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MEANINGLESS vs MEANINGFUL SENTENCES: SENTENCING THE UNSENTENCEABLE

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Meaningless vs meaningful sentences: Sentencing the unsentenceable

Introduction

On a daily basis, I have presided over cases where I have thought to myself, “What the blazes will I do with this case? The offending is too serious to dismiss or discharge, imprisonment is out of the question, the defendant can’t pay a fine and any order I make where the defendant has to promise not to offend is totally impractical. I don’t think a rehabilitative order is necessary and don’t want to bring them back to court. I need to impose an order where it looks like I’m doing something (the community and the police have an expectation that I will deal with the matter to punish the offender and deter them from further offending) and the offender is facing a consequence for their actions. It would be easy to just fine them and get on with the list, but I know that will lead to even more problems. Where the offender has been on remand, it would be easy to sentence him or her to time served, but that would then show up on their priors in the future or may be too harsh a penalty for the offence committed.”

Low level offenders whose offences do not warrant a term of imprisonment and who are homeless, poor or mentally impaired regularly provide sentencing dilemmas for magistrates. Some offenders are not able to pay a fine or have lives which are too chaotic to enable them to comply with community corrections orders and suspended sentences, or to undertake to be of good behaviour.

As a sentencer, I find it more difficult to find an appropriate for sentence persons in this category than determining how to sentence persons who are guilty of serious offending. It would be trite to say that it is simple to sentence any-one to imprisonment, but it is less creatively demanding to fix “how long” as opposed to “what sentence disposition is appropriate in this case?”

It is meaningless to impose a sentencing disposition on a person that, as a sentencer, one knows that the offender cannot comply with. That leads to the inevitable question: what meaningful sentence can be imposed instead?

The role of the sentencer at summary level has undergone a metamorphosis over the last 10 to 15 years. It is a more demanding role with increasingly complex matters coming before the courts, and persons with increasingly complex personal circumstances coming before the courts. Well before the expressions ‘problem-solving courts’ and ‘therapeutic jurisprudence’ were coined, sentencers had put them into practice. The sentencing principle of ‘specific deterrence’ has taken on a new guise: we are now focussing on reducing harm to the community by addressing individual factors which have led to offending in an attempt to prevent or reduce recurrence of offending.

The courts and legislators have responded to the increasing complexity of cases and the move towards ‘problem-solving’ in a variety of ways. This paper will outline the current sentencing options and problem-solving approaches which have been developed throughout Australia in an effort to respond more appropriately and meaningfully to the difficult cases which come before us. There is a group of offenders for whom

sentencing remains problematic and this paper will describe this group and suggest possible approaches which could be applied.

TOM

Tom, 35, appeared before me in January 2006. He epitomised the dilemma which is the topic of this paper. He faced the Magistrates' Court on 16 charges of failing to produce tickets on public transport. The charges were dated between August 2003 and November 2004.

Tom presented with a long prior history for criminal offending such as drug possession, theft, burglary and the like. He had not been before the Court for any significant offending since 2002.

His solicitor explained that during 2003–2004, Tom experienced long periods of homelessness and rode on trains during the day to sleep; keeping awake at night to survive. He was eventually identified as requiring services and became a client of the Open Door (an organisation auspiced under the Salvation Army). As such, he lives in supported accommodation. His case worker has arranged drug treatment and psychological and psychiatric assessment. Much of the chaos in his life has been stabilised.

Tom was placed on a regime of pharmacotherapy and has been on methadone for the last couple of years. He has been drug free while on methadone.

Tom has been diagnosed as suffering from several psychological disorders such as anxiety, depression, Attention Deficit Disorder and agoraphobia. He is being treated by a psychiatrist for these disorders.

Tom has two children whom he visits each Sunday, and sometimes on Wednesdays.

A recent neuropsychological assessment indicates that he has literacy and numeracy problems due to pre-existing learning disorders.

Tom is in receipt of New Start allowance of \$356 per fortnight. Rent is \$256 per fortnight. The methadone dispensing fee is \$75 per fortnight. He is left with \$25 to live on for the rest of the fortnight.

He cannot find the money to pay for public transport. He requires a 3 zone pass. A monthly concession pass is \$88.20. He travels to his various psychiatric appointments, to collect his methadone each day and to see his children.

He is not able to perform community work, can't pay a fine, and simply cannot undertake to be of good behaviour as he is likely to travel without a ticket during the period of any adjournment.

MISH

Mish has been charged with 3 counts of 'loitering for prostitution'. Her 'spot' is around the corner from residential houses and the residents have complained. She has 9 prior convictions for prostitution but no other priors. She is a 33 year old mother of 2 children. The children reside with her. She was diagnosed with schizophrenia at 21 and is managing her illness well. She is well supported by her local area mental health service and local support agencies, although she is socially isolated. She is in receipt of a Supporting Parent's Benefit and lives in private rental accommodation. Mish engages in prostitution when necessary to supplement her income, for example when the rent is due. She is not able to undertake to be of good behaviour as she is not able to cope financially without the additional income she generates through street prostitution and will continue to commit the offence when she deems it necessary.

AMY

Amy has been taken into custody this morning following detection by police. Amy has been charged with the theft of a Barbie doll, some nail polish, mascara, hair dye and a box of chocolate with a total value of \$60.00. She is on bail for a shoptheft (disposable nappies and chocolate bars) at the time of the commission of this offence. Amy is 27 and has several prior convictions for drug possession, three priors for shoptheft and several for failing to appear on bail. Amy has a history of engaging well with drug counselling but is unable to cease drug use. She does not have a dependency on any particular drug, choosing rather to use whatever she is able to access. Amy has a range of psychological problems stemming from childhood sexual abuse. She has three children aged 4, 3 and 6 months. The father of the children does not reside with them and does not contribute to their care. She does not have any support from family. DHS has had sporadic involvement with the family and have no concerns in relation to the welfare of the children. Due to the age of the children, it is a struggle for her to attend appointments or undertake community work. She does not have the means to pay a fine and unable to undertake that she will not use illegal substances.

