

THEMIS AND THE BALANCE OF SENTENCING

JUSTICE MARGARET NYLAND *

1. INTRODUCTION

Themis was one of the 12 Titans who were the first-born children of Uranus, the god of the sky and Gaia, the goddess of the earth. Themis was the embodiment of divine order, law and custom. She presided over the proper relation between man and woman, the basis of the rightly ordered family.

Judges were often referred to as the servants of Themis.

The ability to foresee the future enabled Themis to become one of the Oracles of Delphi, which in turn led to her establishment as the goddess of divine justice.

Unlike her Roman counterpart, Justitia, who is commonly portrayed as a blindfolded woman holding scales and a double-edged sword, Themis is not depicted as a blindfolded figure. That is not necessary due to her talent for prophecy. Nor does she hold a sword because she represents common consent, not coercion.

You might think that the modern day judge continues to be a servant of Themis as when taking the oath of office he or she still promises to:

... do right to all manner of people after the laws and the issues of the State without fear or favour, affection or ill will ...

When grappling with the knotty problems which constantly confront a sentencing judge, I reflect on how helpful it would be to have been given the gift of prophecy given to Themis!

2. SOUTH AUSTRALIAN COURTS

The focus of this paper is on public attitudes towards the sentencing of the mentally impaired and the part the media has to play in these matters.

By way of background, however, I should explain that in South Australia there are three levels of courts which administer the criminal justice system¹:

The comprise the various divisions of the Magistrates Court, the District Court and the Supreme Court of South Australia.

- **Magistrates Court**

The Magistrates Court is a court of summary jurisdiction and has jurisdiction to hear cases in which the maximum penalty does not exceed two years imprisonment.

There are a number of diversionary courts operating within the Magistrates Court system:

(1) **Nunga Court**

The Nunga Court at Port Adelaide is concerned with sentencing Aboriginal offenders. To be eligible for this court the defendant must not only be Aboriginal but must have some connection with the Aboriginal community living in and around the Port Adelaide area. The court is considered to be most effective where elders, the defendant and his family are able to have a meaningful dialogue about the defendant's circumstances. This court is a sentencing court only.

(2) **Drug Court**

The Drug Court is a voluntary 12-month intervention program which operates only from the Adelaide Magistrates Court. Participants receive access to rehabilitation and counselling services and are supported to remain drug free and crime free, through an intensive program involving regular court appearances, regular urine testing for drugs, supervised bail and accommodation and community support services. Defendants charged with major indictable offences are not eligible. The aim of the Drug Court is to assist people to stop using illicit drugs and committing drug-related offending.

(3) **Magistrates Court Diversion Program**

The Magistrates Court Diversion Program (or the Mental Impairment Court, as it is sometimes called), provides an opportunity for eligible defendants voluntarily to address their mental health and/or disability needs and any offending behaviours, while legal proceedings are adjourned for approximately six months. Eligible individuals are those adults who have been charged with certain minor or summary offences who have impaired intellectual or mental functioning arising from:

- mental illness
- intellectual disability

- personality disorder
- acquired brain injury, or
- a neurological disorder, including dementia.

- **District Court**

This is the major trial court. It has jurisdiction to hear cases with respect to all serious crimes, excluding murder or treason or attempts to commit those crimes. The District Court therefore conducts trials with respect to a wide range of offences. These include offences against the person such as rape and other forms of assault, property crimes such as arson, serious criminal trespass cases, armed robbery, charges of causing death by dangerous driving and drug offences.

- **Supreme Court**

The Supreme Court has sole jurisdiction to hear cases of murder or attempted murder (so far no charges of treason or attempted treason have been laid). There is however a procedure whereby serious or long and complex trials are referred to the Supreme Court for hearing². In addition there is some flexibility in the listing system which allows Supreme Court Judges (if available) to assist the District Court from time to time by hearing more routine District Court trials.

3. LEGISLATION

The majority of serious offences against the criminal law and the penalties for them are consolidated in the *Criminal Law Consolidation Act 1935*³. This Act also incorporates the provisions applicable to defendants who raise issues of mental impairment.

The sentencing powers of the court are brought together in the *Criminal Law Sentencing Act 1988* (Sentencing Act). This Act sets out the powers and matters required to be taken into account by a sentencing court, provisions for such matters as the fixing of non-parole periods, the release of defendants on bonds, making community service orders and the like. The Act also includes provisions relating to orders for the indeterminate detention of certain sexual offenders, or a person declared to be a dangerous offender.

4. LAW AND ORDER

The topic of law and order is very much in the headlines these days. In South Australia the government policy with respect to the treatment of defendants was

succinctly described last year by the Treasurer, The Honourable Kevin Foley, as “Rack ‘em, pack ‘em and stack ‘em”.

Undoubtedly, these sentiments receive popular support from large sections of the community who have scant sympathy for those who break the law. This is often fuelled by the way cases are reported in the media. Regrettably, much of the media reporting of cases is selective and sensational, leaving the public with the perception that judges are soft on crime and out of touch with community opinion. The cases that attract this kind of criticism tend to be those involving particularly brutal conduct by the offender and/or the particularly tragic consequences for the innocent victims of the crime. It is important however to remember that of the thousands of sentences imposed in our courts every year, the vast majority are dealt with in the Magistrates Court, are generally unreported, are uncontroversial and are not subject to appeal.

