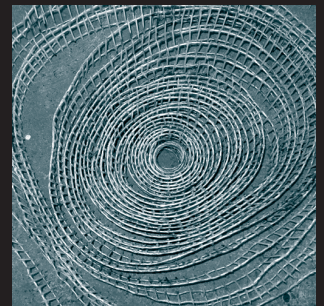


ACCESS TO JUSTICE AND LEGAL NEEDS

ON THE EDGE OF JUSTICE

THE LEGAL NEEDS OF PEOPLE WITH A MENTAL ILLNESS IN NSW

May 2006



LAW AND JUSTICE
FOUNDATION

OF NEW
SOUTH WALES

On the Edge of Justice

THE LEGAL NEEDS OF PEOPLE WITH A MENTAL ILLNESS IN NSW

ACCESS TO JUSTICE AND LEGAL NEEDS

Volume 4

Maria Karras, Emily McCarron,
Abigail Gray and Sam Ardasinski

May 2006

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The series is aimed at researchers, policy-makers, government, the legal community and others interested in legal need and access to law and justice. It is a scholarly, refereed series. Monographs are refereed by at least two appropriate external referees who are independent of the Foundation and any other organisations/authors involved in the publication.

Managing Editor: Geoff Mulherin

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Foreword

The objects of the Law and Justice Foundation of New South Wales (the Foundation) are to contribute to the development of a fair and equitable justice system which addresses the legal needs of the community, and to improve access to justice by the community (in particular, by economically and socially disadvantaged people).¹

In 2002 the Foundation commenced the Access to Justice and Legal Needs research program. The main purpose of the program is to provide a rigorous and sustained assessment of the legal and access to justice needs of the community, especially disadvantaged people, which will assist government, community and other organisations develop policy and plan service delivery. The research is a challenging program involving an interconnected set of projects employing a range of qualitative and quantitative methodologies.

An important feature of the program is the examination of the particular access to justice and legal needs of selected disadvantaged demographic groups. This report is a qualitative study examining the legal needs of people with a mental illness. Other groups examined or to be examined as part of the program include older people, homeless people and prisoners and those recently released from prison. These groups have been chosen principally because less is available in the literature concerning their legal needs, but also because less comprehensive data concerning their needs is likely to be obtained through the other components of the research program.

People with a mental illness are amongst the most disadvantaged in our society. A surprisingly large number of Australians experience mental illness, and this is often associated with other social and economic disadvantage. As a result of their illness and related disadvantage, our research suggests that people with a mental illness are vulnerable to particular legal issues, and come up

¹ *Law and Justice Foundation Act 2000* (NSW), s. 5(1).

against particular barriers that limit their ability to deal with these issues. The combination of poor financial circumstances, a perceived lack of credibility and cognitive and communication impairment pose major challenges for people with a mental illness seeking to participate in legal processes. People with a mental illness are likely to experience complex and multiple legal and other issues, which they are not always well placed to address, and which are deserving of particular attention from both research and service provision.

This report into the legal needs of people with a mental illness is based on a review of existing literature and consultations with legal and non-legal service providers, academics, and the people themselves. It seeks to canvass many of the particular issues relevant to this group in NSW. While the report 'stands on its own', it is also important to consider this report in the context of the relevant data on the legal needs and barriers experienced by homeless people and prisoners, as well as the data contained in other components of the Access to Justice and Legal Needs program. The following reports in particular should be considered:

- ◆ *Stage 1: Public Consultations* (August 2003)
- ◆ *Stage 2: Quantitative Legal Needs Survey, Bega Valley (Pilot)* (November 2003)
- ◆ *Data Digest* (February 2004)
- ◆ *The Legal Needs of Older People in NSW* (December 2004)
- ◆ *No Home, No Justice? The Legal Needs of Homeless People in NSW* (July 2005)
- ◆ *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas* (March 2006).

Geoff Mulherin

Director

Law and Justice Foundation of NSW

April 2006

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Finally, the authors especially wish to thank all the people and agencies who contributed their time and insights to the current study. Each has made a significant contribution to this report. We particularly appreciate the willingness of the 30 people with a mental illness who spoke with us about their legal issues and experiences of the legal system.

Shortened Forms

ABA	acceptable behaviour agreement
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ADA	Anti-Discrimination Act 1977 (NSW)
ADB	Anti-Discrimination Board
ADR	alternative dispute resolution
AGD	NSW Attorney-General's Department
AIHW	Australian Institute of Health and Welfare
AVO	apprehended violence order
Burdekin Report	HREOC report, Human Rights and Mental Illness (1993)
CCLC	Consumer Credit Legal Centre
CCLC NSW	Combined Community Legal Centres' Group (NSW) Inc
CLC	community legal centre
CSHA	Commonwealth State Housing Agreement
CTTT	Consumer, Trader and Tenancy Tribunal
DADHC	Department of Ageing, Disability and Home Care
DDA	Disability Discrimination Act 1992 (Cth)
DDLC	Disability Discrimination Legal Centre
Disability Council	Disability Council of NSW
DoCS	Department of Community Services
DOH	Department of Housing
DSM-IV	Diagnostic and Statistical Manual for Mental Disorders

DSP	disability support pension
EPA	enduring power of attorney
HREOC	Human Rights and Equal Opportunity Commission
ICD-10	International Classification of Diseases
JGOS	Joint Guarantee of Service
KLC	Kingsford Legal Centre
Legal Aid	Legal Aid Commission of NSW
MHAS	Mental Health Advocacy Service
MHCA	Mental Health Council of Australia
MHCC	Mental Health Co-ordinating Council
MHLC	Mental Health Legal Centre, Victoria
MHRT	Mental Health Review Tribunal
MMHA	Multicultural Mental Health Australia
NCOSS	Council of Social Services of NSW
NCSMC	National Council of Single Mothers and their Children
NESB	Non-English speaking background
NHS	National Health Survey
NMHP	National Mental Health Plan
NSMHW	National Survey of Mental Health and Wellbeing
NSW Ombudsman (CSD)	NSW Ombudsman (Community Services Division)
NVivo	QSR NUD*IST Vivo
OPC	Office of the Protective Commissioner
OPG	Office of the Public Guardian
Palmer Report	Report of the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (2005)

Project	Legal Needs of People with a Mental Illness Project
PWD	People with Disability Australia
SAAP	Supported Accommodation Assistance Program
SCCLS	Statewide Community and Court Liaison Service
Select Committee on Mental Health	NSW Parliament Legislative Council Select Committee on Mental Health
Shopfront	Shopfront Youth Legal Centre
SSAT	Social Security Appeals Tribunal
Tenants' Union	Tenants' Union of NSW
TPV	temporary protection visa
WLS	Women's Legal Services NSW
WRC	Welfare Rights Centre, Sydney

Access to Justice and Legal Needs Research Program: Terms of Reference

Program aim

To identify the particular legal and access to justice needs of economically and socially disadvantaged people in NSW.

Program objectives

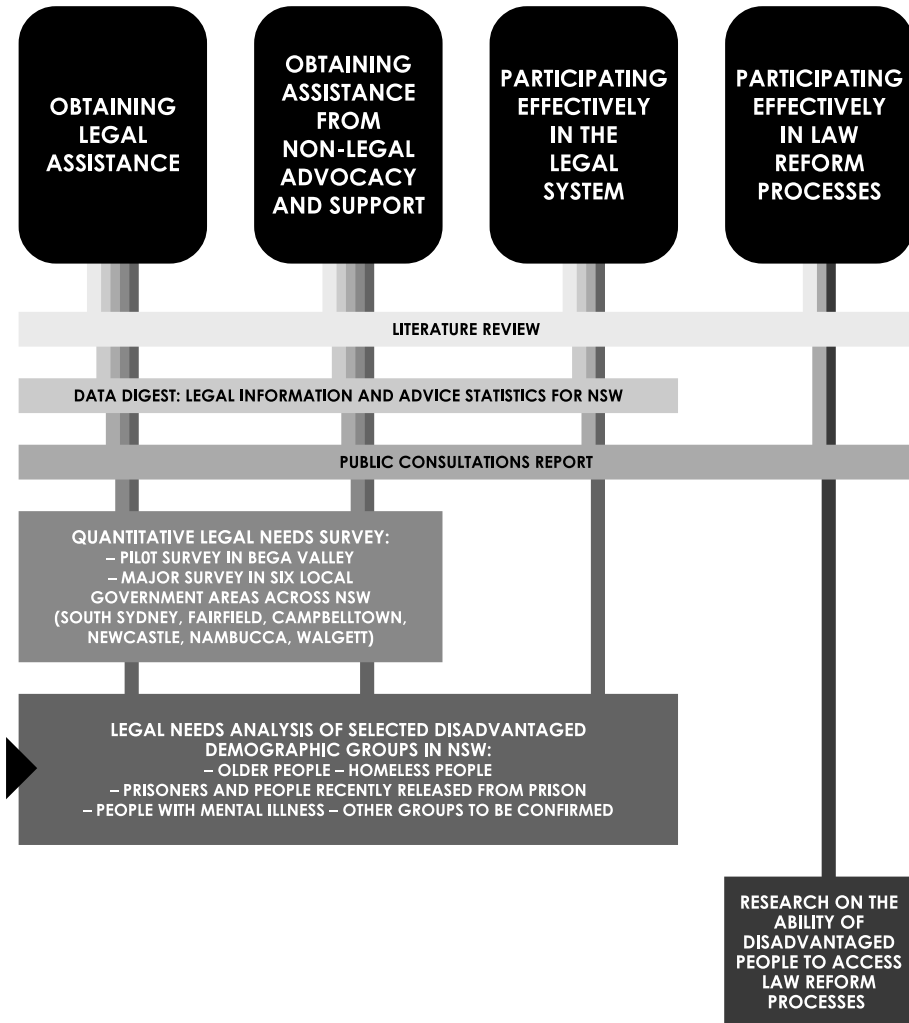
The program examines the ability of disadvantaged people to:

- ♦ obtain legal assistance (including legal information, basic legal advice, initial legal assistance and legal representation)
- ♦ participate effectively in the legal system (including access to courts, tribunals and formal alternative dispute resolution mechanisms)
- ♦ obtain assistance from non-legal advocacy and support (including non-legal early intervention and preventative mechanisms, non-legal forms of redress, and community-based justice)
- ♦ participate effectively in law reform processes.

The program involves both qualitative and quantitative investigations into:

- ♦ legal issues encountered by disadvantaged people
- ♦ services and processes to deal with these problems
- ♦ barriers that obstruct access
- ♦ useful services and processes not provided by the legal system.

Program components



Executive Summary

The aim of this project

The Legal Needs of People with a Mental Illness Project (the Project) is part of a broader research program being undertaken by the Law and Justice Foundation of New South Wales (the Foundation) to study and report on the access to justice and legal needs of economically and socially disadvantaged people in New South Wales (NSW).¹

The Project aimed to examine the capacity of people with a mental illness in NSW to:

- ♦ obtain legal assistance (including legal information, basic legal advice, initial legal assistance and legal representation)
- ♦ participate effectively in the legal system (including courts and tribunals)
- ♦ obtain assistance in legal processes from non-legal advocacy and support agencies (including non-legal early intervention).

Why a project on the legal needs of people with a mental illness?

According to the World Health Organisation, mental illness refers to “the existence of a clinically recognisable set of symptoms or behaviour associated in most cases with distress and with interference with personal functions”.²

¹ The Access to Justice and Legal Needs Program is described in the preface to this report.

² World Health Organisation, *ICD-10 Classification of Mental and Behavioral Disorders: Clinical Descriptions and Diagnostic Guidelines*, World Health Organisation, Geneva, 1992, p. 5.

Using this definition, research has found that a considerable number of Australians—approximately one in five—have a mental illness.³

Previous studies have identified people with a mental illness as among the most vulnerable and disadvantaged in our community.⁴ People with a mental illness have been found to have lower levels of education and employment, less stable housing conditions, and higher levels of poverty.⁵ This relationship between mental illness and other forms of social and economic disadvantage make this a group of particular interest to the Access to Justice and Legal Needs Program. Further, the extensive reporting of the ‘crisis’ in mental health care, as well as human rights concerns,⁶ alerts us to the vulnerability of this group and the difficulties they are likely to face in having their legal needs addressed.

While some literature on the access to justice and legal needs of people with a mental illness does exist, there are many gaps. Previous literature has focused primarily on criminal justice issues. Accordingly, this Project sought to address the gaps and to collect new information regarding access to justice and legal needs issues experienced by people with a mental illness.

³ G Andrews, W Hall, S Henderson & M Teeson, *The Mental Health of Australians*, Mental Health Branch, Commonwealth Department of Health and Aged Care, Canberra, 1999.

⁴ P Butterworth, *Estimating the Prevalence of Mental Disorders among Income Support Recipients: Approach, Validity and Findings*, Policy Research Paper No. 21, Centre for Mental Health Research, Australian National University, Canberra, 2003; Human Rights and Equal Opportunity Commission (HREOC), *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, HREOC, Canberra, 1993; A Jablensky, J McGrath, H Herrman, D Castle, O Gureje, V Morgan & A Korten, *People Living with Psychotic Illness: An Australian Study 1997–98*, Mental Health Branch, Department of Health and Aged Care, Canberra, 1999; Mental Health Council of Australia (MHCA), *Submission to the Senate Select Committee on Mental Health*, 2005, <http://www.aph.gov.au/senate/committee/mentalhealth_ctte/submissions/sub262.pdf> (accessed August 2005); M Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, Commonwealth of Australia, Canberra, 2005; NSW Parliament Legislative Council Select Committee on Mental Health (Select Committee on Mental Health), *Inquiry into Mental Health Services in NSW: Final Report*, Parliamentary Paper No. 368, NSW Parliament, Sydney, 2002.

⁵ Jablensky et al., *People Living with Psychotic Illness*; Andrews et al. *The Mental Health of Australians*; Butterworth, *Estimating the Prevalence of Mental Disorders among Income Support Recipients*.

⁶ HREOC, *Human Rights and Mental Illness*; MHCA, *Submission to the Senate Select Committee on Mental Health*; Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*; Select Committee on Mental Health, *Mental Health Services in NSW: Final Report*.

Methodology

A research design, which involved few assumptions about the nature and range of the legal needs of people with a mental illness, was employed for the Project. This involved the use of qualitative techniques in both the collection and analysis of data.

An initial review of literature was completed, and two ‘roundtable’ focus group discussions with key stakeholders⁷ were held in the early stages of the Project. This was followed by in-depth interviews with 81 legal and non-legal service providers, court and tribunal staff, advocates and other stakeholders. Another key component was the completion of 30 semi-structured interviews with people who have a mental illness. The barriers they perceived and experienced in addressing their legal issues add great richness to this study’s results. Also drawn upon were statistics reported by agencies such as the Australian Bureau of Statistics and the Australian Institute of Health and Welfare, case studies provided by stakeholders, and data from the Foundation’s quantitative survey of the legal needs of people in six regions in NSW.

One final noteworthy feature of the Project’s design was the inclusion of people with a mental illness as advisors at key stages of the research process. Advocates, researchers and trainers in the field, who had lived experience of mental illness themselves, provided input into roundtable discussions, sampling methods and interview schedule design.

Key findings

Legal issues experienced by people with a mental illness

Consultations indicated that people with a mental illness experience particular legal issues. These issues often reflect their financial and social disadvantage,

⁷ The term ‘stakeholder’ is used throughout this report to refer to those we consulted at the legal and non-legal agencies listed in Appendix 1. These people are considered a sample of ‘stakeholders’ or ‘key-informants’ because of their experience and/or knowledge of the legal issues and needs experienced by people with a mental illness.

as well as the incapacity that may be caused by their illness. The issues raised include:

- ◆ legal issues relating to mental illness specifically, such as those falling under the *Mental Health Act 1990* (NSW) and adult guardianship issues
- ◆ discrimination in relation to employment, education and insurance
- ◆ housing issues, including problems relating to Department of Housing, private rental and boarding house accommodation
- ◆ social security issues, including eligibility, breaching, social security debt and prosecution for fraud
- ◆ consumer issues, such as credit card debt and banking issues, mobile phone and other contractual debt
- ◆ domestic violence and victim of crime issues
- ◆ family law and care and protection issues.

These legal issues can have serious financial and personal consequences if not addressed, which highlights the importance of resolving them through accessing legal assistance.

Barriers to accessing legal assistance

Consultations for the Project revealed that people with a mental illness face a number of barriers to accessing legal assistance. Some of these barriers relate to the individual's circumstances and symptoms, namely:

- ◆ *A lack of awareness of their legal rights*, whereby individuals do not realise that their problem has a legal element and potential remedy.
- ◆ *Being disorganised*, which may make it difficult for people to prioritise their legal problem and keep appointments with legal service providers.
- ◆ *Being overwhelmed*, and therefore too frightened, or lacking the motivation, to seek legal assistance.
- ◆ *Being mistrustful* of, or frightened of, divulging personal information to legal service providers. This may prevent the service provider from adequately assisting the client.

- ♦ *Difficult behaviour.* Some people with a mental illness may exhibit difficult behaviour, making it challenging for service providers to assist them.
- ♦ *Communication problems,* which can hinder a solicitor in assisting their client effectively.
- ♦ *Lack of mental health care and treatment,* the absence of which, it was noted, resulted in the exacerbation of the above barriers.

Apart from these individual barriers, those we interviewed argued that there are also certain systemic barriers experienced by people with a mental illness accessing legal services. These include:

- ♦ *The limited availability of affordable legal services.* Given that people with a mental illness tend to have lower levels of income, they are likely to be reliant on increasingly stretched services such as the Legal Aid Commission of NSW (Legal Aid), community legal centres (CLCs), Aboriginal legal services and pro bono legal service provision.
- ♦ *Time constraints placed on legal service provision.* Stakeholders argued that while people with a mental illness often require longer appointment times with lawyers, the limited resourcing of Legal Aid and CLCs make this extremely difficult.
- ♦ *Remote, rural and regional issues.* Stakeholders suggested that the lack of affordable legal services is even more pronounced in rural and regional areas. The organisation and cost required to travel large distances to access services create additional barriers.
- ♦ *Difficulties in identifying mental illness.* Legal service providers may not always be able to identify that a client has a mental illness, which may result in a person not receiving the time, assistance and understanding they need to resolve their legal issue. While mental illness is often considered by Legal Aid and CLCs to determine whether a person is eligible for legal representation, this is impossible if the illness remains unidentified.

- ♦ *A perceived lack of credibility.* Stakeholders observed that some lawyers find people with a mental illness less credible, and are less inclined to believe what they say, and more ready to dismiss their claims.
- ♦ *Physical environment.* It was noted that certain aspects of the physical environment and office procedures of a legal service may act as barrier to individuals with a mental illness using the service.

Barriers to participating in the legal system

This study identified a number of barriers that appear to prevent people from accessing and participating in the legal system.⁸ These included:

- ♦ *Stress,* which may deter people with a mental illness from initiating or continuing with legal proceedings.
- ♦ *Cognitive impairment.* While not always a symptom of mental illness, this can create barriers in understanding legal documents and processes.
- ♦ *Problems with time management.* When present, these can lead to difficulties in managing documents and appointments, and complying with timeframes.
- ♦ *Communication problems associated with the symptoms of mental illness.* Such problems may be exacerbated when a person does not speak English as a first language and when complicated legal terminology is used.
- ♦ *Features of the courtroom environment,* such as the formality and structure of courtrooms, can intimidate people with a mental illness and at times even exacerbate their symptoms.
- ♦ *Features of alternative dispute resolution (ADR).* Certain benefits of ADR for people with a mental illness were noted. However, concerns about ADR were raised where people with a mental illness are unrepresented during the dispute resolution process, and where there is an imbalance in power between parties.

⁸ For the purposes of this project, participation in the legal system includes participation in courts and tribunals, internal appeals processes of government departments (e.g. Centrelink), alternative dispute resolution, and other external complaints processes (e.g. NSW Ombudsman).

- ♦ *A lack of legal representation.* Stakeholders argued for the importance of legal representation in facilitating effective participation in the legal system.
- ♦ *A perceived lack of credibility.* Consultations for this study also highlighted the perception by those in the legal system that people with a mental illness are less honest and less credible as a result of their illness.
- ♦ *Failure to identify or recognise a person's mental illness,* resulting in no allowance being made to cater to the individual's needs, or the illness not being taken into consideration in determining the outcome of the matter.

Non-legal support in accessing the justice system

Consultations indicated that non-legal services are often the first point of call for disadvantaged people faced with a legal problem. The assistance provided by non-legal services includes:

- ♦ the identification of a legal issue and the provision of preliminary legal information
- ♦ referral to legal service providers
- ♦ helping a client when they seek legal assistance
- ♦ advocacy
- ♦ education, training and awareness-raising about mental illness.

It was suggested that despite the important role non-legal services can provide to people with a mental illness, there are a number of barriers preventing non-legal agencies from undertaking this role. Firstly, non-legal agencies may not be equipped in terms of resources, availability of staff, and legal knowledge and expertise. In some case, such expertise will be well outside of the primary function of these service providers. The reported crisis in mental health care and constraints on resources may mean that non-legal agencies are not able to provide support to clients with a mental illness in the legal system.

A lack of awareness of services, and the stigma associated with having a mental illness, may prevent some people from accessing non-legal services and agencies in the first place. Therefore, some people with a mental illness may be isolated from both legal assistance and non-legal assistance. This presents a major barrier to accessing justice.

Addressing barriers to justice

A number of strategies and innovations that could improve access to legal assistance and participation in legal processes for people with a mental illness were raised in the literature and our consultations.

One such strategy involves a more flexible service delivery approach to legal service provision, courts, tribunals and other legal processes. A more flexible approach could allow the needs of people with a mental illness to be targeted and tailored to—for instance, allowing for breaks, and more time for explanations. This may assist in overcoming stress and communication problems.

The adoption of a more ‘therapeutic jurisprudence-based approach’ to courtroom processes may also assist in breaking down some of the barriers to people with a mental illness participating in the legal system. In addition to tailoring a more therapeutic outcome, courts that adopt this approach also attempt to involve the person in the process as much as possible, by implementing a less adversarial approach within the courtroom, thus allowing for a more direct interaction with judges.⁹

Consultations also suggested that training programs promoting awareness of mental illness and disability be provided to legal service providers, judges, court staff and other legal stakeholders (see Chapter 4 for a discussion of training programs already in existence). Such training could assist with addressing two key barriers, namely, misperceptions regarding the credibility of people with a mental illness, and the failure of those in the justice system to identify mental illness.

⁹ See Chapter 5 for an explanation and discussion of the therapeutic jurisprudence-based approach.

Given the important role that non-legal service providers can play in helping people to access legal services and processes, stakeholders argued that non-legal agencies need access to legal advice and information themselves. It was also suggested that relationships between non-legal and legal agencies be further developed to assist the referral process and improve each sector's understanding of the other.

Many of those we consulted in this study commented on the difficulties people with a mental illness face in accessing mental health care and treatment. Importantly, this lack of treatment and care for people with a mental illness was linked to their experience of certain legal issues, as well as their ability to access legal assistance and to participate in the legal system. This highlights the need to recognise the way in which limitations in mental health care can impact on access to justice for people with a mental illness in NSW.

Conclusion

A considerable number of Australians experience mental illness, and this is often associated with other social and economic disadvantage. This study used qualitative methods to examine the legal and access to justice issues experienced by people with a mental illness. Stakeholders and participants indicated that while people with a mental illness experience a number of legal issues with potentially serious personal and financial consequences, they can also face many barriers in having these legal issues addressed. Based on the data collected for this study several suggestions for improving access to legal services and participation in the legal process have been raised.

1. Introduction

The Legal Needs of People with a Mental Illness Project (the Project) is part of a broader research program being undertaken by the Law and Justice Foundation of NSW (the Foundation) to study and report on the access to justice and legal needs of economically and socially disadvantaged people in NSW.¹

As explained in the background paper to the Access to Justice and Legal Needs Program,² ‘access to justice’ and ‘legal needs’ involve more than access to formal legal representation and the courts. However, the terms will not be interpreted in such a broad fashion as to consider contested political issues concerning broader notions of ‘rights’ and ‘justice’, where the law is clear. The Access to Justice and Legal Needs Program and this specific project therefore endeavour to investigate issues of access to justice according to current Australian law.

The aim of this project

The Project aimed to examine the capacity of people with a mental illness in NSW to:

- ♦ obtain legal assistance (including legal information, basic legal advice, initial legal assistance and legal representation)
- ♦ participate effectively in the legal system (including courts and tribunals)
- ♦ obtain assistance in legal processes from non-legal advocacy and support agencies (including non-legal early intervention).

¹ The Access to Justice and Legal Needs Program is described in the foreword to this report.

² Law and Justice Foundation of NSW, *Access to Justice and Legal Needs Program, Background Paper*, 2002, <<http://www.lawfoundation.net.au/access/background.html>> (accessed July 2005).

A separate study will examine the capacity of people with a mental illness and other disadvantaged groups to participate in law reform processes.

This chapter will begin by developing the Project's working definition of the term 'mental illness'. This will be followed by a summary of available data on the prevalence of and demographic factors associated with mental illness. The remainder of this chapter will discuss the Foundation's reasons for choosing to conduct the Project, and will end with a discussion of relevant literature.

What is 'mental illness'?

*Definitions of mental illness are notoriously difficult to draft. If they are framed too narrowly they deny services to people. If they are too broad they may result in unnecessary intervention.*³

Mental health problems and mental illness refer to a range of cognitive, emotional and behavioural disorders that interfere with the lives and productivity of people.⁴ There is, however, no one single definition of mental illness, as definitions vary across jurisdictions and professions.⁵ In determining an appropriate definition of mental illness for the Project, we have taken into consideration legal, clinical and social approaches to defining mental illness.

Legal definitions of mental illness

Under *Mental Health Act 1990* (NSW) sch. 1, "mental illness" is defined as a condition characterised by the presence of symptoms such as delusions, hallucinations, serious disorder of thought form, a severe disturbance of mood, or sustained or repeated irrational behaviour, which seriously impairs, either temporarily or permanently, the mental functioning of a person.⁶ A "mentally

³ B Wilson, "Legal Straitjackets: When Reason Fails: Law and Mental Illness", in H Selby (ed.), *Tomorrow's Law*, Federation Press, Sydney, 1995, pp. 295–316 at p. 312.

⁴ Australian Health Ministers, *National Mental Health Plan 2003–2008*, Australian Government, Canberra, 2003, p. 5.

⁵ K Freeman, "Mental Health and the Criminal Justice System", *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice*, no. 38, 1998, p. 8.

⁶ *Mental Health Act 1990* (NSW), sch. 1.

ill person” is someone who suffers a mental illness where, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary, for their own or others’ protection. This determination must take into account the person’s continuing condition, including the effects of any likely deterioration in their condition.⁷

It is noteworthy that the above-named symptoms, listed in the *Mental Health Act 1990* (NSW), are most often associated with a diagnosis of psychosis, a particular and more severe form of mental illness. Other more common mental illnesses such as anxiety disorders, depression and substance abuse may not necessarily fit the definition provided in this Act.⁸

Clinical definitions of mental illness

Because the focus of clinical practice is on prevention and control of mental illness through treatment, clinical definitions of mental illness are far broader than their legal counterparts. It is rare to find a single definition in the clinical setting: in this context, a definitive statement about what is mental illness is often less helpful than determining how a disorder should be classified and treated.

Accordingly, there are two main international medical standards used in the classification of mental illness. The first of these is the World Health Organisation’s International Classification of Diseases (ICD-10), last revised in 1992 and used predominantly in Europe. The ICD-10 defines “mental disorder” as “a general term which implies the existence of a clinically recognisable set of symptoms or behaviour associated ... with ... interference with personal functions”.⁹

⁷ *Mental Health Act 1990* (NSW), s. 9.

⁸ Freeman, “Mental Health and the Criminal Justice System”, p. 8. According to Carney, conditions such as addictions and co-morbidities “have always taxed the law and service systems”, and the lack of coordination in many jurisdictions fails both people with a mental illness and the community. While the NSW model in regards to such “complex needs clients” is broader and “well grounded ethically” in comparison to many others, there remains a need for greater linkages and accountability as between service providers, perhaps through a legislative regime like Victoria’s *Human Services (Complex Needs) Act 2003*. See T Carney, “Complex Needs at the Boundaries of Mental Health, Justice and Welfare: Gatekeeping Issues in Managing Chronic Alcoholism Treatment?”, in *Current Issues in Criminal Justice*, (in press), 2006.

⁹ World Health Organisation, *ICD-10 Classification of Mental and Behavioral Disorders: Clinical Descriptions and Diagnostic Guidelines*, World Health Organisation, Geneva, 1992, p. 5.

The second international standard is the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), revised in 2000 and used more frequently in the UK and the US. According to this system, a "mental disorder" must comprise a manifestation of "behavioural, psychological, or biological dysfunction in the individual". It is:

*a clinically significant behavioural or psychological syndrome or pattern that occurs in an individual and that is associated with present distress ... or disability ... or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom ...*¹⁰

Both classification systems have been adopted by key Australian agencies. The Australian Bureau of Statistics (ABS) has used an adapted version of the ICD-10 for its surveys (such as the 2001 National Health Survey (NHS)).¹¹ In the National Mental Health Plan 2003–08,¹² both the ICD-10 and DSM-IV classification systems are cited.

The Commonwealth Department of Health and Aged Care's Mental Health Branch makes the further distinction of classifying mental illnesses as either psychotic—including schizophrenia and some forms of depression—or non-psychotic—including phobias, anxiety, some forms of depression, eating disorders, physical symptoms involving tiredness or pain, and obsessive-compulsive disorder.¹³

Social definitions of mental illness

The term 'psychiatric disability' is a narrower term than mental illness, as not all people with a mental illness will consider themselves, or be considered, to have a psychiatric disability. This is reflected, for example, in the *Disability Services Act 1986* (Cth), where the very narrow definition of "disability"

¹⁰ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR*, 4th edn, American Psychiatric Association, Washington, DC, 2000.

¹¹ Australian Bureau of Statistics (ABS), *National Health Survey: Summary of Results*, cat. no. 4364.0, Canberra, 2001.

¹² Australian Health Ministers, *National Mental Health Plan 2003–2008*.

¹³ Department of Health and Aged Care (now the Department of Health and Ageing), *National Action Plan for Promotion, Prevention and Early Intervention for Mental Health*, Mental Health and Special Programs Branch, Commonwealth Department of Health and Aged Care, Canberra, 2000.

is restricted to those conditions which are “permanent or likely to be permanent”.

Nevertheless, it is important to consider the social model of disability, which though subject to constant evolution, is largely preferred by disability advocates. While not denying the individual’s limitations, the social model understands disability as a function of “society’s failure to provide appropriate services and adequately ensure the needs of disabled people are fully taken into account in its social organisation”.¹⁴ This is in contrast to “official” definitions, which locate disability in the individual’s pathology or biology.¹⁵ One important Australian study which applied the social model was the Disability Council of NSW’s (Disability Council) 2003 *A Question of Justice* report.¹⁶ Here, the model was used to “shift the focus from issues of individual impairment to issues of systemic disablement”, identifying as the source of disability not impairment itself, but socially and economically constructed discrimination and exclusion, that is, the responses of society *towards impairment*. Carney suggests that the social model has now gained wide acceptance within disability literature, with policy also moving away from the traditional medical model and towards a more nuanced understanding, whereby the emphasis is on “participation” rather than “impairment”.¹⁷

Working definition of mental illness for this project

Although the DSM-IV is somewhat more commonly used in clinical settings in Australia, the Project has adopted the ICD-10 definition, which is used by the ABS and so enables the use of ABS data. The Project did not adopt the *Mental Health Act 1990* (NSW) definition due to its more limited scope.

¹⁴ M Oliver, *Understanding Disability—From Theory to Practice*, MacMillan Press, London, 1996, p. 32.

¹⁵ M Oliver and C Barnes, *Disabled People and Social Policy—From Exclusion to Inclusion*, Addison Wesley Longman, New York, 1998, p. 17.

¹⁶ Disability Council of NSW (Disability Council), *A Question of Justice: Access to Participation for People with Disabilities in Contact with the Justice System*, Disability Council, Sydney, 2003, p. 19.

¹⁷ For a comprehensive overview of this shift in policy imperatives see T Carney, “Disability and Social Security: Compatible or Not?”, in *Australian Journal of Human Rights*, vol. 9, no. 2, 2003, pp. 139–172.

Of particular interest to the Project were the disorders with the highest prevalence in Australia and NSW, namely, anxiety disorders, affective disorders and substance use disorders. As the next section indicates, a significant number of people in NSW are affected by these disorders. Recent literature has focused on the social and economic disadvantages that those suffering from these disorders can face.¹⁸ Despite their lower prevalence, psychotic disorders were also of interest, given their strong association with high levels of social, economic and, at times, physical disadvantage.¹⁹ While the above-named disorders were of particular interest, no mental illnesses were excluded from our study. In accordance with the design of this research, those we interviewed and consulted were free to raise whichever mental illnesses they felt were relevant.

In summary, for the purposes of the Access to Justice and Legal Needs of People with Mental Illness Project, ‘mental illness’ means *the existence of a clinically recognisable set of symptoms or behaviour associated in most cases with distress and with interference with personal functions.*²⁰ While not an exhaustive list, the following clinically recognisable disorders were of particular interest in our study:

- ◆ **Anxiety disorders:** social phobia, agoraphobia, panic disorder, generalised anxiety disorder, obsessive-compulsive disorder, and post-traumatic stress disorder.
- ◆ **Affective disorders:** major depressive disorder (depression), dysthymia, mania, hypomania, and bipolar mood disorder.
- ◆ **Substance use disorders:** alcohol and drug abuse and dependence.
- ◆ **Psychotic disorders:** schizophrenia and substance-induced psychotic disorders.

¹⁸ P Butterworth, *Estimating the Prevalence of Mental Disorders among Income Support Recipients: Approach, Validity and Findings*, Policy Research Paper No. 21, Centre for Mental Health Research, Australian National University, Canberra, 2003.

¹⁹ A Jablensky, J McGrath, H Herrman, D Castle, O Gureje, V Morgan & A Korten, *People Living with Psychotic Illness: An Australian Study 1997–98*, Mental Health Branch, Department of Health and Aged Care, Canberra, 1999.

²⁰ World Health Organisation, *ICD-10*, p. 5.

In conjunction with this definition, the social model of disability—explained above—was also drawn upon. This model allows for an understanding of the social and environmental factors that contribute to the lived experience of people with these disorders.²¹

Mental illness in Australia and NSW

How many people in NSW experience mental illness, and what are their demographic characteristics? This section provides information on available statistics in order to describe the scope and nature of mental illness experienced in Australia and NSW.²²

Statistics for this section were drawn from the following sources:

- ◆ *The Mental Health of Australians*, 1999²³

In 1997, the Commonwealth Department of Health and Aged Care undertook a comprehensive survey of the mental health of Australians. The product of their effort was the National Survey of Mental Health and Wellbeing (NSMHW), which comprised both an adult component and a section outlining the same issues for children and young people (see below for a description of the child component). The report outlines statistics obtained on the national incidence of high prevalence disorders (i.e. affective disorders, anxiety disorders, and substance use disorders) for all Australian adults. Importantly, the study used a structured diagnostic interview that mapped the symptoms elicited during the interview onto DSM-IV and ICD-10 diagnostic criteria. The validity of this study was therefore greatly enhanced beyond self-reported measures of mental illness.

²¹ Oliver, *Understanding Disability*.

²² Due to the limited data specifically available on NSW, this section will include national data. Where NSW data is available, Australian data will be reported alongside this to alert the reader to any noteworthy consistencies or differences.