Sentencing Options in Victoria

Sentencing options in Victoria are set out in the Sentencing Act 1991. They are briefly described as follows:

Type	Section	Description
Discharge	s.73	Upon conviction, the offender may be unconditionally discharged without further penalty
Dismissal	s.76	A charge might be proven, but can be dismissed if it is not appropriate to impose a sentencing disposition—it may be minor, or it may be minor in the scheme of things, or a person may already have been punished enough (eg a person who has shop lifted food but has been in the cells for the weekend due to outstanding warrants)
Deferred Sentence	s.83A	For persons under 25 years, sentence can be deferred for up to 6 months to assess progress under a Rehabilitative regime
Adjourned undertaking without conviction	s.75	Can be for up to 5 years. Conditions as well as a contribution to the Court fund can be imposed. Can be charged with breach of undertaking and resentenced if charge found proven. Option most used with mentally impaired offenders to attempt to achieve better compliance with treatment regimes
Adjourned undertaking with conviction	s.72	Can be for up to 5 years. Conditions as well as a contribution to the Court fund can be imposed. Can be charged with breach of undertaking and resentenced if

		breach of undertaking found proven. Option most used with mentally impaired offenders to attempt to facilitate compliance with treatment regimes
Fine without conviction	s.49	Individual Act set out maximum fines for specific offences
Fine with conviction	s.49	Individual Acts set out maximum fines for specific Offences
Community Based Order with conviction and Community based order without conviction. (CBO)	s.36	May be imposed for up to 24 months Supervision by a Community Corrections officer may be a component if necessary. Community work may also be ordered. Other conditions may also be imposed, such as drug and alcohol treatment and testing, psychiatric or psychological treatment, anger management, sex offender programs, cognitive skills, etc. Consequences on breach: resentence
Suspended sentence	s.27	Can be imposed by magistrate for up to 24 months With an operational period up to 12 months—conditions are not able to be attached. If breached, sentence may be restored in full or part
Intensive Corrections Order (ICO)	s.19	Can be imposed for up to 12 months Supervision by a community corrections officer mandatory. Twelve hours of compulsory programs per week—this may include: community work, and programs such as drug & alcohol treatment and testing, psychiatric or psychological treatment, anger management, sex offender programs, cognitive skills, etc. Consequence of breach of conditions or by reoffending, generally restoration of outstanding portion of sentence
Youth detention (YTC)	s.32	Incarceration of offenders aged between 18 and 21 years in a youth training facility
Drug treatment order (DTO)	s.18X	Specific to Drug Court – treatment order made after a term of imprisonment fixed to a maximum of 24 months
Combined Custody and Treatment Order (CCTO)	s.18Q	Offender whose offending is drug related may be imprisoned for 12 months, with 6 months to be served in prison and 6 months being served in the community while participating in a specialist drug program Consequence on breach—serve balance of sentence in prison

Home detention (HDO)	s.18ZT	Can be made after a prison term is ordered and a favourable assessment has been undertaken to a maximum of 12 months
Imprisonment	Division 2	Generally considered to be the sentence of last resort A magistrate has the power to imprison for up to 2 Years on a single charge (3 years for some drug offences ¹) to a maximum of 5 years. Maximum terms of Imprisonment for specific offences are set out in the legislation applicable to the individual offence. If a sentence of between 12 and 24 months is imposed, the sentencer may consider fixing a non-parole period of not less than 6 months before the expiration of the sentence. For sentences in excess of 24 months or over, the sentencer must consider setting a non-parole period ²
Hospital Orders and Hospi Security Orders	Part 5, S90-94	Where offender, upon assessment by a psychiatrist, is sentenced to a term of imprisonment to be served in a mental health facility until no longer certified, and then serves balance in general prison population ³

Current sentencing options under the Sentencing Act are often not appropriate for the disposition of criminal cases involving mentally impaired, homeless, seriously drug dependant, poor offenders. The Sentencing Act provides for three types of rehabilitative orders in lieu of imprisonment, and one that combines imprisonment and drug treatment conditions. These are Community Based Orders (CBO's), Intensive Correction Orders (ICO's) and Home Detention Orders (HDO's) and Combined custody and Treatment Orders (CCTO). These orders can include supervision, drug, psychiatric, psychological, and anger management programs, personal development programs such as literacy and education and community work. The community work component involves introductory courses into first aid and occupational health and safety.

This group of offenders are sometimes placed on CBO's with treatment components, but have difficulty complying with the conditions. ICO's, with their mandatory 12 hours per week Community Correction Centre attendance and other onerous program requirements are too difficult for many mentally impaired person to negotiate.

HDO's were introduced on 1st January, 2004.⁴ Prior to their introduction, concern was expressed that these orders would not be available to offenders apart from white collar criminals again due to the onerous program conditions as well as the necessity to have suitable accommodation. These orders are clearly not appropriate for this group of offenders.

One of the major concerns when sentencing offenders in this cohort is that the disposition may be "setting them up to fail." What is meant by this is that for Adjournd

Undertakings, CBO's, ICO's, HDO's, CCTO's, in the event of a breach either by non-compliance or by further offending, the initial charges are to be returned to court and the offender is to be resentenced in respect of them. Mentally impaired persons find it difficult to maintain conditions and to remain offence free.

Most of the offenders in this cohort lack funds, thus fines (as demonstrated by the Enforcement Review Program List which is referred to on pages 16 and 17) are not a practical sentencing option.

As previously mentioned, community based dispositions such as Combined Custody and Treatment Orders, Home Detention Orders, Intensive Corrections Orders and Community Based Orders are often not available to mentally impaired persons due to their incapacity which is often accompanied by homeless status, and would in any event be 'setting them up to fail'.

Similarly, adjourned undertakings, either with or without conviction may also be setting homeless persons up for breach proceedings and the need for resentence. Suspended sentences upon breach generally result in offenders being incarcerated for the term of the suspended sentence, so not only are they setting them up to fail, they are setting them up to go to prison.

Imprisonment or detention for the sake of imposing a form of punishment on persons whose crimes are generated by need and for whom no other penalty is available due to their impecuniosity is not appropriate.

Comparison of Interstate Sentencing Options

After extensive research into problem solving courts such as Homelessness Courts and Mental Health Courts in the United States and Neighbourhood or Community Courts in both the United States and Britain, I have been unable to discern any sentencing options which could be adapted for offenders in this cohort. Almost all rely on an adjournment with supervision prior to sentencing along conventional lines, or alternatively, sentence to time already served in detention awaiting the court proceedings.