All the matters taken into account by a sentencing judge are rarely fully reported nor understood. For example, s. 38 *Sentencing Act* empowers a court to suspend a sentence of imprisonment on conditions if it thinks *good reason* exists for so doing. Good reason is not circumscribed by any formula, but a relevant reason might be found in such matters as the youth of the defendant, strong prospects for the rehabilitation of an offender, the lack of any prior criminal history or the particular circumstances in which the crime was committed. In *R v Locke*⁴ Bray CJ helpfully described a suspended sentence in the following way:

In the case of a suspended sentence the operation of that sentence is automatic on the defendant being brought before the court and proved to have broken the bond, either by committing some other offence or by failing in any of its other conditions. The court in such a case has no discretion. It must decree the automatic operation of the suspended sentence. Anyone released under a suspended sentence therefore knows, or ought to know that the sword of Damocles hangs over his head and that only his continued good behaviour and observance of the bond can prevent his automatic incarceration under the suspended sentence.

Unfortunately, a suspended sentence is often regarded as no sentence at all. The media usually reports these cases as the defendant “walking free”, or under such headings as “no gaol for killing best mate”.⁵

Sentencing, however, is not a simple process. The law requires the court to treat imprisonment as a sentence of last resort, to be imposed only if no other sentencing option is appropriate. It must also be borne in mind that Judges frequently have to deal with complex sets of facts and are required to balance against those facts the various aims of sentencing, the range of options available and the widely differing

circumstances of the offending, as well as the different personal circumstances of the offenders.

The large range of matters to which a sentencing court should have regard are set out in s. 10 *Sentencing Act* and include such matters as the circumstances of the offence, the personal circumstances of the victim(s) and the degree to which the defendant may have shown contrition by pleading guilty, making reparation or cooperating in the investigation.

The court is also required to consider the protection of the community from the defendant's criminal acts, questions of personal and general deterrence and the need to ensure that a defendant is adequately punished for his or her crime.

These are clearly important considerations, but in addition the court is required to take into account such matters as the character, antecedents, age, means and physical or mental condition of a defendant, the question of rehabilitation and the probable effect of any sentence on the dependants of a defendant.

For example, on 11 August 2009 a woman who pleaded guilty to manslaughter was given a suspended sentence following the killing of her partner in circumstances which amounted to excessive self defence. At the sentence hearing, evidence was provided by the sergeant in charge of the local police station that she had been subjected to abuse for some years, that she had endeavoured to seek help when required and that following the killing of her partner she had been extremely remorseful and suffered from suicidal ideation. This was confirmed by a psychiatrist who considered she would be at risk if incarcerated. The woman had seven children and although arrangements had been made for their care in the event of a gaol term being imposed, there was evidence of the detrimental effect upon the children if they were to be separated from the mother. Of particular importance was the strong support from the local community, all of whom were anxious to support the defendant in her rehabilitation amongst them. Fortunately, the media reporting in this case was, in the main, positive.

Striking the correct balance between the competing considerations set out in the *Sentencing Act* is however frequently difficult and often misunderstood. Sentencing has been described as:

... an attempt to juggle objects of various sizes while walking a tightrope which is being shaken at both ends⁶.

There is however a perception amongst large sections of the community (and promoted by the media) that the emphasis in sentencing should be on the punishment of the offender and that the problems of law and order will be cured by

the imposition of longer sentences. This is however a simplistic solution and gives little heed to all the requirements set out in the *Sentencing Act*. Rehabilitation, for example, is of particular importance when dealing with young people, or offenders with drug and alcohol problems, or a person without any relevant prior criminal history.

In addition, there is the challenge of managing offenders with mental health issues within an overcrowded prison environment with limited access to professional assistance⁷.

The problems which result from overcrowding in prisons also make it difficult for correctional authorities to ensure minimum standards of treatment for prisoners, and the need to provide well-planned, quality rehabilitation programs for them. I might add that the tensions which arise from overcrowding not only affect prisoners but also create an unsafe and stressful environment, for prison staff. This creates further problems and may affect how prisoners behave when they are eventually released back into the community.

Obviously, there are some crimes that are so serious that the questions of rehabilitation or a defendant's personal circumstances will be greatly outweighed by the need to impose a sentence which has the emphasis on specific and/or general deterrence, but the well-known, rather flamboyant American lawyer, Melvyn Belli, once made the point that:

Eight out of 10 guys who hit you on the head in the streets have learned their trade in prison.

5. MENTAL IMPAIRMENT

The lack of understanding of the sentencing process is particularly evident in the sentencing of the mentally impaired. In the past in South Australia, the McNaghten Rules⁸ applied to defendants charged with committing crimes while suffering from a mental illness.