²³ G Andrews, W Hall, S Henderson & M Teeson, *The Mental Health of Australians*, Mental Health Branch, Commonwealth Department of Health and Aged Care, Canberra, 1999.

- ◆ *Child and Adolescent Component of the NSMHW, 2000*²⁴

This report outlines the findings of the NSMHW for children and adolescents aged 4–17. The prevalence among young people of three mental disorders (depressive disorder, conduct disorder and attention-deficit/hyperactivity disorder) is reported. Also detailed is the prevalence of mental health problems, quality of life and health-risk behaviour among adolescents, as reported by adolescents themselves.

- ◆ *People living with psychotic illness: an Australian study, 1997–98*²⁵

This report was conducted in conjunction with the NSMHW, and aimed at estimating the prevalence of low prevalence disorders (e.g. psychotic disorders) in Australia.

- ◆ *Mental Health and Wellbeing Profile of Adults: NSW, 1997*²⁶

Based on data extrapolated from the NSMHW, the ABS has released profiles of the mental health of adults in each of the states, including NSW.²⁷ Only the high prevalence disorders (affective, anxiety and substance use disorders) are reported in this profile.

- ◆ *Australia's Health, 2004*²⁸

As part of the Australian Institute of Health and Welfare's (AIHW) reporting of national statistics on the health of Australians, this report incorporates both NSMHW statistics and the ABS figures obtained from the 2001 NHS.²⁹

Due to under-reporting and sample limitations, most estimates of mental illness prevalence outlined in the above studies have been appropriately described

²⁴ M G Sawyer, F M Arney, P A Baghurst, *Mental Health of Young People in Australia: Child and Adolescent Component of the National Survey of Mental Health and Well-being*, Mental Health and Special Programs Branch, Commonwealth Department of Health and Aged Care, Canberra, 2000.

²⁵ Jablensky et al., *People Living with Psychotic Illness*.

²⁶ ABS, *Mental Health and Wellbeing: Profile of Adults: New South Wales 1997 (Profile of Adults: NSW)*, cat. no. 4326.1.40.001, Canberra, 1998.

²⁷ ABS, *Profile of Adults: NSW*.

²⁸ Australian Institute of Health and Welfare (AIHW), *Australia's Health 2004: The Ninth Biennial Health Report of the Australian Institute of Health and Welfare*, AIHW cat. no. AUS 44, Canberra, 2004.

²⁹ ABS, *National Health Survey: Summary of Results*.

as underestimates of actual prevalence. Furthermore, these sources have collected no or limited information about certain groups, such as Indigenous Australians and people from culturally and linguistically diverse backgrounds, as well as people living in institutions such as hospitals, colleges, sheltered accommodation and prisons, members of the armed services, and homeless persons.³⁰

These studies provide the bulk of the information available on people with mental illness in Australia and NSW. However, due to the limitations described above, the statistical data are somewhat deficient, a situation which has been noted in several publications to date.³¹

High prevalence disorders: adults

Figures taken from the adult component of the NSMHW reveal that an estimated 17.7 to 18% of adults in Australia had experienced an anxiety, affective or substance use disorder, or a combination of these, in the 12 months preceding the 1997 survey. These rates mean that, overall, approximately 2 383 000 Australian adults had a high prevalence mental disorder.³² The NSW estimate at 17.4% (approximately 800 000 people) was not markedly different from the national average.³³

Breaking down these figures further into the separate disorders, the prevalence of affective disorders was shown to be 5.8% of all adults within the Australian adult population and 5.4% of adults in NSW. Anxiety disorders were found to affect 9.7% of adults within Australia and 9.9% of adults in NSW. With respect to substance use disorders, the prevalence was shown to be 7.7% of all adults in the Australian population, a figure which was matched exactly in NSW adults.

³⁰ Andrews et al., *The Mental Health of Australians*.

³¹ Disability Council, *A Question of Justice*, p. 28; Human Rights and Equal Opportunity Commission (HREOC), *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, HREOC, Canberra, 1993, p. 13.

³² Andrews et al., *The Mental Health of Australians*.

³³ ABS, *Profile of Adults: NSW*; Andrews et al., *The Mental Health of Australians*.

Psychotic mental illnesses: adults

Prevalence figures for psychotic illness were reported in a study examining the low prevalence disorders component of the NSMHW.³⁴ This component studied people living with psychotic disorders in catchment areas in the Australian Capital Territory, Queensland, Victoria and Western Australia. Prevalence estimates for the national population were extrapolated from these samples.

Nationally, the prevalence of psychotic disorders in the adult population is estimated to be in the range of 4 to 7 per 1000 people.³⁵ The range of prevalence is dependent on the area under study, with rural and remote areas being under-reported in the study.³⁶ Schizophrenia and schizoaffective disorders (as per the DSM-IV)³⁷ account for over 60% of reported psychotic disorders.³⁸

Co-morbid substance use disorder (dual diagnosis)³⁹ complicates the course of psychotic illness in a substantial proportion of cases: 30% report a history of alcohol abuse, 25.1% a history of cannabis abuse and 13.2% a history of other substance abuse.⁴⁰ According to *Australia's Health*:

*Although less common than disorders such as anxiety and depression, psychotic disorders such as schizophrenia represent a very serious group of illnesses that affect brain functioning, perceptions, emotions and communication.*⁴¹

Overall prevalence estimate: adults

In relation to their figure of approximately one in five Australians experiencing a mental illness, the authors of *The Mental Health of Australians* state:

³⁴ Jablensky et al., *People Living with Psychotic Illness*.

³⁵ Jablensky et al., *People Living with Psychotic Illness*, p. 88.

³⁶ Jablensky et al., *People Living with Psychotic Illness*, p. 12.

³⁷ See American Psychiatric Association, *DSM-IV-TR*.

³⁸ Jablensky et al., *People Living with Psychotic Illness*, p. xv.

³⁹ Dual diagnosis is "a primary diagnosis of a psychotic disorder and a co-morbid diagnosis of a disorder due to substance use". See Jablensky et al., *People Living with Psychotic Illness*, p. 3.

⁴⁰ Jablensky et al., *People Living with Psychotic Illness*, p. xvi.

⁴¹ AIHW, *Australia's Health 2002: The Eighth Biennial Health Report*, AIHW cat. no. AUS 25, Canberra, 2002, p. 62.

*The overall figure for any mental disorder is likely to be more than one in five after neurasthenia, psychosis, personality disorder and cognitive impairment are included, and after one adds in the fifth of the population who could not be contacted or who refused to be interviewed in the Survey.*⁴²

The 2001 NHS provides more recent estimates of the prevalence of mental health problems in Australia. Unlike the 1997 NSMHW, which used a structured diagnostic interview, the NHS estimates are based on self-reports (a method more likely to lead to underestimates). Almost 9.6% of respondents reported a long-term mental or behavioural problem. The NHS also measured psychological distress using the Kessler Psychological Distress Scale.⁴³ In total, about 18% of adult respondents reported a mental or behavioural problem, and/or had a very high or high level of psychological distress, with 12% reporting both a mental or behavioural problem and a very high level of psychological distress. In summary, both of these key sources indicate that a significant number of people in Australia, approximately one in five people, experience mental illness.

Prevalence of mental illness: children and adolescents

The child and adolescent component of the NSMHW found that 14% of children and adolescents have mental health problems, and this high prevalence extended across all age and gender groups. There was a higher prevalence of child mental health problems among those living in low-income, step, blended and sole parent families.⁴⁴

⁴² Andrews et al., *The Mental Health of Australians*, p. 37.

⁴³ The Kessler Psychological Distress Scale-10 (K10) is a 10-item scale of current psychological distress. The K10 records the negative emotional states in the four weeks prior to interview. The results from the K10 are grouped into four categories: low (indicating little or no psychological distress); moderate; high; and very high levels of psychological distress (which may indicate a need for professional help). See ABS, *National Health Survey: Summary of Results*.

⁴⁴ Sawyer et al., *Mental Health of Young People in Australia*.

Demographics and high prevalence disorders

Gender

According to the NSMHW, mental illness in general affects 17.4% of Australian males and 18% of Australian females within the adult population.⁴⁵ The NSW estimate is 16.9% for males and 17.9% for females.

As can be seen in Table 1, nationally, men were much more likely to have a substance use disorder than women (11.1% versus 4.5%), while women were much more likely than men to have an anxiety disorder (12.1% versus 7.1%) or an affective disorder (7.4% versus 4.2%). The survey found approximately the same magnitude of difference for NSW in the measurement of prevalence of substance use disorders (10.4% versus 5%), while for anxiety and affective disorders the prevalence for women was again greater than for men, with anxiety at 12.8% versus 7%, and affective disorders at 6.8% versus 4%.

Table 1: Prevalence of disorders in NSW and Australia according to gender

	<i>Females</i>		<i>Males</i>	
	<i>NSW</i>	<i>Australia</i>	<i>NSW</i>	<i>Australia</i>
	%	%	%	%
Anxiety disorders	7.0	7.1	12.8	12.1
Affective disorders	4.0	4.2	6.8	7.4
Substance use disorders	10.4	11.1	5.0	4.5
Total mental disorders	16.9	17.4	17.9	18.0

Geographical area

Again, based on the NSMHW, the ABS reports that nationally, the prevalence of mental illness generally is equivalent between “capital city” (17.5%) and “rest of State” (17.3%) areas.⁴⁶ However, different patterns emerge when these figures are broken down. From a sample of adults, both male and female, it was observed that substance use disorders were more prevalent in the city than in the rest of the state (8.2% versus 6.8%), while anxiety disorders were more prevalent in the rest of the state than in the capital city (11.1% versus 9.2%).

⁴⁵ Andrews et al., *The Mental Health of Australians*, p. 15.

⁴⁶ ABS, *Profile of Adults: NSW*.

The pattern of mental illness between the sexes showed more interesting discrepancies between capital city and rest of state samples: for males, the rates of anxiety disorders were equivalent (7.0% capital city versus 7.1% rest of state), while the rates of anxiety disorders for females varied distinctly (11.4% capital city versus 15.1% rest of state). Likewise, the rates of substance use disorders for males varied considerably between capital cities and the rest of the state (11.6% capital city versus 8.3% rest of state), while the rates for females were not very different (4.9% capital city versus 5.2% rest of state).

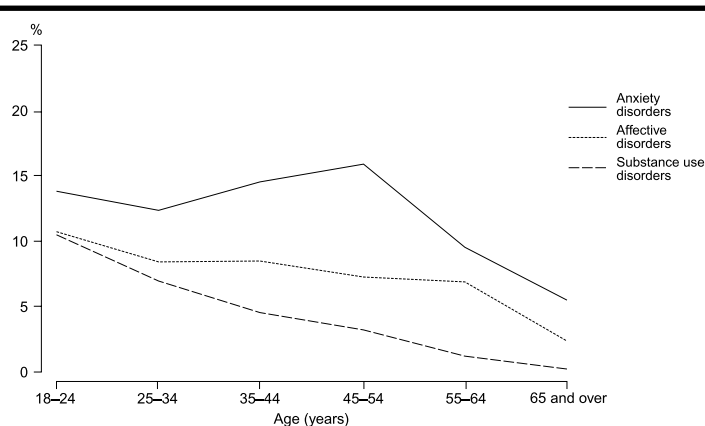
Table 2: Mental illness in NSW according to geographic area and gender

<i>Geographic Area</i>	<i>Males %</i>	<i>Females %</i>
Capital city	17.6	17.5
Rest of state	15.8	18.8

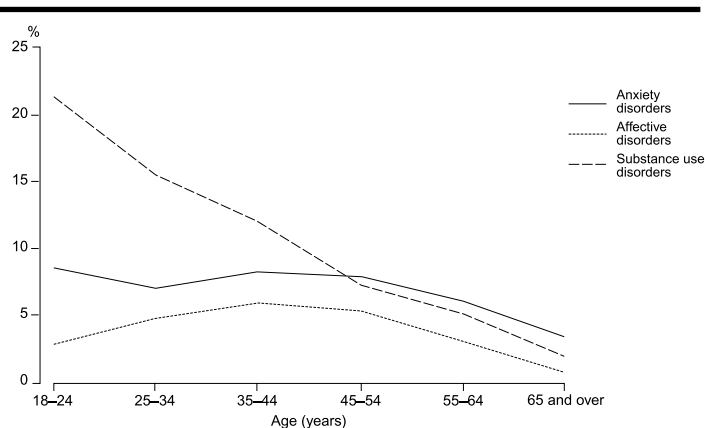
The NSW picture shows a slightly different pattern: for males, compared to an approximately equivalent national rate in capital city versus rest of state (i.e. 17.1% versus 17.5%), the NSW statistics show that rates of mental illness are actually *lower* for the rest of the state than for the capital city (17.6% capital city versus 15.8% for rest of state). The rates for women in NSW more closely reflect the national statistics (17.5% capital city versus 18.8% rest of state).

Age and gender

Figure 1 shows the prevalence statistics among women for different types of mental illness in Australia. As can be seen, the highest rate of anxiety disorders was observed in females aged 45–54 years (16%). The NSW statistics tell a different story, where the highest prevalence of anxiety disorders is in women aged 18–24 years (17.5%). Also, the prevalence in women aged 45–54 years was the same as for women aged 35–44 years (17.1%).

Figure 1: Females, prevalence of types of mental disorders by age, in Australia.⁴⁷

In the Australian adult population, the prevalence of affective (mood) disorders was highest for women aged 18–24 years at 11%, more than three times the rate for men of this age (see Figure 2). This is quite a similar pattern to the NSW profile, where the same age group had the highest prevalence (females, aged 18–24), but the rate was slightly lower (9.2% compared to 11.1% national average). For women, the prevalence of affective disorders generally declined with age, while for men rates increased in the middle years before declining after age 55.

Figure 2: Males, prevalence of types of mental disorders, by age, in Australia.⁴⁸

⁴⁷ ABS, *Mental Health and Wellbeing: Profile of Adults, Australia 1997 (Profile of Adults, Australia)*, cat. no. 4326.0, Canberra, 1998.

⁴⁸ ABS, *Profile of Adults, Australia*.

The NSMHW obtained information on the use of alcohol and four groups of drugs that included both illegal and prescription drugs. Young men were particularly prone to substance use disorders, with about one in five of those aged 18–24 being affected. For both men and women, the prevalence of substance use disorders declined with age to 1.1% of those aged 65 years and over. Alcohol use disorders were about three times as common as drug use disorders. In terms of prevalence, the NSW statistics on substance use disorders are slightly below the national average. While the same age and gender group has the highest prevalence (males aged 18–24), the NSW rate was markedly below the national rate, at 16.0% as opposed to 21.5%.⁴⁹

Living arrangements and marital status

After adjusting for age, the prevalence of mental disorder across Australia was highest for both men and women living alone.⁵⁰ This was also the case for anxiety, affective and substance use disorders individually. Overall, the prevalence of mental illness decreased as the number of people living in a household increased. Rates of mental disorder were also highest among those who were separated or divorced (24% of men and 27% of women). People who had never married also had higher rates of mental disorder than those who were married. In terms of specific disorders, those who were separated or divorced had higher rates of anxiety and affective disorders (18% and 12%, respectively). Of those never married, 14% had substance use disorders.

In terms of the rates of mental illness in people living alone as opposed to those living with other people, patterns in NSW differed according to gender.⁵¹ While the highest rate of mental illness in men was found in those living alone (18.9%), the number of people living in the household impacted differently on women. The highest prevalence of mental illness in women was in those living in households of four or more people (20.4%), compared to 15.6% and 14.9% for females living alone or with one other person respectively.

⁴⁹ See also M Teesson & L Byrnes, *National Comorbidity Project*, National Drug and Alcohol Research Centre, Sydney, 2001, p. 8; NSW Health, *The Management of People with a Co-existing Mental Health and Substance Use Disorder—Discussion Paper*, State Health Publication No. (CMH) 000050, NSW Department of Health, Sydney, 2000, p. 6.

⁵⁰ Andrews et al., *The Mental Health of Australians*.

⁵¹ ABS, *Profile of Adults: NSW*.

As to marital status, in NSW, as in the rest of Australia, the highest rates of mental illness are experienced by people who are separated or divorced (27.7% of men and 29.9% of women). This is followed by the rates in people who have never been married (as per the national statistics). Similar patterns exist for the type of mental illness by marital status in NSW as for the rest of Australia.

Employment

After adjusting for age, rates of mental disorder across Australia were highest for men and women who were unemployed or not in the labour force.⁵² People employed part-time were more likely to have mental disorders than their full-time counterparts. Unemployed people had relatively high rates of substance use disorders (19% of men and 11% of women). Unemployed women also had a high rate of anxiety disorders (20%).

In NSW, similar patterns emerge in regard to unemployed people, who have the highest rates of mental illness in the state, with 43.9% experiencing some form of mental disorder. However, rates for people not in the labour force (15.5%) are not as high as for those in part-time employment (19.4%).⁵³ People in part-time employment experience rates of mental illness of 16% and 20.7% for males and females, respectively, as compared to rates of 12.9% and 17% for people not in the labour force. Interestingly, while the national pattern applied to women in NSW—females in part-time employment being more likely to have mental disorders than their full-time counterparts—the figures were different for NSW men. The survey found that NSW males in full- and part-time employment experienced equivalent rates of mental illness (16.2% and 16.0%, respectively).

The rates of substance use disorders for unemployed people in NSW were substantially higher than the national average, with 34.6% of unemployed men and 18.3% of unemployed women in NSW experiencing substance use disorders, compared to 19% and 11% of the national sample. Rates of anxiety disorders in unemployed people were also higher in NSW than nationally.

⁵² Andrews et al., *The Mental Health of Australians*.

⁵³ ABS, *Profile of Adults: NSW*.

Education

These statistics for labour force status dovetail with those relating to a person's highest educational qualification. According to the literature,⁵⁴ mental illness can often be most debilitating in the years when a young person is finishing school or beginning post-school study. Mental illness can therefore have a negative impact on a person's ability to attain the highest educational qualification possible. This argument is supported in the ABS figures,⁵⁵ which show that in NSW the rate of mental illness (15.6%) is lower in people who have completed some post-school qualification than in those who have either failed to complete school, or completed only secondary school (21.1% and 18.5%, respectively). A similar pattern is found in data for the whole of Australia.⁵⁶

Non-English speaking background

According to the ABS figures, people born in Australia and people born in other countries whose main language is English have equivalent rates of mental illness (18.4% of adults), while people born in non-English speaking countries tend to have lower rates of mental illness (12.5%).⁵⁷ While these figures suggest that there may be lower incidence of mental illness in people of non-English speaking background, research conducted using qualitative methods has raised some other concerns around this issue.⁵⁸ It is also possible that the survey instruments used to assess prevalence may not be trans-culturally sensitive.

Indigenous Australians

As noted above, the key Australian studies collected only very limited statistics on the mental health of Indigenous Australians. Both Andrews et al.⁵⁹ and Jablensky et al.⁶⁰ indicated that separate studies, investigating the mental

⁵⁴ Disability Council, *A Question of Justice*, p. 77.

⁵⁵ ABS, *Profile of Adults: NSW*, p. 6.

⁵⁶ Andrews et al., *The Mental Health of Australians*.

⁵⁷ ABS, *Profile of Adults: NSW*, p. 7.

⁵⁸ HREOC, *Human Rights and Mental Illness*, p. 730.

⁵⁹ Andrews et al., *The Mental Health of Australians*.

⁶⁰ Jablensky et al., *People Living with Psychotic Illness*.

health of Indigenous Australians, and using culturally appropriate survey methods and interview schedules, are required and should be conducted.

On the issue of obtaining data on Aboriginal mental health, the South Australian government's final submission to the *Bringing Them Home* inquiry noted:

*The area of Aboriginal mental health is poorly understood; few experts would claim to fully understand the normal Aboriginal psyche or to confidently diagnose deviations ... Many of the so called mental health issues in the Aboriginal Community result from striving to fulfill the expectations of two different cultures—about finding a sense of place.*⁶¹

Despite the lack of data, the Human Rights and Equal Opportunity Commission (HREOC) nevertheless characterised the incidence of mental illness in Aboriginal and Torres Strait Islander communities as a “widespread”, “common and crippling problem which goes undiagnosed, unnoticed, and untreated”.⁶² The NSW Department of Health has also raised concern over the high rates of depression, suicide, substance misuse and mental illness-related hospitalisation for Indigenous Australians.⁶³

The best available data illustrating these concerns can be found in the report by the AIHW, which relies on information regarding hospitalisations and deaths in custody.⁶⁴ The report states that Indigenous Australians were twice as likely to be hospitalised for mental and behavioural disorders as other Australians. In particular, hospitalisations due to psychoactive substance abuse among male and female Indigenous Australians were around four and three times those for other male and female Australians, respectively. The report also states that as incarceration separates Indigenous people from their communities, many Indigenous prisoners experience depressive symptoms that can result in suicide attempts.

⁶¹ South Australian government submission, cited in HREOC, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, HREOC, Sydney, 1997.

⁶² HREOC, *Human Rights and Mental Illness*, at pp. 693–95.

⁶³ HREOC, *Human Rights and Mental Illness*, at p. 698ff.

⁶⁴ AIHW, *Mental Health Services in Australia 2002–2003*, Mental Health Series No. 6, AIHW, HSE 35, Canberra, 2005.

It is worth noting that the 2004–05 National Aboriginal and Torres Strait Islander Health Survey collected information relating to the health of Indigenous Australians. The survey has been carried out by the ABS in urban, rural and remote areas of Australia and results are expected to be available in 2006.

Welfare status

Drawing on data from the NSMHW on high prevalence mental illnesses, Butterworth estimated the prevalence of mental disorders among income support recipients.⁶⁵ The key findings were striking, in that almost one in three (more than 30%) income support recipients have an anxiety, affective or substance use disorder. This is 66% more than the prevalence of mental illness among Australians not receiving income support. The prevalence of clinical anxiety and depressive disorders among sole mother income recipients is between three and four times the national average, with 45% of these experiencing a diagnosable mental disorder. The report noted that mental illness can be a significant barrier to workforce participation and that people with mental illness are among the most disadvantaged in our society.

Demographic characteristics of adults with psychotic disorders⁶⁶

As noted above, the low prevalence/psychotic disorders component of the NSMHW did not collect any data in NSW; therefore, only national data are outlined here. Jablensky et al. report that the extreme disadvantage experienced by people with a psychotic mental illness is evidenced in the disproportionately high prevalence of unemployment and relative poverty, which “are widespread among people with psychotic disorders”.⁶⁷ Interestingly, almost half of those with psychotic illnesses had not completed their schooling or gained any post-school qualification, and 72% were unemployed. In the 12 months prior to

⁶⁵ Butterworth, *Estimating the Prevalence of Mental Disorders among Income Support Recipients*.

⁶⁶ The sections above on demographics and high prevalence disorders outlined the rate of high prevalence disorders experienced by different demographic groups. Given the much lower prevalence of psychotic disorders, this section will instead present the demographic characteristics of those who have psychotic disorders.

⁶⁷ Jablensky et al., *People Living with Psychotic Illness*, p. 91.

the interview, only one in five had been involved in part-time work and less than 10% had been in full-time employment. Of those who reported some occupation, including housework or studying, almost half had experienced a serious or moderate degree of dysfunction in the performance of such activities. The majority of those surveyed were living in relative poverty: 85.2% were recipients of a pension or other form of welfare benefits, and only 15.5% had any income from employment or other independent sources.

In terms of accommodation, the majority of those surveyed (44.7%) were

living in institutions, hostels, group homes or other supported housing, and one-quarter of this group (11.3% of the total sample) were practically homeless or living in very marginal accommodation (living in marginal supported housing, rooming houses, hotel/rented rooms, crisis shelters, or were homeless or of no fixed address).⁶⁸

Almost one-third of participants (31%) were living alone. As to marital status, the majority (64%) were single and had never married (77% of men and 44% of women) and 21% reported to be separated, divorced or widowed.

Why a project on the legal needs of people with a mental illness?

The criteria for choosing the disadvantaged groups that would be examined individually in the Access to Justice and Legal Needs Program were:

- ◆ the extent to which these groups may be missed by the quantitative legal needs assessment (Stage 1, see the Foreword and below for a description)
- ◆ whether there was a case for special consideration of a particular disadvantaged group
- ◆ the extent to which these groups have been previously examined in terms of their access to justice and legal needs.

⁶⁸ Jablensky et al., *People Living with Psychotic Illness*, p. 91.

The quantitative legal needs assessment was conducted by way of a telephone survey of households in disadvantaged regions in NSW. It was not the purpose of the study to obtain representative sub-samples of specific disadvantaged groups such as people with a mental illness; rather the purpose was to survey six disadvantaged communities as a whole. Nonetheless, a small sample of people who responded to the survey indicated that they did have a mental illness. This small sample, however, was unlikely to be a representative group, given the varied living arrangements of people with a mental illness, which can include shelters, refuges and boarding houses.⁶⁹ It was also expected that many people may not self-identify as having a mental illness in the telephone survey. This expectation was realised with only 5% of the sample indicating that they had a mental health problem.⁷⁰

As was mentioned above and will be further evidenced later in this chapter, people with a mental illness have been identified as among the most vulnerable and disadvantaged in our community.⁷¹ The relationship between mental illness and other forms of social and economic disadvantage make this a group of particular interest for the Access to Justice and Legal Needs Program.

We turn next to examining the final consideration, that is, the extent to which the legal needs and access to justice issues for people with a mental illness have been addressed in previous literature.

⁶⁹ HREOC, *Human Rights and Mental Illness*; Jablensky et al., *People Living with Psychotic Illness*; NSW Parliament Legislative Council Select Committee on Mental Health (Select Committee on Mental Health), *Mental Health Services in NSW: Final Report*, Parliamentary Paper No. 368, NSW Parliament, Sydney, 2002.

⁷⁰ C Coumarelos, Z Wei & A Zhou, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, Law and Justice Foundation of NSW, Sydney, 2006.

⁷¹ Butterworth, *Estimating the Prevalence of Mental Disorders among Income Support Recipients*; HREOC, *Human Rights and Mental Illness*; Jablensky et al., *People Living with Psychotic Illness*; Mental Health Council of Australia (MHCA), *Submission to the Senate Select Committee on Mental Health*, 2005, <http://www.aph.gov.au/senate/committee/mentalhealth_ctte/submissions/sub262.pdf> (accessed August 2005); M Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, Commonwealth of Australia, Canberra; Select Committee on Mental Health, *Mental Health Services in NSW: Final Report*.

Key literature

While there has been some research conducted—and indeed, is ongoing—into certain legal issues for people with a mental illness, the discussion below outlines the gaps in this literature, and where the Project will accordingly be focused to provide original information.

Before discussing the literature specifically relating to legal and access to justice issues faced by people with a mental illness, it is important to consider two related bodies of literature. These are, first, the literature on the ability of people with a mental illness to access services such as health and housing, and secondly, the human rights issues faced by people with a mental illness. Although access to health services and human rights issues do not always constitute legal issues, these two intertwined areas provide an important backdrop to the subject matter of our report. When denied basic human rights and access to health services, we expect people with a mental illness to be further hindered in having their legal needs addressed. Following a discussion of the literature on access to health services and human rights, we will outline the point of departure for the Project, as well as our precise definition of access to justice and legal needs.

Access to health and related services in NSW

Several sources highlight a “crisis” in mental health services in NSW.⁷² In 2001–02, the NSW parliamentary Select Committee on Mental Health conducted an inquiry into the condition of the state’s mental health services since the adoption of the Richmond Report 20 years earlier.⁷³ The scope of the inquiry was to provide an analysis of mental health services in NSW,

⁷² The term ‘crisis in mental health care’ has been used in this report, given the weight of evidence provided, and the use of this and similar terms in the key reports that will be highlighted in this section. For example, the Select Committee on Mental Health, in *Mental Health Services in NSW: Final Report*, refers to “endemic problems in the provision of mental health services” (p. 15). The MHCA, in *Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia*, MHCA, Canberra, 2005, refers to the “crumbling mental health care system” (p. iii). See also HREOC, *Human Rights and Mental Illness*; as well as G Andrews, “The Crisis in Mental Health: The Chariot Needs One Horseman”, *The Medical Journal of Australia*, vol. 182, no. 8, 2005, pp. 372–73.

⁷³ The inquiry into mental health services and resources headed by David Richmond was set up in August 1982. Its findings were contained in the Richmond Report, released in 1983. The report is primarily known for beginning the process of deinstitutionalisation, or the shift away from psychiatric hospitals and towards community-based care. The chief recommendations contained in the report concerned

and to address specific recommendations to the government where issues of concern were identified. In particular, it sought to investigate the success of the “deinstitutionalisation” policy, looking at issues such as the quality and availability of services in NSW, funding and staffing comparisons with other jurisdictions, and aspects of quality control and outcome measures.

The committee received a total of 302 submissions. Of these 53% were from private citizens, and 41.7% were from private organisations or interest groups (including university research centres and local government). State and Commonwealth government agencies made up the remaining 5.3%. In addition, 12 hearings, with 91 witnesses, were conducted at Parliament House, and a public forum was held in August 2002, at which 27 private citizens were chosen by ballot to speak to the committee of their experiences with the mental health system as carers or people with a mental illness.

The speakers’ concerns tallied with other repeated criticisms of mental health service provision in NSW, namely, in terms of “lack of”, “restrictions”, and “gaps” in mental health services; the emotional and financial toll on families; the inadequacy of supported housing and rehabilitation options; and the need for carer input into discussions about reform. The committee also conducted two site visits to correctional facilities (Long Bay Hospital, and the Metropolitan Remand and Reception Centre and Mulawa Correctional Centre at Silverwater). Overall, the select committee found:

NSW has a community mental health sector with a large responsibility for mental health care, but not the necessary resources. The weight of evidence presented to the Committee highlights that mental health services in NSW need revolutionary improvement. Deinstitutionalisation, without adequate community care, has resulted in a new form of institutionalisation: homelessness and imprisonment.⁷⁴

decreasing the size and number of psychiatric hospitals, expanding integrated community networks, separating developmental disability services from mental health services, and making changes to funding arrangements.

⁷⁴ Select Committee on Mental Health, *Mental Health Services in NSW: Final Report*.

It has been argued that the gaps in mental health service delivery are attributable to poor coordination at the level of both the Commonwealth–state division of responsibilities, as well as between NSW government agencies, such as the NSW Department of Health (NSW Health) and the Department of Ageing, Disability and Home Care (DADHC).⁷⁵ Recently there have been some efforts made to address this lack of coordination in service delivery, notably with the Housing and Support Initiative, a partnership between NSW Health, DADHC, the Department of Housing, and non-government organisational service providers.⁷⁶

Following the events surrounding the wrongful detention of Cornelia Rau, and allegations of severe mishandling of mental health issues in Australia’s immigration detention system, a Senate select committee on mental health was appointed in March 2005, and accepted submissions until May 2005. While the committee’s final report is not due until later in 2006, a number of important submissions are publicly available. Among the most significant is that of the Mental Health Council of Australia (MHCA), which tied in with its recent wide-ranging report, *Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia*.⁷⁷

Not for Service reports on the extent to which the Australian health care system adequately meets the needs of people with a mental illness, “some of the most vulnerable people in the community”.⁷⁸ Responding to continuing community criticism of the mental health care system, the MHCA and the Brain and Mind Research Institute at the University of Sydney, in association with HREOC, initiated this national review into experiences of mental health care. The review aimed to “capture the current critical themes in mental health care from the perspective of those who use and deliver its services on a daily basis”.

⁷⁵ For example, see NSW Health, *Planning Better Health*, NSW Department of Health, July 2004, <<http://www.health.nsw.gov.au/pbh/overview>> (accessed March 2006); NSW Health, *NSW Government Response to the Select Committee Inquiry into Mental Health Services in NSW*, NSW Department of Health, 2003, <http://www.health.nsw.gov.au/pubs/g/pdf/inquiry_mhs.pdf> (accessed February 2006); Mental Health Co-ordinating Council, *Submission to the Senate Community Affairs Committee Inquiry into Aged Care*, 2004, <http://www.aph.gov.au/Senate/committee/clac_ctte/aged_care04/submissions/sub75.pdf> (accessed February 2006).

⁷⁶ A Morris, K Muir, A Dadich, D Abello & M Bleasdale, *Housing and Accommodation Support Initiative: Report 1*, Social Policy Research Centre, Sydney, 2005.

⁷⁷ *Not for Service*. See also MHCA, *Submission to the Senate Select Committee on Mental Health*.

⁷⁸ See Executive Summary, MHCA, *Not for Service*.

Throughout 2003–05, data were collected through open forums (there were 1180 participants), written submissions (351 were received), two community surveys, and individual meetings with specific community, professional, and non-government groups. Further, all Australian governments—that is, state and Commonwealth—were given the opportunity to respond to the primary data and highlight recent policy responses to the issues raised. The vast amount of information in the report, which is mostly presented as accounts of personal experiences, is organised according to the National Standards for Mental Health Service (the Standards) agreed to by all governments in 1996–97.

The majority of submissions highlighted recurrent themes, including poor resources, inadequate facilities, reduced safety, and the lack of respect and dignity for people with a mental illness—all of which were underpinned by difficulties in obtaining redress or registering complaints when dealing with authorities. While the report was not intended as a systematic assessment of the extent to which there is compliance with the Standards, it nevertheless found that “the volume and consistency of the information demonstrates the gaps and the difficulties governments have had in meeting these”,⁷⁹ as well as emphasising a series of pervasive systemic weaknesses. Like the MHCA’s submission to the senate committee, this report notes that while funding has remained at comparable levels since the introduction of the National Mental Health Strategy—and has indeed increased in some areas—the mental health system is failing carers and people with a mental illness, and placing an unacceptable level of strain on mainstream health services.

The “cumulation of personal experiences” presented in *Not for Service* suggests that, despite the Standards, it remains the case that “any person seeking mental health care runs the serious risk that his or her basic needs will be ignored, trivialised or neglected”.⁸⁰ The report notes the “substantial gaps between the aspirations expressed in these documents and the reality of Australia’s mental health care system”.⁸¹ The short-term, long-term, and systemic costs of mental illness for the wider community—ranging from basic

⁷⁹ *Not for Service*, p. 14.

⁸⁰ *Not for Service*, pp. 14 and 239.

⁸¹ *Not for Service*, p. 15.

failures of care provision, to suicide, homelessness, poverty and wider rights abuses—are identified. *Not for Service* reports that, more often than not, the financial and emotional burden of systemic failures falls on the families and friends of people with mental illness, rather than being alleviated in any broad-based way. It sets out a list of mental health reform priorities identified by professionals, people with a mental illness and their families, and calls on Australia’s state and Commonwealth governments to work together and commit to a process of genuine and adequately resourced reform.

Despite the slow pace of reform, the report does highlight some notable examples of political leadership, including a 128% increase in Commonwealth investment, new organisations such as beyondblue that work to destigmatise mental illness, and significant primary care sector reforms. However, given the likelihood that every family in Australia will be affected by mental illness at some point, the report states that these steps are positive but insufficient. Likewise, it is noted that such an ad hoc review can only present the “tip of the iceberg”, and should as such be “superseded by systematic annual reviews of experiences in the mental health care system”.⁸²

A number of issues reported were specific to NSW, which, with low per capita expenditure and low confidence amongst clinicians, fared poorly across all measures of mental health care quality. NSW is particularly criticised in relation to forensic patients (discussed below), as well as in relation to its perceived focus on law and order issues at the expense of enhanced clinical care. Where clinical care does exist, the NSW model tends overly towards the “old models of acute and hospital-based services” as opposed to “genuine service innovation or new partnerships with non-government or primary care service providers”.⁸³

In both its Senate submission and in *Not for Service*, the MHCA drew on and reiterated the findings of a 2003 report by Groom, Hickie and Davenport, *Out of Hospital, Out of Mind!*,⁸⁴ which argued that the gaps in planning, delivery

⁸² *Not for Service*, p. 15.