In Western Australia, the sentencing options are located in s.39 of the Sentencing Act 1995 and follow the usual hierarchy from the imposition of no sentence⁵, Conditional Release Order (CRO)⁶, which is similar to an adjourned undertaking or good behaviour bond, fine⁷, Community Based Order (CBO)⁸, Intensive Supervision Order (ISO)⁹, suspended term of imprisonment¹⁰ and imprisonment¹¹. The imposition of no sentence, CRO, Fine and CBO can be made with or without the making of a "spent conviction"¹² which is similar to a conviction or non-conviction under Victorian legislation.

In relation to releasing an offender without sentence, the sentencing Act provides:

A court sentencing an offender may impose no sentence if it considers that -

- (a) the circumstances of the offence are trivial or technical, AND
- (b) having regard to—

- (i) the offender's character, antecedents, age, health and mental condition:
AND
(ii) Any other matter that the court thinks is proper to consider,
it is not just to impose any other sentencing option.¹³

Western Australia also has a form of deferred sentence, known as the Pre-sentence order which provides for an adjournment of up to 2 years for rehabilitative purposes.¹⁴

The NSW Crimes (Sentencing Procedure) Act 1999 sets out sentencing options for that State.

The NSW legislation sets out purposes of sentencing¹⁵:

- (a) to ensure that the offender is adequately punished for the offence
- (b) to prevent crime by deterring the offender and other persons from committing similar offences
- (c) to protect the community from the offender
- (d) to promote the rehabilitation of the offender
- (e) to make the offender accountable for his or her actions
- (f) to denounce the conduct of the offender
- (g) to recognise the harm done to the victim of the crime and the community.

The sentencing hierarchy in NSW commences with imprisonment, and clearly enunciates that imprisonment is the penalty of last resort:

A court MUST (my emphasis) not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.¹⁶

NSW provides two alternatives to full-time detention, namely periodic detention¹⁷ and home detention.¹⁸

The non-custodial orders provided for under the Act are:

- community service orders¹⁹
- good behaviour bonds²⁰
- dismissal of charges and conditional discharge of offender.²¹ This option is available to the court where 'it is inexpedient to inflict punishment (other than nominal punishment) on the person'.²² The section also provides for defendant entering into a good behaviour bond, the difference apparently being that a s. 9 good behaviour bond carries conviction, while one imposed under s. 10 does not carry conviction.
- Deferral of sentence for a period of up to 12 months for rehabilitation, participation in an intervention program or other purposes²³. Presumably, as is the case in Victoria, at the conclusion of the deferral period, the array of sentencing dispositions available under the Crimes (Sentencing Procedure) Act is available.
- Suspended sentence, either entirely or in part, and with or without a good behaviour bond attached.²⁴
- Fines²⁵

Additionally, the NSW legislation provides a power to make “intervention program orders”²⁶ which has been described as having the following purpose:

to reduce the likelihood of the person committing further offences by inviting or requiring him or her to participate in a rehabilitation, treatment or restorative justice program.²⁷

The sentencing regime in the Northern Territory is contained in the *Sentencing Act* as in force at 13 July 2005. The purposes for sentencing are similar to those stated in the NSW legislation.²⁸ The legislation sets out 15 factors to which the sentencer SHALL (my emphasis) have regard, together with “any other relevant circumstance.”²⁹

Dismissals, discharges and bonds come under Division 2 of the Act and the purposes of orders made pursuant to the division are set out in section 9:

- (a) to provide for the rehabilitation of an offender by allowing the sentence to be served in the community
- (b) to take account of the trivial, technical or minor nature of the offence committed
- (c) to allow for circumstances in which it is inappropriate to record a conviction
- (d) to allow for circumstances in which it is inappropriate to inflict any punishment other than a nominal punishment
- (e) to allow for the existence of other extenuating or exceptional circumstances that justify the court showing mercy to the offender.³⁰

Otherwise, the Northern Territory legislation provides similar sentencing dispositions as those previously mentioned. The legislation does not provide for rehabilitative or treatment orders in lieu of imprisonment such as Community Based Orders, nor is there any provision for deferral of sentence.

In Queensland, sentencing is governed by the Penalties and Sentences Act 1992. Section 9(1) sets out sentencing guidelines which include the principle that imprisonment is the ‘penalty of last resort’ and that ‘a sentence that allows the offender to stay in the community is preferable’.

The legislation does not provide for discharge or dismissal upon charges being proven. It does provide for the gamut of treatment, work, fines, suspended sentences and imprisonment orders,

The Tasmanian legislation³¹ encompasses all sentencing dispositions previously canvassed, with the exception of deferred sentences.

The South Australian legislation³² sets out 18 matters which a sentencing court should have regard, including “the probable effect any sentence under consideration would have on dependants of the defendant,”³³ and “the character, antecedents, age, means, and physical and mental condition of the defendant.”³⁴ All other sentencing options previously canvassed are included in the legislation.

Additionally, the South Australian legislation provides a separate regime for mentally impaired offenders which encourages compliance with a court based intervention program by either dismissing the charge or placing the defendant on a good behaviour bond to enable the offender to complete a program.³⁵ The inclusion of these provisions dovetails with the mental impairment list which constitutes the *Magistrates' Court Diversion Program*, at Adelaide Magistrates' Court of South Australia.³⁶

The South Australian legislation at s. 19C also includes provision for sentencing conferences for Aboriginal defendants.

The ACT is awaiting the enactment of new legislation, namely the *Crimes (Sentencing) Act 2005* which is to commence by 2 June 2006. Notwithstanding the recentness of the legislation, it does not offer anything new in terms of sentencing dispositions.

A table of summarising sentencing options throughout Australia is attached to this paper as an appendix.

Problem-Solving Approaches Taken by the Victorian Magistrates' Court

Over time, the Magistrates' Court has developed several approaches to provide appropriate outcomes for the persons who appear before it and to assist magistrates to make the best possible decisions.

They are categorised as follows:

1. Court based programs
2. Specialised Lists
3. Diversion
4. Specialist Courts
5. Protocols for individual offences

1. Court-based Programs

For as long as any of us can remember, it has been recognised that there are defendants in the Magistrates' Court who have committed crimes of need not greed, and the courts have welcomed and encouraged the assistance of services such as those provided by the Salvation Army.