In 1995 however the government of the day introduced a Bill to amend the provisions of the *Criminal Law Consolidation Act 1935* relating to defendants with a mental illness. On 21 November 1995 the Deputy Premier, the Honourable S J Baker in the second reading speech with respect to the proposed Bill summarised the defects in the common law which then applied as follows:

- (1) The current law operates badly –

- accused people avoid the defence of insanity except where the offence is very serious indeed, because the result of a “successful” defence is indefinite detention;
- the legislation is archaic and offensively worded and is, in many respects, ignored in practice;
- those detained as mentally ill under the criminal law have few effective rights.

The result of all of this is that the role of mental impairment and intellectual disability in the criminal justice system is massively understated with consequent personal and systemic injustice.

- (2) Other jurisdictions in this country have acted to reform their laws on the subject. While the results cannot be described as uniform, there are common themes. Most importantly, the Commonwealth enacted substantial reforms in 1989 and, unless South Australia acts to achieve some kind of consistency, it will result in drastically different treatment for State and Federal detainees. The Government is not urging complete uniformity but some degree of fair consistency is highly desirable.
- (3) It is highly likely that the current law in this State is contrary to the *International Covenant on Civil and Political Rights*. In addition, the current state of the law does not conform to the *UN Draft Guidelines and Principles for the Protection of the Mentally Ill*. These matters have been detailed with considerable force by the *Burdekin Report*.

The Deputy Premier said in general terms, the Bill intended to achieve the following reforms:

- (1) It defines “mental illness” using the words chosen for the purpose by the High Court.
- (2) It defines the role of judge and jury;
- (3) It isolates the question of the defendant’s fitness to plead or the question of whether the defendant was, at the time of the alleged offence, suffering from mental impairment from other questions that may be at issue in the case. This enables judge and jury to concentrate on the issues affecting those fundamental questions.

- (4) It ensures that if the question of fitness to plead or mental impairment is raised, the court must first be satisfied that there is sufficient evidence available to show that the accused actually committed the acts in question.
- (5) It empowers a court that finds that the accused is unfit to plead, or was not criminally responsible (due to mental impairment), to make the most appropriate disposition with respect to each accused (including detention or community based treatment programs).
- (6) It requires a court to set a limit to the exposure of the accused to any supervision order made – the limit being fixed in relation to the penalty that would have been applicable had the accused been found guilty of the offence with which he or she was charged.⁹
- (7) ...

Part 8A, which is headed *Mental Impairment* was in due course inserted in to the *Criminal Law Consolidation Act 1935* and came into operation on 2 March 1966

A mental illness is now defined as “a pathological infirmity of the mind (including a temporary one of short duration)” It is noted however that a condition that results from the reaction of a healthy mind to extraordinary external stimuli is not a mental illness although such a condition may be evidence of mental illness if it involves some abnormality and is prone to recur.¹⁰

Mental impairment is defined to include:

- (a) *a mental illness; or*
- (b) *an intellectual disability; or*
- (c) *a disability or impairment of the mind resulting from senility, but does not include intoxication.*

The Act provides that:

A person is mentally incompetent to commit an offence if, at the time of the conduct alleged to give rise to the offence, the person is suffering from a mental impairment and, in consequence of the mental impairment—

- (a) *does not know the nature and quality of the conduct; or*

(b) does not know that the conduct is wrong; or

(c) is unable to control the conduct.¹¹

If, on the trial of a person for an offence a defence of mental incompetence is raised by a defendant, or the court decides, on application by the prosecution or on its own initiative, that the defendant's mental competence to commit the offence should be investigated in the interests of the proper administration of justice, the question of the defendant's mental competence to commit the offence must be separated from the remainder of the trial.¹²

A distinction is drawn between the objective and subjective elements of an offence. An objective element of an offence is defined as "an element of an offence that is not a subjective element". A subjective element of an offence means "voluntariness, intention, knowledge or some other mental state that is an element of the offence".

The trial judge has a discretion as to the manner of proceeding. He/she can proceed first with the trial of the objective elements of the offence or, alternatively can proceed first with the trial of the mental competence of the defendant.¹³ The steps which the court should take with respect to each of these alternatives were helpfully set out by the Court of Criminal Appeal in *Question of Law Reserved No 1 of 1997* as follows¹⁴:

Trial of Mental Competence First

The court hears evidence and representations on the issue of mental competence (s. 269FA(1))

If not satisfied of mental incompetence the trial of the offence proceeds in the normal way (s. 269FA(3)).

If satisfied of mental incompetence court determines whether objective events of offence are established. (s. 269FB(1)).

If satisfied that objective

If not satisfied that objective

elements are established the accused is found not guilty of the offence but declared to be liable to supervision. (s. 269FB(3)).

elements are established the accused is found not guilty of the offence and discharged. (s. 269FB(3)).

Trial of Objective Elements First

The court hears evidence and representations on the issue of the objective elements (s269GA(1))

If objective elements not established the accused is found not guilty and discharged. (s. 269GA(2)).

If objective elements are established court hears evidence and representations on the issue of mental competence. (s. 269GB(1)).

If satisfied of mental incompetence the accused is found not guilty but declared to be liable to supervision. (s269GB(3)).

If not satisfied of mental incompetence court determines whether subjective elements of offence are established. (s269GB(4)).

If satisfied that subjective elements are established the accused is found guilty of the offence. (s. 269GB(4)).

If not satisfied that subjective elements are established, the accused is not found guilty of the offence. (s. 269GB(4)).