⁸³ *Not for Service*, p. 62.

⁸⁴ G Groom, I Hickie & T Davenport, *Out of Hospital, Out of Mind! A Report Detailing Mental Health Services in Australia in 2002 and Community Priorities for National Mental Health Policy for 2003–2008*, MHCA, Canberra, 2003.

and evaluation of mental health services stem not from a “failure of policy” but from “a failure of implementation”.⁸⁵ This report outlined the widespread failure of community-based care models to provide adequate care: specific criticism centred on restricted access, variable quality, poor continuity, and lack of support for recovery from illness and protection against human rights abuses. The report pointed to several factors identified by people with a mental illness and stakeholders alike, those being poor administration, lack of accountability, lack of ongoing government commitment to genuine reform, and a failure to support the degree of community development required to achieve high quality mental health care outside institutional settings.⁸⁶

While it has been reported that the absence of suitable supported accommodation is one of the major obstacles to recovery and effective rehabilitation,⁸⁷ the availability of such housing is not always assured. Under the 2003 Commonwealth State Housing Agreement (CSHA, effective until June 2008),⁸⁸ the Commonwealth, states and territories are to provide funding for those people whose housing needs cannot be met by the private market. However, in the last decade, opportunities to rent public housing have fallen by 20%.⁸⁹ As discussed by NSW Health in a policy paper, “waiting lists for social housing in NSW are long and priority waiting lists are highly competitive. Alternatively, the private rental market is both expensive and competitive.”⁹⁰ A 1998 report by the Richmond Fellowship noted that the average waiting period for appropriate services was 12 months, with people forced to remain in hospital until suitable places were available.⁹¹

⁸⁵ Groom et al., *Out of Hospital, Out of Mind!*, p. 1.

⁸⁶ Groom et al., *Out of Hospital, Out of Mind!*, p. 1.

⁸⁷ HREOC, *Human Rights and Mental Illness*, p. 338.

⁸⁸ Department of Family and Community Services, *Commonwealth State Housing Agreement*, <www.facs.gov.au/internet/facsinternet.nsf/AboutFaCS/programs/house-csha.htm> (accessed February 2006).

⁸⁹ Tenants' Union of NSW, *Secure, Affordable Housing for All*, <www.tenants.org.au/about/about_projects.html> (accessed February 2006).

⁹⁰ NSW Health, *Framework for Housing and Accommodation Support for People with Mental Health Problems and Disorders*, NSW Department of Health, Sydney, 2002, pp. 1–32 at p. 3.

⁹¹ NSW Health, *Framework for Housing and Accommodation Support for People with Mental Health Problems and Disorders*, p. 6.

At the same time, the Commonwealth has shifted its focus from funding under the CSHA to a preference for Commonwealth Rental Assistance as the primary form of housing support.⁹² This has manifested in a decline of just over 1% each year, which “raises questions of at what point public housing is reduced to unsustainable levels and whether the present stock profile and management is adequate to its changing role and focus”.⁹³ Further, it has been reported that little new stock has been added to public housing recently, meaning that the current stock is ageing and often inappropriate.⁹⁴

Human rights of people with a mental illness

HREOC’s landmark report *Human Rights and Mental Illness* (published in 1993 and also known as the Burdekin Report)⁹⁵ first raised many of the issues now frequently addressed in the literature. It did so, however, from a rights perspective, going one step further in the analysis of poor service delivery for people with a mental illness, to frame these problems as human rights violations. Importantly, these issues are often non-justiciable: that is, they rarely have a corresponding legal remedy.

The Burdekin Report was compiled after a wide-ranging and in-depth inquiry. The inquiry involved a vast number of submissions from and interviews with people with a mental illness, carers, stakeholders, and members of the community, as well as visits to mental health facilities all over Australia. The Burdekin Report’s enduring achievement lies in the sheer breadth of coverage it was able to give to mental illness issues. The report continues to be frequently cited and relied upon in the recent literature, which suggests that many of the problems it identified in 1993 remain unsolved.

The Burdekin Report offers strong anecdotal evidence on a range of legal and human rights issues that confront people with a mental illness. This approach, which frames the information from the perspective of people with a mental

⁹² M Powell & G Withers, *National Summit on Housing Affordability: Resource Paper*, National Summit on Housing Affordability, Canberra, 2004, p. 30.

⁹³ Powell & Withers, *National Summit on Housing Affordability*, p. 29.

⁹⁴ Powell & Withers, *National Summit on Housing Affordability*, pp. 29–30.

⁹⁵ HREOC, *Human Rights and Mental Illness*.

illness, is important in demonstrating the influence of perceived or subjective barriers to accessing legal services. One significant example is in relation to housing: while many people with a mental illness technically qualify for supported housing, a lack of confidence in dealing with bureaucracy or filling in forms, or simply a lack of knowledge about eligibility, means that in reality, the proportion of people actually benefiting from such housing is small. As mentioned above, the decreasing availability of public housing stock⁹⁶ has meant that low-income tenants who would otherwise be living in such housing are forced into the private rental market. This presents a scenario that the Burdekin Report associated with numerous difficulties, including discrimination.⁹⁷

Under the original Commonwealth–State Disability Service Agreement (1991) and its more recent extension into the third Commonwealth–State Territory Disability Agreement (2002–07), the Commonwealth takes responsibility for funding employment programs for people with disabilities, while the states administer accommodation services, respite care, information, and non-vocational daytime activity.⁹⁸ Advocacy, research and development are accepted as joint responsibilities. However, in terms of meaningful delivery of these services, the Burdekin Report noted in 1993 that despite the agreement, there is strong evidence that basic needs are not being met. The report suggested that many professionals—lawyers, government employees, police and ambulance officers—need better training to deal appropriately with people affected by mental illness. The report also highlights the vital role played by non-government organisations in the provision of services to people with a mental illness, but notes the dire lack of funding actually available to these organisations.

The second half of the Burdekin Report identifies groups within the mentally ill population that are particularly prone to missing out on services. The homeless

⁹⁶ For example, from 246 800 to 177 400 between 1986 and 1996. See Powall & Withers, *National Summit on Housing Affordability*, p. 31. See also Tenants' Union of NSW, *Secure, Affordable Housing for All*.

⁹⁷ HREOC, *Human Rights and Mental Illness*, p. 346.

⁹⁸ Department of Family and Community Services, *Commonwealth State/Territory Disability Agreement 2002–2007*, <<http://www.facs.gov.au/internet/facsinternet.nsf/disabilities/policy-cstda.htm#1>>(accessed August 2005) (the past as well as the current agreements are found at this site).

are routinely denied vital services for a number of reasons (discrimination, bureaucratic barriers, identification requirements, inadequate or inappropriate service provision, poor administration by trustees). Further, children and young people with mental illnesses, Aboriginal or Torres Strait Islander people and those from isolated areas may find themselves in the justice system by default, due to a lack of appropriate mental health services.

An illustration of a serious non-justiciable human rights issue cited in the report was the fact that access to tribunals or judicial review is systematically denied to forensic patients in custodial arrangements. “Governor’s pleasure” detention, indeterminate in length, is theoretically reviewed regularly by an advisory body, but the report states that in reality, the executive government makes the relevant decisions. While many jurisdictions have remedied this situation in the wake of the Burdekin Report, it has been observed that NSW still lags behind in many areas. With the exception of decisions about fitness to stand trial, where the Mental Health Review Tribunal’s decision is determinative, decisions in regards to forensic patients are still made at the political level in NSW. Further, appropriate care and detention capacity in NSW remains largely inadequate, particularly for female forensic patients who are often treated in a men’s hospital or men’s prison due to the lack of facilities.⁹⁹

The extent to which Australian mental health legislation and policy conforms to international human rights obligations has been a recurrent theme in the literature—both before and since the Burdekin Report—and continuing efforts are made to evaluate this empirically. One such initiative was the “rights analysis instrument” developed by Watchirs and Heesom, which aimed to quantify compliance with international obligations by categorising rights and rating legislation accordingly.¹⁰⁰ This approach has received some criticism

⁹⁹ For a detailed overview of progress in the treatment and care of forensic patients in Australian jurisdictions since the Burdekin Report, see D Chappell, “Protecting the Human Rights of the Mentally Ill: Contemporary Challenges for the Australian Criminal Justice System”, in *Psychiatry, Psychology and Law*, vol. 11, no. 1, 2004, pp. 13–22; also D Chappell & T Boyd-Caine, “The Forensic Patient Population in New South Wales”, in *Current Issues in Criminal Justice*, vol. 17, no. 1, July 2005, pp. 5–27.

¹⁰⁰ H Watchirs & G Heesom, *Report on a Rights Analysis Instrument for Use in Evaluating Mental Health Legislation*, Human Rights Branch, Attorney-General’s Department, Canberra, 1996.

for its emphasis on the quantitative as opposed to the qualitative, as well as for presenting a “sanitised” account of its findings.¹⁰¹ Rees and Carney suggest the need for a more nuanced, qualitative approach to the intersection of human rights and mental health law, which contemplates medical dimensions as well as rights outcomes.

Many of the human rights concerns referred to in the Burdekin Report were starkly revisited earlier this year with the release of the Palmer Report, from the inquiry into the circumstances of the wrongful immigration detention of Cornelia Rau.¹⁰² The Palmer Report recognised that Ms Rau’s case brought to light a number of systemic failures in the delivery of mental health services in Australia: not only deficiencies in the immigration detention system, but also the “perceived poor performance” of services in the broader community.¹⁰³

In making its findings, the inquiry pointed to a “serious cultural problem” within the Department of Immigration’s compliance and detention sectors,¹⁰⁴ which manifested in inadequate training and education of staff; un-linked, “siloeed” information systems;¹⁰⁵ inappropriate vesting of power; and little qualitative review. These aspects were compounded by what the report described as an “assumption culture”, which limited efforts by individuals within the departments to provide adequate health care,¹⁰⁶ as well as “a disconnect in planning, experience and communication” between the administration of the detention facilities and other bodies such as police, missing persons lists, missing patients lists and hospitals.¹⁰⁷ The result was a “lack of arrangements for effective communication, poor coordination and consultation, and a failure of management responsibility and oversight”.¹⁰⁸

¹⁰¹ See in particular N Rees, “International Human Rights Obligations and Mental Health Review Tribunals”, in *Psychiatry, Psychology and Law*, vol. 10, no. 1, 2003, pp. 33–43; and T Carney, “Mental Health Law in Postmodern Society: Time for New Paradigms?”, in *Psychiatry, Psychology and Law*, vol. 10, no. 1, 2003, pp. 12–32.

¹⁰² Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*.

¹⁰³ Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, p. 6.

¹⁰⁴ Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, p. 173.

¹⁰⁵ Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, p. 189.

¹⁰⁶ Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, p. 120.

¹⁰⁷ Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, p. 53.

¹⁰⁸ Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, pp. 119–120.

Access to justice and legal needs

As noted earlier in this chapter, for the purposes of this project ‘access to justice’ and ‘legal needs’ involve more than access to formal legal representation and the courts. However, the terms are not interpreted in such a broad fashion as to consider contested political issues concerning broader notions of rights and justice, where the law is clear—thus avoiding duplication of HREOC’s work. The Project therefore endeavours to investigate issues of access to justice according to current Australian law.

In considering these specific terms of reference, it is important to note the Disability Council’s *A Question of Justice* report. This report used qualitative methods to gather information about the barriers experienced by people with disabilities accessing the NSW justice system. The researchers conducted consultations with service providers, stakeholders and, importantly, people with a disability who had had contact with the justice system. Fourteen of the 61 participants had a psychiatric disability. The report uncovered a number of issues experienced by people with a disability in dealing with the justice system:

- ◆ lack of recognition and additional support for support persons
- ◆ limited access to advocacy
- ◆ the adversarial nature of the legal system disadvantages some people
- ◆ the “camouflaging” of the adversarial nature of mediation and alternative dispute resolution
- ◆ a lack of role clarity within the legal system
- ◆ communication barriers
- ◆ financial, physical and emotional costs
- ◆ lack of flexibility within the legal system
- ◆ identification or disclosure of disabilities—the visibility of a disability was identified as a significant issue for people with a mental illness, as it is not always immediately clear that a person with a psychiatric disability may have special needs, or require special assistance
- ◆ few policies for the integration of services, and a lack of evaluation of services to determine their appropriateness and adequacy

- ◆ a general lack of community awareness and education
- ◆ stigma.

The Burdekin Report raised a number of issues that can be characterised as legal needs. These were primarily in terms of abuse of people with a mental illness, the experience of discrimination and concerns about the ability of people with a mental illness to participate effectively in the criminal justice system. The report provided the following examples where an individual's ability to participate effectively in the legal system is impaired directly or indirectly by mental illness. First, although NSW under statute requires statements of rights to be made available to people facing involuntary detention, the Burdekin Report noted that people in this situation nevertheless lack basic information about their rights and roles. Secondly, abuse during detention is reportedly prevalent. Thirdly, mental illness frequently raises evidentiary problems in terms of witness credibility. The report noted that this issue is often experienced by women with a mental illness, particularly domestic violence victims.

Just as prisoners, forensic patients, and the criminal justice system were a particular focus of the Burdekin Report, most of the literature dealing with legal needs has been focused on the criminal justice system. The high number of people with a mental illness in custody has provided an impetus for this research:¹⁰⁹ many of the key reports listed earlier,¹¹⁰ along with other more specific studies,¹¹¹ have considered the over-representation of people with a mental illness in the criminal justice system, and related issues.

¹⁰⁹ T Butler & S Allnut, *Mental Illness among New South Wales Prisoners*, NSW Corrections Health Service, Sydney, 2003.

¹¹⁰ HREOC, *Human Rights and Mental Illness*; Select Committee on Mental Health, *Mental Health Services in NSW: Final Report*; Disability Council, *A Question of Justice*.

¹¹¹ S Henderson, *Mental Illness and the Criminal Justice System*, Mental Health Co-ordinating Council, Sydney, 2003, <http://www.mhcc.org.au/projects/Criminal_Justice/contents.html> (accessed August 2005); P Mullen, *Mental Health and Criminal Justice: A Review of the Relationship Between Mental Disorders and Offending Behaviours and on the Management of Mentally Abnormal Offenders in the Health and Criminal Justice Services*, Criminology Research Council, Melbourne, 2001, <<http://www.aic.gov.au/crc/reports/mullen.pdf>> (accessed August 2005); H Syme, "Mental Health and the Criminal Justice System: A NSW Local Court Perspective", *AJJA Magistrates Conference*, Brisbane 2002, <<http://aija.org.au/Mag02/Helen%20Syme.pdf>> (accessed August 2005).

Many of these reports raised concern about the ability of people with a mental illness to participate effectively in legal processes when their mental health needs—among other basic needs—are not being met. A lack of training in disability awareness and mental health issues for staff such as magistrates, police, lawyers and custodial officers was another common theme.¹¹² For example, the Burdekin Report noted that mentally ill people may be less likely than others to be released on bail—perhaps because they are too poor to raise bail, because they have no fixed address, or because they do not understand the bureaucratic requirements. Thus, the report notes, people with a mental illness who commit relatively minor offences will often go to jail where they might otherwise have received a non-custodial sentence.

Further, the report indicated that people with a mental illness will often enter, or remain longer in, jails due to poor quality legal representation, or poor communication with their lawyers. The Burdekin Report argues that many lawyers lack appropriate communication skills, and are simply too uncomfortable or unskilled to deal helpfully with mentally ill clients.

As a response to some of these concerns, the NSW Statewide Community and Court Liaison Service was introduced by the Corrections Health Service to provide psychiatric assessment for people with a mental illness who commit minor offences and appear at court.

*The service involves forensic psychiatrists and nurses working with magistrates, lawyers and police to identify and assess people with suspected mental illness and divert them from the criminal justice system into mental health services. Where such diversion is not possible for the individual, the service facilitates referral to mental health care within the prison system.*¹¹³

Other diversionary options for mentally ill offenders are a topic of discussion in current literature.¹¹⁴

¹¹² See, for example, Disability Council, *A Question of Justice*; MHCA, *Submission to the Senate Select Committee on Mental Health*.

¹¹³ Henderson, *Mental Illness and the Criminal Justice System*.

¹¹⁴ D M Greenberg, "Interaction between Mental Health and Criminal Justice System", *Mental Health and the Criminal Justice System: A Public Seminar*, Institute of Criminology, University of Sydney, Sydney, 2002.

Apart from criminal justice system issues, some other areas of legal need have been raised in the literature. As yet, however, these areas have not been extensively investigated in Australia and NSW. For example, recent literature has raised concerns about service provision to people with a mental illness in the family law system.¹¹⁵ The Productivity Commission's recent review of the *Disability Discrimination Act 1992* (Cth) also presents a noteworthy contribution to understanding the barriers faced by people with mental illness and other disabilities, with respect to enforcing their rights under that Act.¹¹⁶ These and other references regarding specific legal issues will be raised throughout the body of the report in the context of our findings.

Before concluding this chapter, it is also important to note two relevant areas currently under investigation. First, the Law and Justice Foundation is currently partnering the Universities of Sydney and Canberra and the mental health tribunals in NSW, the Australian Capital Territory and Victoria in a project investigating mental health tribunals. The principal aim of the study is to assess the 'fairness and justice' of tribunal hearings, and to identify best practice reforms that enhance the fairness of hearings and the therapeutic outcomes for participants.

Secondly, it is important to note that the *Mental Health Act 1990* (NSW) is currently under review. The NSW parliamentary Select Committee on Mental Health, which was established to consider the functionality and effectiveness of the *Mental Health Act*, has released two discussion papers. One of these dealt with issues concerning carers and access to information under the Act; the other dealt with operational and treatment issues contained in the Act.¹¹⁷ Each paper raises access to justice issues, some of which are due to inadequacies in the drafting and operation of the legislation. Others, the committee suggests,

¹¹⁵ E Robinson & D B Rodgers, *Depression and Changing Families: A Scoping Study of Mental Health and the Family Law System*, Centre for Mental Health Research, Australian National University, 2004; B Rodgers et al., "Mental Health and the Family Law System", *Journal of Family Studies*, vol. 10, no. 1, April, 2004, pp. 50–70.

¹¹⁶ Productivity Commission, *Review of the Disability Discrimination Act 1992*, Report No. 30, Commonwealth of Australia, AusInfo, Melbourne, 2004.

¹¹⁷ See NSW Health, *Review of the Mental Health Act 1990. Discussion Paper 1: Carers and Information Sharing*, Legal and Legislative Services, NSW Department of Health, Sydney, 2003; also NSW Health, *Review of the Mental Health Act 1990: Discussion Paper 2: The Mental Health Act 1990*, NSW Department of Health, Sydney, 2004.

are more to do with the ongoing education and awareness gaps of mental health professionals. The first paper raises a number of areas where the main issue is competition between rights: the right of a person with a mental illness to privacy weighed against the right of their family to make decisions in an emergency; the need to establish a relationship of trust and confidence, as against the scenarios in which breaching that confidence might be justified. Of necessity, this discussion overlaps with carer concerns, with issues of who has a right to access information, and the fact that the *Mental Health Act* in many instances fails to include carers, while including family members.

The second discussion paper is far more extensive, dealing with each chapter of the Act in turn to determine its continuing appropriateness.¹¹⁸ Justiciable issues, or problems for which a legal remedy exists,¹¹⁹ often turn here upon definitions—of mental illness, of voluntariness, of mental health facility—which may have significant repercussions upon the validity of a person’s incarceration. There are many concepts in the *Mental Health Act 1990* (NSW) that are simply too grey in their ambit, and the inadequacy of some of these provisions leads to justiciable problems. In several instances clearer wording is recommended by the committee.

As noted above, the Project has avoided duplicating existing literature on areas that are currently under investigation by others. Ultimately, however, we allowed those we interviewed to guide us in focusing on the most pressing and poorly recognised areas of legal need and access to justice issues.

Summary

Many people in NSW experience mental illness, and this is often associated with other social and economic disadvantage. The extensive literature focusing on the crisis in mental health care and concerns about the human rights of people with a mental illness alert us to the vulnerability of this group

¹¹⁸ See earlier reference (at note 100) to another such evaluation, conducted by Watchirs et al.

¹¹⁹ This definition is based on Hazel Genn’s study, *Paths to Justice—What People Do and Think about Going to Law*, Hart Publishing, Oxford, 1999, p. 12. Genn makes the important point that the person experiencing the issue does not have to recognise it as legal in order for it to be a justiciable issue.

and the difficulties they are likely to face in seeking to have their legal needs addressed. Given the focus of previous literature on mainly human rights and criminal justice issues, this report will focus primarily on civil issues for people with a mental illness. Importantly, in accordance with the design of this study, we were guided by the service providers and people with a mental illness that we interviewed, in determining the most pressing access to justice and legal needs issues.

Structure of this report

Chapter 2 of this report outlines the methodology used in this study.

Chapters 3–6 report on the findings of this study, bringing together the data collected through consultations and interviews. Pre-existing data sources and literature are also drawn on to place these findings within a broader context:

- ◆ Chapter 3 outlines the legal issues often experienced by people with a mental illness.
- ◆ Chapter 4 discusses the barriers people with a mental illness can face when they attempt to access legal assistance.
- ◆ Chapter 5 examines the experiences of people with a mental illness when they participate in legal processes.
- ◆ Chapter 6 discusses the role that non-legal service providers can play in supporting their clients with a mental illness in accessing legal assistance and processes.

Chapter 7 presents a synthesis of the report's major findings regarding the legal issues and barriers to accessing legal assistance and processes that people with a mental illness in NSW experience.

2. Methodology

As outlined in Chapter 1, many areas of legal need and access to justice issues for people with a mental illness have not been addressed in the literature. A research design that involved few assumptions about the nature and range of legal needs experienced by this group was, therefore, deemed most appropriate. Accordingly, this study employed qualitative techniques in both the collection and analysis of data. The overall purpose was to gain insight into the broad range of legal issues experienced by people with a mental illness and the barriers they face in accessing the justice system and having these issues addressed.

Literature review

The first necessary step in this study was to identify relevant literature. Literature that focused on the nexus between mental health issues and the justice system, written in the last 20 years, was considered key. Health and legal databases were both investigated for the Project. The focus was on literature relating to mental illness and access to justice in NSW and Australia; however, international literature was also drawn on where it described innovative models for enhancing access to justice for people with a mental illness.

Methods

Roundtable discussions with service providers, advocates and other stakeholders

The next significant step in framing the focus of the Project was the conduct of two half-day roundtable discussions with legal and non-legal service providers, advocates and other stakeholders. A total of 16 people attended these discussions, held on 3 June and 16 June 2004. Those who attended

included solicitors from CLCs, advocates, mental health service providers and workers from community organisations who support people with a mental illness.

Roundtable attendees were asked to provide insights on the following issues:

- ◆ legal issues faced by people with a mental illness
- ◆ barriers faced by people with a mental illness to accessing or using legal services
- ◆ gaps in legal service provision to people with a mental illness
- ◆ barriers faced by people with a mental illness to accessing or using non-legal advocacy and support services
- ◆ relationship building between legal and non-legal service providers
- ◆ successful initiatives for special-needs clients.

The information provided through the roundtable discussions and the results of the literature review were used to frame the interview schedules in the following stages of the Project, namely, consultations with stakeholders and interviews with people who have a mental illness.

Consultations/interviews with stakeholders

A key component of this study was individual interviews conducted with stakeholders. These stakeholders were chosen because of their experience in working with people with a mental illness and their informed perspectives on the barriers their clients face in accessing the justice system.

Those interviewed included academics, government policy staff, private legal service providers, CLC solicitors, Legal Aid staff, mediators, counsellors, court staff, tenancy workers, advocates and trainers in disability awareness issues. Most interviews took place between August 2004 and March 2005. A complete list of the agencies consulted for the Project is included in Appendix 1. Twenty-nine were from legal service providers, 24 were from non-legal services, 14 were from government departments and agencies and 10 were from courts or tribunals. Four academics were also consulted. Interviews

were conducted with individuals and in groups. Most interviews were face-to-face although a small number were conducted by telephone. Interviews lasted between 30 and 90 minutes.

The interview schedules included a number of open-ended questions, a subset of which was covered in all interviews. Other questions were tailored to the particular expertise of the interviewee. An example of the interview schedule for legal service providers and the schedule for non-legal service providers are attached in Appendices 2 and 3.

Interviews with people who have a mental illness

Thirty semi-structured interviews were conducted with people who have a mental illness (see Appendix 4 for the interview schedule).¹ The term ‘participants’ is used in the following chapters to describe these interviewees. Participants were contacted through a range of organisations providing services to people with a mental illness in NSW (see Appendix 5). Of the 30 people interviewed, 17 were men and 13 were women. One participant was Indigenous, and five were living in rural or regional NSW at the time of the interview. Six participants were young people (under the age of 25).

Interviews were conducted at the contact organisation and, in one case, at the Foundation’s office. Each of the researchers who conducted these interviews had an honours degree in psychology and/or sociology and had received additional training from St Vincent de Paul Learning Services in interviewing people with complex needs.

Interviewers introduced themselves to participants providing a short description of the Foundation and the research project. In order to ensure informed consent, participants were provided with an information and consent form (see Appendix 6). The form outlined that participation was anonymous and voluntary, that the participant could choose not to answer any questions,

¹ Ten of these interviews with people with a mental illness were conducted as part of the Foundation’s study of homeless people. Given the high rate of mental illness among homeless people, we identified 10 people who had a mental illness among this group. The interview schedules used for both studies were close to identical, further enabling the use of this data.

and they could stop the interview at any time. The interviews were to be recorded with the permission of the participants and transcribed material would be kept securely, and the tape erased once transcribed. All participants were reimbursed \$20 for their time.

Once both the participant and interviewer signed the consent form, the interviewer commenced the interview by asking participants if they had a recent legal problem or issue in their life. If the participant indicated that they had a legal problem, they were asked what had happened, whether they sought help, who they had sought help from, if they had not done anything about it, why this was the case, and what happened in the end.

It was important to allow for the likelihood that participants would not necessarily be able to identify problems they had experienced as being legal. Therefore, whether or not participants nominated a legal issue in response to the first question, they were then asked a series of questions regarding different areas of the law and legal problems that had been identified by stakeholders as being particularly relevant to people with a mental illness in NSW. These included housing, income and employment, debt, fines, family issues, crime and victim of crime issues, relationships with police and health issues. If the participant indicated that they had any of these legal issues, they were asked the same questions listed above regarding whether they sought help and the outcome of the problem.

Use of other data sources

As noted in Chapter 1, data reported by agencies such as the ABS and AIHW on the prevalence and the correlates of mental illness provide an important backdrop for this study and have been drawn upon in our report.

Another source of data utilised for the Project was the data collected by the Foundation for the Legal Needs Survey conducted in late 2003.² This household survey involved a quantitative telephone survey of 2400 people in

² C Coumarelos, Z Wei & A Zhou, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, Law and Justice Foundation of NSW, Sydney, 2006.

six regions in NSW. It was not the purpose of the study to obtain representative sub-samples of specific disadvantaged groups such as people with a mental illness; rather the purpose of the region survey was to survey six disadvantaged communities as a whole. Nonetheless, 56 people who participated in this study indicated that they had a mental health problem. It was determined, however, that this small sample of people with a mental illness was unlikely to be a representative group, given the varied living arrangements of people with a mental illness, which can include shelters, refuges and boarding houses.³ Therefore, rather than use the information quantitatively, the responses provided by these participants were investigated as individual case studies. Where these cases provide information relevant to our report they have been incorporated.

It was hoped that additional data could be provided by the agencies consulted for our study. Unfortunately, legal agencies were unable to provide data to us on the mental health status of their clients, and non-legal agencies were unable to provide data on legal issues experienced by their clients with a mental illness.

Data analysis

The transcripts of all consultations for the study were entered into the qualitative software analysis program QSR NUD*IST Vivo (NVivo). NVivo is commonly used by qualitative researchers to organise rich data from interviews. Information is categorised under particular ‘nodes’ (or themes) that can be developed prior to coding or as the analysis progresses. In this case, most nodes were developed before data was entered into the NVivo database. Nodes were based on themes identified in earlier research, particularly as part of the Foundation’s Access to Justice and Legal Needs Program (e.g. areas of law/legal issue, types of barriers to accessing legal assistance). New nodes were added where required.

³ HREOC, *Human Rights and Mental Illness*; Jablensky et al., *People Living with Psychotic Illness*; Select Committee on Mental Health, *Mental Health Services in NSW: Final Report*.

Strengths and limitations of the study's design

The range of experience of the stakeholders we interviewed, and the depth of their understanding of legal and other issues experienced by people with a mental illness, are key strengths of this study. Another key strength is the perspective and insights provided by people who have a mental illness themselves. The barriers they perceived and experienced in addressing their legal issues add great richness to this study's results.

Another important component in this study's design was the inclusion of people with a mental illness (often referred to as 'consumers' in the literature) as advisors at key stages of the research processes. Advocates, researchers and trainers in the area of mental illness, who had a mental illness themselves, provided input into roundtable discussions, sampling methods and interview schedule design.

It is important to note that the purpose of this study was not to use quantitative sampling techniques that would provide a representative sample and would therefore allow us to generalise our results to all people with a mental illness in NSW. Such a design would have been appropriate if more were known about the legal needs and access to justice issues experienced by people with a mental illness at the outset of the study.

Given that key data collected for this study was based on consultations, it is also important to note the inherent weaknesses of self-report data—that is, data that is based on the subjective experiences of those interviewed. In interviewing people with a mental illness and stakeholders we were interested in gaining insight into their experiences, recognising that perceived barriers can be as insurmountable as actual barriers. We were also mindful, however, that at times interviewees may not fully understand or be aware of laws, legal and bureaucratic processes or legal services. Therefore, we have, where possible, sought to further investigate and verify some of the statements made by interviewees.

Reporting of findings in the following chapters

In line with the aim of this study, reporting in the following chapters will focus on presenting the range of issues and experiences raised by those we consulted. This report does not seek to quantify legal needs experienced or to generalise to all people with a mental illness. Where supporting literature is strong or where many of those we interviewed raised a particular issue, more weight will be given to this issue and the possibility of extrapolating this finding more broadly will be suggested.

3. Legal Issues

Consultations for this study indicated that people with a mental illness appear to experience particular legal issues. These include:

- ◆ legal issues relating to mental illness, such as issues falling under the *Mental Health Act 1990* (NSW) and adult guardianship
- ◆ discrimination in relation to employment, education and insurance
- ◆ criminal legal issues including behaviour-related offences, drug offences and fines
- ◆ housing issues, including problems relating to the Department of Housing (DOH), private rental and boarding house accommodation
- ◆ social security issues, including eligibility, breaching and social security debt and prosecution for fraud
- ◆ consumer issues, such as credit card debt and banking issues, mobile phone and other contractual debt
- ◆ family law and care and protection issues
- ◆ domestic violence and victim of crime issues.

Mental health care system-related legal issues

Under the *Mental Health Act 1990* (NSW), NSW Health is responsible for providing mental health care. The Act covers and facilitates both the voluntary and involuntary care and treatment of people who have been defined as “mentally ill” or “mentally disordered” in both community care facilities and hospital facilities.¹ The Act defines three categories of mental health patients: informal (voluntary) patients, who agree voluntarily to go to hospital and

¹ See Mental Health Co-ordinating Council (MHCC), *The Mental Health Rights Manual—A Legal Guide to the NSW Mental Health System*, 2nd edn, MHCC, Sydney, 2004, p. 25.

receive treatment; involuntary patients, who under the Act are ordered to go to hospital by a magistrate; and forensic patients, who are those patients who have a mental illness and have been arrested for committing a crime or who are in prison.² Eight participants in this study reported having been hospitalised as involuntary patients under the *Mental Health Act 1990* (NSW) at some stage.³ In addition, four participants also reported having been admitted as informal (voluntary) patients.⁴

According to consultations, the main legal issues facing people with a mental illness who have been hospitalised include:

- ◆ confusion about when they are to be discharged from hospital⁵
- ◆ confusion about when they move from voluntary to involuntary status⁶
- ◆ not understanding their rights in relation to medical treatment.⁷

Although involuntary patients do not have the right to refuse medication under NSW law (unlike the situation in North America), they must be told what the medication is. One participant alleged that she was forcibly injected with medication without being told what it was:

One nurse told me to take a drug and I asked him what is it for and he said just take it. I refused to so they called security. Security marches me to the isolation room and some nurse puts a needle in my bum and then they all go on their merry way. If I had been informed what the medication was and what it was for, I would have complied and hence not created a scene.⁸

² See MHCC, *The Mental Health Rights Manual*, p. 29.

³ Interviews nos. 3, 4, 6, 8, 10, 12, 13 and 19.

⁴ Interviews nos. 1, 2, 18 and 20.

⁵ Consultation with official visitor, October 2004; roundtable consultation, 16 June 2004. Patients may apply to the medical superintendent to be discharged. If they are refused, they can then apply to the Mental Health Review Tribunal.

⁶ Roundtable consultation, 16 June 2004. If the hospital believes that it is in the interests of the patient to stay in hospital, voluntary patients may be reclassified as involuntary patients. In these circumstances, patients are afforded the same rights as involuntary patients with the exception that an initial schedule is not required. See MHCC, *The Mental Health Rights Manual*, p. 30.

⁷ Consultation with community legal centre (CLC) workers, Mental Health Legal Centre (MHLC), Victoria, March 2004.

⁸ Interview no. 6.

Service providers argued that people from a non-English speaking background (NESB) face difficulties understanding their rights because of language barriers. On arrival at hospital, involuntary patients must be read their rights under the *Mental Health Act 1990* (NSW).⁹ If a person does not speak English the medical superintendent who is responsible for informing the patient of their rights must arrange for an interpreter.¹⁰ However, service providers argued that people from NESBs are not being properly informed of their rights upon being involuntarily admitted to hospital, because an interpreter was not always available.¹¹ The need for interpreters was also raised as an issue by the Official Visitors Programme.¹²

Adult guardianship

Guardianship is the management of an individual's personal affairs in the event that they lose the capacity to manage their affairs themselves. Individuals (such as a person with dementia) may appoint their own "enduring guardian", before they lose capacity, to make lifestyle and medical decisions on their behalf once they lose capacity.¹³ A person can also appoint a person to manage their financial and property affairs by drawing up an enduring power of attorney (EPA), which comes into effect when capacity is lost.¹⁴ The Guardianship Tribunal is a legal tribunal that has the power to appoint a guardian or a financial manager in the event that a person is not able to make their own decisions.¹⁵ In the event that an EPA or other instrument has not been executed, a private guardian, a friend or family member may be appointed by the Guardianship Tribunal to make decisions on behalf of the person. Under the *Protected Estates Act 1983* (NSW), the Mental Health Review Tribunal and the Supreme Court of NSW Equity Division—Protective also have the jurisdiction to appoint a financial manager.

⁹ *Mental Health Act 1990* (NSW), s. 30(1).

¹⁰ *Mental Health Act 1990* (NSW), s. 30(4).

¹¹ Roundtable consultation, 16 June 2004.

¹² Consultation with official visitor, October 2004.

¹³ Guardianship Tribunal NSW, *Planning Ahead. Enduring Power of Attorney*, http://www.gt.nsw.gov.au/information/doc_44_enduring_power_of_attorney.htm#whatis (accessed October 2004).