In Victoria, by the early 1990's, it was evident that the court's work would be enhanced if other specialised services were introduced. The court currently has these services:³⁷

PROGRAM	DESCRIPTION / AIM
FORENSIC NURSE	To provide immediate assessment of persons displaying symptoms of psychiatric illness AND to provide information and advice in relation to persons with a psychiatric history.
Rural Forensic Mental	To provide the above-mentioned psychiatric service to Country

Health Service	Courts, and also to assist with persons suffering from disabilities.
DISABILITY	To assist by providing advice to the court and support for persons suffering a disability; to advocate on their behalf with both government and non-government agencies. Disability is very loosely defined—it can relate to intellectual disability, personality disorder, physical disability, dementia, aging, acquired brain injury. This service has developed an expertise in the area of “complex care” that is, in providing assistance for persons exhibiting multiple co-morbidities of any of the above-mentioned traits includes substance abuse and mental illness.
JUVENILE JUSTICE	Assessment for YTC detention suitability—and to suggest alternatives to incarceration. Supervision of young people on bail. Providing reports to all jurisdictions.
RURAL OUTREACH	Drug assessment, treatment, referral linkages in rural areas
ABORIGINAL LIAISON OFFICER	To fill gaps in knowledge about Koori persons in the court system, to liaise with Koori specific organisations and to provide supervision and reports while defendants are on bail.
CREDIT/BAIL PROGRAM	This is an amalgamation of two programs, previously the CREDIT (Court Referred Drug Evaluation and Treatment) and Bail co-ordination. CREDIT provides assessment and referral to treatment for drug dependant persons, as well as court supervision and regular reporting to the court. The bail component facilitates bail for indigent offenders, who, but for homelessness, poverty etc would be suitable candidates for bail, thereby keeping these offenders in the community and reducing demand for remand beds.
COMMUNITY CORRECTIONS SERVICES	To provide timely court advice, conduct assessments and prosecute breaches
COURT NETWORK	Court network offers support, information and referral for people attending court. ³⁸

In addition to these support services, the CISP (Court Integrated Services Program) is due to commence on 1st July 2006. This program will no doubt be elaborated on in Astrid Birgden’s conference paper.³⁹

2. Specialised Lists

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 focussed around individual problems.

The Magistrates’ Court considers the key elements of problem solving courts to be:

- To focus on an individual's problems which cause or contribute to that individual's offending behaviour

- To commence intervention at whatever stage in the court process it is deemed appropriate
- To incorporate the 'problem' focus into the sentencing of the individual with access to programs in conjunction with existing sentencing law
- To promote effective rehabilitation and reduce recidivism and reoffending
- Where appropriate, to utilise a less adversarial, more inquisitorial approach
- To extend the application of problem solving approaches beyond sentencing to pre-sentence interventions and other areas of the courts work, such as Victims of Crime, Crimes Family Violence and Family Law.

The Court sees the implementation of specialist problem solving “lists” (in contradistinction to stand-alone courts) as an effective, accessible and cost efficient innovation. The Magistrates’ Court has been advocating the implementation of a specialist list to meet the justice needs of mentally impaired. Specialist Mental Impairment Lists have commenced at Shepparton and Bendigo Magistrates’ Courts in consultation with their local communities and mental health networks with promising results.

Due to the specialisation involved in these lists, the processes have had the added effect of achieving a degree of cultural change. For example, public transport organisations are now meeting with community groups to consider alternative approaches to issuing fines with respect to persons with special circumstances. Importantly, prosecuting agencies have embraced the concepts espoused in the Enforcement Review Program and are driving cultural change within their organisations.

What has become evident from these lists is:

- That treating professionals can become involved in their patients’ court issues and can make a significant contribution to their court outcomes.
- That a non-adversarial approach is not only warranted but is very effective
- That 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
- That the court can be seen to support treaters in the treatment plans devised by them
- That individuals generally respond much more favourably to a process which treats them with dignity and accords them a ‘voice’.

What has been interesting about these lists is that they operate in a non-adversarial manner in which the outcome and the process are largely achieved through consensus between the parties.

These lists encompass all the anticipated benefits of running a specific list for an individual type of offence within the context of the existing court infrastructure.⁴⁰

Currently, two specialist ‘problem-solving’ lists operate at Melbourne Magistrates’ Court:

a. Enforcement Review Program (ERP) also known as the Special Circumstances List

This list arose as a collaboration with the Sheriff's Office as a response to the incarceration for fine default of persons suffering from significant mental or physical impairment (for the purposes of this list, a "special circumstance"). The list is in great demand and cases were initially listed for one morning a month, then two mornings a month and are now listed for two full days a month.

If a carer or treatment provider has identified a client with 'special circumstances', 'an application for revocation of fines' supported by medical evidence, needs to be forwarded to the ERP officer. The application for revocation of fines can be in a letter format and must outline the general circumstances of the client.

Medical evidence is also required from the client's treating doctor or psychiatrist, which should explain things such as:

- The nature of the condition (diagnosis);
- The current treatment; and
- How the client is now dealing with the illness (is the condition under control?).

At the hearing, the Magistrate takes into consideration the 'special circumstances' of the client. The usual outcome on resentencing is a short undertaking to be of good behaviour. It is usual for the undertaking to include a condition to comply with the offender's treatment regime.⁴¹

Through the Enforcement Review Program, the Court has seen that the Court process has a significant impact on the participants. The participants in the Enforcement Review Program are generally persons with a form of mental impairment. The format of the ERP court proceedings has empowered the participants to take a role in their Court case.

One of the surprising results has been that the services for the mentally impaired have become involved in the process and have taken ownership of some of the issues. Previously, it was very difficult to get service providers for the mentally impaired, such as case workers, treating professionals, outreach workers, to attend Court. It has been the Court's experience that not only do the service providers attend at Court, they also provide important details to the Court via Court reports.

The participants in the program have been taking their undertakings to the Court very seriously, and have been continuing the treatment as ordered in the adjourned undertakings.

Although there is no data to support this contention, anecdotally it has been the Court's experience that people with special circumstances are attending at Court in this specialised list because they are aware that they will receive the appropriate type of hearing and the appropriate disposition.