In my experience the usual practice is for the question of mental competence to be determined first, following an election by the defendant to have the matter dealt with by a judge sitting alone.¹⁵

I should mention that the defendant's right to elect to have an investigation pursuant to part 8A conducted by a judge sitting alone is not subject to any statutory qualification. In particular, it is not an election made under the *Juries Act 1927*.

It should be formally made, but it can be inferred from the conduct of Counsel¹⁶. Counsel also have an independent discretion to act in what he/she believes to be in

the defendant's best interests, if the defendant is unable to instruct counsel on questions relevant to an investigation, which includes his/her right to an election for trial by judge alone.¹⁷

If the court records a finding that the defendant was mentally incompetent to commit the offence, the court must thereafter hear evidence and representations relevant to the question or whether the court should find that the objective elements of the offence are established.¹⁸ In the majority of cases, after a finding of mental incompetence, that has been relatively straightforward. It is usually heard by a judge sitting alone and is often dealt with by simply tendering declarations of prosecution witnesses. If at the conclusion of that hearing there is a finding that the objective elements of the offence have been established, the court must find the defendant not guilty of the offence, but declare the defendant liable to supervision¹⁹.

Once a defendant is declared liable to supervision, the court may release the defendant unconditionally, or make an order which is called a supervision order.

Pursuant to a supervision order, a defendant can be committed to detention or the court may release the defendant on licence, on conditions decided by the court and specified in the licence. Later in this paper I discuss the case of a young man called Joshua, whose release on licence received considerable attention in the media. I have included at the end of this paper an edited list of the conditions which were included in Joshua's release on licence. This sets out some fairly typical conditions imposed by the courts when making orders for release on licence.

If a court makes a supervision order, the court must fix a term, which is referred to as a "limiting term". This is equivalent to the period of imprisonment that would, in the court's opinion, have been appropriate if the defendant had been convicted of the offence of which the objective elements have been established. This requires a certain amount of mental gymnastics as the court is obliged to fix the limiting term by reference to the sentence that would have been imposed if the defendant had been found guilty of the relevant offence *but without taking into account the defendant's mental impairment*. By contrast, when sentencing a defendant who has psychiatric problems, but who has not been able to avail him/herself of a defence of mental incompetence, the court in fixing penalty may take into account matters relevant to his/her psychiatric condition or history.

The limiting term is fixed by reference to the head sentence of imprisonment, not the non-parole period. So, for example, with respect to the crime of murder for which the mandatory sentence is imprisonment for life, the limiting term must also be life. At the end of the limiting term a supervision order in force against a defendant lapses²⁰.

It is the release of a defendant on licence which I believe people, particularly victims and their families, find difficult and confusing. Those who have been the victims of a serious crime or those who have lost a family member as a result of a defendant's actions have difficulty in understanding why a defendant should be released after what is perceived to be a short period of time or, for that matter, at all. Applications for release do however require the court to undertake a detailed investigation. The court is required to obtain a number of reports. These include a report setting out so far as is reasonably ascertainable the views of the next of kin of the defendant, the views of the victim (if any) of the defendant's conduct and, if a victim was killed as a result of the defendant's conduct, the next of kin of the victim²¹.

In deciding whether to release the defendant, or in determining what conditions should be included in the licence, the court must apply the principle that restrictions on a defendant's freedom and personal autonomy should be kept to the minimum, consistent with the safety of the community.²²

In addition, the court is required to have regard to such matters as:

- (a) the nature of the defendant's mental impairment;
- (b) whether the defendant is, or would if released be, likely to endanger another person, or other persons generally; and
- (c) whether there are adequate resources available for the treatment and support of the defendant in the community; and
- (d) whether the defendant is likely to comply with the conditions of a licence.

Before a court can release a defendant, or significantly reduce the degree of supervision to which the defendant is subject, the court is also obliged to consider at least three expert reports prepared by different psychiatrists or (other appropriate expert), who have personally examined the defendant as to his or her mental condition and the possible effects of the proposed action on his or her behaviour, as well as the reports as to the attitudes of the victims and next of kin, which I mentioned earlier. Accordingly, there is a wealth of material provided to a court to assist in determining whether it is appropriate to release on licence a person who has committed a crime when mentally impaired. Very little of that information is however reported in the press to explain the decision for, or condition of, release. The emphasis is usually on the circumstances of the original crime, particularly where the crime has been violent or committed in bizarre circumstances.

6. THE "EVIL CLONE" CASE

The problems associated with the release on licence of a mentally incompetent offender and the role the media plays in stereotyping the actions of someone who has offended while suffering from a mental illness is illustrated by having regard to a case involving a young man called Joshua.²³

On 18 October 2005, Joshua aged 19 years entered the house of strangers and subjected the two occupants to a random and quite frantic, frenzied attack with a knife. An investigation into his mental state concluded that at the time of the attack, Joshua was suffering from a mental illness, namely paranoid schizophrenia. For some days he had been suffering escalating symptoms of delusional intensity. He was hearing compelling voices and he thought the world had been taken over by a force, which was manufacturing evil clones. He did not believe the occupants of the house were real people. He thought they were evil clones whom he had to kill to survive.