¹⁴ Guardianship Tribunal, *Planning Ahead*.

¹⁵ MHCC, *The Mental Health Rights Manual*, p. 64.

In circumstances where no private guardian is available or suitable for appointment, the Office of the Public Guardian (OPG) may be appointed to act as guardian and to make decisions relating to the person's medical, dental and accommodation needs (but not their financial needs).¹⁶ In the absence of an authority under an EPA or appointment of a suitable person as financial guardian, the Office of the Protective Commissioner (OPC) will be appointed to manage a person's financial affairs.¹⁷ The OPC can also be appointed to manage a person's financial affairs where they have problems doing so themselves as a result of disability (such as mental illness, dementia, intellectual disability, brain injury).¹⁸ For example, the OPC may be made a prescribed nominee by Centrelink to receive and manage a person's social security benefits.¹⁹ Four participants interviewed for this study reported having their financial affairs managed by the OPC.²⁰

The only issue raised in this study relating to guardianship and financial management was where clients placed under a financial management order wished to challenge it or have the order removed. A solicitor from the OPC reported that people who are the subject of financial management orders can develop a lot of anger and resentment as a result of being under such an order, because of the restrictions these place upon what a person can do with their finances.²¹ People under financial management orders may seek to challenge these orders because they want greater control over their money.²² Although most financial management orders are indefinite, people can appeal to the Guardianship Tribunal for the order to be revoked.²³

¹⁶ Office of the Public Guardian (OPG), *Common Questions*, <http://www.lawlink.nsw.gov.au/lawlink/opg/ll_opg.nsf/pages/OPG_faq> (accessed August 2005).

¹⁷ Office of the Protective Commissioner (OPC), *What We Do*, <http://www.lawlink.nsw.gov.au/lawlink/office_of_the_protective_commissioner/opc_ll.nsf/pages/OPC_whatwedo> (accessed August 2005).

¹⁸ OPC, *What We Do*.

¹⁹ *The Independent Social Security Handbook*, National Welfare Rights Network, Sydney, 2005, <www.welfarerights.org.au/iss> (accessed November 2005), para 9.3.4.

²⁰ Interviews nos. 3, 9, 10 and 27 (taken from the Foundation's study into homeless people).

²¹ Consultation with solicitor, OPC, September 2004.

²² Consultation with social worker, Mental Health Advocacy Service (MHAS), August 2004.

²³ MHCC, *The Mental Health Rights Manual*, p. 73.

Three participants who were the subjects of financial management orders felt that they did not receive enough money from the OPC to live on each week and that it was very difficult to obtain additional money for emergencies and further expenses:

*I thought they were a little bit hard on me because they didn't give me enough money.*²⁴

*It's like getting blood from a stone.*²⁵

*I am currently underneath the Protective Office and they can control my finances ... It's really hard because I have nearly over \$2000 in my account and they are not letting me have it. They give me \$360 a fortnight. They expect me to be able to go to the Salvation Army to get clothes ... and being homeless it's really hard.*²⁶

In a 2001 review of the OPC, the NSW Parliament Public Bodies Review Committee said that one of the ongoing challenges facing the OPC is the quality of relations between clients and staff members.²⁷ The review argued that OPC clients and their families reported communication problems that included difficulties contacting OPC staff on the phone, long delays in officers responding to inquiries as well as perceived rudeness on the part of staff.²⁸ Although acknowledging the difficulties highlighted by the OPC in balancing the direct wishes of a client with their overall best interests, the review recommended that the OPC specifically address the quality of client contact.²⁹

Following the NSW Auditor General's *Performance Audit of the Review of the Office of the Protective Commissioner and Office of the Public Guardian Complaints and Review Processes*, in 1999, and its 2003 follow-up audit, both the OPG and the OPC have implemented internal and external appeals

²⁴ Interview no. 3.

²⁵ Interview no. 10.

²⁶ Interview no. 27 (taken from the Foundation's study into homeless people).

²⁷ NSW Parliament Public Bodies Review Committee, *Personal Effects: A Review of the Offices of the Public Guardian and the Protective Commissioner*, Parliament of NSW, Sydney, 2001, p. 57. Also T Carney, "Challenges to the Australian Guardianship and Administration Model", *Elder Law Review*, vol. 2, 2003, pp. 1–13 at p. 4.

²⁸ NSW Parliament Public Bodies Review Committee, *Personal Effects*, p. 59.

²⁹ NSW Parliament Public Bodies Review Committee, *Personal Effects*, p. 66.

mechanisms.³⁰ Clients of both agencies can request an internal review of a decision made by either the OPG or the OPC.³¹ Following this, decisions can be reviewed externally by the Administrative Decisions Tribunal.³²

Disability discrimination

Discrimination on the basis of disability (including psychiatric disability) is unlawful in NSW, under the *Anti-Discrimination Act 1977* (ADA), and in Australia generally, under the Commonwealth *Disability Discrimination Act 1992* (DDA). Although they both cover discrimination on the basis of disability, both pieces of legislation differ in the areas they cover, their complaints process, exemptions and upper limits on compensation. For example, under both pieces of legislation it is unlawful to discriminate against someone on the basis of their disability in relation to employment and related areas, education, accommodation, the provision of goods and services and clubs.³³ In addition, under the DDA, it is unlawful to discriminate in relation to sport, Commonwealth laws and programs and land. Under the ADA it is unlawful to discriminate in the area of education, but not for private schools. Complaints made under the DDA must be made to HREOC and there is no upper limit on compensation. Complaints made under the ADA must be made to the Anti-Discrimination Board and compensation must not exceed \$40 000.³⁴

³⁰ NSW Auditor General, *Performance Audit: Office of the Protective Commissioner and Office of the Public Guardian Complaints and Review Processes*, NSW Audit Office, Sydney, 1999; NSW Auditor General, *Follow-up of Performance Audits: Office of the Protective Commissioner and Office of the Public Guardian Complaints and Review Processes*, NSW Audit Office, Sydney, 2003.

³¹ OPG, *Making a Complaint*, <http://www.lawlink.nsw.gov.au/lawlink/opg/ll_opg.nsf/pages/OPG_forms#appeal> (accessed February 2006); OPC, *Feedback, Complaints and Reviews of Decisions*, <http://www.lawlink.nsw.gov.au/lawlink/office_of_the_protective_commissioner/opc_ll.nsf/pages/OPC_feedbackcomplaints> (accessed February 2006).

³² NSW Administrative Decisions Tribunal, *Administrative Decisions Tribunal—Guardianship and Protected Estates List, General Division*, <http://www.lawlink.nsw.gov.au/lawlink/adt/ll_adt.nsf/pages/adt_guardianship#PE2> (accessed February 2006).

³³ Under the *Disability Discrimination Act 1992* (DDA) it is unlawful to discriminate against someone on the basis of employment, education, access to premises, goods and services, facilities, accommodation, land, clubs and incorporated associations, sport, Commonwealth laws and programs, disability standards, and requests for information. Under the *Anti-Discrimination Act* (ADA) it is unlawful to discriminate against someone on the basis of disability in relation to employment, education (but not private schools), provision of goods and services, accommodation, registered clubs and local government.

³⁴ For a complete list of the differences between the ADA and the DDA, see NSW Disability Discrimination Legal Centre (DDLCC), *Using Disability Discrimination Law in New South Wales*, DDLCC, Sydney, 2004.

Participants for this study reported being discriminated against on the basis of psychiatric disability in relation to employment, accommodation, education and the provision of goods and services.³⁵

Employment

Discrimination in employment was the most common type of discrimination reported by participants and stakeholders.³⁶ Consultations and the literature suggested that people with a mental illness are susceptible to discrimination when they are merely looking for work and once they are in the workforce.³⁷ For example, people with a mental illness may also have to take time off work because of their illness and as a result, they may face discrimination while they are away or when they return.³⁸

*Because I was sick at Christmas and had time off, they realised that I had the illness. When I rang up and said "I am right, can I come back to work?" they said "we will call you" and then it basically just fizzled right out.*³⁹

*I was in employment, and I was away sick, and my employer rang my GP and the GP told her that I had a mental illness. My employer walked up to me and said "people with a mental illness shouldn't be doing what you are doing" and so I resigned on the spot.*⁴⁰

Or as one solicitor indicated, people with a mental illness may be dismissed from employment as a result of the manifestation of their illness, where this affects their work performance and relationship with other employees. For example:

The majority of cases we get ... is [where] a person who is already in employment and whose mental illness has manifested, alleges that they are about to be or have been [terminated], and that the reason given is their

³⁵ See also MHCA, *Not for Service*, p. 134. Daily experiences of stigma and discrimination were reported repeatedly in the submissions and consultations.

³⁶ Interview nos. 2, 9, 10, 14 and 18. See also HREOC, *Human Rights and Mental Illness*, pp. 406–08.

³⁷ Consultation with policy officer, HREOC, June 2004. See also Productivity Commission, *Review of the Disability Discrimination Act 1992*; HREOC, *Human Rights and Mental Illness*, pp. 406–08.

³⁸ Consultation with policy officer, HREOC, June 2004.

³⁹ Interview no. 2.

⁴⁰ Interview no. 10; also interview no. 18.

*mental illness. Associated with that might be a breakdown in relationships with people and the employment in the workplace.*⁴¹

As a result, service providers reported that people are unwilling to disclose their illness for fear of being discriminated against when they are looking for a job and once they are employed.⁴² A conciliation officer from HREOC provided a case study of a woman who after disclosing that she had a mental illness had had an offer of employment withdrawn:

*A woman who was working in a temporary position with a government service agency complained that she had been discriminated against when an offer of permanent work was withdrawn. On her pre-employment medical questionnaire she indicated that she had received treatment for depression. The employer's medical officer recommended that she undergo a psychiatric assessment. The psychiatrist was of the view that the complainant would not be able to cope with the stressful environment in the workplace concerned. The offer of employment was withdrawn.*⁴³

People are not required by law to disclose their disability. However, if they don't disclose their mental illness, they may not be able to request that certain adjustments be made in the workforce.⁴⁴ In addition, if a person does not disclose that they have a mental illness, then their mental illness may not be taken into account if they have trouble fulfilling the job requirements.⁴⁵

Not all discrimination on the basis of disability in employment is unlawful. If an employer can demonstrate that a person is unable to meet the "inherent requirements" of the job then discrimination is not unlawful.⁴⁶ However, simple adjustments (that do not cause "unjustifiable hardship" to the employer) may allow a person with a disability to meet the requirements of a job.⁴⁷ An

⁴¹ Consultation with solicitor, People with Disability Australia (PWD), August 2004.

⁴² Consultations with HREOC, August 2004; senior solicitor, PWD, August 2004. See also Productivity Commission, *Review of the Disability Discrimination Act 1992*, p. 131; HREOC, *Human Rights and Mental Illness*, p. 407.

⁴³ Consultation with HREOC, August 2004. Also consultation with solicitor, PWD, August 2004.

⁴⁴ Consultation with solicitor, PWD, August 2004.

⁴⁵ Consultation with clinical psychologist, Sydney, July 2004.

⁴⁶ NSW DDLC, *Using Disability Discrimination Law in New South Wales*.

⁴⁷ NSW DDLC, *Using Disability Discrimination Law in New South Wales*.

employer is not allowed to discriminate against a person with a disability just because they require certain adjustments to be made.⁴⁸ However, if an employer can argue that an adjustment will cause unjustifiable hardship to them, then it may be lawful for them to discriminate against a person with a mental illness.⁴⁹

Other areas of discrimination

Reported in both the literature and by service providers consulted for this study, people with a mental illness also face discrimination in the area of insurance, whereby they are refused access to various types of insurance including travel, income and mortgage protection insurance, on the basis of a past or existing psychiatric disability.⁵⁰

A woman with a psychiatric disability complained that she had been refused death or disablement cover because of her disability which she had disclosed to the insurer.⁵¹

A solicitor from People with Disability Australia (PWD) reported that despite work being done in this area by SANE, beyondblue and the Insurance Council of Australia, insurance companies are still able to deny people with a mental illness access to insurance, because they are thought to have a higher risk of harming themselves.⁵²

Examples of discrimination in the areas of education and housing were also provided by HREOC:

⁴⁸ NSW DDLC, *Using Disability Discrimination Law in New South Wales*.

⁴⁹ NSW DDLC, *Using Disability Discrimination Law in New South Wales*, p. 15.

⁵⁰ Roundtable consultations, 3 and 16 June 2004. Consultations with conciliator, HREOC, August 2004; policy officer, HREOC, June 2004; solicitor, PWD, August 2004. See also beyondblue, *Discrimination in Insurance—Implications for General Practice*, 2003, <http://www.beyondblue.org.au/index.aspx?link_id=4.62> (accessed February 2005); HREOC, *Draft Revision: Guidelines for Providers of Insurance and Superannuation*, 2004, <http://www.humanrights.gov.au/disability%5Frights/standards/Insurance/draft_rev.htm> (accessed December 2005); HREOC, *Human Rights and Mental Illness*, p. 449.

⁵¹ Case study provided by HREOC.

⁵² Consultation with solicitor, People with Disability Australia (PWD), August 2004.

The parents of a boy with a psychiatric condition complained that he had been discriminated against when he was refused admission to a secondary college after the principal formed the view that he was unsuitable for mainstream schooling.⁵³

The complainant leased residential premises from the respondent department. In 2003 the respondent commenced proceedings to evict the complainant alleging that he had failed to keep the premises reasonably clean in accordance with the tenancy agreement. The complainant claimed that it was unreasonably difficult to comply with the terms of the tenancy agreement because of his disability, obsessive compulsive disorder, which causes him to hoard. He claimed that the respondent sought to evict him for the storing of goods in his home. He also claimed that the respondent treated him less favourably than other tenants because of his disability by inspecting and accessing his premises more times than other tenants.⁵⁴

Occupational health and safety

An emerging issue in discrimination law is the interplay between occupational health and safety laws and discrimination laws. A solicitor from PWD argued that following the *Purvis* decision,⁵⁵ there appears to be a feeling within the Department of Education, and among some employers, that behavioural issues that *might* pose an occupational health and safety risk may in turn provide “sufficient grounds to terminate a person’s access to either the benefits of that employment or education, or more ... in terms of disability services”.⁵⁶

This is supported by the Productivity Commission, which recommends that the “*Disability Discrimination Act 1992* be amended to include a general duty by employers to make reasonable adjustments”.⁵⁷ For example, an employer

⁵³ Consultation with conciliator, HREOC, August 2004.

⁵⁴ Case study provided by HREOC. See also HREOC, *Human Rights and Mental Illness*, p. 347.

⁵⁵ *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62. This case involved a young boy (who had brain damage and an intellectual disability) who was expelled from his school for violent behaviour. The High Court ruled that a comparison should be made with the treatment of a person without a disability in the same circumstances. The High Court found that the school would have acted in the same manner (expelling a person for such behaviour) if a person did not have a disability.

⁵⁶ Consultation with solicitor, PWD, August 2004.

⁵⁷ Productivity Commission, *Review of the Disability Discrimination Act 1992*, Finding 8.1, p. 96.

should “work with the individual and put in place prevention approaches ... and only where those fail and there is a persistent occupational health and safety risk to then consider termination”.⁵⁸ Without such a duty, the commission states that discrimination would not be adequately addressed.⁵⁹

An example of the interplay between discrimination and occupational health and safety is the reported exclusion of people with a mental illness who have complex needs and behaviours from the Supported Accommodation Assistance Program (SAAP). This program is a jointly funded Australian government and state/territory program that provides supported, temporary accommodation to people experiencing homelessness.⁶⁰ In the Foundation’s *No Home, No Justice?* report, concerns were raised by stakeholders that people with complex needs (such as mental health and drug and alcohol problems) were being excluded from SAAP services because of concerns for the occupational health and safety of SAAP employees.⁶¹

In its inquiry into the exclusion of people with complex needs from SAAP services, the NSW Ombudsman recommended that SAAP services should move away from a “presumption of risk to considered assessment and risk management”, whereby “policies, procedures and practices are inclusive, and that any exclusions be based on considered assessment of the presenting circumstances of individual clients and fair and transparent exiting procedures”.⁶²

⁵⁸ Consultation with solicitor, PWD, August 2004.

⁵⁹ Productivity Commission, *Review of the Disability Discrimination Act 1992*, p. 193.

⁶⁰ Department of Family and Community Services, *Supported Accommodation Assistance Program*, <http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/programs/house-nhs_saap.htm> (accessed October 2005).

⁶¹ S Forell, E McCarron & L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of NSW, Sydney, 2005.

⁶² NSW Ombudsman, *Assisting Homeless People: The Need to Improve Their Access to Accommodation and Support Services*, NSW Ombudsman, Sydney, 2004, p. 14.

Criminal legal issues

Criminal legal issues that were raised during consultations included:

- ♦ behaviour-related criminal offences (including offensive conduct and assault)
- ♦ drug-related criminal offences (including theft)⁶³
- ♦ fines (e.g. transport fines) particularly for young homeless people with a mental illness.

Consultations indicated that people with a mental illness may be charged with offences relating to behaviour arising from their illness (such as offensive language and conduct, assault, resisting arrest and assaulting police).⁶⁴

*As a general rule it's usually public disorder ... where they bring themselves under notice due to their actions. Apart from that, it's generally assault where somebody has walked up to someone else and hit them.*⁶⁵

The Burdekin Report noted that the behaviour of people with a mental illness who are untreated can bring them to the attention of the police:

*Untreated mental illness clearly causes some people to behave irresponsibly, irrationally and in a bizarre fashion. Sometimes this behaviour brings people to the attention of the police.*⁶⁶

A couple of legal service providers said that behaviour may also be drug- and alcohol-related.⁶⁷ For example:

A lot of our clients with mental health issues or alcohol problems get pulled up for offensive language. If they are walking a bit strangely or they look like

⁶³ Substance use disorders were included in the definition of mental illness used for this report.

⁶⁴ Roundtable consultation, 3 June 2004; consultations with CLC workers, Shopfront Youth Legal Centre (Shopfront), September 2004; mental health worker, Sydney, September 2004.

⁶⁵ Consultation with NSW Police inspector, South Coast, November 2004.

⁶⁶ HREOC, *Human Rights and Mental Illness*, p. 757.

⁶⁷ Consultations with CLC worker, Western NSW, September 2004; CLC workers, Women's Legal Services NSW (WLS), October 2004.

*they are under the influence, a police officer will pull them up. And if they give them an earful of abuse they get charged with offensive language.*⁶⁸

Consultations also indicated that people with drug and alcohol problems may experience particular legal issues specifically related to drugs (such as possession) or to their financial situation (such as stealing).⁶⁹

*He has schizophrenia [which is] often made worse by taking a variety of drugs. [He] was detained by railway police on a train for strange behaviour (he said he was hearing voices) and a small amount of marijuana dropped out of his pocket. He admitted everything and was charged with possession and released on bail.*⁷⁰

*Yeah, I got charged a while back. I got charged for car [theft], assault and grievous bodily harm. I was in for two and a half months. And then rehab for three months.*⁷¹

*I broke into cars and stole them, stripped them. Drugs do evil things to people. I'm a walking example.*⁷²

A number of participants reported that they had fines that ranged in amount and seriousness. For example, one participant had a fine for riding a pushbike without a helmet.⁷³ Another had a parking fine.⁷⁴ Another had received a fine for smoking at a train station.⁷⁵ Two other participants had received fines and lost their drivers' licences as a result of speeding.⁷⁶ One older participant reported that he had \$12 000 in unpaid fines from another state.⁷⁷

⁶⁸ Consultation with CLC workers, WLS, October 2004.

⁶⁹ Consultations with mental health worker, Sydney, September 2004; NSW Police inspector, South Coast, November 2004. See also HREOC, *Human Rights and Mental Illness*, p. 757; D MacKenzie & C Chamberlain, *Homeless Careers: Pathways in and out of Homelessness*, Counting the Homeless 2001 Project, Hawthorn, 2003.

⁷⁰ Case study provided by the OPG.

⁷¹ Interview no. 28 (taken from the Foundation's study into homeless people).

⁷² Interview no. 25 (taken from the Foundation's study into homeless people).

⁷³ Interview no. 23 (taken from the Foundation's study into homeless people).

⁷⁴ Interview no. 8.

⁷⁵ Interview no. 4.

⁷⁶ Interviews nos. 5 and 18.

⁷⁷ Interview no. 25 (taken from the Foundation's study into homeless people).

Young people with a mental illness (especially those who are homeless) are particularly vulnerable to receiving fines for transport, traffic and graffiti-related offences:⁷⁸

I've received some pretty hefty fines for impulsive things that I am known to do. The fines have added up to \$1600 or something. One was due to the fact that my driver licence had expired and I jumped in my car and got a speeding fine and a no-licence fine which is like \$578. Then on top of that, train fines: having no ticket, running on the platform, lying about who I was, smoking on the platform.⁷⁹

Driving without a licence, graffiti, malicious damage. I got caught [doing graffiti] in a tunnel. I didn't really think that it'd be that illegal, in a tunnel out in nowhere. I got charged and fined.⁸⁰

One of them [a fine] was issued when I was mentally unstable—I ran across the train tracks without using the train bridge.⁸¹

Housing issues

Housing is always an issue, both when they have it and when they don't.⁸²

Housing-related legal issues were raised in the consultations as a particular concern for people with a mental illness. Because a large proportion of people with a mental illness are on low incomes in NSW, many are dependent primarily on private rental accommodation, and on public and community housing. Other than this, there is a paucity of stable, secure and appropriate accommodation available to people with a mental illness.⁸³ If evicted from private rental accommodation or public housing, the only other

⁷⁸ Consultations with mental health worker, Sydney, September 2004; CLC workers, Shopfront, September 2004. See also Forell et al., *No Home, No Justice?*; J Sanders, *Fines and Young people (or, All You Need to Know about the SDRO)*, 2004, <<http://www.legalaid.nsw.gov.au/data/portal/00000005/public/48109001084410066281.doc>> (accessed November 2004).

⁷⁹ Interview no. 15.

⁸⁰ Interview no. 14.

⁸¹ Interview no. 29 (taken from the Foundation's study into homeless people).

⁸² Consultation with social worker, MHAS, August 2004.

⁸³ Shelter NSW, *Submission to the NSW Legislative Council Select Committee on Mental Health Inquiry into and Report on Mental Health Services in NSW*, Sydney, 2002, p. 3, <<http://www.shelternsw.infoxchange.net.au/docs/sub02mhinq.pdf>> (accessed March 2006); also A Reynolds, S Inglis & A O'Brien,

accommodation available to people with a mental illness are boarding houses, caravan parks, family/friends and emergency accommodation (such as SAAP accommodation). Housing stress and homelessness is a reality facing many people with a mental illness.⁸⁴

Participants interviewed in this study were found to be living in private rental accommodation, public housing, licensed and unlicensed boarding house accommodation and SAAP accommodation. Legal issues are documented according to each type of accommodation. A number of participants consulted for this study were also homeless.

Private rental accommodation

Four participants from this study lived in private rental accommodation. Service providers reported that people with a mental illness face a number of barriers in trying to access private rental accommodation. They may be vulnerable to discrimination because of the stigma associated with their mental illness.⁸⁵ They may not possess the necessary references (or they might have bad references) to gain private rental accommodation.⁸⁶ Furthermore, because many people with a mental illness are financially disadvantaged, they might not be able to raise the bond money, or to pay for private rental accommodation—particularly those living in Sydney.⁸⁷

Once people are in accommodation, it would appear that they are still vulnerable to discrimination.⁸⁸ A caseworker from a regional area was of the

Effective Programme Linkages: An Examination of Current Knowledge with a Particular Emphasis on People with Mental Illness, Australian Housing and Urban Research Institute, Melbourne, 2002; HREOC, *Human Rights and Mental Illness*; MHCA, *Not for Service*, pp. 270–71.

⁸⁴ Shelter NSW, *Submission to the NSW Legislative Council Select Committee on Mental Health Inquiry*, p. 4; HREOC, *Human Rights and Mental Illness*; Select Committee on Mental Health, *Inquiry Into Mental Health Services in NSW*; T Hodder, M Teesson & N Buhrich, *Down and Out in Sydney: Prevalence of Mental Disorders, Disability and Health Service Use among Homeless People in Inner Sydney*, Sydney City Mission, Sydney, 1998.

⁸⁵ Consultation with Terry Carney, Faculty of Law, University of Sydney, January 2004.

⁸⁶ Consultation with psychiatrist, Sydney, August 2004; see also Select Committee on Mental Health, *Inquiry into Mental Health Services in NSW*, p. 135.

⁸⁷ Consultation with psychiatrist, Sydney, August 2004; see also Jablensky et al., *People Living with Psychotic Illness*, p. 91.

⁸⁸ Reynolds et al., *Effective Programme Linkages*, p. 10.

opinion that once a landlord establishes that a tenant has a mental illness, they can be very quick to try to get rid of them:

*The landlord might have observed them [the tenant] trying to cope with schizophrenia, depression and drug addiction. They tend to become very antagonistic [although] they do it very diplomatically. They'll just go to the real estate agent and say "I'm pulling the house off the market, I'm moving into it or selling it: I need them out."*⁸⁹

Department of Housing (DOH) accommodation

Eleven participants reported living in DOH accommodation, a major provider of accommodation to people with a mental illness.⁹⁰ A number of legal issues were raised by both stakeholders and participants in relation to DOH.

Eligibility

To be eligible for public housing, applicants must meet a number of criteria that includes possessing citizenship or permanent residency in Australia, having a certain household income and also the “ability to sustain a successful tenancy”.⁹¹ To prove that they can sustain a successful tenancy, the applicant must show that they can pay their rent, look after their property, not create a nuisance to their neighbours and live independently on an ongoing basis.⁹² DOH can order an “independent living skills report” that assesses the ability of the applicant to meet these requirements.⁹³

The Tenants’ Union of NSW (Tenants’ Union) suggested that people with a mental illness can have problems proving their eligibility for DOH accommodation because of their potential inability to pass an independent living skills report or comply with a residential tenancy agreement:

⁸⁹ Consultation with caseworker, South Coast, NSW, November 2004.

⁹⁰ NSW Health, *Framework for Housing and Accommodation Support for People with Mental Health Problems and Disorders*, pp. 3–4; Shelter NSW, *Submission to the NSW Legislative Council Select Committee on Mental Health*, p. 3.

⁹¹ NSW Department of Housing (DOH), *Department of Housing—Policy ALL0030A: Eligibility for Public Housing*, <<http://www.housing.nsw.gov.au/>> (accessed January 2006).

⁹² DOH, *Policy ALL0030A*.

⁹³ DOH, *Policy ALL0030A*.

*If they have got problematic behaviour then, yes, it may stop them getting public housing. It depends on whether the department can be convinced that they have the independent living skills and they are capable of complying with the residential tenancy agreement.*⁹⁴

A mental health worker working with young people also observed that young people with a mental illness face difficulties accessing DOH accommodation because they are often unable to prove that they can sustain a successful tenancy:

*... it's like getting gold from a dragon getting Department of Housing accommodation for a young person.*⁹⁵

One of the aims of the independent living skills report is to determine whether an applicant needs support services in order to sustain a successful tenancy.⁹⁶ A legal officer from the Tenants' Union argued that people with a mental illness may need a lot of support to prove they are eligible, and to be able to stay in DOH accommodation.⁹⁷ Although they can refer people to support services, it is not the responsibility of DOH to provide such support directly to tenants.⁹⁸ One legal worker believed that a lack of available mental health and other support services in rural and regional areas may make it difficult for some people with a mental illness to comply with their residential tenancy agreements.⁹⁹ This worker also highlighted the dilemma in using a person's mental illness as a reason for applying for housing, as it can be used as a reason for not giving it to them.¹⁰⁰

Eviction and debt

Service providers also argued that people with a mental illness may face eviction and accrue housing related debt as a result of unpaid rent and

⁹⁴ Consultation with legal officer, Tenants' Union, September 2004.

⁹⁵ Consultation with mental health worker, Sydney, September 2004.

⁹⁶ DOH, *Policy ALL0030A*

⁹⁷ Consultation with legal officer, Tenants' Union, September 2004.

⁹⁸ DOH, *Policy ALL0030A*

⁹⁹ Consultation with CLC workers, WLS, October 2004.

¹⁰⁰ Consultation with CLC workers, WLS, October 2004.

property damage.¹⁰¹ In its submission to the NSW Legislative Council Select Committee on Mental Health, Shelter NSW pointed out that people with a mental illness can be forgetful, and forget to pay rent and fall into arrears.¹⁰² Property damage may be committed by the people themselves or by family members. One participant provided an example of where he had been held responsible for damage committed by a family member:

*Four months ago I had one of my sons staying with me. It was because of him I had to move out of the house. It was just a nightmare. He got into the house after I moved out and trashed it. I got a bill there.*¹⁰³

There is a Joint Guarantee of Service (JGOS) between DOH, NSW Health, DoCS, the NSW Aboriginal Housing Office and the Aboriginal Health and Medical Research Council of NSW, which outlines the roles and responsibilities of each agency in relation to housing people with a mental illness.¹⁰⁴ The aim of the guarantee is to enhance the coordination of service delivery between the agencies.¹⁰⁵ Guidelines as set out by the JGOS are to be implemented at the local level.¹⁰⁶ However, Shelter NSW has maintained that the application of these guidelines across NSW depends on local circumstances, and they are therefore not always completely upheld.¹⁰⁷ In consultation, policy officers from DOH said that where the behaviour of people with a mental illness leads them to experience difficulties maintaining their tenancy, under the JGOS, DOH workers are to refer people to appropriate mental health support.¹⁰⁸ Be that as it may, they argued that it may not be obvious to DOH workers that a person has a mental illness, or people themselves may be unwilling to disclose that they have a mental illness.¹⁰⁹

¹⁰¹ Consultations with legal officer, Tenants' Union, September 2004; solicitor, PWD, August 2004; disability awareness trainer, August 2004.

¹⁰² Shelter NSW, *Submission to the NSW Legislative Council Select Committee on Mental Health*, p. 3.

¹⁰³ Interview no. 22 (taken from the Foundation's study into homeless people).

¹⁰⁴ NSW Health, *Joint Guarantee of Service for People with Mental Health Problems and Disorders*, NSW Department of Health, Sydney, 2003, p. 3.

¹⁰⁵ NSW Health, *Joint Guarantee of Service*, p. 3.

¹⁰⁶ NSW Health, *Joint Guarantee of Service*, p. 4.

¹⁰⁷ Shelter NSW, *Submission to the NSW Legislative Council Select Committee on Mental Health*, p. 4.

¹⁰⁸ Consultation with policy officers, DOH, June 2004.

¹⁰⁹ Consultation with policy officers, DOH, June 2004.

Ultimately, DOH has the discretion to allow a person to remain as a tenant, even if the department has successfully taken a client to the Consumer, Trader and Tenancy Tribunal (CTTT) and had an eviction order made. A legal officer from the Tenants' Union held that DOH does not necessarily enforce every termination and possession order it gets:

*Sometimes DOH, having got orders of termination and possession, uses those orders to convince other organisations to provide the support that the person needs to remain in public housing, and maybe transfer them to better premises for that arrangement. So it's not the case that every time they get orders they actually do make somebody with a mental illness homeless. But it is something that does happen.*¹¹⁰

In addition to being evicted, people may be left with significant debt arising from rent arrears or property damage, which can also act as a barrier to people re-entering DOH accommodation in the future.¹¹¹

Neighbourhood disputes

As public housing stock is diminishing, it is being increasingly allocated to households with the greatest needs, with a significant emphasis placed on disability, homelessness and health problems.¹¹² This suggests that in certain public housing areas there will be a high concentration of complex needs among public housing tenants. Exacerbated by the limited availability of mental health and other support services to people with complex needs in such areas, disputes between residents can occur. Many people with a mental illness may either feel harassed, intimidated or discriminated against by their neighbours, contributing to a feeling of insecurity and, often, an exacerbation of their mental illness, or indeed they may exhibit behaviour that is problematic to others, likewise jeopardising the security of their housing.¹¹³

¹¹⁰ Consultation with legal officer, Tenants' Union, September 2004.

¹¹¹ See DOH, *Policy ALL0040A: Priority Housing*, 2003, <<http://www.housing.nsw.gov.au/phop/all0040a.htm>> (accessed November 2004).

¹¹² K Hulse & T Burke, "Social Housing Allocation Systems—How Can They Be Improved?", *AHURI Research and Policy Bulletin*, no. 64, September 2005, pp. 2–3.

¹¹³ A O'Brien, S Inglis, T Herbert & A Reynolds, *Linkages between Housing and Support—What is Important from the Perspective of People with a Mental Illness*, Australian Housing and Urban Research Institute, 2002, p. 61.

The most common issue relating to DOH raised in the consultations for this study were neighbourhood disputes between residents with a mental illness and other public housing residents:

*We do tend to get complaints about people with particular behaviours that neighbours don't agree with or the housing authority doesn't agree with.*¹¹⁴

Disputes ranged from small disputes over privacy to theft and harassment:

*I had a problem: my next door neighbour put some excrement on the garden. I asked DOH to come out and tell her to stop it [but] it's still going on. The same woman looks in my window if I have my blinds open, stands there and stares at me, or through the hole in my back gate.*¹¹⁵

*I have only lived here for three months. They have been there for three years. It's like their turf; I feel like I am the one that has to be locked in the flat all day and not make an appearance out the front, otherwise they will stare at me or something.*¹¹⁶

*I have had conflict with neighbours; some have gotten over it and responded to me, others haven't. What did I do? Have I offended people? Is it because I have been in trouble with the police?*¹¹⁷

Acceptable behaviour agreements

Quite recently, the NSW Parliament passed the *Residential Tenancies Amendment (Public Housing) Act 2004* introducing acceptable behaviour agreements (ABAs), in an attempt to curb neighbourhood disputes and address problematic “anti-social” behaviour in public housing. The legislation statutorily recognises the concept of renewable tenancies, so that a fixed term can be imposed on a public tenant’s residential tenancy agreement. The second part of the legislation allows DOH to require tenants who have been identified as exhibiting “anti-social” behaviour to sign an ABA.

¹¹⁴ Consultation with HREOC, August 2004; also consultation with caseworker, Blue Mountains, July 2004.

¹¹⁵ Interview no. 10. Also interview nos. 12 and 14; Shelter NSW, *Submission to the NSW Legislative Council Select Committee on Mental Health*, p. 3.

¹¹⁶ Interview no. 5.

¹¹⁷ Interview no. 11. Also interview no. 21 (taken from the Foundation’s study into homeless people).

The legislation stipulates that following an application from DOH, the CTTT *must* order that the tenancy be terminated in either of two situations:

- ◆ a tenant refuses DOH's request to sign an ABA¹¹⁸
- ◆ a tenant or a member of a tenant's household persistently breaches the ABA.¹¹⁹

Given the fact that public housing tenants with a mental illness may be involved in neighbourhood disputes and exhibit problematic behaviour, tenancy workers and legal workers are concerned that ABAs will be likely to disproportionately impact upon people with a mental illness.¹²⁰ The MHCC reports that DOH has finalised a policy framework that will ensure people with disabilities will receive a proper assessment, placing them outside the ABA regime. For example, when considering whether to put a person on an ABA, DOH must consider whether there are any special circumstances that need to be taken into account.¹²¹

This may however be problematic for people who do not disclose or who actively deny that they have a mental illness. Furthermore, a legal officer from the Tenants' Union was concerned that this policy would not be always implemented:

*DOH has said in writing that they do not want to use these amendments to evict people with mental illness. But people with a mental illness are obviously vulnerable to this if it's used other than according to the department policy.*¹²²

¹¹⁸ *Residential Tenancies Amendment (Public Housing) Act 2004* (NSW) sch. 1, cl. 5—new s. 64 (2A)(a).

