co-ordinated services in accordance with an individual support plan. The availability of Aboriginal and Torres Strait Islander appropriate services, of the eight types listed, must be evaluated.

- VALS agrees with section **FU (3)**, that in hearing any proceedings in the Mental Health List, the Court must exercise its jurisdiction with as little formality and technicality. Alienation from the formal systems of the justice system for the Aboriginal and Torres Strait Islander community, as with those suffering severe mental illness, is a serious access to justice issue.

- In relation to section **4Y (2)**: *If an accused completes, or participates in, an individual support plan to the satisfaction of the Court, the court may discharge the accused without any finding of guilt*. There is a need to consider that factors effecting the successful or unsuccessful completion and/or participation of a support plan by an Aboriginal and Torres Strait Islander offender may stem from the cultural appropriateness of treatment and services attached to such support plan. This needs to be taken into consideration when the court is evaluating levels of satisfaction with participation that hinge on the accused chances of being discharged without a finding of guilt.

Conclusion

VALS is supportive of this new procedural framework in the Magistrates' Court of Victoria as it is aimed at addressing the issues associated with offending behaviour of those with a mental illness. However, in order for the Mental Health List to be truly accessible and effective in both justice and clinical functions, recognition of Aboriginal and Torres Strait Islander understandings of health and healing are vital.

It is acknowledged that the active supervision of the individual's support plan by the magistrate is likely to increase contact with the justice system. For this reason it is critical that the procedural framework for the Mental Health List recognises therapeutic jurisprudence principles and practices in order to avoid situations such as non-compliance, and increase participation.

Furthermore, VALS believes that the successful completion of a treatment support plan is dependent on the coordination of the health and welfare services undertaken by experienced court-based case managers. Court-based case managers, health and welfare services together need to be sensitive to the unique and distinct needs and circumstances of Aboriginal and Torres Strait Islander people suffering from mental illness.

The submission can further summarised by the following points:

- The operation of, and the services connected to, the Victorian Mental Health List must consider the unique and distinct needs of the Aboriginal and Torres Strait Islander population suffering from a mental illness if successful diversion from inappropriate incarceration is to be achieved. To do so in an ad hoc manner would be exposing Aboriginal and Torres Strait Islanders with a mental illness to further risk of overrepresentation in the Victorian prison system.

- While contact with the criminal justice system is almost always viewed as having a negative impact on peoples lives, it can be argued that the criminal justice system is capable of providing an opportunity to identify people who suffer mental illness, and can therefore be a way that mental illness needs and issues can be dealt with.

- The needs of a defendant should not only be addressed through medical considerations and treatment. Criminogenic *and* non-criminogenic needs of defendants with a mental illness must be addressed for the Mental Health List to be of true value. In order for this to be achieved, the compounded complexity inherent in the circumstances experienced by some members of the Aboriginal and Torres Strait Islander community participating in the criminal justice system must be addressed.

- There must be and understanding of the unique conception of what Aboriginal and Torres Strait Islander communities consider constitutes mental health and wellbeing, as well as what is considered mental illness.

- Not only are definitions of mental illness and wellbeing influenced by personal experience, but conceptions and learnings about mental health, mental illness and/or wellbeing evolve with time, place, and culture - as do their respective definitions. The central role of family, culture and community in mental health is must be recognised.

- People with a mental illness experience particular legal issues. Such issues often reflect their financial and social disadvantage, as well as their incapacity that may be caused by their illness. There are also systemic barriers experienced by people with mental illness accessing legal services. These include:

  - The limited availability of affordable legal services
  - Time constraints placed on legal service provision
  - Remote, rural and regional issues
  - Difficulties in identifying mental illness
  - A perceived lack of credibility

- VALS agrees with the aim of adopting problem solving approaches of justice as utilised in the Tasmanian MDHL. The MDHL aims to achieve this through the incorporation of therapeutic jurisprudence concepts when encountering offenders with a mental illness.

- VALS is aligned with the following therapeutic jurisprudence elements that deviate away from conventional adjudication:
  - a collaborative approach is favoured over a purely adversarial approach;
  - aims are people-oriented rather than case-oriented;
  - it is needs focused;
  - it is common-sensical rather than legalistic; and
  - it is forward-looking and planned-based (rather than relying on precedents).

- VALS is supportive of the active role offenders' play in therapeutic jurisprudence approaches to court proceedings because the importance of self-determination is emphasised.

- For self-determination to be achieved for Aboriginal and Torres Strait Islanders in the Victorian Mental Health List, formal involvement by Elders/Respected Persons and/or other members of the Koori community must be present in the development of the Lists framework and operation.

- There is a need for the magistrate (as well as the prosecution and defence lawyers) to be able to understand the offender's view of the world.

- The level of language the magistrate uses and the amount of direct dialogue they use when engaging with the offender can have a direct impact on the offender's understanding of, and compliance with, any order made against them. Recognition and understanding of Aboriginal English (AE) as a form of English which differs from Standard Australian English (SAE) is critical to this interaction.

- Reservations about bail conditions being used to facilitate treatment in place of the stated purpose of bail, that is, to ensure attendance at court, need to be addressed.

- There is a need to consider that factors effecting the successful or unsuccessful completion and/or participation of a support plan by an Aboriginal and Torres Strait Islander offender may stem from the cultural appropriateness of treatment and services attached to such support plan.

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