Another unexpected offshoot of the ERP is the role played by the prosecutors from the various agencies. They have adopted a consensual approach, often applying to withdraw charges and have from time to time assisted in the 'problem-solving' process by making common-sense suggestions to prevent offenders being charged in the future.⁴²

b. Tuesday Afternoon List

This is a list dealing with street sex workers (SSW) charged with prostitution offences and takes place on the first Tuesday afternoon of each month. It too came about through collaboration with community groups.

No additional funding was required for the Court to run this program. The list simply fits into the normal listing process by having an afternoon a month set aside for the hearing of these particular cases.

The user-friendly aspects of the List, for example, it takes place at 2:00 pm in a separate court, are contributing to the increasing numbers of women answering their charges. The setting aside of a list at a particular time on particular dates also means that service providers are able to attend to provide specialist services as required.

Health and community workers access a number of support services as required by individual defendants, such as:

- Housing and emergency accommodation
- Centrelink
- Drug and Alcohol Programs
- Health services
- Material Aid

The advantages of this list are seen to be:

- Early intervention by agencies and support services leading to a reduction in harm, both to the sex workers and the wider community
- Offending issues being addressed leading to a reduction in recidivism
- Street sex workers will more likely attend court because:
 - Afternoon court will be more accessible to street sex workers who generally work until the early hours of the morning;
 - Street sex workers will have existing relationship with Drug Outreach Lawyer and greater confidence in being supported at Court by lawyer they already know.
- Magistrates will be more able to attempt to address issues behind the offending behaviour of street sex workers by tailoring their sentencing decisions to the particular needs of defendants, such as, imposing good behaviour bonds conditional on access of treatment/support, deferred sentences, community based orders etc. In the absence of an appearance by defendants, Magistrates' currently have few options but to impose fines or order a term of imprisonment.

- Street sex workers will have access to immediate assessment for the CREDIT program and be linked into drug treatment services and monitored by the Court.
- Less police and court resources wasted through enforcement of fines and arrest warrants.

As a result of the operation of this List, fewer bench warrants are issued, saving some court time, and considerably reducing the demands placed on police executing warrants and watch-house/Custody Centre beds. The benefits to street sex workers of not having warrants executed against them is that there is less disruption to their lives and less likelihood of them losing personal items and accommodation due to incarceration.⁴³

2. Diversion

Additional to the sentencing options provided by the Sentencing Act, Victoria operates a Court Diversion program. The statutory regime for the Court Diversion Program is to be found in the Magistrates' Court Act.⁴⁴ A full description of the scheme is set out on the Magistrates' Court of Victoria's website.⁴⁵ Court diversions are usually applied for first offenders whose offences are not serious. The scheme of the program is that an offender-specific plan is devised which can include a number of conditions such as treatment conditions, donations to charity, apologies, community work, at the satisfactory completion of which the charges or charge are dismissed. There is no police record of a successfully completed Diversion.

3. Specialised Courts

a. Koori Court

The Koori Court⁴⁶ sits at Shepparton in the State's North East, Warrnambool in the State's West, Broadmeadows, a metropolitan court north of Melbourne and Mildura, in the State's North West, near the New South Wales and South Australian borders.

The physical layout of the Koori Court is that a court hearing room has been set aside in each of the court complexes specifically for the Koori Court. The court rooms are decorated with Aboriginal art works and the Australian, Aboriginal and the Torres Strait islander flags are also displayed. All persons involved in the case, namely the magistrate, two community Elders, the Aboriginal Justice Worker, the prosecutor, a corrections worker, the defence lawyers, the defendant, a family member or particular worker (such as a drug and alcohol worker or mental health worker) sit at the purpose-built oval bar table. The hearings are open to all members of the local indigenous and non-indigenous communities. Often, other family members are present to support the defendant.

The procedure for the conduct of proceedings in the Koori Court has been described in an article by Kate Auty and Daniel Briggs⁴⁷ and will not be repeated in this paper.

Victoria has had the benefit of many learnings from the Koori Court.

These include:

- The effectiveness of the non-adversarial approach in effecting behavioural change.

- The effectiveness of community ownership of issues has been demonstrated. The community is greatly involved in the Koori Court and takes a huge interest in the Court itself and the individual participants.
- The Court also demonstrates the effectiveness of the solemnity of the Court proceedings. The Court in some respects is more solemn than an ordinary Court hearing because of the attendance of the elder who is sitting with the Magistrate, and also because of the regular attendance of other elders from the community on Koori Court days.⁴⁸

b. Drug Court

The Drug Court in Victoria is a specialist, stand alone court which operates similarly to other drug courts. It has been established pursuant to legislation⁴⁹ at Dandenong, a south eastern suburb of Melbourne with a significant population of drug using offenders. Defendants are referred to the Drug court by magistrates who consider that they meet the eligibility criteria including the probability of a gaol term on sentence. The Drug Court magistrate, after hearing the plea, determines whether or not a prison term is likely, and refers the offender for assessment. If suitable, the offender is sentenced to a term of imprisonment and a Drug Treatment Order⁵⁰. The Drug Court team consists of a police prosecutor, Community Corrections Officer, Drug clinician Housing officer and Legal Aid Lawyer.⁵¹

3. Protocols for Specific Offences

Begging⁵² remains an offence in Victoria. A protocol for assisting persons charged was introduced by the court in August 2005 after consultation with the PILCH Homeless Person's Clinic and the Salvation Army.

In essence, magistrates have the ability to refer defendants charged with begging to the Salvation Army officers at the court.

The purpose of the referral is twofold:

- To provide the offender with a pack which will contain:
 - A \$20.00 food voucher,
 - A voucher redeemable at a Salvation Army Family Store,
 - A travel card,
 - Clean underwear,
 - A list of services (material aid, health services and alcohol and drug treatment services) local to the offender.
- To engage the offender on a one to one basis to ascertain what his/her needs are and to provide pastoral care

The availability of this assistance does not in any way interfere with a magistrate's sentencing discretion. It is intended only to alleviate the immediate plight of the person charged and to endeavour to assist them to access services in order that in future they seek material aid lawfully.