¹¹⁹ *Residential Tenancies Amendment (Public Housing) Act 2004* (NSW) sch. 1, cl. 5—new s. 35A (2), 64 (2A)(b).

¹²⁰ Consultation with disability awareness trainer, Sydney, August 2004. Also consultations with legal officer, Tenants' Union, September 2004; solicitor, PWD, August 2004.

¹²¹ MHCC, *Improved Attitudes to "Acceptable Behaviour Agreements" Achieved*, 2005, <<http://www.mhcc.org.au>> (accessed June 2005). See also PWD, "Acceptable Behaviour Agreements: Update", *PWD E-Bulletin*, no. 20, February 2005, <http://www.pwd.org.au/e-bulletin/pwd_e-bulletin_20.html#nsw4> (accessed March 2006).

¹²² Consultation with legal officer, Tenants' Union, September 2004.

Tenants may appeal to the CTTT within 14 days of an order of termination being made.¹²³ However, as discussed in Chapter 5, this may be problematic for people with a mental illness who face many barriers to participating in legal processes such as the CTTT.

Boarding houses

People with a mental illness have been found to live in both licensed (licensed by DADHC to provide accommodation to people with intellectual and psychiatric disabilities) and unlicensed boarding houses (privately owned boarding houses). Instead of just providing a room, licensed boarding houses provide a higher level of service, including the provision of food and the coordination of other services, such as mental health care. Two participants interviewed for this study lived in unlicensed boarding houses and two lived in licensed boarding houses.

No Home, No Justice? acknowledged some of the issues experienced by people living in unlicensed boarding houses.¹²⁴ These included:

- ◆ Unsanitary and dangerous conditions
- ◆ Arbitrary eviction
- ◆ Unsatisfactory lock systems and belongings being stolen
- ◆ No regulation over rent or late penalties
- ◆ Lack of legislative protection.

Similar issues confront residents of licensed boarding houses with the predominant legal issue being that licensed boarding houses (just like unlicensed boarding houses) fall outside existing tenancy protection.¹²⁵ Hence, boarding house residents are not protected against arbitrary eviction. The NSW Ombudsman has reported that if mistreated, “in many instances

¹²³ DOH, *Policy REN0020A: Consumer Trader and Tenancy Tribunal*, <<http://www.housing.nsw.gov.au/>> (accessed November 2005).

¹²⁴ Forell et al., *No Home, No Justice?*.

¹²⁵ Roundtable consultations, 3 and 16 June 2004. Also consultations with community worker, Sydney, October 2004; Terry Carney, Faculty of Law, University of Sydney, January 2004.

residents are too frightened to complain in case they are either punished or evicted”.¹²⁶

In addition to a lack of tenancy protection, service providers also commented on the poor quality of service provided by some boarding house operators. An investigation officer from the NSW Ombudsman reported receiving many complaints about licensed boarding houses, regarding the adequacy of nutrition, appropriate support available to residents, and appropriate medical attention.¹²⁷ A community worker raised concerns over the lack of privacy given to residents, unsanitary and dangerous conditions in boarding houses, and violence directed at residents from boarding house operators and other residents.¹²⁸ In its investigation into two particular licensed boarding houses, the NSW Ombudsman documented an incident where a person with a mental illness had his bank account accessed and all the money withdrawn while he was in hospital.¹²⁹

Social security issues

*The big problems that people can end up with are either not getting paid, having their payment cancelled because they can't comply, not getting granted it in the first place because they can't get through all the paperwork, or ending up with a significant debt and not dealing with it.*¹³⁰

Australia-wide, 21% of people receiving the disability support pension (DSP) have a psychological or psychiatric disability, and these conditions are among those which may satisfy the necessary “impairment rating” needed for qualification for this payment.¹³¹ However, people with a mental illness will

¹²⁶ NSW Ombudsman, *Report under Section 26 of the Ombudsman Act. Department of Ageing, Disability and Home Care. Investigation of the Monitoring and Enforcement of Licensing Conditions for Residential Centres for Handicapped Persons*, NSW Ombudsman, Sydney, 2004, para 8.13.

¹²⁷ Consultation with investigation officer, NSW Ombudsman, September 2004.

¹²⁸ Consultation with community worker, Sydney, October 2004.

¹²⁹ NSW Ombudsman, *Report under Section 26 of the Ombudsman Act*, para 7.3.58.

¹³⁰ Consultation with case manager, Welfare Rights Centre (WRC), Sydney, November 2004.

¹³¹ Australian Council of Social Services, *Ten Myths and Facts about the Disability Support Pension (DSP)*, ACOSS Info. Paper 362, Sydney, 2005, <<http://www.acoss.org.au/upload/publications/papers/info%20362%20dsp.pdf>> (accessed February 2005).

frequently be on other benefits, such as Newstart payment for people who are unemployed. A recent study on the prevalence of mental illness among social security income recipients found that almost one in three income support recipients had a diagnosable mental illness in any 12-month period.¹³²

In our study, nearly every participant reported receiving social security benefits: 23 participants were on the DSP, 3 participants were on the sole parent pension, 1 was on the age pension and another was on Newstart. Only 2 people were working, and 1 person's status was unknown.

DSP eligibility

Consultations suggested that one of the main legal issues relating to social security for people with a mental illness is proving eligibility for the DSP.¹³³ Problems with proving eligibility for the DSP may mean that many people receive other social security benefits, which are paid on less generous terms (both in the base rate and the generosity of the 'taper' for any non-pension income) and have much stricter compliance obligations attached to them. Claimants for the DSP have to establish that they have not been able to work or retrain for the last two years because of their disability.¹³⁴ A person's disability must also attract an impairment rating of at least 20 points on Centrelink's impairment tables.¹³⁵

Proving the seriousness of mental illness

According to a case manager from the Sydney Welfare Rights Centre (WRC), people have problems proving that their psychiatric disability is serious enough to warrant receiving the DSP, particularly if they suffer from episodic mental illness:

¹³² Butterworth, 2003.

¹³³ Consultations with case manager, WRC, Sydney, November 2004; convener of the National Council of Single Mothers and their Children (NCSMC), December 2004; director, Social Security Appeals Tribunal (SSAT), September 2004.

¹³⁴ Centrelink, *Who Can Get Disability Support Pension*, <http://www.centrelink.gov.au/internet/internet.nsf/payments/qual_how_dsp.htm> (accessed November 2005).

¹³⁵ Centrelink, *Who can get Disability Support Pension*.

*The DSP rules are difficult for people with episodic disability because they might see the government doctor and be assessed on a good day and have periods where they have the capacity to work.*¹³⁶

The MHCC has written that application forms for the DSP do not necessarily pick up on a person's past history of illness or the severity of their illness.¹³⁷ Furthermore, as part of the 2005 Budget, from 1 July 2006 people applying for the DSP will have to prove that they are unable to work a 30-hour week instead of a 15-hour week. Those people who are able to work between 15 and 30 hours a week will have to apply for Newstart.¹³⁸ These new requirements may make it harder for people with a mental illness to prove that they are eligible for the DSP.

One participant interviewed for this study said that she had been concerned that she wouldn't be able to prove her eligibility for the DSP when she went to see a new doctor:

*I had problems ... I was up for review, and I was a bit worried that I wouldn't be able to get the pension again because I got a GP who didn't know me as well as the psychiatrist.*¹³⁹

Failure to identify the mental illness

Another issue relating to eligibility is where either people fail to disclose that they have a mental illness (because they are unaware of it, or because they do not want to disclose this information), or where Centrelink staff fail to identify or pick up that people have a mental illness.¹⁴⁰ As a result, the DSP may not be provided as an option for that particular person. In consultation for this study a Centrelink manager acknowledged that Centrelink officers can have problems identifying whether a person has a mental illness but that when they

¹³⁶ Consultation with case manager, WRC, November 2004.

¹³⁷ MHCC, *Centrelink, Breaches and Implications for Welfare Recipients Living with Mental Health Problems*, <<http://www.mhcc.org.au/projects/centrelink.htm>> (accessed May 2004).

¹³⁸ Department of Employment and Workplace Relations, *Welfare to Work—\$554.6 Million to Help People with Disabilities into Work*, media release, 10 May 2005.

¹³⁹ Interview no.20.

¹⁴⁰ Consultations with Terry Carney, Faculty of Law, University of Sydney, January 2004; convener of the NCSMC, December 2004. See also MHCC, *Centrelink, Breaches and Implications for Welfare Recipients Living with Mental Health Problems*.

do, they try to “identify which is the most prominent [mental] illness when going through the process of eligibility”.¹⁴¹ However, he also said that “many people will develop other illnesses while on payments because of changes in life which aren’t necessarily disclosed to Centrelink”.¹⁴²

The exclusion of particular categories of applicants

A case manager from the WRC reported that many people on temporary protection visas (TPVs) suffer from mental illness, often as a result of a traumatic past as a refugee.¹⁴³ However, they are not eligible for any type of social security benefit other than special benefits and family assistance.¹⁴⁴

People who have received compensation for an injury (including payment from damages in respect of lost earnings or capacity to earn¹⁴⁵) were also identified by this case manager as not being eligible to receive social security.¹⁴⁶ People who have received a compensation payment settlement will have a “preclusion period” prohibiting them from getting social security for a particular period of time, regardless of whether they spend their lump sum before the expiration of the preclusion period.¹⁴⁷ For a lump sum settlement made after 9 February 1988, 50% of the amount paid by way of compensation is deemed to be the “compensation part” of the payment and is used to calculate the preclusion period.¹⁴⁸ This case manager was of the opinion that people often spend their money before the expiration of the preclusion period.¹⁴⁹ A case study was provided by a community worker regarding a woman with a mental illness who had received a lump sum compensation payment and was unable to receive any benefits:

¹⁴¹ Consultation with manager, Centrelink, June 2004.

¹⁴² Consultation with manager, Centrelink, June 2004.

¹⁴³ Consultation with case manager, WRC, Sydney, November 2004.

¹⁴⁴ Centrelink, *Payments If You Have a Temporary Protection Visa or a Return Pending Visa*, <http://www.centrelink.gov.au/internet/internet.nsf/individuals/settle_pay_tempretturn.htm> (accessed August 2005).

¹⁴⁵ T Carney, “Social Security”, *Laws of Australia*, vol. 22.3, para. 389. It should be noted that compensation does not include victim’s compensation or compensation arising from unlawful dismissal, sexual harassment, or racial discrimination (*The Independent Social Security Handbook*, para 26.1.6).

¹⁴⁶ Consultation with case manager, WRC, Sydney, November 2004.

¹⁴⁷ Carney, “Social Security”, para. 386.

¹⁴⁸ Carney, “Social Security”, para. 390.

¹⁴⁹ Consultation with case manager, WRC, Sydney, November 2004.

*This woman who was injured at work some years ago was granted \$200 000 of compensation for a severe neck injury ... The legal firm that represented her took \$52 000 because she was non-union. Her husband squandered away most of what was left. Her medical expenses are extreme. She has absolutely no income because the Centrelink exclusion period continues until 2006.*¹⁵⁰

Preclusion periods can be set aside in special circumstances; however, the gateway is a narrow one, with financial hardship alone not usually enough to qualify.¹⁵¹ Normally, a combination of factors including financial hardship, ill-health, and impact on dependents, among other factors, must be considered.¹⁵² The case manager from the WRC also felt that applying to have the period set aside can be arduous for someone with a psychiatric disability.¹⁵³

Hence, consultations for this study and literature suggest that there is a whole group of people with a mental illness who are not able to prove that they are eligible to receive the DSP, but who may be on other social security benefits.

Breaching and debt

All social security recipients are required to notify Centrelink of any income they receive (there is a cap on the amount of income people are allowed to earn on top of their payment), any change in assets, and changes in other circumstances (such as change in address, or whether a person has moved in with a partner).¹⁵⁴ Where people fail to declare their income on other pensions and benefits, or fail to notify Centrelink of a change in their circumstances that would have affected their payment—such as when a student fails to notify Centrelink that they are not studying anymore—that person may incur a debt.¹⁵⁵ All debts are presumptively recoverable, including by deductions from ongoing payments, or garnishment.¹⁵⁶ Debts can also be waived under s1237AAD of the *Social*

¹⁵⁰ Case study provided by Genderlight.

¹⁵¹ Carney, “Social Security”, para. 392.

¹⁵² Carney, “Social Security”, para. 392.

¹⁵³ Consultation with case manager, WRC, Sydney, November 2004.

¹⁵⁴ *The Independent Social Security Handbook*, Chapters 15 and 33.

¹⁵⁵ *The Independent Social Security Handbook*, para 35.1.

¹⁵⁶ *The Independent Social Security Handbook*, para 35.6.

Security Act 1991 (Cth) where the debt did not arise from a person knowingly making a false statement or if there are special circumstances other than financial hardship alone.¹⁵⁷

Where a person incurs a significant debt (generally over \$5000) as the result of deliberately “making a false statement and representation to Centrelink”, the matter may be referred to the DPP for criminal prosecution. This can ultimately lead to a person being convicted on criminal charges and sentenced accordingly.¹⁵⁸

In addition, there are a number of requirements that people receiving Newstart and Youth Allowance have to fulfil as part of receiving their benefit. Recipients of Newstart and Youth Allowance (those who are not full-time students) may be required to look for work, participate in courses or voluntary work, or participate in the work-for-the dole program. If they do not fulfil these requirements they may be “breached”. Breaching involves a temporary period of rate reduction (of 13 or 26 weeks) or non-payment (for 8 weeks).¹⁵⁹

DSP

Only two participants receiving the DSP interviewed for this study reported having experienced any problems with their benefits once in receipt of them. Both had incurred a debt as a result of changes to their circumstances:

*They made a mistake. I did a course at my church and I told them about it but I was also doing a part-time course at uni. They told me that they only thought I was doing the church course. So they told me that I have to pay back all the pension education supplement. They are taking that out of my wage, at a rate of \$40 a fortnight.*¹⁶⁰

*I am with the OPC, and they know that I never find out how much I have got for the fortnight until I receive a payslip, which is four days after. I have tried sorting that out with them, but they keep cutting off my pension.*¹⁶¹

¹⁵⁷ *The Independent Social Security Handbook*, para 35.7.

¹⁵⁸ *The Independent Social Security Handbook*, para 36.3.

¹⁵⁹ *The Independent Social Security Handbook*, para 15.1.

¹⁶⁰ Interview no. 13.

¹⁶¹ Interview no. 10. Also interview no. 9.

A manager from Centrelink acknowledged that people with a mental illness who are on the DSP may have problems complying with information requests, or informing Centrelink of changes to their circumstances.¹⁶² However, he said that if Centrelink knows that the person has a mental illness, they will investigate whether that person was experiencing problems at the time the debt was incurred:

*If there is a situation being investigated, especially with our mental illness customers, we have to involve our psychologists or disability officers to look at the history, what influence we might have had, interview them or the carer and look at compliance ability. If any doubt, we don't penalise people.*¹⁶³

Job seekers

*We regularly advocate for clients who are clearly suffering from a firmly entrenched mental illness due to which they cannot comply with their obligations on Newstart or Youth Allowance (a payment which requires recipients to undertake an "activity test"), and who should be on disability support pension (which is not currently activity tested). Such clients face endless interruptions to payments.*¹⁶⁴

Consultations revealed that job seekers with a mental illness who are on Newstart Allowance or Youth Allowance are very vulnerable to incurring breaches and debt. Pearce et al. note that these are

*job seekers whose personal circumstances make them especially vulnerable to particular difficulties in receiving, understanding or being able to comply with official communications about obligations such as attending interviews or returning forms.*¹⁶⁵

¹⁶² Consultation with manager, Centrelink, June 2004.

¹⁶³ Consultation with manager, Centrelink, June 2004.

¹⁶⁴ Welfare Rights Centre, Sydney, *Submission to the Senate Select Committee on Mental Health*, 2005, <http://www.aph.gov.au/senate/committee/mentalhealth_ctte/submissions/sub256.pdf> (accessed October 2005).

¹⁶⁵ D Pearce, J Disney & H Ridout, *The Report of the Independent Review of Breaches and Penalties in the Social Security System*, Sydney, 2002, at 15, <<http://eprints.anu.edu.au/archive/00001515/01/index.html>> (accessed May 2005). See also Productivity Commission, *Independent Review of the Job Network*, Commonwealth of Australia, AusInfo, Canberra, 2002, para. 6.2.1; T Eardley, J Brown, M Rawsthorne, K Norris & L Emrys, *The Impact of Breaching on Income Support Customers*, Social Policy Report 5/05, Social Policy Research Centre, Sydney, 2005, p. 109. In this report, the authors chose to conduct in-depth interviews with breached customers who they expected to be representative of particular demographic groups, including people with a mental illness.

That people with a mental illness can find it hard to comply with social security requirements was reported by a number of service providers:

*People with mental illness for practical and personal reasons can find it very hard to comply ... People are required to make written applications for 10 jobs a fortnight. This is difficult for anyone but for someone with an underlying problem or an episodic problem it can be very very difficult ... they end up being suspended or breached and their payment is reduced or stopped.*¹⁶⁶

*It's hard enough for any sane, rational or well-educated person to sort it out [but] for a young person, particularly a young person with a mental illness, it's virtually impossible to negotiate your way through. And it's not uncommon in my experience ... to discover that somebody has been cut off because they haven't responded to anything ... They see the envelope and they just throw it [away] because they know they can't interpret it.*¹⁶⁷

One participant interviewed for this study talked about some of the difficulties he had experienced in complying with his Newstart requirements:

*They'd call you in for an interview [but] I wouldn't get the letter, because I had been moving around the place. And then they breach you and they fine you. You tell them, "Oh, I didn't get the letter," and they would say "we'll have a look into it." And then you call them back a couple of months later, and they're like, "Oh, it's too late now". And you're living off, like, not enough to eat.*¹⁶⁸

The new social security compliance framework, introduced as part of the 2005–06 Budget and commencing in mid-2006, will also impose stricter participation requirements on job seekers. If a job seeker does not meet a participation requirement (such as attending a job interview), their payment will be suspended until they do so. For repeated and more serious breaches, job seekers will be suspended without payment for eight weeks.¹⁶⁹ Although

¹⁶⁶ Consultation with case manager, WRC, Sydney, November 2004.

¹⁶⁷ Consultation with mental health worker, Sydney, September 2004; also consultations with Terry Carney, Faculty of Law, University of Sydney, January 2004; director, SSAT, September 2004.

¹⁶⁸ Interview no. 14.

¹⁶⁹ Department of Employment and Workplace Relations, *Welfare to Work—A Better Compliance Framework*, media release, 10 May 2005.

the government did announce that there would be an at-risk list of vulnerable people for whom the Job Network agencies would not have to suspend payments,¹⁷⁰ this does not recognise those people who may not, as discussed above, be identified as particularly vulnerable. Therefore, these changes may have an effect on those people with a mental illness who are not eligible for the DSP, but who have difficulties in complying with their Newstart or Youth Allowance requirements.

A director from the Social Security Appeals Tribunal (SSAT) did note that Centrelink has adopted an internal procedural policy in response to breaching: if a person is breached two or three times, they will be referred to a Centrelink social worker or personal adviser. Commencing in June 2001, the Centrelink “Third Breach Alert” states that when a person is breached for the third time, they will be referred to a social worker or psychologist to determine whether the customer has any special needs.¹⁷¹ A director from the SSAT was of the opinion that this had resulted in the number of breaches being reduced.¹⁷² People can also be granted a temporary exemption from an activity test if they get a medical certificate from a doctor stating that they are unable to work for a certain period of time. They are then paid Newstart allowance on sickness allowance conditions.¹⁷³ However, a case manager from the WRC was of the opinion that Centrelink are being increasingly strict in terms of whether they accept medical certificates.¹⁷⁴

Sole parents and students

Butterworth’s study on mental health and social security found that the prevalence of anxiety and depressive disorders was highest among un-partnered women with children, on the parenting payment (single).¹⁷⁵ The convener of the National Council of Single Mothers and their Children argued that the high number of women with mental illness on the parenting payment

¹⁷⁰ P Karvelas, “Dole Threat Watered Down”, *The Australian*, 7 June 2005.

¹⁷¹ A Vanstone, *Breaching Rules Change to Protect the Vulnerable*, media release, 19 February 2002, <<http://www.vanstone.com.au/default.asp?Menu=19.02>> (accessed October 2005).

¹⁷² Consultation with director, SSAT, September 2004

¹⁷³ Consultation with case manager, WRC, Sydney, November 2004.

¹⁷⁴ Consultation with case manager, WRC, Sydney, November 2004.

¹⁷⁵ Butterworth, 2003, p. 47.

(45.3% compared to 33.7% of people on unemployment benefits)¹⁷⁶ raises concern over the ability of recipients with mental illness to comply with the requirements of the parenting payment.¹⁷⁷

Recent changes to the parenting payment, announced under the 2005–06 Budget are also set to start from 1 July 2006. From 1 July 2006, those on existing parenting payments will remain on the parenting payment until their child is 16. Parents applying for the parenting payment after 1 July 2006 can do so until their youngest child turns six, at which point they will be transferred to the Newstart Allowance.¹⁷⁸ Once parents are placed on Newstart Allowance they will be required to seek at least 15 hours part-time paid work.¹⁷⁹ This has the potential to seriously impact on parents with a mental illness, who may have difficulty in complying with the new requirements.

A couple of service providers were of the opinion that students who have a mental illness who are on Austudy or Youth Allowance (student) can experience problems complying with the requirements¹⁸⁰ of their benefit:

*For people who, say, during semester one start fading away, intending to study, intend re-enrolling in semester two, but by that stage [they] are in the depths of depression or it's the first episode of schizophrenia, [or they are] just not coping thinking that they will be better next week but it goes on and on. You can end up with students who haven't attended study from March through to the end of year with a debt that is quite significant—\$6000 or \$7000.*¹⁸¹

*We've got a few where they drop out of school and they often don't think to tell [Centrelink] ... and then they get cut off and hit with a debt repayment because they didn't notify [Centrelink] that they weren't at school.*¹⁸²

¹⁷⁶ Butterworth, 2003, p. 33.

¹⁷⁷ Consultation with the convener of the NCSMC, December 2004. People on parenting payments have requirements to satisfy according to the age of their children. For example, a parent whose youngest child is between the ages of 13 and 16 is currently required to undertake a total of 150 hours of agreed activities over a six-month period—see *The Independent Social Security Handbook*, para 7.1. Also consultation with case manager, WRC, Sydney, November 2004.

¹⁷⁸ Department of Employment and Workplace Relations, *Welfare to Work—\$389.7 Million to Help Parents into Work*, media release, 10 May 2005.

¹⁷⁹ Department of Employment and Workplace Relations, *Welfare to Work—\$389.7 Million to Help Parents into Work*.

¹⁸⁰ See *The Independent Social Security Handbook*, para 13.4.4.

¹⁸¹ Consultation with case manager, WRC, Sydney, November 2004.

¹⁸² Consultation with mental health worker, Sydney, September 2004.

Consumer issues

*[There is an] issue with their capacity to make sensible decisions about what they are doing; financial problems, gambling, spending money on drugs and alcohol, preyed upon by other people. The financial problems are fairly common.*¹⁸³

That consumer debt is an issue affecting people with a mental illness has been raised in the literature and by both service providers and participants interviewed for this study. The literature suggests that people with a mental illness are in many instances financially disadvantaged,¹⁸⁴ which may place them at risk of accruing debt. This was also raised in the consultations:

*I think that debt and credit cards and mobile phones and all that sort of stuff is an area of need ... for people with mental illness, as it is for many people without a lot of money basically.*¹⁸⁵

*Credit and debt [are issues], given that the disability support pension is not adequate.*¹⁸⁶

First, a number of participants in this study appeared to have accrued debt as a result of general financial disadvantage:

*My mum dying ... I have got the debt collectors on about the funeral bill, because it's all in my name. The funeral guy just came over to me then. I can't believe he did it; I was sitting there with groceries I [obviously] got from St Vincent de Paul.*¹⁸⁷

*[I have a] low income ... I have many bills to pay ... car insurance, the green slip of my car, telephone and electricity, and the pension is just sometimes not enough. I don't believe I can pay my insurance this year, or I can register my car this year ... I have a credit problem. I owe \$1300.*¹⁸⁸

¹⁸³ Consultation with psychiatrist, Sydney, August 2004.

¹⁸⁴ P Cameron & J Flanagan, *Thin Ice: Living With Serious Mental Illness and Poverty in Tasmania*, Social Action and Research Centre, Anglicare Tasmania, Hobart, 2004, p. 10; Jablensky et al., *People Living with Psychotic Illness*, p. 91; C Robinson, *Understanding Iterative Homelessness: The Case of People with Mental Disorders*, Australian Housing and Urban Research Institute, Sydney, 2003.

¹⁸⁵ Consultation with solicitor in charge, MHAS, December 2004.

¹⁸⁶ Consultation with community worker, October 2004.

¹⁸⁷ Interview no. 17.

¹⁸⁸ Interview no. 16. Also Interview no. 15.

*My phone bill, because my mother passed away the money dropped down so I have been having trouble managing financially ... credit card, I have it owing, yeah, rates, water rates, land rates, I have all that owing at the moment. Austar, you name it, I owe money on it at the moment.*¹⁸⁹

Secondly, a number of service providers suggested that people may be particularly unwell (e.g. in a manic state), or have an addiction, which influences their capacity to make sensible decisions about purchasing items or entering into contracts:

*Issues relating to people who have a mental illness may include capacity (in the legal sense) to enter into a binding contract or understanding of purchase. For example, a person who is in a manic state who has made a purchase; comprehension issues about complex contracts.*¹⁹⁰

For example, a solicitor from the Consumer Credit Legal Centre believed that the biggest financial issue for people with a mental illness concerns credit cards, with people over-committing themselves while they are unwell:

*I don't know how many times people have rung me up and said "I was manic and the bank let me spend all this money. I shouldn't have done it but I was sick." If you have a mental illness and you get an unsolicited limit increase, you just sign, if you are in a manic stage you just sign.*¹⁹¹

A British study on mental illness and social exclusion reported that people with a mental illness can experience problems with credit and debt after they go on "sprees" while unwell. The same study also found that many people with a mental illness who had accumulated such credit-related debt were on very low incomes.¹⁹²

¹⁸⁹ Interview no. 19.

¹⁹⁰ Consultation with public servant, Commonwealth regulatory body, May 2004; roundtable consultation, 16 June 2004. Also consultations with private solicitor, Sydney, March 2004; community worker, Sydney, October 2004; solicitor, Consumer Credit Legal Centre (CCLC), September 2004; consumer advocate, Sydney, August 2004.

¹⁹¹ Consultation with solicitor, CCLC, September 2004.

¹⁹² L Cullen, *Out of the Picture: CAB Evidence on Mental Health and Social Exclusion*, Citizens Advice Bureau, 2004, pp. 57–62, <<http://www.citizensadvice.org.uk/outofthepicture.pdf>>.

An example of someone entering into a financial agreement whilst they were unwell was provided by the OPC:

*X owned an apartment. On the basis of this property X got a loan from a financial institution to buy an investment property. It was a bad investment and X could not rent it out and therefore had no income to finance the interest on the loan. The loaning institution wanted to sell both properties to get back their original loan and the interest owing. X was actually very ill and was admitted as a patient to a mental hospital. X's psychiatrist gave evidence re the mental state of X at the time X entered into the mortgage agreement. Under the Contract Review Act there was a good case to set the transaction/contract aside and the situation was successfully resolved.*¹⁹³

Thirdly, a couple of service providers suggested that some people with a mental illness appear to be vulnerable to high pressure sales tactics. For example:

*The way that those sorts of services are marketed, tends to mean that those [people] with a less sophisticated understanding of that [service] get the worst deals. [They] don't necessarily appreciate what they are signing up for, and are the ones that in the end get the greater debts.*¹⁹⁴

*People with particular illnesses are susceptible to particular sales tactics. For example, sales tactics that feed into situations where people are in a manic state.*¹⁹⁵

Finally, consultations also indicated that people with a mental illness can be vulnerable to financial exploitation and fraudulent activity by other people. The following are examples of this:

*A young man with chronic schizophrenia became infatuated with a young woman he knew. She was able to persuade him to borrow money from a lending shark at very high interest rates (40%). He owned half an apartment with his brother and this was used as collateral. He gave the money to the woman and never saw her again. He couldn't repay the interest on the loan so the loaning institute came after him.*¹⁹⁶

¹⁹³ Consultation with solicitor, OPC, September 2004.

¹⁹⁴ Consultation with solicitor in charge, MHAS, December 2004.

¹⁹⁵ Consultation with public servant, Commonwealth regulatory body, May 2004.

¹⁹⁶ Consultation with solicitor, OPC, September 2004. Also consultation with registrar, Local Court, August 2004.

I was talking to someone on the internet, and he said he was a “working humanitarian” who gave financial assistance. He said he could help me if I needed help. He said “if I send you a cheque would you accept it?” and I said “yes I would accept it”, and so he sent me a cheque. And then I took it to the bank, and the bank cleared it, but after the bank cleared it, they told me that the cheque had bounced. But I had already withdrawn the money. Then, they told me that I had to pay the money back.¹⁹⁷

Family law issues

It is evident from the literature that there is a link between family separation and mental illness.¹⁹⁸ Indeed, there are high rates of anxiety, depression, substance abuse and depression among adults experiencing divorce or separation.¹⁹⁹ This raises questions regarding the impact mental illness can have on outcomes for people involved with the family law system.

For this study, consultations indicated that the most significant legal issue facing people with a mental illness who are involved in the family law system relates to parenting orders (orders concerning where and with whom children live). One participant stated:

I am going to apply for a full blown divorce after I’ve moved into my own place. Then it will be an uphill battle after that just to get contact, or a phone number or a letter or something ... I can’t see me getting unsupervised access anywhere.²⁰⁰

In making a parenting order, the Family Court must take into consideration the best interests of the child. Hence, in addition to the child’s expressed wishes and

¹⁹⁷ Interview no.16.

¹⁹⁸ E Robinson, “Mental Health and Changing Families”, in *Australian Institute of Family Studies Conference: Steps Forward for Families: Research, Practice and Policy*, Melbourne 2003; B Rodgers, B M Smyth & E Robinson, “Mental Health and the Family Law System”, *Journal of Family Studies*, vol. 10, no. 1, April 2004, pp. 50–70.

¹⁹⁹ E Robinson, “Mental Health and Changing Families”; Rodgers et al., “Mental Health and the Family Law System”, pp. 50–70;

²⁰⁰ Interview no. 25. Also interview no. 2; consultations with mediator, community justice centre, September 2004; family law solicitor, October 2004; private solicitor, Sydney, March 2004; CLC workers, WLS, October 2004; psychiatrist, Sydney, August 2004; psychologist, Legal Aid Commission of NSW (Legal Aid), Sydney, October 2004.

current living arrangements, and the parent's attitude, the capacity of each parent to provide for the child's needs is taken into account.²⁰¹ Mental illness may be taken into account in assessing the capacity of a parent to care for their child.²⁰²

Legal service providers noted the difficulties people with a mental illness can have in proving they have the capacity to look after their children. First, one solicitor was of the opinion that there is often a perception that men who have a mental illness are more violent, and that this creates a bias against them in the Family Court.²⁰³

Secondly, community legal centre workers from Women's Legal Services held that that for women who have been hospitalised as a result of mental illness, they can have great difficulties in regaining custody of their children when they are in hospital:

*She has been married for seven years, and there was ongoing domestic violence. She must have been very depressed [so] the husband suggested to her that she go and stay with her mother for a week, to give her a break. In the meantime her mental illness became much worse, and she ended up being hospitalised for a month. The children became settled in living with the father (even though he had been perpetrating domestic violence against her) so it will become much harder for her to get the children back again to live with her. It comes down to the best interests of the children and courts are very reluctant to change what they call the status quo residency. He might be violent towards her, but not violent towards the children. And you have got the case that she has mental health issues that will probably affect her parenting skills, so she has an uphill battle to start with. He will probably in all likelihood get residence.*²⁰⁴

This was also reported by HREOC in the Burdekin Report.²⁰⁵

²⁰¹ Barry, R (ed.), *The Law Handbook: Your Practical Guide to the Law in New South Wales*, 9th edn, Redfern Legal Centre Publishing, Sydney, 2004, p. 670.

²⁰² See Robinson, "Mental Health and Changing Families". See also J Nicholson, K Biebel, B Hinden, A Henry & L Stier, *Critical Issues for Parents with Mental Illness and Their Families*, Center for Mental Health Services Research, Department of Psychiatry, University of Massachusetts Medical School, 2001, p. 43, <<http://www.nmha.org/children/criticalIssuesforParents.pdf>> (accessed March 2006).

²⁰³ Consultation with private solicitor, Sydney, March 2004.

²⁰⁴ Consultation with CLC workers, WLS, October 2004.

²⁰⁵ HREOC, *Human Rights and Mental Illness*, p. 593.

One family law solicitor said that in family court proceedings, parents with a mental illness must show that they have the capacity to care for their child:

*The best interests of the child are of paramount consideration when it comes to making parenting orders. So for somebody with a mental illness ... if that becomes an issue in the proceedings, it becomes important to be able to show capacity in terms of being able to cater for the needs of children whether they are the contact parent or resident parent or shared care parent ... It's important to get relevant medical evidence so that the issues of capacity can be squarely addressed, so that the person is not disadvantaged by that evidence not being available.*²⁰⁶

She stated that an important part of proving that parents have the capacity to care for their children is through assessment of the type of medical supervision available to the parent.²⁰⁷ However, one rural and regional solicitor was of the opinion that lack of appropriate medical treatment in rural and regional areas can pose a problem for parents with a mental illness who wish to gain residence or contact with their children.²⁰⁸

Care and protection issues

*... why is DoCS taking proceedings? They are taking proceedings because they don't think the parent has the capacity to look after the kids. Very often it will be because of allegations of mental illness and/or substance abuse; the child is just sitting there and not being fed, nappies are not being changed. The kids themselves can be at risk ... DoCS could consider that the level of services which a family might need to address the capacity issues of a parent might be simply too great.*²⁰⁹

Consultations indicated that care and protection under state child welfare law can be an issue facing parents who have a mental illness. In particular, a number of service providers believed that if DoCS is notified about the child

²⁰⁶ Consultation with family law solicitor, October 2004.

²⁰⁷ Consultation with family law solicitor, October 2004.

²⁰⁸ Consultation with solicitor, Aboriginal Legal Service, regional NSW, November 2004.