The objective elements of the crimes of aggravated serious criminal trespass and attempted murder were subsequently proved and a finding made in accordance with legislation that Joshua was not guilty of the charged crimes, but was liable to supervision. A limiting term of 10 years was fixed with respect to these offences.

Immediately after he committed these dreadful acts Joshua was detained in a secure mental health facility. About a year later, however, he made an application for release on licence. Three psychiatrists reported that by that time he had been treated appropriately and his mental health was stable. Each of the psychiatrists considered he was fit to move back into the community with appropriate supports. There were, however, obvious concerns expressed by the victims about such an immediate release and in particular a concern about compliance with medication. In the course of the hearing with respect to Joshua's release a proposal was put forward by the prosecution that there be a graduated release program which would require Joshua to be detained for a longer period, but in a less secure facility, before being allowed to return to the community.

That matter was canvassed with the Director of Rehabilitation Services of the relevant hospital and he reported that Joshua did not strictly comply with the criteria for admission to his hospital. He indicated that where a mental illness had already been effectively treated, extended hospitalisation was essentially not clinically required and might in fact be counter productive as it could, in effect, cause the individual to be unnecessarily stressed and thereby set back the progress made. He considered that Joshua's rehabilitation would be more effective if he was placed on home detention with strict supervision of a parole officer and strict supervision in terms of non-abuse of controlled substances, including marijuana and alcohol. There

were also other suggestions as to appropriate conditions to maintain Joshua's mental state in the community and compliance with medication.

The order which was eventually made for Joshua's release incorporated all of those recommendations, including home detention. Not surprisingly, the order was the subject of considerable attention in the media. It was reported in the *Adelaide Advertiser* on 5 October 2006 under the heading: *Stabbing: Man freed 11 months after horrific attack – Two victims warn: lock your doors*. It was also the subject of considerable debate on talk-back radio. The order for release was described by one commentator as a *very sorry and depressing situation*. The Attorney-General, The Honourable Michael Atkinson, commented that it was not a decision the government endorsed and when asked by the interviewer, *Who takes the rap if something goes awry?* the Attorney responded, *I think in the first instance, those of the psychologists who wrote the report ...*

About one month later after his release, Joshua made a further application to the court to vary his conditions of licence to relax the need for the 24-hour supervision, which was included in his licence conditions, to enable him to attend a plumbing course at a technical college, as well as other activities. This application was reported in the *Advertiser* on 19 December 2006 as: *Paranoid schizophrenic: Attacker wants more freedom*.

Regrettably, Joshua subsequently breached two of the conditions imposed with respect to his release on licence. He left home without permission. He met a friend at a hotel in the city where he consumed some beer. The two men went to a beachside suburb where they had a meal and Joshua consumed some more beer. After lunch, Joshua returned home voluntarily, where he was met by the forensic community team, which had been alerted to his absence. Joshua's mental state was however assessed by them as stable. There did not appear to be any exacerbation of his schizophrenia. Drug tests were negative for illicit substances. A blood alcohol test confirmed a level of 0.06. There was no suggestion that Joshua had behaved inappropriately while absent from his home. There was no return to any violent behaviour, such as had led to the charges against him, nor any threat nor approach of any kind to the victims or anyone else. Nevertheless, the court treated the breach of licence conditions as extremely serious, and Joshua's release on licence was cancelled.

The matter was subsequently reported in *The Adelaide Advertiser* on 8 January 2007 as: *Mentally ill man breaks strict home custody rules: A paranoid schizophrenic man released back into the community after committing a frenzied stabbing has breached his custody conditions by being found roaming the streets alone*

On 12 January 2007 the matter was again reported: *Victims' new terror as mentally ill attacker lies, drinking exposed*. No mention was made however in any of those reports that Joshua had not misbehaved (apart from consuming some alcohol) during his period of absence from his home, nor that he had returned home voluntarily. The comment that he had been found *roaming the streets* was clearly inflammatory and was hardly consistent with the fact that all he had done was to go out to lunch with a friend and had returned home of his own accord.

Joshua however remained in secure custody for about 12 months following the breach, after which he again applied for release on licence to enable him to return to live at home. This was reported in the press under the heading on 22 January 2008 as: *Paranoid knife attacker rehabilitated, says Judge*.

Joshua remained in secure care until March 2008 while the matter was fully investigated. He was then released on licence to return to home to live with his family on strict conditions, which included constant supervision. This was reported under the heading *Attacker back in the community*, accompanied by a photograph which described Joshua as *Former schizophrenic*. In the month that followed his release, a number of minor variations to the licence conditions took place to facilitate Joshua pursuing a course of study. On each occasion the matter was heard in court, Joshua was subjected to attention from the media.

On 7 June 2008, the Internet site *Adelaide Now* reported: *Closed hearings for 'rehabilitated knife attacker'*. The closed hearing was in fact a procedural hearing in chambers which the journalist had been permitted to attend in the hope that he would have a better understanding of any order that might later be made. Permission was given to attend on the strict understanding that this hearing was an informal one in which the discussions were non-reportable. A request by the reporter to subsequently report some of that discussion in the media was refused, thereby sparking the report which initially described the hearing as a "secret hearing" but following complaint by the media liaison officer of the court was amended to "closed hearing".