Bail as a Form of Pre-Sentence Rehabilitative Order

Many of the ‘problem-solving’ programs implemented by courts throughout Australia rely on some form of deferral of sentence, be it either legislatively conferred or a ‘Griffiths’⁵³ remand.

The programs generally add program conditions to bail during the period of adjournment.

Freiberg and Morgan⁵⁴ express their reservations about bail conditions being used to facilitate treatment instead of the stated purpose of bail, that is, to ensure attendance at court. The focus of the article is the Western Australian Drug Court which uses bail as part of a punitive as well as rehabilitative Drug Court regime.

Bail programs such as CREDIT in Victoria and MERIT in NSW are not designed to be punitive, and, it could be argued, put in place programs which improve the prospects of remandees appearing to answer their bail and reduce the risk of reoffending while on bail. Some of the programs, such as CREDIT, do not require a plea or a finding of guilt but are there to assist defendants simply because they require it – the non-punitive nature of the programs promotes the ‘readiness to change’ which is fundamental to a therapeutic intervention.

Until other sentencing options are devised, bail with conditions remains an effective, and often the only, appropriate way forward to deal with cases.

Rehabilitative Pre-Sentence Orders

One of the more innovative programs currently operating in Australia is the Geraldton Alternative Sentencing Regime, the scheme of which is described by its instigator, Dr. Michael King, Magistrate in these terms:

GASR aims to promote offender rehabilitation and is available in suitable cases pre-sentence or prior to determination of guilt. It has been used in a range of cases including drug related, drink driving, domestic violence and dishonesty offences. GASR consists of two tracks: the Court Supervision Regime (CSR) and the Brief Intervention Regime (BIR). A community corrections officer or juvenile justice officer must assess a person as suitable for admission to the CSR. Participation in the CSR consists of the participant’s signing of a behavioural contract, their supervision by a court team and their involvement in a range of programs designed to promote the ability to live a constructive and fulfilling life in the community without offending. The BIR generally involves those defendants on less serious charges. They sign a behavioural contract to participate in a range of rehabilitation programs relating to their offending for a period of approximately three months, appear in court for review half way through the period and then for sentencing at the end of it. Those admitted to either track pending sentencing by the magistrate are offered the incentive of a lesser sentence—such as a suspended term of imprisonment rather than an actual term.⁵⁵

Creative Use of Sentencing Options

In cases such as those which are the subject of this paper, a sentencer from time to time applies sentencing dispositions in ways that may at first appear unconventional. An

example is the use of Adjudged Undertakings⁵⁶ in Victoria. Adjudged undertakings replaced good behaviour bonds⁵⁷ and common law bonds. The old good behaviour bonds were of 12 months duration. Adjudged undertakings may be made for a maximum of 5 years, but there is no minimum period. Notwithstanding that the Sentencing Act was introduced in 1991, it has been in relatively recent times that undertakings of short duration and undertakings with conviction have been handed down. Conceivably, an undertaking could be ordered for a duration of only a few days.

Similarly, the Victorian Sentencing Act⁵⁸ does not prescribe a minimum operational period. It would be possible to impose a suspended sentence of imprisonment but impose an operational period of a few days or weeks.

Sentencers might be reluctant to impose short operational periods for fear of bringing the orders into further disrepute!

There has been a reluctance in the past to utilise the ‘conviction and discharge’ or ‘conviction and dismissal’ options by judicial officers on the basis that they will be seen to be attributing trivial status to offending which is not trivial, and will not be seen to be imposing a ‘consequence’ on the offending behaviour. Section 70 of the Sentencing Act⁵⁹, in particular the power to ‘allow for the existence of other extenuating or exceptional circumstances that justify the court showing mercy to an offender’, provides enormous scope to deal with offences in this way. I would suggest that those dispositions should be applied more liberally than at present.

Possible Sentencing Solutions

There has been little consideration in relation to the offenders who are the subject of this paper in Victoria. The Sentencing Review⁶⁰ did not examine the options available for this cohort. Of the 50 recommendations made, only those relating to the expansion of deferred sentences have any relevance.⁶¹ These recommendations relate to the expansion of the deferral option to all jurisdictions, age groups and for a period of up to 12 months. It is interesting to note that whilst the legislation has not been amended, interstate jurisdictions have included the recommendations in their legislation.⁶²

The Suspended Sentences Interim Report⁶³ makes further recommendations in relation to deferred sentences⁶⁴. The report also recommends a new form of order in substitution of the current Community Based Order called a ‘Correction and Supervision Order’ (CSO).⁶⁵ It is recommended that such an order have a great deal of flexibility as to the amount of supervision and treatment and that any special conditions be optional. Circumstances where special conditions could be deemed appropriate could be where:

- the offence or offences are not of a serious nature and where the offender has no prior offences, or only a limited history of offending;
- rehabilitation is a more important consideration in the circumstances than punishing the offender, and the offender has already demonstrated his or her rehabilitation and/or does not require program intervention; and/or
- despite the seriousness of the offence and the need for deterrence, there are special circumstances which justify the court exercising its mercy.⁶⁶

The difficulty with imposing this order is the ability of the offenders to comply with the proposed core conditions which include the condition “not to commit another offence punishable by imprisonment in or outside Victoria during the period of the order”⁶⁷. Offences such as prostitution⁶⁸, begging⁶⁹ and drug possession⁷⁰, activities which are often engaged in by this cohort all carry with them terms of imprisonment. The option may be a suitable one for the repeat fare evaders as fare evasion does not carry a term of imprisonment in Victoria.

The report of the Homeless Persons’ Court Project⁷¹ examined the difficulties faced by homeless people within the criminal justice system. In terms of sentencing, the Report recommended, inter alia,

- comprehensive assessment to determine appropriate diversionary or alternative sentencing disposition
- expansion of deferral of sentence option
- provision of funding to ensure adequate, if not supported, accommodation to assist homeless persons to comply with any sentencing (or alternative sentencing) regime they are placed on
- funding the development of diversionary and alternate sentencing options
- that community corrections provide assistance to homeless persons to enable them to comply with and complete community based dispositions⁷²
- The Report does not make any specific recommendations in relation to new options apart from recommending that they be investigated. It makes the valid point that current sentencing options could work better if appropriately resourced.