²⁰⁹ Consultation with family law solicitor, October 2004.

of a person with a mental illness, that parent's mental illness may be taken into account when assessing the wellbeing and safety of the child.²¹⁰

I do believe that people with a mental illness are discriminated against as being incompetent people ... [P]eople ... hear of a diagnosis of a mental illness, and they immediately think that they are incompetent, they immediately think that they are unpredictable, unreliable, and unsafe.²¹¹

I can think of several examples where complainants have come to us specifically with complaints against DoCS ... The ones that I am thinking of actually have been diagnosed with a mental illness, and feel that ... their behavioural capacities or otherwise have been mis-assessed, or not adequately assessed, and then that fuels into the assessment of their capacity to parent, and the department's ensuing involvement with them.²¹²

If DoCS is notified about a child whose wellbeing is at risk, they have a legislative duty of care to do what is in the best interests of the child at risk. A manager from DoCS stated that when they are notified about a child at risk, they do a risk analysis on the current situation facing the child. They use the expertise of a variety of experts (such as psychiatrists and psychologists) to inform their decisions.²¹³ She also argued that although mental health issues do figure very heavily in the risk analysis of children at risk, care and protection issues usually arise out of a combination of factors (such as domestic violence and mental health issues):

It could be because they are not capable of adequately supervising them. It could be because they are exposed to terrible domestic violence. It could be because they are exposed to psychological harm. It could also be because they are not supervising the child and the child is being neglected or sexually

²¹⁰ Consultations with CLC workers, WLS, October 2004; manager, Department of Community Services (DoCS), December 2004; solicitor, PWD, August 2004; convener of the NCSMC, December 2004; CLC workers, Kingsford Legal Centre, Sydney, August 2004; family law solicitor, October 2004; mental health worker, Sydney, September 2004; CLC workers, MHLC, Victoria, March 2004; investigation officer, NSW Ombudsman, September 2004; solicitor, Legal Aid, December 2004; roundtable consultations, 3 and 16 June. See also D McConnell, G Llewellyn & L Ferronato, *Parents with a Disability and the NSW Children's Court*, Family Support and Services Project, University of Sydney, Sydney, 2000; MHCA, *Not for Service*, p. 273.

²¹¹ Consultation with mental health worker, Sydney, September 2004.

²¹² Consultation with investigation officer, NSW Ombudsman, September 2004.

²¹³ Consultation with manager, DoCS, December 2004.

*assaulted. So when we get a report and the primary thing is that the carer has a mental health issue, it is not just because they have a mental health illness per se; it is the impact of the caring for that child. It may be a whole heap of issues and because of their mental health condition they are not able to address those issues adequately.*²¹⁴

In addition to removing children, DoCS also has a wide range of other options available to it, including referring families to other services for assistance. However, service providers argued that DoCS is not always able to take up the option to refer people to services for assistance because it is limited by a lack of available services for people with a mental illness.²¹⁵ A manager from DoCS said:

*Sometimes a big problem is that we have no one to refer to ... we can only focus on assessment and then taking the appropriate action. We don't provide services ourselves as such. We don't do counselling or therapy or those sorts of things.*²¹⁶

In this study, four participants who had children had come into contact with DoCS. One participant said that when she was hospitalised, the hospital had notified DoCS about her children, although they were not removed.²¹⁷ Three other parents, who were also homeless, had their children previously removed by DoCS.²¹⁸

Victim of crime issues

People with a mental illness are often depicted in the media and in popular culture as violent, dangerous and aggressive.²¹⁹ Yet the literature shows that overwhelmingly, people with a mental illness are themselves the victims of

²¹⁴ Consultation with manager, DoCS, December 2004.

²¹⁵ Consultation with manager, DoCS, December 2004; solicitor, Legal Aid, December 2004; roundtable consultation, 16 June 2004.

²¹⁶ Consultation with manager, DoCS, December 2004.

²¹⁷ Interview no. 18.

²¹⁸ Interviews nos. 26, 27 and 28 (taken from the Foundation's study into homeless people).

²¹⁹ SANE, *Mental Illness and Violence: Factsheet 5*, 2005, <<http://www.sane.org/index.php?option=displaypage&Itemid=317&op=page>> (accessed September 2005).

assault, sexual assault, domestic violence and child abuse.²²⁰ For this study, 12 participants reported having been the victim of a crime: three reported sexual assault, five reported general assault, five reported having been victims of child abuse, and one reported being the victim of severe domestic violence. For example:

*I was raped when I was six months pregnant with my daughter, by a stranger.*²²¹

*I got dragged off the street and raped by two guys who were high on something.*²²²

*They came around because my husband had put me on fire and then tipped scalding water over me.*²²³

Many service providers interviewed for this study, particularly mental health workers and solicitors who undertake domestic violence and victims compensation matters, reported having clients with past histories of abuse, sexual assault and domestic violence.²²⁴

I have a client who ... between the age of 5 and about 14 ... kept on getting in trouble with the police. It turned out that the reason why she kept on getting in trouble with the police was [she was being sexually abused] and she was being bailed to the perpetrator ... She kept on getting in trouble with the police because going to jail was a lot safer than being bailed to this man. She has subsequently, understandably, had severe drug and alcohol problems; her life now is flitting between Bloomfield [psychiatric] hospital and Mulawa

²²⁰ T Ryan, "Abuse Issues Relating to People with Mental Health Problems", in Pritchard, J (ed.) *Good Practice with Vulnerable Adults*, vol. 9, Jessica Kingsley Publishers, Philadelphia, PA, 2001; C Robinson, "Cycles of Homelessness", in *AHURI Research and Policy Bulletin*, no. 39, March 2004; A Taft, "Promoting Women's Mental Health: The Challenges of Intimate/Domestic Violence Against Women", *Australian Domestic and Family Violence Clearinghouse*, no. 8, 2003; L A Teplin, G M McClelland, K M Abram & D A Weiner, "Crime Victimization in Adults with Severe Mental Illness: Comparison with the National Crime Victimization Survey", *Archives of General Psychiatry*, vol. 62, 2005, pp. 911–21.

²²¹ Interview no. 1.

²²² Interview no. 19.

²²³ Interview no. 7.

²²⁴ Roundtable consultation, 3 and 16 June 2004; consultations with CLC workers, Shopfront, September 2004; CLC workers, WLS, October 2004; mental health worker, Sydney, September 2004; pro bono solicitor, Sydney, September 2004; caseworker, Blue Mountains, July 2004.

women's prison. When she gets out, all she wants to do is go back in, because that is where she feels safe, in jail, because her outside life is horrible.²²⁵

*A woman [with a mental illness] with older teenage children ... suffered 23 years of violent abuse at the hands of her husband (who) was convicted as recently as July of assault upon her, causing actual bodily harm. He was put onto a 2-year-long good behaviour bond and a 2-year-long AVO to stay away from her. That worked for 2 weeks. He is abusing his eldest daughter as a way of getting back at his wife.*²²⁶

Not only do some people with a mental illness have prior histories of trauma, but the experience of mental illness can also lead to people being more vulnerable to abuse and trauma. Consultations indicated that people with a mental illness are very vulnerable to sexual exploitation and sexual assault:

*I had a client in Dubbo, who was 19, and we were doing a section 63 application for child support. You have to do a DNA test to see who the father was, and she sat down with me with this baby, and said "oh I had sex with eight men that night". This group of blokes picked her up, took her back to their hotel room and had sex, took turns with her.*²²⁷

People with a mental illness are vulnerable to homelessness,²²⁸ and are often forced to live on the streets and in boarding houses, where it is reported they are further exposed to abuse. A 1998 study of homeless people living in inner-city Sydney found that "75% of all homeless people using inner-city hostels and refuges had had a mental disorder (including schizophrenia, alcohol use disorders, drug use disorders, and mood and anxiety disorders) in the previous 12 months".²²⁹ This 1998 study also found that "93% of homeless people in the inner city have experienced at least one major trauma event" (such as serious physical assault, rape and witnessing someone being killed) in their lives.²³⁰ A caseworker interviewed for this study reported having received

²²⁵ Consultation with CLC workers, WLS, October 2004.

²²⁶ Consultation with caseworker, Blue Mountains, July 2004.

²²⁷ Consultations with CLC workers, WLS, October 2004; mental health worker, Sydney, September 2004.

²²⁸ Robinson, *Understanding Iterative Homelessness*; NSW Select Committee on Mental Health, *Mental Health Services in New South Wales*, p. 133.

²²⁹ Hodder et al., *Down and Out in Sydney*, p. 2.

²³⁰ Hodder et al., *Down and Out in Sydney*, p. 7.

*reports of boarding house staff having [not treated] the clients in the manner that they should be treated. There have been a number of instances where people have been verbally abused ... other instances where reports of physical abuse have occurred ... Other instances where one person with a health problem has physically or verbally abused another resident of the house, and no action has been taken by staff at the boarding house.*²³¹

Service providers also reported that people can be vulnerable to abuse in psychiatric institutions.²³² An official visitor alleged that instances of theft, assault and general aggressive behaviour committed by other patients are reported, more so in public mental health facilities than in private hospitals.²³³ The Burdekin Report stated that there had been many submissions to the inquiry about the abuse of people with a mental illness, by both staff and other patients in hospital. HREOC maintained that the rate of sexual assaults among patients was particularly disturbing.²³⁴ One participant in our study articulated her fears of being assaulted in hospital:

*I feared I would get raped. I was so sedated I don't know if I was being touched or not ... I believe there should be a security patrol once or twice a night just for patients to feel safe and to ensure that patient social conduct is within policy and not in breach (e.g. verbal and physical threats, assault, rape and illicit drug use).*²³⁵

A recent study conducted by the Victorian Disability Discrimination Legal Service found that women with cognitive impairment (including women with cognitive impairment from mental illness) are particularly vulnerable to abuse, particularly those who are homeless or living in boarding houses or institutional settings.²³⁶

²³¹ Consultations with community worker, Sydney, October 2004; CLC workers, WLS, October 2004.

²³² Consultations with CLC workers, WLS, October 2004; official visitor, October 2004;

²³³ Consultation with official visitor, October 2004.

²³⁴ HREOC, *Human Rights and Mental Illness*, pp. 271–74; J Davidson, *Every Boundary Broken: Sexual Abuse of Women Patients in Psychiatric Institutions*, Women and Mental Health Inc, Rozelle, Sydney, 1997.

²³⁵ Interview no. 6.

²³⁶ See also J Goodfellow & M Camilleri, *Beyond Belief, Beyond Justice: The Difficulties for Victim/Survivors with Disabilities When Reporting Sexual Assault and Seeking Justice*, Disability Discrimination Legal Service, Melbourne, 2003, p. 42.

Summary

This study has raised a number of legal issues experienced by people with a mental illness. These include legal issues that relate specifically to their experience of mental illness and subsequent incapacity. For example, people with more severe and persistent mental illnesses who have been hospitalised may experience legal issues relating to the *Mental Health Act 1990* (NSW), and mental health care. They may also experience legal issues relating to guardianship and financial management.

As many people with a mental illness tend to be financially disadvantaged, they tend to face legal issues relating to this disadvantage. For example, legal issues relating to social security and housing reflect the fact that many of them receive government benefits and live in public housing. The legal issues arising in these areas also reflect the difficulties they can experience, in complying with certain administrative and behavioural requirements set out by Centrelink and DOH. In addition, they may also experience consumer issues such as credit and debt problems (such as mobile phone and other contractual debt), which are a further reflection of the fact that they are likely to be financially disadvantaged. Consumer issues can arise for people with a mental illness as a result of being particularly unwell when they enter into contracts or make purchases. They, particularly young people, are also vulnerable to receiving fines.

Another category of legal need that can lead to financial disadvantage for people with a mental illness is disability discrimination. They may face discrimination on the basis of psychiatric disability, particularly in the area of employment. They can experience discrimination in the areas of education, housing and the provision of goods and services. The impact that occupational health and safety has had on decisions by employers and education and housing providers not to provide services to people with a mental illness was also discussed.

Another area of legal need raised both in the literature and by participants and stakeholders interviewed for this study was the high rate of violence committed against people with a mental illness. They are vulnerable to sexual

assault, general abuse and violence, and domestic violence, as children and adults. In addition, they are vulnerable to abuse while homeless, living in boarding house accommodation, and in psychiatric institutions. Women with mental illness were thought to be particularly vulnerable to sexual assault and domestic violence.

The purpose of this chapter has been to look at the types of legal issues that people with a mental illness in NSW may face. They face a range of legal issues that reflect their financial and social disadvantage. If unaddressed, these issues may lead to increased financial and physical vulnerability, which highlight the importance of accessing legal advice. Drawing on this, the next chapter will look at types of legal service provision available to people with a mental illness, and the barriers they face in accessing these services.

4. Barriers to Accessing Legal Assistance

I don't think that a person with chronic depression, schizophrenia, bipolar disorder, post-traumatic stress disorder, or drug and alcohol issues has the capacity to seek out help.¹

As discussed in the previous chapter, people with a mental illness face particular legal issues, including those relating to the *Mental Health Act 1990* (NSW), discrimination, housing, social security, debt and consumer issues. Legal issues concerning family law, domestic violence, victims of crime, and care and protection were also raised in consultations, and are supported by the literature.

This chapter will look at the barriers faced by people with a mental illness in accessing legal assistance.² For the purpose of this report, the term 'legal assistance' includes the provision of legal information, legal advice and legal assistance (see Appendix 7 for definitions of each of these).

Consultations for this study revealed that people with a mental illness experience both individual and systemic barriers to accessing legal services. The first part of this chapter will look at the individual barriers that people with a mental illness confront in accessing and using legal services, while the second part will discuss the systemic barriers to accessing legal services. This chapter will also consider the ways in which access to legal assistance for people with a mental illness can be improved.

¹ Consultation with CLC workers, Shopfront, September 2004.

² A description of legal services generally used or referred to by participants and stakeholders can be found at Appendix 8.

Individual barriers to accessing legal assistance

The clients we get, obviously have enough strength to access some sort of assistance; [however,] there are probably many people out there [who] don't have the capacity or the strength to try and get assistance.³

Consultations with stakeholders and participants revealed that symptoms or manifestations of a mental illness may affect a person's ability to access legal services. These symptoms or manifestations included:

- ◆ lack of awareness of legal rights
- ◆ being disorganised
- ◆ being overwhelmed
- ◆ mistrust of service providers
- ◆ difficult behaviour
- ◆ communication problems
- ◆ lack of mental health care.

Legal service providers reported that the degree to which having a mental illness can act as a barrier to accessing legal services will vary according to the individual's specific circumstances, the severity of their illness, where they are in the cycle of their illness and their particular personality.⁴

It should also be noted that recent studies, including Genn (2004) and the Foundation's *Bega Valley Pilot Study* (2003) and *Justice Made to Measure* (2006), found that the majority of people don't access legal services when they have a legal problem.⁵ This suggests that this may also apply to people with a mental illness.

³ Consultation with pro bono solicitor, Sydney, September 2004.

⁴ Consultation with family law solicitor, October 2004. Also consultations with CLC workers, Kingsford Legal Centre (KLC), August 2004; solicitor, CCLC, August 2004; August 2004; pro bono solicitor, Sydney, September 2004.

⁵ H Genn, P Pleasance, N J Balmer, A Buck, A O'Grady, *Understanding Advice Seeking Behaviour: Further Findings from the LSRC Survey of Justiciable Problems*, Legal Services Research Centre,

Lack of awareness of legal rights

A number of stakeholders and two participants suggested that people with a mental illness often lack awareness that their problem—for instance, housing, family, debt—has a legal element to it.⁶ Because people do not recognise that they have a legal problem, they may be unaware of their legal rights in a particular situation and may therefore not seek legal assistance.

*So there are probably many people out there who don't know they have a problem.*⁷

*Quite often with mental health, clients are totally confused about what actually is a legal issue.*⁸

Several service providers were of the opinion that because people with a mental illness tend to have lower levels of participation in education and employment, they lack basic knowledge of legal issues and the legal process, and they may also lack the ability to find this information.⁹ This is supported by the Disability Council in *A Question of Justice*, which found:

*People with disabilities reported being disadvantaged as a result of lost educational opportunities which contributed to them not having the necessary knowledge, awareness, and skills to locate information or know what questions to ask.*¹⁰

London, 2004, <<http://www.lsrc.org.uk/publications/advice.pdf>> (accessed March 2006); Law and Justice Foundation of NSW, *Access to Justice and Legal Needs: A Project to Identify Legal Needs and Barriers for Disadvantaged People in NSW. Stage 2: Quantitative Legal Needs Survey, Bega Valley (Pilot)*, Law and Justice Foundation of NSW, Sydney, 2003; Coumarelos et al., *Justice Made to Measure*.

⁶ Consultations with caseworker, South coast, NSW, November 2004; consumer advocate, Sydney, August 2004; Aboriginal mental health worker, Sydney, September 2004; mental health worker, Western NSW, August 2004; community worker, Sydney, October 2004. Also interviews nos. 18 and 14.

⁷ Consultation with pro bono solicitor, Sydney, September 2004.

⁸ Consultation with caseworker, South Coast, NSW, November 2004.

⁹ Consultations with solicitor in charge, MHAS, Legal Aid, December 2004; caseworker, Blue Mountains, July 2004; convener of the NCSMC, December 2004; registrar, Local Court, Sydney, August 2004; Manager, Anti-Discrimination Board (ADB), November 2004; Aboriginal mental health worker, Sydney, September 2004; registrar, Local Courts & Sheriff, July 2004. This is also supported by Cameron et al., *Thin Ice*. See also Jablensky et al., *People Living With Psychotic Illness*; Andrews et al., *The Mental Health of Australians*.

¹⁰ Disability Council, *A Question of Justice*.

It was also reported that loss of education is a particular issue for young people with a mental illness who, as a result, lack knowledge about legal issues and the legal system.¹¹

Being disorganised

A number of legal and mental health workers were of the opinion that some people with a mental illness tend to be disorganised, which can make it difficult for them to remember to keep appointments with legal service providers.¹² For example, in consultation for this study, one pro bono solicitor described how a person's illness can make it difficult for them to keep appointments and prioritise their legal matter:

The practical stuff is actually getting the client to progress their matter. So [you try] to help them pursue a legal remedy, but their mental illness, often it's depression or some sort of anxiety disorder, makes it hard for them to keep appointments or prioritise this, as you can imagine, over other aspects of their lives.¹³

A family law solicitor argued that substance abuse can also make it difficult for people to be organised and keep appointments:

The substance abuse is another matter, because again people are just struggling to organise their lives to do things by a certain time ... People will make appointments but something will happen, and they just won't keep it ... so [there are] issues in just getting instructions.¹⁴

A non-legal service provider argued that the side-effects of medication can make it difficult for some people to get up early in the mornings, which may result in them missing appointments with legal services providers.¹⁵ This is supported by Cullen:

¹¹ Consultations with mental health worker, Sydney, September 2004; CLC workers, Shopfront, September 2004.

¹² Consultations with pro bono solicitor, Sydney, September 2004; family law solicitor, October 2004; consumer advocate, Sydney, August 2004; CLC workers, KLC, August 2004.

¹³ Consultation with pro bono solicitor, Sydney, September 2004.

¹⁴ Consultation with family law solicitor, October 2004.

¹⁵ Consultation with consumer advocate, Sydney, August 2004.

*Depression and the side effects of medication can lead to extreme fatigue. When people are not able to manage appointments and arrangements, this can be interpreted as “not bothering”.*¹⁶

A Department of Family and Community Services study on barriers to service provision for young people with substance abuse and mental illness found that not turning up to appointments with health professionals was a particular problem for this group.¹⁷

Being overwhelmed

It was raised in consultations that people with a mental illness can become overwhelmed by their legal issues, and that as a result, they may avoid addressing them and accessing legal assistance.¹⁸ A few stakeholders reported that people with depression may be overwhelmed by their problems and so may not be motivated to access a legal service provider.¹⁹

*When someone is very ill and depressed, they are not going to be motivated to get any legal advice.*²⁰

*It depends on what sort of mental illness people have, but some people might believe that no one can help them [if] they are suffering from depression. So they might not be able to access services simply because of the way they are looking at the world at that time. People can't see how they can be helped, because their problems are just so overwhelming.*²¹

In addition, a couple of service providers argued that people with a mental illness may be so frightened by having a legal problem that they will avoid addressing it:

¹⁶ Cullen, *Out of the Picture*, p. 9.

¹⁷ T Szirom, D King & K Desmond, *Barriers to Service Provision for Young People With Presenting Substance Misuse and Mental Health Problems*, National Youth Affairs Research Scheme, Department of Family and Community Services, Canberra, 2004.

¹⁸ Consultations with senior public servant, NSW Centre for Mental Health, April 2005; family law solicitor, October 2004; solicitor, CCLC, August 2004; disability awareness trainer, August 2004; also roundtable consultation, 16 June 2004.

¹⁹ Consultations with senior public servant, NSW Centre for Mental Health, April 2005; family law solicitor, October 2004; also roundtable consultations, 3 and 16 June 2004.

²⁰ Consultation with senior public servant, NSW Centre for Mental Health, April 2005.

²¹ Consultation with family law solicitor, October 2004.

[It's a] general mental illness thing. People get confused and ... they cope really poorly with solving the problem, because of the mental illness. They hide, they run. People without mental illness do that too, but it seems to be more pronounced [for people with a mental illness].²²

I know people who get mail, who are so freaked out, they don't open it. So it piles up, and the problem just gets worse and worse, because they cannot make the first step to deal with it, because it's just getting bigger and bigger. And so the [problem] escalates, because their capacity at that time to actually deal with these life issues isn't there.²³

Roundtable attendees suggested that situating legal services in places where people with a mental illness would normally go in the course of their day-to-day activities might increase the accessibility of these services.²⁴ This could also address the barriers caused by a lack of motivation and fear of the problem.

Mistrust of service providers

It was raised in several consultations that some people with a mental illness are reluctant to access or contact a legal service provider, either because they are mistrustful of them, or because they are frightened of divulging personal information.²⁵ Personal information required by legal services usually includes contact details and full name, but may also include other information about a person's life, which may be relevant to the legal issue. This reluctance or fear about divulging personal information may mean that a legal service provider is unable to ascertain the client's full circumstances and details, which may prevent them from adequately assisting the client. For example, one caseworker said:

And there are barriers in that we ask them many nosey parker questions. For the Legal Aid requirements, we are obliged to know who we are speaking

²² Consultation with solicitor, CCLC, August 2004.

²³ Consultation with disability awareness trainer, August 2004; also roundtable consultation, 3 June 2004.

²⁴ Roundtable consultations, 3 and 16 June 2004.

²⁵ Consultations with national program manager, Multicultural Mental Health Australia (MMHA), July 2004; disability awareness trainer, August 2004; CLC workers, WLS, October 2004; case manager, WRC, Sydney, October 2004.

to before we give legal advice, and for people with paranoia [this is a problem].²⁶

A solicitor from a CLC gave an example of how this fear may prevent people from getting the legal support they need:

I saw this woman who had come to see me about a neighbourhood dispute. I had never seen her before, and I started taking instructions and writing down what she was telling me, and then ... I think I just called her by her name, or just quoted back what she said to me. And she said, "How do you know that? [Do] you have other information on me? [Do] you have records on me?" And I said, "No, it's only just what you have told me now that I have written down." And she said, "No you must be involved in this conspiracy against me." And I said, "No I haven't, you can have a look ... I have just written down what you've told me." And so I gave it to her, and she ripped it into pieces. We couldn't continue the discussion ... That just stopped her getting legal advice, because she was so paranoid.²⁷

A disability awareness trainer provided an example of how this type of mistrust can act as a barrier to accessing services. She commented that some people experiencing paranoia believe that government computer systems and legal service providers' computer systems are linked to one overall monitoring system.²⁸ This may increase a client's reluctance to divulge personal information:

They may have a broadened belief that everybody, and I encounter this all the time, that you are all connected up together, and you are connected up with the police, and anything I say to you, you are going to put that on your computer, and you are all in on this together.²⁹

This same stakeholder also argued that a fear of being recorded over the phone can prevent people with a mental illness from accessing legal services by phone. This trainer, who has experienced mental illness herself, gave an

²⁶ Consultation with case manager, WRC, Sydney, October 2004.

²⁷ Consultation with CLC workers, WLS, October 2004.

²⁸ Consultation with disability awareness trainer, August 2004.

²⁹ Consultation with disability awareness trainer, August 2004.

example of where her own fear of being bugged prevented her from using a telephone:

I could never make a phone call in years gone by. I might make two phone calls a year and I would get someone else to ring the phone and start talking, and then put it over to me. And it was just horrific, because my paranoia was so severe that I was absolutely convinced that I was bugged, and everywhere I went I was [watched], so it was very hard for me to access a service.³⁰

The national program manager from Multicultural Mental Health Australia (MMHA) thought that in addition to having a great fear of legal issues, refugees with a mental illness also have a great fear or mistrust of “authority”. This might act as one barrier (among others) to such refugees accessing legal assistance.³¹

Difficult behaviour

It was suggested in three consultations that some mentally ill clients can be difficult, and in some circumstances exhibit quite threatening behaviour, which can make it difficult for legal service providers to assist them.³² If a legal service provider does not feel physically safe with a client, they may not be able to provide them with legal assistance. For example:

Sometimes people can come in very angry, and be very difficult and alienating to deal with. [They] come in and make threats, “I am going to kill this person, I am going to do this”, and all sorts of things ... so accessing the service can be a problem.³³

We had a particular client, who was coming into the office, and we had a couple of situations that were quite alarming and we really didn't quite know what to do. Some staff wanted to call the police. Other staff were reluctant to call the police because this particular client was so frightened of being taken away.³⁴

³⁰ Consultation with disability awareness trainer, August 2004.

³¹ Consultation with national program manager, MMHA, July 2004.

³² Consultations with disability awareness trainer, August 2004; case manager, WRC, Sydney, October 2004, also roundtable consultation, 3 June 2004.

³³ Consultation with family law solicitor, October 2004.

³⁴ Consultation with case manager, WRC, Sydney, October 2004.

A disability awareness trainer commented that training for legal services staff may be useful to overcome this barrier.³⁵

Communication problems

*I have worked in the community sector for 10 years now ... you adapt your communication skills, and your approach to things, and you make sure you explain things in a certain way from that professional point of view.*³⁶

Consultations indicated that the symptoms of mental illness can make it difficult for a person to communicate easily with others and that it was difficult in some circumstances for lawyers to understand what their client's problem was and what their instructions were.³⁷ Communication problems can act as a barrier to accessing legal assistance, as a solicitor may not be able to gather the right information from a client and therefore may not be able to assist them effectively.

*Accessing the service can be a problem simply because with some mental illness conditions, there can be a real problem with communication.*³⁸

*The mental illness affects their expression a bit, and they find it hard to articulate their problems.*³⁹

*It's impossible to get verbal instructions: the words just don't make sense. To try and understand what they are saying, there are key words, but I have no idea what [they are] saying. So there is probably a huge group of people that are totally lost, totally unable to access the system.*⁴⁰

*Getting instructions, to know what to do in a matter, can be awfully difficult.*⁴¹

³⁵ Consultation with disability awareness trainer, August 2004.

³⁶ Consultation with pro bono solicitor, Sydney, September 2004.

³⁷ Consultations with solicitor in charge, MHAS, Legal Aid; December 2004; executive officer, Human Services CEOs' Forum, March 2005; CLC workers, WLS, October 2004; pro bono solicitor, Sydney, September 2004; family law solicitor, October 2004; barrister, Sydney, January 2005; caseworker, Blue Mountains, July 2004. See also Cullen, *Out of the Picture*, paras.1.10, 4.10 and 6.22.

³⁸ Consultation with family law solicitor, October 2004.

³⁹ Consultation with solicitor, CCLC, August 2004.

⁴⁰ Consultation with pro bono solicitor, Sydney, September 2004.

⁴¹ Consultation with family law solicitor, October 2004.

The difficulties people can have communicating with legal service providers were also reported by the Disability Council in *A Question of Justice*:

*Difficulties in communication between client and legal representative were commonly reported. Lawyers expressed that they were often uncertain about the instructions they received, particularly from people with a psychiatric disability.*⁴²

A senior solicitor from the Mental Health Advocacy Service (MHAS) argued that it can be difficult for some clients with a mental illness to communicate the most (legally) relevant details about their situation:

*I think mental illness can interfere with the way that people remember and relay that sort of [detailed] information.*⁴³

People with a mental illness may also have difficulties comprehending information relayed to them, particularly if it is complex. A mental health caseworker and a CLC worker reported that clients with a mental illness can have problems absorbing and understanding legal advice given to them.

*If they are unable to even cook their own breakfast, how are they interpreting the legal advice that's being given to them?*⁴⁴

One participant argued that communication problems can be exacerbated by the effects of medication:

*There are side-effects when, my brain is sort of, I am thinking straight, but I am not clear-headed, I am medicated. So it might take me a bit longer to achieve something.*⁴⁵

In consultation for this study, a senior solicitor from the MHAS also argued that communication problems are exacerbated for people from NESBs with a mental illness, because they have to rely on the use of interpreters:

If somebody turns up to the Legal Aid Commission office and can't speak a word of English, we will try and arrange an appointment with an interpreter.

⁴² Disability Council, *A Question of Justice*, p. 86.

⁴³ Consultation with solicitor in charge, MHAS, Legal Aid; December 2004.

⁴⁴ Consultation with caseworker, South Coast, NSW, November 2004. Also consultation with CLC workers, KLC, August 2004.

⁴⁵ Interview no. 11.

*All of that stuff is more difficult to a person who is mentally ill. They need to be coherent enough to know what their problem is really, to know what they are after.*⁴⁶

In *A Question of Justice*, the Disability Council argued that using interpreters may be harder for people with a mental illness whose first language is not English, particularly when interpreters are not trained to work with people who have disabilities.⁴⁷

Communication over the telephone

Many legal services provide legal advice and information over the phone—for example, some CLCs, particularly those based in capital cities, will have a telephone advice service at particular times of the day. LawAccess is a free telephone advice service that provides people with legal information and advice on where to seek additional legal assistance.⁴⁸ Telephone advice lines are invaluable ways of providing advice to people who have difficulty accessing legal assistance face-to-face, such as people living in rural and regional areas and people with very specific mental illnesses, such as agoraphobia and serious depression.⁴⁹ However, several service providers interviewed for this study commented that people with a mental illness often have difficulties communicating with lawyers over the phone, and prefer face-to-face communication.⁵⁰ For example:

*It is hard for people with a mental illness to ring the advice line, so they tend to do better with face-to-face advice. They just find it very difficult to find us and ring up.*⁵¹

⁴⁶ Consultation with solicitor in charge, MHAS, Legal Aid; December 2004.

⁴⁷ Disability Council, *A Question of Justice*, p. 83.

⁴⁸ *LawAccess Online*, <http://info.lawaccess.nsw.gov.au/lawaccess/lawaccess.nsf/pages/about_us> (accessed September 2005).

⁴⁹ Roundtable consultation, 16 June 2004

⁵⁰ Consultations with solicitor, CCLC, August 2004; CLC worker, Western NSW, September 2004; family law solicitor, October 2004; caseworker, South Coast, NSW, November 2004; CLC workers, KLC, August 2004; case manager, WRC, Sydney, November 2004. See also Combined CLCs' Group (NSW) Inc (CCLC NSW), *Submission to the Senate Select Committee on Mental Health*, Sydney, 2005, p. 7, <http://www.aph.gov.au/Senate/committee/mentalhealth_ctte/submissions/sublist.htm> (accessed October 2005).

⁵¹ Consultation with solicitor, CCLC, August 2004.

*The illness itself can be a problem, and the person on the other end [of the phone], if they are not aware of the situation, can find the communication difficult, and so it will be less beneficial than otherwise.*⁵²

*Speaking to a legal rep on the telephone could be quite daunting.*⁵³

Commenting on the lack of support services available in rural and regional areas, a solicitor from a regional CLC made the following remarks:

*... there are not the support services that can assist them to make that phone call, or interpret the information, or provide that sort of assistance. In my experience, people feel much more comfortable in accessing legal advice or information by sitting down and talking to someone, and being in the same room.*⁵⁴

A caseworker reported that a reliance on the telephone can act as a barrier for people with a mental illness who are from a culturally and linguistically diverse background and, in particular, those who are from a small community and who rely on the Translating and Interpreting Service.⁵⁵ She was of the opinion that fear of stigma within their own community may make it difficult for some people to disclose their illness to a legal service provider through a telephone interpreter:

*... if you are someone from a Cambodian background, and you have a big debt, you don't live in the metropolitan area, you can't come in, and your English is poor, all you can do is disclose your problem to the telephone interpreter service, [and there are] not all that many Khmer interpreters working for the service. [There are] not only fears related to the mental illness, but also fears of being identified by the community. [This is] just an additional problem for people forced to rely on telephone interpreters.*⁵⁶

⁵² Consultation with family law solicitor, October 2004.

⁵³ Consultation with caseworker, South Coast, NSW, November 2004.

⁵⁴ Consultation with CLC worker, Western NSW, September 2004.

⁵⁵ The Australian government, through the Department of Immigration and Multicultural and Indigenous Affairs, provides the Translating and Interpreting Service for people who do not speak English and for English speakers needing to communicate with them. The service is available to any person or organisation in Australia requiring interpreting services 24 hours a day, 7 days a week, and is accessible from anywhere in Australia.

⁵⁶ Consultation with case manager, WRC, Sydney, November 2004.

Lack of mental health care and treatment

The impact of the above barriers on those people with a mental illness who receive appropriate mental health care and treatment might be reduced. Three stakeholders and one participant indicated that if a person is taking appropriate medication, and/or receiving appropriate support or treatment, they may be more stable and therefore better able to access a legal service provider.⁵⁷ For example:

*If they are not functional, that's where it is serious disadvantage. If they are on medication then they are well controlled, then their functionality might be good. And you can tell them all these things and their access to justice is OK. Versus someone who just got out of a psych hospital and can't even get out of their chair.*⁵⁸

The reported crisis in mental health care in NSW is likely to reduce the chances of many people with a mental illness to receive the treatment and care they need to access and communicate with legal service providers.⁵⁹

Systemic barriers to seeking legal assistance

This section will look at some of the systemic barriers confronting people with a mental illness in accessing legal assistance. These include:

- ◆ the availability of affordable legal services
- ◆ time constraints
- ◆ remote, rural and regional issues
- ◆ identifying mental illness

⁵⁷ Interview no. 25 (taken from the Foundation's study into homeless people). Also consultations with solicitor, CCLC, August 2004; manager, Centrelink, June 2004; investigation officer, NSW Ombudsman, September 2004. See also CCLC NSW, *Submission to the Senate Select Committee on Mental Health*, p. 8.

⁵⁸ Consultation with solicitor, CCLC, August 2004.

⁵⁹ For example, the Select Committee on Mental Health, in *Mental Health Services in NSW: Final Report*, refers to "endemic problems in the provision of mental health services" (p. 15). The MHCA, in *Not for Service* refers to the "crumbling mental health care system" (p. iii). See also HREOC, *Human Rights and Mental Illness*. Also case study 1617 taken from Coumarelos et al, *Justice Made to Measure*.

- ◆ credibility
- ◆ barriers in the physical environment.

Availability of affordable legal services

Consultations for this study and previous literature indicate that people with a mental illness tend to have low levels of income.⁶⁰ People with a mental illness are therefore less likely to be able to afford private legal representation:

*What avenues have I got for representation, just generally? It's just that I associate legal help as costly. So I don't bother about it.*⁶¹

As a result, many people with a mental illness are likely to be dependent on legal assistance and advice from Legal Aid, CLCs and pro bono legal service provision.⁶² However, service providers interviewed for this study were of the opinion that the limited availability and resources of these types of legal services can act as a barrier to accessing legal assistance for people with a mental illness.⁶³

A number of studies and submissions have documented that Legal Aid is under-resourced.⁶⁴ In its submission to the Access to Justice and Legal Needs Program, the Law Society of NSW suggested that it was much harder for people to obtain a grant of legal aid now than it would have been several years ago.⁶⁵ Furthermore, Legal Aid services at court, such as the Duty Solicitor

⁶⁰ Consultations with solicitor in charge, MHAS, Legal Aid, December 2004; caseworker, Blue Mountains, July 2004; convener of the NCSMC, December 2004; registrar, Local Court, August 2004; manager, ADB, November 2004; Aboriginal mental health worker, Sydney, September 2004; Local Courts & Sheriff, July 2004. See also Andrews et al., *The Mental Health of Australians*; Butterworth, 2003; Jablensky et al., *People Living With Psychotic Illness*; Cameron et al., *Thin Ice*.