This particular report once again referred to the occasion of the breach and included the comment that: *In 2007 [Joshua] was found wandering the streets after he had gone drinking ...* – once again, hardly an accurate description of what in fact had occurred. I might add that this particular report had a significant impact upon the victims. They had been kept fully informed with respect to every application for Joshua's release on licence. Despite continuing to be unhappy about his release, over time and with the assistance of the Commissioner for Victims of Crime they had developed some understanding of the court process. Having read this particular report however, they became extremely distressed as they believed that a secret

hearing had taken place for the benefit of Joshua about which they had not been consulted nor informed.

On 11 February 2009, a further variation to the conditions of the licence was reported by *Adelaide Now* as: *[Joshua] - Evil clone case back before court*. Once again reference was made to Joshua having been found roaming the streets after he had gone drinking in 2007.

Each of these reports paid scant attention to the detailed positive information provided to the court which supported the fact that Joshua had made substantial progress with respect to his rehabilitation. The manner of reporting clearly implied that Joshua's rehabilitation was not genuine and reinforced a fear that a *paranoid schizophrenic* was at large in the community.

7. "PSYCHOTIC FATHER"

On 26 June 2009 an article appeared in the *Adelaide Advertiser* under the heading "Psychotic father not guilty of murder". It reported that:

A depressed and psychotic father, who shot his mentally disabled son because he believed it was the moral thing to do, has been found mentally incompetent to stand trial.

In fact, the charge was attempted murder. The elderly father had shot his son and fractured his jaw. The defendant thought he was going to die soon and was concerned that no-one would be able to care for his son, who was severely disabled.

The medical evidence provided to the Judge was that the man had been suffering from a major depressive order with psychotic features, which would have impaired his judgment. As a result, the Judge found that at the time of the alleged offence the defendant was mentally incompetent to commit the crime (not that he was incompetent to stand trial).

8. "KILLER CABBIE"

The *Adelaide Advertiser* is however not alone in its negative reporting of cases involving the mentally ill.

On 30 November 2008, an article appeared in the *Sunday Age* in Victoria under the heading *Trial by the tabloids*²⁴. The question was posed: *Is he a "killer cabbie" or a once mentally ill man now successfully treated?* It appeared that a refugee with a terrible history of trauma killed his wife 18 years ago. He was found not guilty on the grounds of insanity, spent many years in a psychiatric institution, was successfully treated and released about a decade earlier. He had been a model citizen ever

since. He was subsequently found suitable by the Victorian Civil & Administrative Tribunal ("VCAT") to hold a taxi driver's licence. The authors of the article pointed out that the man, now recovered, should have every entitlement to work as a cab driver when there was emphatic evidence that he posed no risk and the Tribunal, possessing all the relevant facts, made its decision.

The decision was however criticised by the government (much as happened when Joshua was released on licence) and was reported in the *Herald Sun* as: *Killer cabbie on our roads*. The authors of the article described this as *an ignorant scare campaign and a disappointing knee-jerk response from the State Government, which condemned the VCAT decision and vowed to do everything in its power to stop the man driving a taxi*. They pointed out however that this ignored the fact that the 1997 law (which I assume is in similar terms to the South Australian legislation) had introduced a step by step approach to assist those who had been found not guilty of killing on the grounds of mental impairment to rehabilitate and achieve independent, meaningful lives in the community, which is what had happened in that case.

As is the case in South Australia, each step had to be approved by the County or Supreme Court, the primary consideration being the safety of the community.

[Editor's Note: Before VCAT in *XFJ v Director of Public Transport (Occupational and Business Regulation)* [2009] VCAT 96, VCAT ruled that society's interests in an individual's rehabilitation can override the principle of 'Open Justice' and the right to freedom of expression. Subsequently, in November 2009, the Victorian Equal Opportunity and Human Rights Commission argued that it would be discriminatory to deny a man who killed his estranged wife the right to drive a taxi in Melbourne; in a proceeding before Hansen J in the Supreme Court of Victoria to consider if there was legal error in VCAT's findings in *XFJ v Director of Public Transport*. At the time of editing the Collated Papers, a decision was pending.]

9. THE KILLERS AMONG US

Perhaps the most graphic illustration of the way in which sensational media reporting can influence community attitudes towards the mentally ill appeared in the Weekend Gold Coast Bulletin on 21 June 2008. The article was headed, *The Killers Among Us*.

The first page of the article has a picture of a number of people sitting around having a relaxed time in a café accompanied by the comment:

You're sitting at a café. The man at the table beside you seems familiar. You search your mind, certain of the knowledge that you know him. Have you met? Is he a café regular? Have you crossed paths? You steal another glance, trying to place his face and suddenly, you realise, this man is a murderer. His face has been splashed on newspapers and

television screens. He's not in jail because he pleaded insanity and is now back on the streets, living a "normal" life. Free to sit in a café, free to live his life. He's free. It could happen. It has happened.

The thrust of the article is that killers are 'getting away with murder' by claiming to be mentally ill. Their incarceration is described as being *quite comfortable*. They are said to have *all the comforts of home as part of their therapy*. They are said to have the advantage of being placed on medication, undergoing treatment and within months being ready to join the community.