Community Based dispositions could be a more effective option for this cohort if they were adapted to the capabilities and needs of the offenders. Homeless people find it difficult to attend appointments for a variety of reasons, including lack of funds for public transport. It does not take much imagination to understand that it is not high on a person’s list of priorities to attend an appointment if they need to find food and shelter first. Part of the solution lies in there being a change of perception of what community corrections orders are aimed at and what the role of community corrections officers is. Although meant to be rehabilitative, the orders are considered punitive, and corrections officers are perceived as being overseers of punitive orders. In an ideal world where resources were unlimited and one did not need to consider Occupational Health and Safety issues, Community corrections could provide outreach and case-management to assist in the compliance with orders and assist participants in gaining the skills necessary to stop offending.

For some offenders, the ability to perform work would be of enormous social benefit. Some offenders are isolated, have low self-worth, experience boredom and lack of skills. Community work should be able to address these needs. Consideration could be given to forming community partnerships with agencies who take over the work component for this cohort to make work more manageable. The way the scheme could work is to make an arrangement with, for example, the Salvation Army, for a person to perform a small number of hours of work, such as 12 hours work. The Salvation Army

could then arrange with the offender when and where the work was to take place and what form it would take.

In relation to offenders who do require treatment or assistance but for whom deferred sentencing is not appropriate, it would be useful to have a sentencing disposition which mandated treatment for a short period of time, (say 2 or 3 months) but did not necessitate return to court or any undertaking to be of good behaviour. This disposition would facilitate the addressing of needs without being punitive and would put the responsibility for compliance directly on the offender.

It may be that now that sentencers have a better understanding of the impact of such factors as homelessness, poverty and mental impairment on offending, sentencers in those States and Territories where it is an option, will apply 'dismissal' more liberally than they are currently. It is especially apposite where an offender has participated in a treatment program during a period of deferral. It may also be appropriate for brief reasons to be provided which explain why the option has been utilised in this case.

Conclusion

What we in the Magistrates' Court have been able to achieve by way of the introduction of creative approaches to persons with special circumstances is to impose appropriate sentencing options and thereby reduce the numbers and categories of offenders whom we previously considered 'unsentencable'.

Notwithstanding the plethora of sentencing options, proliferation of lists and other problem solving approaches, there remain matters coming before our summary courts where existing sentencing options and approaches are inadequate. More thought needs to be given to sentencing options for the lower level offenders who, up to now, have been put in the 'too hard basket'.

What must be stated categorically is that any newly created sentencing options, therapeutic or otherwise, *must* be adequately resourced to ensure that have the prospect of achieving positive changes.

I would urge the Victorian Sentencing Council to consider the issues raised in this paper.

I join the calls from Arie Frieberg and Dr. Michael King for the establishment of a Centre for Court Innovation such as that which exists in New York for research into and development of strategies and programs to reduce recidivism and advance problem-solving justice.⁷³

In the meantime, I for one will be availing myself of 'dismissal' and 'discharge' options in the Victorian legislation⁷⁴, accompanied by short reasons.

ENDNOTES

¹ *Magistrates' Court Act (Vic)* 1989, Schedule 4 Clause 49.

² *Sentencing Act (Vic)* 1991 s. 11.

³ This table has been adapted from one included in a paper written by me for a subject I undertook as part of a Master of Law entitled *Judicial Sentencing and therapeutic Jurisprudence: A contradiction in Terms* in 2004.

⁴ Above n.2 s. 18ZT.

⁵ *Sentencing Act (Western Australia)* 1995 s. 39(2)(a) and s.46.

⁶ Above n. 5 at s. 39(2)(b), s.47-52.

⁷ Above n. 5 at s. 39(2)(c), s53-60.

⁸ Above n.5 at s.39(2)(d), s.61- 67

⁹ Above n. 5 at s.39(2)(e), s68-76

¹⁰ Above n.5 at s.39(2)(f), s.76-84

¹¹ Above n.5 at s.39(2)(h),s.85-96.

¹² Above n.5 at s.39(2)(a), (b), (c) and (d).

¹³ Above n.5 at s. 46.

¹⁴ Above n.5 at s.33A to K.

¹⁵ *Crimes(Sentencing Procedure) Act (NSW)* 1999 s. 3A.

¹⁶ Above n 15 at s. 5(1)

¹⁷ Above n. 15 at s. 6

¹⁸ Above n.15 at s. 7

¹⁹ Above n.15 at s.8

²⁰ Above n.15 at s.9

²¹ Above n. 15 at s.10

²² Above n.15 at s. 10(2)(a)

²³ above n. 15 at s.11.

²⁴ Above n.15 at s. 12.

²⁵ Above n.15 at s. 14 to 17.

²⁶ Above n. 15 at s.100M AND S.100N.

²⁷ Frieberg, A. & Morgan, N. Between Bail and Sentence: The Conflation of Dispositional Options (2004) 15(3) *Current Issues in Criminal Justice* 220.

²⁸ *Sentencing Act (NT)* at July 2005 at s. 5(1).

²⁹ Above n.28 at s.5(2).

³⁰ This is identical to the "Purposes" section, s.70, in division 5 of the *Sentencing Act (Vic)* 1991 and s.58 of the *Sentencing Act (Tas)* 1997.

³¹ *Sentencing Act (Tas)* 1997.

³² *Criminal Law (Sentencing) Act (South Australia)* 1988.

³³ Above n.32 at s. 10(1)(n).

³⁴ Above n.32 at s.10(1)(l).

³⁵ Above n.32 at s.19C.

³⁶ Susan Dusmohamed, *Magistrates' Court Diversion Program*, Magistrates' Court of South Australia. Updated 11 June 2001.

³⁷ A full description of the programs can be found on the Victorian Magistrates' Court website www.magistratescourt.vic.gov.au and following the prompts to 'Court Support Services'.

³⁸ This table has been adapted from the one published in an article written by me entitled: Judicial Officers Complementing Conventional Law and Changing the Culture of the Judiciary (2003), Volume 20 No. 2 *Law In Context* 121.

³⁹ Astrid Birgden: *Applying Therapeutic Jurisprudence Principles in Sentencing: Courts < Corrections and Beyond*.