⁶¹ Interview no. 8.

⁶² In its *Submission to the Senate Select Committee on Mental Health* (p. 6), CCLC NSW estimated that a substantial proportion of their clients have mental health problems.

⁶³ Consultations with Aboriginal mental health worker, Sydney, September 2004; President, Mental Health Review Tribunal, June 2003; executive officer, Human Services CEOs' Forum, March 2005; consumer advocate, Sydney, August 2004; investigation officer, NSW Ombudsman, September 2004.

⁶⁴ Senate Legal and Constitutional References Committee, *Inquiry into Legal Aid and Access to Justice, Final Report*, LSCRC, Canberra, 2004, pp. 4–8.

⁶⁵ Law and Justice Foundation of NSW, *Access to Justice Research Program: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW. Stage 1: Public Consultations*, Law and Justice Foundation of NSW, Sydney, 2003, p. 37.

Scheme, are only found in the criminal jurisdiction and in some family courts. Several service providers interviewed for this study commented that the limited availability of legal aid may prevent some people with a mental illness from accessing legal advice and representation.⁶⁶

*There is not enough legal aid out there. I remember one consumer calling me who had tried Legal Aid and tried the Mental Health Advocacy Service ... he kept trying all these other agencies and he couldn't access any legal support.*⁶⁷

Roundtable attendees argued that the eligibility criteria for obtaining legal aid is also very confusing, which can deter people with a mental illness from even trying to obtain a Legal Aid grant.⁶⁸

Similarly, CLCs' resources are constrained. In its *Submission to the Review of NSW Community Legal Service Funding Program*, the Council of Social Services of NSW (NCOSS) commented in relation to one specific CLC that "existing resources are woefully inadequate to meet demand".⁶⁹ CLCs therefore focus on providing legal assistance and advice and community legal education. Representation is not usually available except in cases of unusual disadvantage or if the case is in the public interest.⁷⁰

Time constraints

And actually trying to get the right information, or enough information out of them, to see if there is a legal claim, and distil it from all the rest of the information they provide you with, can be very difficult. I imagine if they

⁶⁶ Consultations with President, Mental Health Review Tribunal, March 2005; consumer advocate, Sydney, August 2004; mental health worker, Sydney, September 2004; Aboriginal mental health worker, Sydney, September 2004; executive officer, Human Services CEOs' Forum, March 2005; investigation officer, NSW Ombudsman, September 2004.

⁶⁷ Consultation with consumer advocate, Sydney, August 2004.

⁶⁸ Roundtable, 3 June 2004.

⁶⁹ Council of Social Service of NSW (NCOSS), *Submission to the Review of NSW Community Legal Service Funding Program*, NCOSS, Sydney, 2004, p. 6. Note that while this statement relates specifically to the work of the WLS, Indigenous Women's Unit Violence Prevention Units, the tone of this submission indicates that NCOSS is of the view that the under-resourcing of publicly funded legal services is widespread in NSW.

⁷⁰ CCLC NSW, *Submission to the Senate Select Committee on Mental Health*.

*are not going to people who have the time and capacity to go through those things, they are going to be turned away.*⁷¹

Policy and legal officers suggested that people with a mental illness benefit from having more time during interviews with lawyers, in order to overcome some of the problems listed at the start of this chapter.⁷² However, they also argued that this can place extra pressure on CLC and Legal Aid staff, who already face constraints on resources. Stakeholders reported that clients with a mental illness may need substantially longer appointments than what is already allowed for.⁷³ It was argued that present funding levels of CLCs and Legal Aid prevent these services from having enough time to spend with clients who have a mental illness:

*People with mental health [issues] ... their stories are narratives. You can't ask a question and get an answer. You actually have to wait, and it might take three or four times interviewing the client to get the full picture. That understanding can often be quite difficult for lawyers. It's very time-consuming. If you have a lot of work happening, you have to have the time to put in, and often they [service providers] don't.*⁷⁴

For example, the Duty Solicitor Scheme at the Local Court is a Legal Aid service available to people who need representation for criminal matters. Generally, people access the duty solicitor at court on the day their matter is being heard.⁷⁵ This leaves the duty solicitor with only a short amount of time to gather the details of their client's case, which may not be sufficient for clients who have a mental illness. Commenting on people with a mental illness accessing the Duty Solicitor Scheme, a local court registrar reported:

... a person with a mental illness shows up to see the solicitor who has lots of people to see ... They come into an area where resources and time are limited.

⁷¹ Consultation with pro bono solicitor, Sydney, September 2004.

⁷² Consultations with CLC workers, WLS, October 2004; barrister, Sydney, January 2005; policy officer, HREOC, June 2005.

⁷³ Roundtable consultation, 3 June 2004. Also consultations with pro bono solicitor, Sydney, September 2004; CLC workers, KLC, August 2004; disability awareness trainer, August 2004. Also roundtable consultation, 16 June 2004.

⁷⁴ Consultation with CLC workers, WLS, October 2004.

⁷⁵ Legal Aid, *Duty Solicitor Scheme*, <<http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=375>> (accessed September 2005).

*So they [the solicitor] don't see people for a long period of time, only 15–20 minutes. They [the client] fall through the cracks. Unless they get someone who is more vocational and goes into their own time.*⁷⁶

The time constraints on duty solicitors were also raised by one mental health worker as a particular issue for young people with a mental illness.⁷⁷ This worker was of the opinion that the stretched resources of the legal service may mean that a client must repeat their story to several different lawyers throughout the case. The client's communication difficulties, combined with the time constraints of the service, may mean that only pieces of the client's situation are conveyed each time.⁷⁸ This could mean that particular details of a client's case are not discussed.

*I really think the Legal Aid solicitors do a brilliant job. But occasionally when you hear them stand up you know that they have little bits missing that they haven't actually picked up; they haven't picked it up because it would be humanly impossible to do it.*⁷⁹

Furthermore, a few stakeholders indicated that clients with a mental illness may need more support while accessing legal assistance.⁸⁰ Lawyers may need to write letters, make calls and set up appointments on a client's behalf, all of which places extra strain on legal service providers' time.

It was reported that in some instances, CLCs have to refer people with a mental illness on to other services because they do not have the resources to assist these clients themselves. This can act as an additional barrier to accessing legal services for people with a mental illness, as they may be more easily deterred by having to make contact with and explain their situation again to another service.

The nature of her disability and her personality was that she was a difficult person to deal with; difficult to communicate with, emotionally very fragile,

⁷⁶ Consultation with registrar, Local Courts & Sheriff, July 2004.

⁷⁷ Consultation with mental health worker, Sydney, September 2004.

⁷⁸ Also roundtable consultation, 3 June 2004.

⁷⁹ Consultation with mental health worker, Sydney, September 2004.

⁸⁰ Consultation with solicitor, CCLC, August 2004. Also consultation with disability awareness trainer, August 2004, and roundtable consultation, 16 June 2004.

*very tearful, very needy, frequently in communication at a greater level than what was called for. In the sector you talk about people getting burnt out by a particular client, and they [the client] then go on this referral merry-go-round.*⁸¹

*For in-depth legal issues, [people are told to] ring this number or ring that number. So quite often, people get fobbed off. If they have a mental health problem, they'll tend to drop [the matter] altogether.*⁸²

*What we find is that people get on a referral merry-go-round. That's one of the great barriers to [accessing] legal services for people with mental illness ... it's quite difficult to explain to someone who has a [mental illness] about a particular matter that needs to be acted upon, that you can't act on it ... because you don't have the resources.*⁸³

Genn et al. discuss the phenomenon of “referral fatigue”, which refers to a state of affairs whereby the “likelihood of people actually obtaining advice after having been referred on by an adviser declines with each adviser who makes a referral”.⁸⁴ In light of the individual barriers discussed in the first part of this chapter, it would seem that people with a mental illness may be particularly prone to experiencing referral fatigue. This is supported by Cullen:

*It can take a great deal of effort for someone with a mental health problem to come into a bureau or voluntary organisation. If they are then referred to other agencies such as specialist debt services, they may well be lost to help.*⁸⁵

Remote, rural and regional issues

Consultations for this study indicated that there are even less affordable legal services available in rural and regional areas than elsewhere.⁸⁶ This is supported by the Senate Legal and Constitutional References Committee:

⁸¹ Consultation with solicitor, PWD, August 2004.

⁸² Consultation with caseworker, South Coast, NSW, November 2004.

⁸³ Consultation with disability awareness trainer, August 2004.

⁸⁴ Genn et al., *Understanding Advice Seeking Behaviour*, p. 31. See also Figure 11 in this study.

⁸⁵ Cullen, *Out of the Picture*, p 79.

⁸⁶ Consultations with CLC worker, Western NSW, September 2004; family law solicitor, October 2004; with mental health worker, Western NSW, August 2004.

One of the major barriers to access to justice is the fact that large geographical areas in Australia are not covered by legal aid or free legal services.⁸⁷

In addition, where services do exist, they may not have the capacity or funding to take on clients with more complex needs. In country towns throughout NSW, Legal Aid pays local solicitors to do legal aid work for the local population. One solicitor commented that because many of these solicitors are running their own business as well as doing legal aid work, they may not feel they are adequately compensated for the time it takes to work with clients with a mental illness, who may need more time and support than other clients.⁸⁸ CLC workers from Women's Legal Services NSW (WLS) also commented:

If you have a client who has a mental illness and they need constant reassurance, or they need to be in constant contact over certain things ... it can actually turn solicitors off doing Legal Aid work, which means that in rural areas, there are less and less solicitors. Some towns have no solicitor that does Legal Aid work at all, and there is no Legal Aid office there, so it just means that people getting access to Legal Aid is hard enough.⁸⁹

A lack of accessible local legal services may therefore mean that people with a mental illness living in rural and regional areas face additional barriers to accessing legal services, including having to travel long distances to obtain legal advice. It was indicated that the organisation and motivation required to travel large distances to attend appointments is often beyond the capacity of someone who is mentally unwell.⁹⁰ This is compounded by both the cost of travel and the lack of available regular public transport in rural and regional areas.⁹¹

In addition, one regional CLC worker suggested that often, people with a mental illness need to access a lawyer immediately, as they may not have the

⁸⁷ Senate Legal and Constitutional References Committee, *Inquiry into Legal Aid and Access to Justice, Final Report*, p. 114.

⁸⁸ Consultation with family law solicitor, October 2004.

⁸⁹ Consultation with CLC workers, WLS, October 2004.

⁹⁰ Consultations with family law solicitor, October 2004; mental health worker, Western NSW, August 2004; CLC worker, Western NSW, September 2004.

⁹¹ Consultation with mental health worker, Western NSW, August 2004.

capacity to plan ahead. This CLC worker argued that this can be a problem for people living in rural and regional areas who do not have a lawyer based in their town:

*I think the main barrier is it being available right when they need it. I think people that suffer from a mental illness require the assistance when they need it. And that is a great difficulty in terms of the provision of legal services, because there just isn't a solicitor that is based in Bourke that will assist people and be there all the time ... So you have to wait a fortnight to get an appointment, and often in a fortnight things could have completely changed.*⁹²

Accessing telephone-based legal services is an option for people with a mental illness living in rural and regional areas. However, as discussed earlier in this chapter, communication difficulties can be made worse over the phone, and it was therefore suggested that people with a mental illness tend to prefer communicating face-to-face with solicitors.⁹³

In recognition of the lack of available legal services in rural and regional areas, Legal Aid is trialling the Cooperative Legal Service Delivery Model. The aim of this model is to organise coalitions of legal services (including government, private, community and quasi-legal service providers) to work together to identify gaps in service delivery, develop service delivery priorities, and develop a referral network in the area to better assist disadvantaged people to access legal services.⁹⁴ A family law solicitor described the model:

*We have a cooperative service delivery model operating out of Dubbo, which is trying to collaborate between the different sorts of agencies, so that people aren't getting a run around.*⁹⁵

⁹² Consultation with CLC worker, Western NSW, September 2004.

⁹³ Consultations with solicitor, CCLC, August 2004; CLC worker, Western NSW, September 2004; family law solicitor, October 2004; caseworker, South Coast, NSW, November 2004; CLC workers, KLC, August 2004; case manager, WRC, November 2004.

⁹⁴ Law and Justice Foundation of NSW, *NSW Legal Referral Forum*, <<http://www.lawfoundation.net.au/information/referral/together.html>> (accessed September 2005).

⁹⁵ Consultation with family law solicitor, October 2004.

Finally, a lack of available mental health services in rural and regional areas can mean that people with a mental illness have far less support and treatment options to assist them in stabilising their illness. This can further compromise their ability to access and use legal services, as discussed earlier.⁹⁶

Identifying mental illness

Stakeholders were of the opinion that a lack of awareness by legal service providers that a client has a mental illness may compromise that client's ability to access legal assistance.⁹⁷ If a legal service provider is aware that a client has a mental illness, they may take the time to cater to their needs, including allowing more time for the client to give instructions, adopting an appropriate communication style, and providing additional support and flexibility. If a client's illness is not identified, their needs may not be catered to, making it harder for clients with a mental illness to access and use legal assistance effectively.

Furthermore, mental illness is often considered by CLCs and Legal Aid in determining whether a person is eligible for legal representation.⁹⁸ For example, to be eligible for a grant of legal aid in a wide range of matters, including personal injury and employment, it needs to be established that a client has an "unusual or special disadvantage" which includes having "difficulty in dealing with the legal system by reason of a substantial psychiatric condition".⁹⁹ A family law solicitor argued that if a person is not identified as having a mental illness, they may not be eligible for special consideration for a grant of legal aid, and may therefore miss out on legal representation.¹⁰⁰

⁹⁶ Steering Committee for the Evaluation of the Second National Mental Health Plan 1998–2003, *Evaluation of the Second National Mental Health Plan*, Commonwealth of Australia, Canberra, 2003, p. 30.

⁹⁷ Consultation with senior public servant, NSW Centre for Mental Health, April 2005. Also consultations with CLC workers, Shopfront, September 2004; case manager, WRC, Sydney, November 2004; family law solicitor, October 2004.

⁹⁸ CCLC NSW, *Submission to the Senate Select Committee on Mental Health Inquiry*.

⁹⁹ Legal Aid, *Policies in Brief*, <<http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=242>> (accessed September 2005).

¹⁰⁰ Consultation with family law solicitor, October 2004.

Stakeholders reported that people may not be identified by a legal service provider as having a mental illness for either of two reasons:

- ◆ the person does not disclose, because of fear of stigma, or because they are undiagnosed
- ◆ the legal service provider does not recognise that the person has a mental illness.

Non-disclosure

A couple of stakeholders suggested that people may not reveal to a legal service provider that they have a mental illness because of the associated stigma. For example:

There is the whole tension between, if I disclose that I have got a mental illness, will I then be stigmatised, and harmed, and treated more adversely than if I didn't disclose—but if I don't disclose, then my needs don't get met, and I am perhaps excluded from or compromised right through the process.¹⁰¹

This is supported by the Disability Council, which reported in *A Question of Justice* that participants with psychiatric disabilities spoke of being negatively stereotyped as “crazy”, “mad”, “dangerous” and “violent” and, as a result, felt that the “stigma and consequences of disclosing a psychiatric disability were such that it was better not to”.¹⁰²

In consultation for this study, solicitors from Shopfront Youth Legal Centre argued that young people may be embarrassed to disclose to a lawyer that they have a mental illness, particularly young male clients who may also be in denial about their illness.¹⁰³

Different cultural groups may have different approaches to mental illness, which may prevent them from disclosing that they have a mental illness. A court liaison worker was of the opinion that Aboriginal people tend to see

¹⁰¹ Consultation with the convener of the NCSMC, December 2004. Also consultation with CLC workers, Shopfront, September 2004. Also case study 1065, taken from Coumarelos et al., *Justice Made to Measure*.

¹⁰² Disability Council, *A Question of Justice*, p. 60.

¹⁰³ Consultation with CLC workers, Shopfront, September 2004.

mental illness as highly stigmatic, and would rather go to prison than to a psychiatric hospital.¹⁰⁴ Further, the national program manager from MMHA argued that some people whose first language is not English may not recognise the label or concept of mental illness.¹⁰⁵

A Sydney barrister interviewed for this study argued that people with a mental illness may not disclose their illness because they are not aware they have one.¹⁰⁶ This may be due, as one CLC solicitor suggested, to the fact that inadequate levels of mental health care have resulted in some people with a mental illness going undiagnosed.¹⁰⁷ The same solicitor suggested that this is a particular problem in rural and regional areas, where the availability of mental health services is even more limited.¹⁰⁸

Failure to identify

Consultations for this study indicate that if a person does not disclose that they have a mental illness, it may be difficult for legal service providers to identify that a person has a mental illness.¹⁰⁹ Several legal and non-legal service providers suggested that this may be because it is not overtly apparent that a person has an illness. For example:

Of course it's relatively easier if someone is obviously in the middle of psychosis, if someone is paranoid and expressing strange thoughts. But it is the people that have some sort of neurosis where it can be quite difficult, where you just realise after a few calls going over the same stuff, or [they are] unable to pursue our advice.¹¹⁰

¹⁰⁴ Consultation with NSW Statewide Community & Court Liaison Service workers, Justice Health, August 2004.

¹⁰⁵ Consultation with the national program manager, MMHA, July 2004.

¹⁰⁶ Consultation with barrister, Sydney, January 2005.

¹⁰⁷ Consultation with CLC worker, Western NSW, September 2004.

¹⁰⁸ Consultation with CLC worker, Western NSW, September 2004.

¹⁰⁹ Consultations with solicitor, CCLC; August 2004; case manager, WRC, Sydney, November 2004; CLC workers, KLC, August 2004; CLC workers, Western NSW, September 2004; family law solicitor, October 2004.

¹¹⁰ Consultation with case manager, WRC, Sydney, November 2004.

A couple of legal service providers suggested that it can also be difficult for lawyers to distinguish between people with a mental illness and people who were just being “difficult”:

*People may not straight away pick that the problem with this person is that there is an illness happening.*¹¹¹

A solicitor and a case manager were of the opinion that identifying that a person has a mental illness is even more difficult over the telephone:

*I think that is the trick, people don't make that distinction very well [between people with an illness who are functioning well and those who are not]. It is very hard to judge over the phone. It is very hard to judge without someone telling you their functionality.*¹¹²

One solicitor acknowledged the difficulties faced by legal service providers in asking people directly whether they have a mental illness:

*A lot of people won't tell us they have got a mental illness. We do ask people if there are any particular circumstances or things we should be aware of ... but [we] can't say, "are you mentally ill?"*¹¹³

However, service providers referred to ways in which lawyers can attempt to ascertain whether a person has a mental illness. For example, a case manager suggested that if a legal service provider suspects a client may have a mental illness, they could attempt to encourage the client to disclose their illness.¹¹⁴

*Sometimes we can needle it out ... we tend to say, "you are sounding very anxious. I can see that you are finding this experience very stressful. Have you seen a doctor about your anxiety?" Anxiety can be code for lots of things, but it could be something that they feel more comfortable talking about. If you ask them whether they are seeing a doctor about their anxiety, they might just break down and say, "my doctor thinks I might have schizophrenia".*¹¹⁵

¹¹¹ Consultation with family law solicitor, October 2004; also consultation with CLC workers, KLC, August 2004.

¹¹² Consultation with solicitor, CCLC, August 2004; also consultation with case manager, WRC, Sydney, November 2004.

¹¹³ Consultation with family law solicitor, October 2004.

¹¹⁴ Consultations with case manager, WRC, Sydney, November 2004; CLC workers, KLC, August 2004; solicitor, CCLC, August 2004.

¹¹⁵ Consultation with case manager, WRC, Sydney, November 2004.

One CLC worker believed that a lack of clarity in legal instructions was often taken as an indicator of mental illness.¹¹⁶

A perceived lack of credibility

As discussed above, clients may not disclose that they have a mental illness, due to a fear of stigma. One manifestation of the stigma surrounding mental illness raised in this report is that people with a mental illness are often viewed as being less credible. Stakeholders interviewed for this study reported that some lawyers find people with a mental illness less credible, and are therefore less inclined to believe what they say.¹¹⁷ This may act as a barrier, if a solicitor dismisses a client's claim because they don't believe them.

*If somebody comes across as obviously mentally ill, then I think quite often they can be dismissed and not really get through the door. The attitude is, "I just want to get rid of this person".*¹¹⁸

*That fundamental sort of credibility issue that they face trying to access the service is difficult. Because they are vulnerable, because it's apparent they have a mental illness, if you do pursue the matter their credibility is already in question.*¹¹⁹

Two non-legal service providers felt that it is sometimes difficult for lawyers to determine what part of their client's version of events is reality, and what part is fictitious.¹²⁰ The difficulty faced by some people with a mental illness in communicating their issues in a coherent and logical manner can further impact on how seriously they are taken by lawyers.¹²¹

¹¹⁶ Consultation with CLC workers, KLC, August 2004.

¹¹⁷ Roundtable consultation, 16 June 2004. Also consultations with public servant, Centre for Mental Health, March 2005; Executive Officer, Human Services CEOs' Forum, March 2005; pro bono solicitor, Sydney, September 2004.

¹¹⁸ Consultation with solicitor in charge, MHAS, Legal Aid, December 2004.

¹¹⁹ Consultation with pro bono solicitor, Sydney, September 2004.

¹²⁰ Case study obtained in consultation with caseworker, Blue Mountains, July 2004; also consultation with official visitor, October 2005.

¹²¹ Consultations with caseworker, Blue Mountains, July 2004; disability awareness trainer, August 2004; solicitor in charge, MHAS, Legal Aid, December 2004. See also MHCA, *Not for Service*, p. 275.

A disability awareness trainer who provides training on working with people with a mental illness argued that it is important for legal service providers to be aware that people with a mental illness are not necessarily deliberately lying or being misleading, but that what they are saying is an honest reflection of their current reality.¹²² One CLC worker argued that it is important for lawyers to deliver a legal service to their client, to the best of their ability, regardless of how much of the client's story seems "real":

*If I find someone and I am suspicious that this is related to a mental illness, even if I think the story is completely far-fetched and made up, I just give the legal advice. It is much simpler to just say, "Look, this is the legal advice," and you are respecting that person's understanding of the situation, by [giving] them legal advice. Because somewhere in there, there may well be something. And also, contacting us may be the only form of contact and information they get.*¹²³

This was reiterated by a solicitor from PWD, who commented that people who are mentally ill sometimes just need lawyers to give them a chance and attempt to understand their situation and provide them with legal assistance:

*What the person needed was someone who actually sat down and said, "Well I'll give you a chance ... you know it doesn't look good, but I'll go through it with you."*¹²⁴

Physical environment

In consultation for this study, one stakeholder believed that the physical environment of a legal service, and its day-to-day office procedures, may act as a barrier to using legal services for someone who has a mental illness.¹²⁵ For example, seemingly small things, such as fluorescent lighting and extraneous noise, may be distracting to people with a mental illness and prevent them from engaging effectively with legal service providers.¹²⁶ She also argued

¹²² Consultation with disability awareness trainer, August 2004.

¹²³ Consultation with CLC workers, WLS, October 2004.

¹²⁴ Consultation with solicitor, PWD, August 2004.

¹²⁵ Consultation with disability awareness trainer, August 2004.

¹²⁶ Consultation with disability awareness trainer, August 2004.

that simple office procedures, such as, for example, putting someone “on hold” with no explanation or warning, may be confusing and stressful for a client with a mental illness. These concerns identify an additional barrier to accessing a service.

Suggestions to increase the accessibility of legal services to people with a mental illness

A specialist mental health legal centre

A number of service providers felt that a specialist legal service for people with a mental illness would help address some of the barriers encountered in accessing legal assistance.¹²⁷ Although there are a few services that do cater to people with a mental illness (such as the Legal Aid MHAS and the Disability Discrimination Legal Centre (DDLC)), while extremely beneficial, these services are limited by their jurisdictional requirements in the advice they can give. The MHAS acts on legal issues arising from the *Mental Health Act 1990* (NSW), including compulsory hospitalisation and treatment orders, guardianship, community treatment orders and community counselling orders.¹²⁸ The DDLC assists in cases of disability discrimination under either the *Disability Discrimination Act 1992* (Cth) or the *Anti-Discrimination Act 1977* (NSW).

Thus, roundtable attendees felt that there are currently gaps in legal service provision to people with a mental illness.¹²⁹ They felt that there is a role for a specialist mental health legal centre that deals with all areas of law, with the capacity to undertake test case litigation and law reform.¹³⁰ Another roundtable attendee proposed the establishment of a national system of disability legal services.¹³¹

¹²⁷ Roundtable consultation, 16 June 2004. Also consultation with solicitor, PWD, August 2004.

¹²⁸ In addition it was argued that the MHAS has limited resources and is already overwhelmed by existing levels of demand within its jurisdiction: roundtable consultation, 16 June 2004; consultation with CLC workers, WLS, October 2004.

¹²⁹ Roundtable consultation, 16 June 2004.

¹³⁰ Roundtable consultation, 16 June 2004.

It was suggested that ideally, such a service would employ solicitors that had the communication skills necessary to work with people who have a mental illness. This would allow more time during appointments and more flexibility around the needs of people with a mental illness.¹³² The service would be aware of the barriers—such as those discussed earlier in this chapter—facing people with a mental illness.

A possible model for this is the Mental Health Legal Centre in Victoria, a specialist legal centre for people with a mental illness that provides legal advice and representation for people who have a legal matter related to their mental illness, as well as a referral service, legal education and telephone advice.¹³³ The centre acts on issues dealt with in NSW by the MHAS and the DDLC, as well as criminal (fitness to plead), family law (child protection in particular, but also resident and contact order arrangements) and debt issues.¹³⁴

Another example of a specialist legal service for people with a mental illness is the Springfield Advice and Law Centre that operates out of Springfield University Hospital in the United Kingdom. This London-based centre offers independent, free advice, as well as casework and legal representation, to local users of the national mental health system, and operates in regards to hospitalisation, housing, debt and community care matters.¹³⁵

One case manager interviewed for this study expressed some concern that not all people with a mental illness would access a specialist mental health legal centre, because they do not believe or know that they have a mental illness, or because they are afraid of experiencing the stigma associated with mental illness.¹³⁶ For this reason, people with a mental illness may be more likely to access more generalist legal service providers, which, as a result, will need to be aware of and have the capacity to assist people with a mental illness.

¹³¹ Roundtable consultation, 16 June 2004.

¹³² Consultation with solicitor, PWD, August 2004.

¹³³ Consultation with CLC workers, Mental Health Legal Centre, Victoria (MHLC), March 2004.

¹³⁴ Consultation with CLC workers, MHLC, Victoria, March 2004.

¹³⁵ *Springfield Advice and Law Centre*, <<http://homelesslondon.org.uk/services/projinfo.asp?session=googlebot&crumb=pPBI&b=01AR24&p=02PP11&s=&id=UK5734>> (accessed March 2006).

Training and awareness-raising

It was proposed that some of the barriers raised in this chapter might be addressed by providing training on mental health issues to those legal service providers who have clients with a mental illness. Training could include how to communicate effectively with people with a mental illness, what their needs are, what it is like to have a mental illness, indicators of mental illness, referral and resource information, strategies to work effectively with people with a mental illness, stress management and general awareness-raising in order to combat stigma and discrimination.¹³⁷ A number of stakeholders suggested that legal service providers would benefit greatly from training on mental health issues.¹³⁸

*I think lawyers could be greatly assisted by training [to better] understand mental illness, or different types of mental illness.*¹³⁹

A disability awareness trainer made the further suggestion that training on mental illness could also be provided to law students at university.¹⁴⁰ This is supported by Lee.¹⁴¹

A number of legal service providers (including Legal Aid and various CLCs) provide training on mental illness to their solicitors. For example:

- ♦ The Combined Community Legal Centres Group (NSW) Inc has organised sessions at past conferences on dealing with people with behavioural problems;¹⁴²

¹³⁶ Consultation with case manager, WRC, Sydney, November 2004.

¹³⁷ Consultations with disability awareness trainer, August 2004; CLC workers, KLC, August 2004; solicitor, PWD, August 2004. See also Disability Council, *A Question of Justice*, p. 129.

¹³⁸ Consultations with CLC worker, Western NSW, September 2004; solicitor, CCLC, August 2004; CLC workers, KLC, August 2004; case manager, WRC, Sydney, November 2004; consumer advocate, Sydney, August 2004; mental health worker, Sydney, September 2004; CLC workers, Shopfront, September 2004; barrister, Sydney, January 2005; disability awareness trainer, August 2004.

¹³⁹ Consultation with CLC worker, Western NSW, September 2004.

¹⁴⁰ Consultation with disability awareness trainer, August 2004.

¹⁴¹ S H Lee, *Report on Justice and People with Disabilities in Western Australia*, People with Disabilities (WA) Inc, 2001, p 10.

¹⁴² Consultation with case manager, WRC, Sydney, October 2004.

- ◆ The NSW Statewide Community and Court Liaison Service has given talks to Legal Aid and the Law Society of NSW on how to identify mental illness;¹⁴³
- ◆ Legal Aid provides one-day workshops run by a social worker to its staff on dealing with people who have a mental illness;¹⁴⁴
- ◆ The Legal Information Access Centre provides training to staff on dealing with people who have a mental illness;¹⁴⁵
- ◆ The Law Society of NSW provides a training session for its staff in the community referral service about clients with a mental illness;¹⁴⁶
- ◆ The Family Court provides training for its internal mediators about clients with a mental illness. It is also piloting a suicide prevention program which will be evaluated in June 2006 and a mental health education program in Adelaide which aims to educate court staff about working with and supporting clients with a mental illness. Negotiations are underway to provide similar training in all Family Courts around Australia.¹⁴⁷

Support for lawyers

A few stakeholders were of the opinion that people with a mental illness can place great emotional demands on legal service providers.¹⁴⁸ These same stakeholders commented that the personal circumstances of some of their clients can be quite distressing to listen to, and that legal service providers do not usually have the training to cope with this. In addition, some mentally ill clients can be quite demanding and time-intensive, requiring an unusual amount of contact and reassurance. This can lead to lawyers reaching “burn-

¹⁴³ Consultation with NSW Statewide Community & Court Liaison Service workers, Justice Health, August 2004.

¹⁴⁴ Consultation with social worker, Legal Aid, October 2005.

¹⁴⁵ Law and Justice Foundation, Referral Forum, Minutes, 11 November 2004.

¹⁴⁶ Law and Justice Foundation, Referral Forum, Minutes, 11 November 2004.

¹⁴⁷ Law and Justice Foundation, Referral Forum, Minutes, 11 November 2004 and 15 March 2006.

¹⁴⁸ Consultations with case manager, WRC, Sydney, October 2004; CLC workers, WLS, October 2004; solicitor, PWD, August 2004.

out” with a particular client, and therefore having to refer them on to another lawyer.¹⁴⁹

A case manager commented on the need for support services for legal service providers who work with clients with a mental illness, so that they are better able to look after themselves as well as their clients.¹⁵⁰

Summary

Consultations with stakeholders and participants for this study revealed that having a mental illness can affect a person’s ability to access and use legal services. The symptoms of mental illness that may act as a barrier to accessing legal services include a lack of awareness of legal rights, being disorganised, being overwhelmed, mistrust, difficult behaviour, and communication problems. These barriers are compounded by current inadequate levels of mental health care. The above symptoms may mean that a person with a mental illness has difficulty keeping appointments, or does not feel able to even attempt to seek legal assistance—or feel that it is worthwhile to do so. Further, an inability to divulge relevant personal details may mean that service providers are unable to assist the client. Difficult behaviour may also prevent a client from receiving legal assistance.

Communication problems may mean that the client’s situation is not properly understood. Consultations revealed that if a client is unable to give a reasonably coherent account of their situation, the legal service provider may not have enough relevant information to assist them. In addition, service providers argued that communication problems can mean that the client may not understand the advice they receive. They reported that communication issues for clients with a mental illness were often exacerbated by use of the telephone.

¹⁴⁹ Consultations with CLC workers, WLS, October 2004; solicitor, PWD, August 2004.

¹⁵⁰ Consultations with case manager, WRC, Sydney, October 2004; disability awareness trainer, August 2004.

Consultations and the literature indicate that there is a link between serious mental illness and financial disadvantage. The cost of obtaining legal assistance is therefore a barrier for people with a mental illness, and suggests that they are more reliant on Legal Aid, CLCs and pro bono legal advice. Stakeholders reported that there is a lack of availability of these services, and that those that do exist are overstretched and underresourced. This has particular implications for people with a mental illness, who may require more time to communicate their situation, and more support in general.

Consultations indicate that a lack of availability of free legal services is even more pronounced in rural and regional areas. The organisation and cost required to travel large distances to access legal services create additional barriers for people with a mental illness.

Stakeholders indicated that legal service providers may not always be able to identify that a client has a mental illness. This can be important, as the client themselves may not divulge that they are ill, either because they have not been diagnosed or because they fear being stigmatised. If a client's illness is not known, they may not receive the time, assistance and understanding they need to access legal assistance. In addition, someone with a mental illness may be eligible for legal aid—however, if their illness is not identified, they may not receive this support.

On the other hand, service providers believed that people with a mental illness may be taken less seriously if they do divulge that they have a mental illness. It was reported that some lawyers find people with a mental illness less credible, are less inclined to believe what they say, and are more ready to dismiss their claims. Certain aspects of the physical environment of legal services were also raised as potential barriers.

These barriers indicate that people with a mental illness may need greater understanding, assistance, flexibility and time than other clients when accessing legal services. If legal service providers do not understand these issues, then the specific needs of clients with a mental illness may not be catered to, and their legal needs not met.

Service providers revealed a need for more training in identifying symptoms of mental illness, and in determining a client's level of functionality. The need for greater awareness amongst legal service providers of how people with a mental illness experience accessing and using legal assistance was also raised. This could potentially assist legal service providers in identifying clients who have a mental illness, and in better understanding their behaviour.

5. Participation in the Legal System

*What if you don't know how the court system works, what if you are too embarrassed to admit you don't know what to say or do? Or admit that you are scared, or that you have anxiety, or you have a mental illness and you can't cope? What if you don't know who to talk to?*¹

As noted in Chapter 3, people with a mental illness experience a range of legal issues. As a result, people with a mental illness may come into contact with particular legal processes. This chapter will focus on the barriers that face people with a mental illness and prevent them from effectively participating in such legal processes. For the purposes of this chapter, 'participation in the legal system' includes participation in courts and tribunals, internal appeals processes of government departments (e.g. Centrelink), alternative dispute resolution (ADR), and other external complaints processes (e.g. NSW Ombudsman).

This study identified a number of barriers preventing people from initiating legal proceedings and participating effectively in proceedings once commenced. These included:

- ◆ stress
- ◆ cognitive impairment
- ◆ problems with time management
- ◆ communication problems
- ◆ features of the courtroom environment
- ◆ features of ADR
- ◆ a lack of legal representation

¹ Consultation with disability awareness trainer, August 2004.

- ◆ perceived credibility of people with a mental illness
- ◆ failure to identify or recognise a person's mental illness.

This chapter will also look at the features of legal processes that enable people with a mental illness to participate effectively. These include:

- ◆ flexible service delivery
- ◆ therapeutic jurisprudence.