The article describes mentally ill offenders in the following way:

They are getting away with murder. Invisible killers, responsible for brutal acts of atrocity, who will never be found guilty for the simple reason that they are mentally ill – or claim to be. Judges rule these killers should not be placed behind bars because their mental illness meant they did not know what they were doing, or if they did, didn't know it was wrong. It is a defence that is growing in popularity – not guilty by way of mental illness – a legal loophole that allows them to commit the perfect crime.

The article refers to a number of cases in Queensland in which findings had been made of mental impairment and clearly suggests that there is a link between mental illness and violence. The report can hardly be considered unbiased, however, as the author of the article eventually discloses that her cousin was the victim of a fatal assault by a man whose rights she describes as *more important than those of his alleged victim*.

The article also refers to the case of Claude Gabriel, who killed a young teenager some years earlier. He is described as having *avoided standing trial because of his reported insanity*. The same paper earlier reported Gabriel's release from secure care under the heading *Claude Gabriel went fishing and to TAFE – Insane life of luxury*.

This article is perhaps an extreme example of the stereotyping of the mentally ill as incurable, violent offenders who should not be permitted to be at large in the community. Nevertheless, that is a recurring theme in the daily press and perpetuates negative perceptions of the mentally ill.

10. CONCLUSION

The courts are a fruitful source of news for the media but obviously the focus of each is quite different and often difficult to reconcile. A report of a sensational case in a 60-second grab on the television news is hardly likely to include much information to explain why a judge might have seen fit to impose a merciful sentence. In an effort to

provide better information to the public, the court has incorporated on its website the full text of all sentencing remarks and judgments and this is usually done within a few hours of their delivery²⁵. The public are encouraged, whenever possible, to have regard to that resource in the hope that there will be some better understanding of the process undertaken by a judge in imposing sentence or releasing someone on licence.

The Judicial Conference of Australia has also published a very useful guide to sentencing in Australia, entitled *Judge for Yourself – A Guide to Sentencing in Australia*²⁶. That publication endeavours to set out in a practical manner the way the justice system operates in Australia. More recently, the Hunter Institute for Mental Health in partnership with an Advisory Group of Experts for the Mental Health and Suicide Prevention Programs Branch of the Australian Government Department of Health and Ageing has developed a resource for courts entitled *Mental Illness and Suicide in the Media*²⁷.

The resource provides practical advice and information for judges, magistrates, coroners, media liaison officers and other support staff to support work with the Australian media. This may be through indirect means such as statements and remarks made in court or directly through comments or information provided to the media. The resource comments at some length on the media reporting of mental illness and points out:

Negative reporting of mental illness appears to influence community attitude, which in turn may lead to stigma and discrimination. Instances of negative reporting impact significantly on people who experience mental illness and may reduce appropriate help-seeking behaviour, resulting in untreated illness and possibly contributing to suicidal thinking and behaviour and comments, “We are a long way off accepting that mental illness is just another illness. There is still a stereotypical stigma attached to it that is negatively reinforced every time there is bad reporting”.²⁸

The resource is a useful guide for judicial officers to take into account when framing sentencing remarks. It urges judicial officers to consider the potential impact of the story and how information contained in sentencing remarks may improve community understanding of what has taken place.

Unless we can improve the public perception of the problems of the mentally ill, and the importance of rehabilitation in restoring them to the community, I fear we will not have progressed much beyond the early days of Bedlam when those of the mentally ill, called *Anticks*, who were allowed to leave what was described as the *Madman’s Pound*, were tagged with a tin badge on the left arm to signify their status.

ORDER FOR RELEASE ON LICENCE

(Example only)

- (1) That the applicant be under the care of the Clinical Director of Forensic Mental Health Service at James Nash House (the "Director") or a consultant psychiatrist nominated by that Director/Manager (provided such nominated psychiatrist be a treating psychiatrist and not a "trainee" psychiatrist) and that the applicant obey all directions given to him from time to time with regard to medical and psychiatric treatment and medication and further that he be psychiatrically reviewed on a regular basis as directed by the Director.
- (2) That the applicant reside at [nominated address].
- (3) That the applicant be under the supervision of a Community Corrections Officer assigned by the Parole Board, and obey all lawful directions of that officer.
- (4) That the applicant not be absent from the premises of [nominated address] between the hours of 10.00pm until 6.00am until his Community Corrections Officer is satisfied that a curfew is no longer necessary. That period of curfew not being less than [months/days] from the date of this order.
- (5) That the applicant be permitted to attend specific activities or remunerated work or study as approved by the Director or the nominated psychiatrist in consultation with the Community Corrections Officer subject to the following conditions:
 - (a) the applicant will be under the supervision of and in the company of [specified person] if determined necessary by the Director or the nominated psychiatrist in consultation with the Community Corrections Officer assigned, and
 - (b) [specified person] must be approved by the Director or the nominated psychiatrist.
- (6) That the applicant be contacted by a member of the Forensic Community Team at least three times per week and by one personal contact visit each weekend.
- (7) That during the period of the licence, he will not approach or contact or attempt to contact either directly or indirectly or remain in the presence of [victim/s name/s].
- (8) That the applicant continue to receive his medication current at the date of this order as required by the Director or the nominated psychiatrist and, further, that no alteration or reduction in such medication occur without the approval of the Director or the nominated psychiatrist.
- (9) That the applicant continue to receive his medication by injection until further order by the court.
- (10) That the applicant complies in every respect with the treatment plan prepared and in force from time to time pursuant to Section 269Q(1) and (2) of the Act.
- (11) That the applicant not consume alcohol.
- (12) That the applicant not use, possess or administer any narcotic or psychotropic drug or any drug which is not medically prescribed for his use by a legally qualified medical practitioner, and further that any drugs which are prescribed for the