⁴⁰ This portion of the paper has been taken from a paper delivered on 6 May 2005 at the 'At the Cutting Edge: Therapeutic Jurisprudence in the Magistrates' Courts' Conference on and is entitled *Court Process & Therapeutic Jurisprudence: Have We Thrown the Baby Out With the Bathwater* and is awaiting publication.

⁴¹ S. 75 of the Sentencing Act (Vic) 1991.

⁴² Further information about this program can be found at : Anne Condon and Annie Marinakis, 'The Enforcement Review Program' (2003) *Journal of Judicial Administration* 225, the Magistrates Court of Victoria, Annual Report, 1 July 2003 to 30 June 2004 and the Magistrates' Court of Victoria's website, www.magistratescourt.vic.gov.au.

⁴³ Further information, including statistical information is available from the inner south Community Health Services Inc Health Innovations Partnerships Program Annual Report 2004-2005.

⁴⁴ *Magistrates' Court Act* (Vic) 1989 s. 128A.

⁴⁵ www.magistratescourt.vic.gov.au Follow the prompts to "Parallel and Support Services and then to "Guide to Court Support Services" and finally to the entry 'Criminal Justice Diversion Program'.

⁴⁶ The legislative foundation for the Koori Court is to be found at Sections 4D and 4E *Magistrates Court Act* (Vic) 1989.

⁴⁷ Auty, K. and Briggs, D.: Koori Court Victoria – Magistrates' Court (Koori Court) Act 2002, in print. This was a paper presented at the Australia and New Zealand Society of Criminology Conference in Sydney in 2003.

⁴⁸ For further information regarding the Koori Court, refer to Magistrates Court of Victoria, Annual Report, 1 July 2004 to 30 June 2005 and the Magistrates' Court of Victoria's website, www.magistratescourt.vic.gov.au

This portion of the paper was also taken from the 2005 Perth Therapeutic Jurisprudence Conference above n. 40.

⁴⁹ Section 4A of the *Magistrates' Court Act* (Vic) 1989 sets up the Drug Court Division of the Magistrates' Court.

⁵⁰ *Sentencing Act* (Vic) 1991, s. 18X to s. 18ZS.

⁵¹ www.magistratescourt.vic.gov.au, go to 'specialist Court Jurisdictions' and follow prompt to Drug Court.

⁵² Section 49A *Summary Offences Act* (Vic) 1966.

⁵³ *Griffiths v The Queen* (1977) 137 CLR 293.

⁵⁴ Above n. 27.

⁵⁵ *Innovation in Court Practice: Using Therapeutic Jurisprudence in a Multi-Jurisdictional Regional Magistrates' Court*, paper presented to the 21st Annual conference of the Australian Institute of Judicial Administration.

⁵⁶ *Sentencing Act* (Vic) 1991 at s. 73.

⁵⁷ *Sentencing Act* (Vic) 1991 at s.71.

⁵⁸ *Sentencing Act* (Vic) 1991 at s. 27(2A) (a) and (b).

⁵⁹ *Sentencing Act* (Vic) 1991 at s. 70 and see above n.30.

⁶⁰ Arie Frieberg, *Pathways to Sentencing: Sentencing Review 2002*, Victorian State Government.

⁶¹ Above n. 60, recommendations 44 to 47 on pages 19, 20 and 184.

⁶² Above n. 15 at s.11, and the proposed ACT legislation, *Crimes (Sentencing)Act* 2005 at s. 27.

⁶³ Sentencing Advisory Council, October 2005, Victoria.

⁶⁴ Above n. 63 Recommendations 39 to 46 on pages 9 and 10 and pages 71 to 74.

⁶⁵ Above n. 63 Recommendations 21 to 29, pages 8 and 9 and 55 to 64.

⁶⁶ Above n. 63 paragraph 5.20 on page 58.

⁶⁷ Above n, 63 paragraph 5.16 on page 58.

⁶⁸ Section 13(2) *Prostitution Control Act* (Vic) 1994.

⁶⁹ Section 49A *Summary Offences Act* (Vic) 1966.

⁷⁰ Section 73 *Drugs, Poisons and Controlled Substances Act* (Vic) 1981.

⁷¹ Midgley, B.: *Improving the Administration of Justice for Homeless People in the Court Process*, Report of the Homeless Persons' Court Project, Public Interest Law Clearing House, August 2004. An extract of this paper has now been published as 'Achieving Just Outcomes for Homeless People Through the Court Process' (2005) 15 *Journal of Judicial Administration* 82.

⁷² Above n. 67 at pages 8 and 9, and 43 to 49.

⁷³ www.courtinnovation.org

⁷⁴ S. 73 and 76 *Sentencing Act*, referred to above on pages 10 and 23 above.

APPENDIX

Disposition type	States or Territories	Comments
Dismissal	Victoria, NSW, Tasmania, SA, ACT, NT	
Discharge	Victoria, NSW, Tasmania, SA, NT	
Deferral of Sentence	Victoria, SA, ACT	
Drug Diversion Dismissal	Qld	
Rehabilitation order/ Intervention program/ Pre-sentence order	NSW, WA, Tasmania, SA	In Tasmania, limited to family violence offences
Mental Impairment dismissal	SA	
Adjourned Undertaking or Good Behaviour Bond without conviction, CRO	Victoria, NSW, WA, Qld, Tasmania, NT, ACT	

Adjourned Undertaking or Good Behaviour Bond with conviction	Victoria, Tasmania	
Fine Without conviction	Victoria,	
Spent Conviction	WA	
Fine with conviction	Victoria, NSW, WA, Qld	
Community work order	Victoria, NSW, Qld, Tasmania, SA, ACT, NT	In Vic , SA & Qld can be without conviction
Community corrections order/probation	Victoria, Qld, SA	Two types of varying seriousness - In Victoria: CBO & ICO, in WA CBO & ISO, in Qld, probation and ICO. In Vic, Tasmania and Qld, CBO and probation can be without conviction
Suspended Sentence	Victoria, NSW, Qld, Tasmania, SA, NT, ACT	In SA, upon entering bond
Youth Detention	Victoria, SA	
Combined Custody & Treatment order	Victoria,	
Drug Treatment Order	Victoria,	Drug Court only
Home detention	Victoria, NSW, SA, NT	
Periodic detention	NSW, ACT	
Imprisonment	All States and Territories	