applicant by a medically qualified practitioner be possessed or administered by the applicant only at prescribed or recommended dosages.

- (13) That the applicant, whenever required by the Director or his/her nominee to do so, shall submit himself for breath or urine analysis for the purposes of determining whether there is present in his body any alcohol or drug.
- (14) That the Director or his/her nominee upon becoming aware of any breach of the said conditions by the applicant is to inform the Director of Public Prosecutions (on behalf of the Crown) forthwith.
- (15) That the applicant be of good behaviour.
- (16) That the applicant attend any and all programmes for drug and alcohol counselling as directed by the Director or his nominee.

That without limiting the effect of Section 269P of the Act, the applicant and the Director of Public Prosecutions (on behalf of the Crown) shall be at liberty to apply at any time and from time to time as they may be advised, at short notice to the other to vary or revoke this order or seek any other order in substitution thereof.

This order shall take effect on the

GIVEN under my hand at this day of 200 .

.....
Justice of the Supreme Court

I, [applicant's full name] have had the conditions of my release on licence explained to me and fully understand these conditions

.....
[Applicant]

.....
Witnessed by

DATE

* Justice Margaret Nyland, Justice of the Supreme Court of South Australia

I would like to acknowledge the assistance in the preparation of this paper provided by Jaelea Skehan, Program Manager of the Hunter Institute of Mental Health

-
- ¹ The Youth Court also has jurisdiction in criminal matters relating to offenders under the age of 18, although a youth charged with murder or other serious crime may be referred to the Supreme or District Courts for trial.
 - ² Eg *R v Liddy* (decision of Court of Criminal Appeal reported in (2002) 84 SASR 231). In this case a well-known magistrate was charged with a series of sexual offences against male children committed about 20 years earlier. Although the District Court had jurisdiction it was considered more appropriate for the Supreme Court to deal with a charge against a Magistrate. In addition, there were complex legal issues relating to such matters as joinder of charges, cross admissibility and delay in making the complaints.
 - ³ Drug offences are separately dealt with by the *Controlled Substances Act* 1984 and federal offences are governed by the *Crimes Act* 1914.
 - ⁴ (1973) 6 SASR 298 at 301.
 - ⁵ This quote is extracted from Judicial Conference of Australia publication *Judge for yourself – A guide to sentencing in Australia* at pp 26-27 and compares the newspaper report of a man who killed his best friend with a drunken punch, with relevant extracts taken from the detailed reasons provided by Bongiorno J when handing down sentence.
 - ⁶ Quoted by Ari Frieberg in his review of *How Judges Sentence* by Geraldine McKenzie, reported in Australian Policy Online <http://apo.org.au/commentary/juggling-tightrope>.
 - ⁷ The psychiatric evidence in the case referred to earlier was to the effect that the defendant was unlikely to obtain the counselling she required, due to the lack of immediacy and limited time available in a busy weekly prison clinic.
 - ⁸ The rules were formulated in McNaghten's Case 1843 10 C and F200 in which the House of Lords expressed the rule as follows:

... the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.
 - ⁹ House of Assembly 2nd Reading of the *Criminal Law Consolidation Act* (Mental Impairment) Amendment Bill 21/11/2005 at p17.
 - ¹⁰ *R v Falconer* (1990) 171 CLR 30.
 - ¹¹ Section 269C.
 - ¹² Section 269E.
 - ¹³ Section 269E(2).
 - ¹⁴ (1997) 70 SASR 251 at pp 254-255.
 - ¹⁵ Section 269B(4).
 - ¹⁶ *R v T* (1999) 75 SASR 235.
 - ¹⁷ Section 269W *Sentencing Act*.
 - ¹⁸ Section 269 FB(1).
 - ¹⁹ Section 269 FB(3).

-
- 20 Section 269 O.
- 21 Section 269R.
- 22 Section 269S.
- 23 Although the defendant's name has been widely publicised in the media, I consider that it is unnecessary and inappropriate to include it in this discussion paper.
- 24 Article by Sophie Delaney and Vivienne Topp, lawyers at the Mental Health Legal Centre Incorporated.
- 25 Court website: <http://www.courts.sa.gov.au>.
- 26 The full text of this publication can be found at www.jca.asn.au.
- 27 Available at www.mindframe_media.info.
- 28 Hunter Institute of Mental Health (2007) *Mindframe for Law Enforcement: Final Scoping Study Report*. Available from www.mindframe_media.info.