Barriers to participating in the legal system

Stress

When things get too complicated I can't cope.²

Legal processes can be lengthy, complicated and stressful. People with a mental illness may already have stressful lives as a result of their illness, financial circumstances and other issues, and participating in a legal process may create even more stress. Consultations suggested that stress may act as a barrier to initiating a legal process, it may deter people from continuing with a legal process, or prevent them from participating effectively during a legal process. Two participants interviewed for this study said:

I wasn't well enough at the time to keep going through the system [CTTT] and get the money that they owed me.³

Well it broke me, emotionally and mentally ... I think it was the whole process. The magistrate and the witnesses. Witnesses were saying what I did ... it was all stressful, and the outcome was stressful too.⁴

Legal and policy officers interviewed for this study also argued that legal processes can be stressful for people with a mental illness:

² Interview no. 18

³ Interview no. 29.

⁴ Interview no. 11.

If you try to mount a claim in the civil courts and you're a participant, you don't get treated that gently. And I would think that a mentally ill person with less-than-perfect recollection and maybe with less-than-perfectly ordered thoughts could be pretty easily reduced to a wreck, basically.⁵

You can't truthfully say to people it is not stressful because it is. And when you have so many stressful issues in your life as you can handle ... to seek a remedy can be too much for some people.⁶

When you have people from non-English speaking backgrounds, or who have a mental illness or intellectual disability or are just very nervous, they find it [the CTTT] very difficult and stressful.⁷

Commenting on the experience of a mentally ill person being discriminated against at university, one solicitor argued:

It's fairly common ... that a person finds themselves, in terms of trying to move forward in their university study, dealing with threatened expulsion from a course and embroiled in a range of grievance mechanisms and disability discrimination type complaints in order to try and deal with the issues. I have not seen that situation pan out particularly well for any individual. It invariably seems that the more they get involved in these mechanisms, the greater the level of stress and anxiety it places upon them.⁸

The high rates of sexual assault and domestic violence experienced by people with a mental illness was reported in Chapter 3. One solicitor noted the particular stress that may be faced at the court by people with a mental illness who have been the victim of sexual assault:

My experience with the court is it's not generally that sensitive to people who are vulnerable, like victims of sexual assault. I get many of my clients who go through the criminal court process telling me about how traumatic it is. I have had one client, in particular, who had absolutely no recall, who was the victim in a child sexual assault matter. He was cross-examined for three days by a barrister [in] Sydney and on the last day of cross-examination, went

⁵ Consultation with solicitor in charge, MHAS, December 2004.

⁶ Consultation with policy officer, HREOC, June 2004.

⁷ Consultation with legal officer, Tenants' Union, September 2004.

⁸ Consultation with solicitor, PWD, August 2004.

*home, took too many drugs and alcohol and put a knife through someone. It is a really awful experience.*⁹

This stress may deter people from wanting to go to court. One participant interviewed in this study, who had been sexually assaulted by one of her parents, said:

*After much soul-searching I realised that it wasn't worth it. It was just going to cause me more heartache and pain.*¹⁰

CLC workers from Shopfront said that many of their clients were so traumatised in child abuse and sexual assault matters that they had difficulties even reporting the offence to the police:

*Many of our clients are too frightened to make that sort of disclosure, or too traumatised, and they don't want to go through the justice process, giving evidence at a court or in a trial.*¹¹

The convener of the National Council of Single Mothers and their Children was also of the opinion that in family law matters, women with a mental illness who have been the victims of domestic violence, and have to face the perpetrator in court, may become so stressed that they are unable to participate effectively in the process:

*Often they are forced to come into court as self-represented litigants, and put up an argument against the person who has been their perpetrator, and panic attacks, anxiety attacks, mean that some women just physically can't do that. So mental health issues arising from domestic violence actually become a barrier to participation.*¹²

WLS workers acknowledged recent Family Court strategies to assist women who have been the victims of violence during family law matters, such as conferencing, which allows the two parties to sit in different rooms, with the registrar or mediator moving between them. However, they argued that this

⁹ Consultation with CLC workers, Shopfront, September 2004.

¹⁰ Interview no. 18.

¹¹ Consultation with CLC workers, Shopfront, September 2004.

¹² Consultation with the convener of the NCSMC, December 2004. Also consultation with CLC workers, WLS, October 2004.

does not necessarily address the problem of victims having to wait outside in the waiting area with the perpetrator.¹³ This is supported by Kennedy and Tait, who argue that consideration should be given to the stress experienced by victims when they come into contact with perpetrators in courtroom waiting areas.¹⁴

In its submission to the Productivity Commission's Review of the *Disability Discrimination Act 1992* (Cth), the Mental Health Council of Australia argued that for people with a psychiatric disability, reporting acts of discrimination can be a very stressful experience, which can in turn lead to relapses in illness. The review argued that this is a major barrier to participating in the disability discrimination complaints process. One solicitor interviewed for this study described how stressful the experience of reporting discrimination had been for one of her clients:

*And then actually having to recall stuff again ... [one client] didn't want to be put on the stand, and that was a big reason why. We got a good settlement, but she was prepared to walk away with nothing, rather than go to court, because it was so difficult for her to have to face all of that again.*¹⁵

In its submission to the review, HREOC reported that as a result of stress, outcomes were less favorable for people with psychiatric disabilities.¹⁶ The Disability Council also discussed the impact that lengthy proceedings can have on the stress experienced by people with disabilities, particularly in personal injury compensation cases and discrimination complaints.¹⁷

Cognitive impairment

Cognitive impairment refers to a limitation in a person's ability to think, perceive, reason or remember. Cognitive impairment is not necessarily a symptom of mental illness; however, some people with a mental illness,

¹³ Consultation with CLC workers, WLS, October 2004.

¹⁴ L Kennedy & D Tait, *Court Perspectives: Architecture, Psychology and Western Australian Law Reform*, Western Australian Law Reform Commission, 1999, p. 1038.

¹⁵ Consultation with pro bono solicitor, Sydney, September 2004.

¹⁶ Productivity Commission, *Review of the Disability Discrimination Act 1992*, p. 102.

¹⁷ Disability Council, *A Question of Justice*, p. 141.

particularly those with schizophrenia, may experience a degree of memory loss, and problems with concentrating or planning.¹⁸ Further, cognitive impairment may also be caused by drug and alcohol abuse¹⁹ and concentration and memory problems may be experienced by people with depression.²⁰

Service providers suggested that even slight cognitive impairment may act as a barrier to people participating effectively in the legal system.²¹ For example, after being asked whether they had thought to make a complaint about their mental health treatment, one participant interviewed for this study responded:

*The only thing you can do is write an official visitor's letter but you aren't quite cognitive at that time [in hospital].*²²

Service providers argued that cognitive impairment for people with a mental illness may lead to problems with understanding and comprehending what is occurring during a legal process. For example:

*When you've got somebody whose world has been restricted due to a mental illness intervening in their life ... their developmental milestones are slower. Not because they are intellectually impaired but because they are psychiatrically impaired at times when they are ill ... They may get through the acute illness fairly quickly, but the recovery for that illness can take up to a year, so that their cognitive capacity to understand what is going on [is affected].*²³

*It's often the case with mental illness that there are concentration impairments. Barriers are a lack of understanding of what is going on, lack of appreciation of what they're charged with sometimes.*²⁴

¹⁸ R Pollard, "Poor Planning and Problem-Solving Skills Linked to Schizophrenia", *Sydney Morning Herald*, 18 February 2005 (accessed online); Schizophrenia fellowship of NSW Inc, <<http://www.sfnsw.org.au/schizophrenia/symptoms.htm>> (accessed August 2005).

¹⁹ Better Health Channel, *Alcohol Related Brain Damage*, 2004, <<http://www.betterhealth.vic.gov.au/>> (accessed November 2005).

²⁰ Better Health Channel, *Depression: Different Types*, <http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Depression_different_types?OpenDocument> (accessed August 2005).

²¹ Consultations with psychologist, Legal Aid, October 2004; NSW Statewide Community & Court Liaison Service workers, Justice Health, August 2004; roundtable consultation, 3 June 2004.

²² Interview no. 6.

²³ Consultation with mental health worker, Sydney, September 2004.

²⁴ Consultation with solicitor, regional Aboriginal Legal Service, November 2004.

*Capacity to participate in the process is limited ... The process unfolds around them without their capacity to understand what is going on.*²⁵

*I was in the District Court with this client who was very unwell. He was finding it very hard to understand things ... he literally sat there and I could see he had no idea what happened, no idea what the conversation was about. When I got out, I had to sit down with him and speak to him and had to explain very clearly what had happened. He just didn't feel like a participant at all in the court process.*²⁶

A service provider reported that people with a mental illness may not understand legal documents, as a result of cognitive impairment arising from mental illness.²⁷ One local court registrar felt that some people with a mental illness were not even aware of why they were at court:

*Mostly they don't understand, and they don't want to, why they are in court or understand the offence because of the mental illness.*²⁸

One mental health worker pointed out that even if a person is well at the time of going through the legal process, a person's mental illness may have previously impacted on their education and ability to learn those skills essential to negotiating legal processes.²⁹ An investigation officer from the NSW Ombudsman argued that people with a mental illness "may not have sometimes, the education or the background to be able to deal with the many technical bureaucratic processes".³⁰

Problems with time management

As noted in Chapter 4, people with a mental illness may have problems turning up to appointments with legal service providers as a result of psychiatric

²⁵ Consultation with the OPG, August 2004.

²⁶ Consultation with CLC workers, Shopfront, September 2004; also consultations with NSW Statewide Community & Court Liaison Service workers, Justice Health, August 2004; psychiatrist, Sydney, August 2004.

²⁷ Roundtable consultation, 16 June 2004.

²⁸ Consultation with registrar, Local Courts & Sheriff, July 2004.

²⁹ Consultation with mental health worker, Sydney, September 2004. See also Disability Council, *A Question of Justice*, p. 77; HREOC, *Human Rights of People with Mental Illness*, p. 430; Jablensky et al., *People Living with Psychotic Illness*; Andrews et al., *The Mental Health of Australians*, p. 89.

³⁰ Consultation with investigation officer, NSW Ombudsman, September 2004.

medication, substance abuse and illness. During the legal process, service providers suggested that people with a mental illness may also have problems managing court appointments and adhering to strict timeframes.³¹ For example, they reported that people have problems turning up to court and have problems submitting documents necessary to particular legal processes on time:

*Their lack of capacity to plan [is a problem]. Many times a magistrate will put them on bail, and then they will forget to show up to court, [which will] make the situation worse.*³²

*Some people cannot get up in the morning or start functioning till one or two in the afternoon, so how are they going to report at 9 am?*³³

*People often cannot comply with "this needs to be done in seven days".*³⁴

If people are unable to turn up to court on time, fill in application forms, or respond to timeframes, this may act as a barrier to their effective participation during legal processes. For example, when a person incurs a fine they must pay it within a certain period of time or elect to have the matter heard at court. If they do not do either of these things, a reminder notice is sent out. If the fine is still not paid, it is referred to the State Debt Recovery Office, at which point it is too late to dispute the fine.³⁵ CLC workers from Shopfront were of the opinion that not being able to comply with the time periods in which they have to pay a fine is a particular problem for young people with a mental illness.³⁶ This is also compounded by the fact that many of their clients are homeless, which means that in many instances, people do not receive further notification of their fines.³⁷

³¹ Consultations with psychiatrist, Sydney, August 2004; director, SSAT, September 2004; pro bono solicitor, Sydney, September 2004; disability awareness trainer, August 2004; conciliator, HREOC, August 2004; CLC workers, Shopfront, September 2004. See also Cullen, *Out of the Picture*, p. 9.

³² Consultation with psychiatrist, Sydney, August 2004.

³³ Consultation with disability awareness trainer, August 2004.

³⁴ Consultation with conciliator, HREOC, August 2004. Also consultations with pro bono solicitor, Sydney, September 2004; CLC workers, Shopfront, September 2004.

³⁵ Inner City Legal Centre and Redfern Community Legal Centre, *Fined Out*, 2004, <http://www.iclc.org.au/fined_out/> (accessed November 2004) at 8.

³⁶ Consultation with CLC workers, Shopfront, September 2004.

³⁷ Consultation with CLC workers, Shopfront, September 2004.

Communication

As previously discussed in Chapter 4, consultations suggested that people with a mental illness may have difficulties communicating and therefore participating effectively during the legal process.³⁸ Service providers believed that communication issues are a particular issue for people with a mental illness who are unrepresented throughout a legal process. They argued that problems with communication in addition to being self-represented may act as significant barriers to effective participation in the legal system.³⁹

*I think that people with a mental illness find it very difficult to communicate what it is they want, and what their case is. Both to their own representatives, and if they are unrepresented, at court.*⁴⁰

*Not to be able to get your thoughts together to communicate them adequately; getting to the stage where you're so emotionally overwhelmed by the whole process that you lack clarity in the delivery of your answers, and there is no capacity to actually have the open court really understand, in your words, what's going on.*⁴¹

That people with a mental illness may experience problems with communicating throughout the legal process is also supported in previous literature. The Disability Council has argued that communication problems for people with a disability may be compounded by “excessive reliance on legal terminology and complicated language”.⁴² The Disability Discrimination Legal Service of Victoria has suggested that people with a cognitive impairment (including those with a mental illness) may need a support person, who can relay and translate information between the court and the person with the impairment.⁴³

³⁸ Consultations with caseworker, Blue Mountains, July 2004; family law solicitor, October 2004; Aboriginal Legal Service worker, Western NSW, November 2004; CLC worker, Western NSW, September 2004; manager, ADB, November 2004. Also roundtable consultation, 3 June 2004. See also Cullen, *Out of the Picture*, p. 33.

³⁹ Consultations with caseworker, Blue Mountains, July 2004; family law solicitor, October 2004.

⁴⁰ Consultation with family law solicitor, October 2004. Also consultations with Aboriginal Legal Service worker, regional NSW, November 2004; CLC worker, Western NSW, September 2004. Also roundtable consultation, 3 June 2004.

⁴¹ Consultation with mental health worker, Sydney, September 2004.

⁴² Disability Council, *A Question of Justice*, p. 85.

⁴³ Goodfellow & Camilleri, *Beyond Belief, Beyond Justice*, p. 64.

Courtroom environment

Consultations with service providers and participants indicated that the formality and structure of the courtroom environment can be intimidating to people with a mental illness:

*The court process is a fairly formal, intimidating kind of experience where [people with a mental illness] sit on the margins and don't understand the process.*⁴⁴

*The whole courtroom, the whole atmosphere ... It takes a lot for people to walk through the doors. It is intimidating. The atmosphere is very bad for people with a mental illness.*⁴⁵

*I think that court is a serious thing ... I felt stressed and anxious.*⁴⁶

Service providers argued that being frightened as a result of the formality and structure of the courtroom may prevent people with a mental illness from actively participating in the legal process:

*You've been through security, there are all these people walking around in uniforms, and there's police and then there's all these cameras watching. [You think] "I'm not going to say anything more, in fact I am going to walk out because I can't handle this place ... I'm anxious, I can't make words happen, how humiliating".*⁴⁷

*Trying to lead evidence out of someone who is already intimidated or psychotic is really difficult. The language of the courtroom is foreign to most people who aren't legally trained, let alone someone with a mental illness. It is incredibly difficult for them to make appropriate responses.*⁴⁸

*In a courtroom setting, it is very dehumanising for people with bipolar disorder. If people are not confident then they will tell a minimum amount of information.*⁴⁹

⁴⁴ Consultation with CLC workers, Shopfront, September 2004.

⁴⁵ Consultation with registrar, Local Court, Sydney, July 2004.

⁴⁶ Interview no. 10.

⁴⁷ Consultation with disability awareness trainer, August 2004.

⁴⁸ Consultation with CLC workers, WLS, October 2004.

⁴⁹ Roundtable consultation, 16 June 2004.

In addition, two service providers commented on the way the structure of the court process can prevent advocates from conversing with their clients, in order to support them or explain to them what is going on. Both were of the opinion that other legal settings, such as tribunals, were more conducive to the needs of people with a mental illness:

I think that people with a mental illness perhaps need more explanation at certain critical stages. However there is no opportunity to do this in a formal court setting. Also, being able to go outside, you can do that in dispute resolution but you can't do it in a court. [You] can't say "oh look we need a moment" quite as easily.⁵⁰

When my client was on the witness stand and the prosecutor was interviewing her ... she couldn't string a sentence together. She couldn't convey the information to the court that she actually needed to tell them. Whereas if you are in a tribunal, and you are sitting along side of them, you can actually write them notes and talk to them.⁵¹

Kennedy and Tait argue that consideration should be given to how the design and structure of courtrooms can influence people's "experience of justice".⁵² They argue that both the physical and psychological needs of court users should be taken into consideration when designing courts.⁵³ For example, in building and designing courtrooms, consideration should be given to whether courtroom layout and design contributes to people becoming stressed and aggressive.⁵⁴ Consideration should be given to design factors that improve communication between people within the courtroom.⁵⁵ Just as the needs of people with physical disabilities should be taken into account in designing courtrooms, the needs of people with intellectual and psychiatric disabilities should also be taken into account:

While not all needs can be fully met in all courts, court planning procedures should avoid stigmatizing or marginalising people with special needs.⁵⁶

⁵⁰ Consultation with CLC worker, Western NSW, September 2004.

⁵¹ Consultation with mental health worker, Sydney, September 2004.

⁵² Kennedy & Tait, 1999, p. 1018.

⁵³ Kennedy & Tait, 1999, p. 1018.

⁵⁴ Kennedy & Tait, 1999, p. 1032.

⁵⁵ Kennedy & Tait, 1999, p. 1034.

⁵⁶ Kennedy & Tait, 1999, p. 1048. Also consultation with disability awareness trainer, August 2004.

In a study of the Guardianship Tribunal in NSW and Victoria, Tait and Carney argued that in comparison to courts, tribunals tended to “incorporate the person who is the subject of the application, treat them as equal participants, with a right to speak, be listened to, and express views and even comment on the decision”.⁵⁷ Service providers, interviewed for this study, were also of the opinion that the structure of the Guardianship Tribunal is less formal, and therefore more suited to the needs of people with a mental illness.⁵⁸

CLC workers from Shopfront argued that the Children’s Court is less intimidating for young people with a mental illness, due to the fact that magistrates are trained to be “much kinder and much gentler in their approach and less punitive”.⁵⁹ Similarly, one mental health worker was of the opinion that magistrate inquiries at hospital are a lot more inclusive to people appearing before them:

*It’s a much less formal process. You are able to have the odd little interjection with the client. The magistrate, who comes to hear the Mental Health Act stuff, will canvas if anybody else wants to say anything, and lets the person talk as much as they want to talk, and let the family talk if they want to talk. So I think most people get out of it feeling less worried than when they go into it. That is a real issue for a lot of people, probably because most of them when they come in under the Mental Health Act, they have a sense of being stripped of [their] rights in some way. So to be able to sit down and talk ... that can actually be kind of empowering for some of them, to be part of that process.*⁶⁰

When a person is involuntarily admitted to hospital, a magistrate’s inquiry is held on-site, to determine whether the person should stay in hospital or be discharged.⁶¹

⁵⁷ T Carney & D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice*, The Federation Press, Sydney, 1997, p. 195. See also MHCC, *The Mental Health Rights Manual*, p. 53.

⁵⁸ Roundtable consultations, 3 & 16 June 2004. Also consultations with the OPG, August 2004; solicitor, OPC, September 2004; social worker, MHAS, August 2004.

⁵⁹ Consultation with CLC workers, Shopfront, September 2004.

⁶⁰ Consultation with mental health worker, Sydney, September 2004.

⁶¹ MHCC, *The Mental Health Rights Manual*, p. 33.

Features of ADR

A few service providers suggested that legal processes that offer alternative dispute resolution (ADR)—such as HREOC, the Anti-Discrimination Board (ADB) and the Family Court—may be more accessible to people with a mental illness.⁶² ADR includes mediation, where parties to a dispute negotiate directly with each other in the presence of a neutral mediator, and conciliation, which is similar to mediation but generally involves the conciliator taking on a more interventionist role during the conciliation process.⁶³ Simpson suggests that while litigation can be expensive, formal and lengthy, ADR is relatively cheap, and its informality and flexibility may be better suited to a person who is intimidated by the courtroom experience.⁶⁴

*ADR is generally a beneficial process, that doesn't have the stress barriers associated with court processes. I think ADR is educative, and provides people with a sense of participating and feeling involved: "I negotiated this, this is my outcome".*⁶⁵

One of the features of ADR is that, in general, it relies less on legal representation and more on the parties to a dispute meeting face-to-face with each other in the presence of a professional mediator or conciliator.⁶⁶ For example a person can make a complaint about unlawful discrimination to HREOC, which offers parties conciliation without the need for legal representation (although it does not exclude parties from getting legal advice).⁶⁷ At the CTTT, people have to get leave to allow another person, tenant advocate or lawyer to represent them in proceedings.⁶⁸ The Family Court also offers mediation and conciliation.⁶⁹

⁶² Consultations with pro bono solicitor, Sydney, September 2004; conciliator, HREOC, August 2004; disability awareness trainer, August 2004.

⁶³ J Simpson, *Guarded Participation: Alternative Dispute Resolution and People with Disabilities*, Law and Justice Foundation of NSW, 2002, <<http://www.lawfoundation.net.au/resources/simpson/>> (accessed June 2005), p. 3.

⁶⁴ Simpson, *Guarded Participation*, p. 6.

⁶⁵ Consultation with conciliator, HREOC, August 2004.

⁶⁶ Simpson, *Guarded Participation*, pp. 3–6.

⁶⁷ HREOC, *The Complaints Handling Process*, <http://www.humanrights.gov.au/complaints_information/lobby/index.html#9> (accessed November 2005).

⁶⁸ Tenants' Union, *Consumer, Trader and Tenancy Tribunal*, <<http://www.tenants.org.au/factsheet/28.html>> (accessed November 2005).

⁶⁹ Family Court of Australia, *Step by Step Guide to Proceedings in the Family Court*, <<http://www.familycourt.gov.au/presence/connect/www/home/guide/>> (accessed November 2005).

Less reliance on legal representation in ADR, however, may not be beneficial to people with a mental illness. Service providers argued that ADR can still be a stressful experience for this group, particularly in discrimination and family law problems where they may have to face the person who discriminated against them or the person from whom they are separated or divorced:

*It doesn't matter how accessible you make it, it is still stressful to come face-to-face.*⁷⁰

*I had a very depressed client who found the conciliation process dreadful. The solicitor for the respondent was an aggressive man, and the respondent literally sat there and smirked at my client the whole time. My client, who was literally shaking like a leaf by the time he got out during the break, said to me "I can't go back in there".*⁷¹

Simpson states that these problems may exist where there is an imbalance in power between a person with a disability and the other party, which may lead to the party with a disability not understanding what is going on and not identifying and protecting their own interests.⁷² This can place extra pressure and stress on a person with a mental illness.⁷³ One of the participants interviewed for this study described her experience during mediation:

[And how did you feel about going into mediation with this person?] *I was a bit sort of anxious about it. I didn't know whether he [the other party] was going to get angry at me.*⁷⁴

The Family Law Division of Legal Aid runs a mediation service for couples with a family law issue. A family law solicitor noted the problems for people with a mental illness participating in this service:

There will be times where it might be very difficult to have mediation if someone has particular mental health conditions, because they may have certain problems giving instructions. The issue of equal bargaining power

⁷⁰ Consultation with conciliator, HREOC, August 2004.

⁷¹ Consultation with CLC workers, Shopfront, September 2004

⁷² J Simpson, M Martin & J Green, *The Framework Report: Appropriate Community Services in NSW for Offenders with Intellectual Disabilities and Those at Risk of Offending*, NSW Council for Intellectual Disability, Sydney, 2001, p. 7.

⁷³ Consultation with CLC worker, DDLC, August 2004.

⁷⁴ Interview no. 11.

is obviously very important—it can affect people with some sorts of mental illness. On the other hand, sometimes people with a mental illness, depending on what it is, can be more aggressive than the other person. [There is] a screening process for ADR ... the conference organisers will make contact [with the parties] to determine if a matter is appropriate for ADR..⁷⁵

CLC workers from WLS argued that at the Family Court,⁷⁶ which encourages people to participate in mediation, women who have developed a mental illness as a result of domestic violence, may be at a distinct disadvantage due to low self-esteem and communication difficulties:

It could be any mental illness, but [it is] often depression where they have been in situations of DV. Often the women have low self-esteem, and it's just hard for them even to express themselves, and to put their point of view forward at all.⁷⁷

Simpson has argued that barriers to participation in ADR for people with a mental illness might be addressed through a number of measures, including the mediator being made aware of a person's particular needs and being made aware of and addressing the power imbalances between parties, and the use of an advocate—whether a lawyer or a non-legal advocate—for the person with a disability.⁷⁸ A solicitor for this study suggested that without legal representation, ADR may not be beneficial to people with a mental illness:

A person with a mental illness unsupported in reconciliation is going to be at a particular disadvantage if [their] anxiety impacts on their mental illness. In my opinion, the more formal court processes are better because there is more opportunity for representation ... I don't wish to give the impression that I wish to see more formalised court-based processes, [but] where the

⁷⁵ Consultation with family law solicitor, October 2004.

⁷⁶ Once people have initiated proceedings in the Family Court, they are required to attend a case assessment conference. The purpose of this conference is to assess what people need, although people are allowed to reach an agreement at this stage. Following this, parties are encouraged to attend mediation. If there are any family violence issues, the court states that people should notify the registrar. See Family Court of Australia, *What To Expect In A Case Assessment Conference*, <http://www.familycourt.gov.au/presence/connect/www/home/guide/resolution/conference/step_resolution_conference_what> (accessed September 2005). Note, however, that this information does not take into consideration those people who do not notify the court of family violence issues.

⁷⁷ Consultation with CLC workers, WLS, October 2004.

⁷⁸ Simpson et al., *The Framework Report*, pp. 9–10.

*disadvantage arises is where the person doesn't have advocacy or support with them.*⁷⁹

Ultimately, the facilitator or mediator needs to decide whether ADR is appropriate for the particular situation. This might include an assessment of whether the person is able to “fully participate” in the process.⁸⁰ A mediator from a community justice centre was of the opinion that, if a mediator becomes aware that a person is not capable of making a decision, they may make an assessment to determine whether mediation is appropriate for the parties.⁸¹ This mediator also highlighted the need for mediators to have training on mental illness.⁸²

Lack of legal representation

Consultations indicated that without appropriate legal representation at court and in ADR, many people with a mental illness do not participate as effectively in the legal system.⁸³ For a person who has problems communicating and understanding what is going on during the legal process, a legal representative can assist by explaining events, advocating and ensuring the person makes it through the legal process:

*If you are paranoid and fearful you may not be able to make an informed judgment about what's needed [at court]. They need lawyers to explain the process to them properly.*⁸⁴

*I can get people to participate in the legal process if I can get a hold of them and walk them through. But if they never get to me or the centre, then they are not going to get through it.*⁸⁵

⁷⁹ Consultation with solicitor, PWD, August 2004; also consultation with disability awareness trainer, August 2004.

⁸⁰ Simpson et al., *The Framework Report*, p. 22.

⁸¹ Consultation with mediator, community justice centre, September 2004.

⁸² Consultation with mediator, community justice centre, September 2004.

⁸³ Roundtable consultation, 3 June 2004; consultations with barrister, Sydney, January 2005; solicitor, CCLC, August 2004; Aboriginal mental health worker, Sydney, September 2004; family law solicitor, October 2004; convener of the NCSMC, December 2004. See also Goodfellow & Camilleri, *Beyond Belief, Beyond Justice*, pp. 63–64.

⁸⁴ Consultation with barrister, Sydney, January 2005.

⁸⁵ Consultation with solicitor, CCLC, August 2004.

*Stressed by litigation or stressed by their circumstances. During a hearing they are absolutely exhausted, because they have to go home and think about what they are going to do the next day, and they are just totally exhausted by it all. They haven't a clue how to do their affidavits.*⁸⁶

In its submission to the Senate Select Committee on Mental Health, the WRC indicated that without legal representation, people with a mental illness may not receive a good outcome in court, particularly if they do not understand the legal options available to them:

*We regularly deal with clients with a mental illness who may have had a strong case for waiver of their social security debt, for whom we can do nothing—because they have already been convicted of a criminal offence in relation to the debt. In many cases our clients in this situation were unrepresented (or poorly represented) in the criminal matter, and they inappropriately pleaded guilty. These people now have undeserved criminal convictions as well as the burden of repaying a debt—both of which exacerbate their mental illness.*⁸⁷

A family law solicitor was of the opinion that some self-represented litigants in the Family Court who have a mental illness behave inappropriately, which may also affect the outcome of their case:

*I have had people stand up there and scream. They don't care what the judge does, because they will just do what they are going to do anyway. I have seen judges try to handle that without calling the court officer. I had a guy go into court wearing a green Elvis suit and bring in a whole range of baby bottles and blankets and put them on the bar table and then stand up and talk over the judge.*⁸⁸

One participant with a mental illness described going to court as the defendant to an apprehended violence order (AVO) without legal representation:

I have been to court with this neighbor, and I had no solicitor there. I didn't know what to do legally. I had to examine the witnesses you know. Well I broke down, at the hearing and admitted it. The magistrate's attitude was very harsh ... I think that [not having legal representation] might have

⁸⁶ Consultation with family law solicitor, October 2004.

⁸⁷ WRC, *Submission to the Senate Select Committee on Mental Health*, p. 6.

⁸⁸ Consultation with family law solicitor, October 2004.

*contributed to me breaking down. Because I know very little about the law and court proceedings.*⁸⁹

Support for people with a mental illness through the legal process need not be strictly legal. For example, support through the legal process might be provided by a non-legal advocate such as a tenancy worker or a social worker. Non-legal service providers can provide support to people with a mental illness during the legal process by assisting them with filling out forms, advocating to a government department or providing general support at court or a tribunal.⁹⁰ For example, people appearing before the SSAT are allowed to bring a friend, family member or advocate to a hearing.⁹¹

*If somebody has a serious mental illness, then without a lot of support, they may not be able to get through the [DOH] application process, let alone the actual living process. And if they are knocked back, they may not be able to go through the appeal process without serious assistance.*⁹²

Credibility

As noted in Chapter 4, consultations suggested that people with a mental illness are often viewed as being less credible by those in the legal system.⁹³ In *A Question of Justice*, the Disability Council reported that communication problems may lead to people working in the justice system not understanding people with a disability, and labelling them as delusional or paranoid.⁹⁴ For example, they may be perceived as incapable of perceiving the ‘reality’ of events:

There is a lot of prejudice against our clients who are suffering mental illness or have drug and alcohol issues. And that is [from] DoCS, the police, or

⁸⁹ Interview no. 11.

⁹⁰ This type of support is explored in greater detail in Chapter 6.

⁹¹ SSAT, *General Appeal Information*, <<http://www.ssat.gov.au/iNet/ssat.nsf/pubh/generalinformation.5.0>> (accessed November 2005).

⁹² Consultation with legal officer, Tenants’ Union, September 2004.

⁹³ Consultations with official visitor, October 2004; CLC worker, Western NSW, September 2004; CLC workers, WLS, October 2004; disability awareness trainer, August 2004; clinical psychologist, Sydney, July 2004; mental health worker, Sydney, September 2004. Also roundtable consultations, 3 and 16 June 2004.

⁹⁴ Disability Council, *A Question of Justice*, p. 76.

*the court. And it is often a challenge—their story isn't as clear, and the presumptions that different people have [against them] can create hurdles for them legally.*⁹⁵

*Their complaint gets trivialised or it's put down to being something else. Their mental illness is seen as the problem rather than their legitimate complaint. And so the barrier is people's perception.*⁹⁶

Not being taken seriously or not being believed may act as a barrier to people with a mental illness participating in legal processes. For example, consultations suggested that for people with a mental illness who have been the victims of violence, police do not always take their complaints seriously because they do not view their evidence as credible:

*Evidence might not be seen as valid, you know because they might think that she has a mental illness; she is a bit mad, you can't really trust her evidence because who is to say that she isn't psychotic or wasn't psychotic at the time she was attacked. Who is to say that really happened? So my validity as a witness may be in question.*⁹⁷

One participant provided an example of this:

*Someone keeps sending me bogus texts on my phone. I want to go to the police and report it. But I am worried that because they have scheduled me before, that they will think that I am a loony, that I am imagining it or something.*⁹⁸

In its submission to the Productivity Commission's Review of the *Disability Discrimination Act 1992* (Cth), the Victorian Office of the Public Advocate said that people with cognitive incapacities who have been the victim of a crime or sexual assault are often viewed as making less credible witnesses.⁹⁹ The NSW Council of Social Services has also reported that women with

⁹⁵ Consultation with CLC workers, WLS, October 2004.

⁹⁶ Consultation with CLC worker, Western NSW, September 2004.

⁹⁷ Consultation with disability awareness trainer, August 2004. Also consultation with CLC workers, WLS, October 2004, and roundtable consultations, 3 and 16 June 2004.

⁹⁸ Interview no. 13.

⁹⁹ Productivity Commission, *Review of the Disability Discrimination Act 1992*, p. 249. See also Goodfellow & Camilleri, *Beyond Belief, Beyond Justice*, p. 59.

disabilities, particularly women with intellectual and psychiatric disabilities, often feel that they are not treated equally in the legal setting, and are not viewed as “credible” victims or witnesses.¹⁰⁰

Excessive complainants

Excessive complainants have been described as people who look to the legal system to address wrongs that have been done to them, engaging in “querulous and apparently interminable campaigning and complaining”.¹⁰¹ They appear to be difficult to negotiate with, unable to accept a negative outcome, and continue to use the legal system even where those wrongs cannot be addressed.¹⁰² It should be noted that not all excessive complainants will have a mental illness, just as, clearly, not all people with a mental illness will be excessive complainants. Mullen notes that in some circumstances, however, complaints may be born out of delusions or a pre-existing psychotic illness.¹⁰³ A number of examples of people with a mental illness who had exhibited such behaviour while participating in the legal system were raised in consultations.¹⁰⁴ Two legal service providers gave examples of this type of complainant:

The first one is I have [is] this lady. She used to work at [a university]; she resigns and takes a part-time job at the uni, has a fall-out with them; starts forming views of them being racist, holding her back, etc. and now she has been to the Supreme Court, has been arrested twice for trespassing into the uni. She has an apprehended violence order [AVO] against the chancellor, against the staff, against security and she writes to Bob Carr on a regular basis. Here are 15 letters from her to Bob Carr. She also writes on a regular basis to the solicitor at the uni; has personally taken AVOs to the Supreme

¹⁰⁰ *Our Rights, Our Voices: A Forum for Women and Community Groups Working with Women to Discuss, Explore and Report on Women’s Rights in NSW*, NSW Council of Social Services & Women’s Rights Action Network Australia, Sydney, 2004, p. 11. See also Goodfellow & Camilleri, *Beyond Belief, Beyond Justice*, p. 53.

¹⁰¹ Mullen, P, Notes on lecture entitled *Persistent and Abnormal Claiming and Complaining*, Department of Psychological Medicine, Monash University and Victorian Institute of Forensic Mental Health, Melbourne, 2003, p. 2.

¹⁰² Mullen, *Persistent and Abnormal Claiming and Complaining*, p. 3.

¹⁰³ Mullen, *Persistent and Abnormal Claiming and Complaining*, p. 3.

¹⁰⁴ Consultations with psychiatrist, Sydney, August 2004; CLC workers, KLC, Sydney, August 2004.

*Court and has lodged a complaint against the HREOC complaints division. This lady is obsessed and has paranoia. She sees the legal system as against her.*¹⁰⁵

*[A senior executive going through a divorce] ... it all started to change with the ramifications of [his] property settlement. He just couldn't handle it ... he goes from one legal representative to another. He genuinely is strapped; he has no money, no property. It would have been nice if somewhere along the line the solicitor had said "Stop this, don't spend any more money, you are not going to get anywhere, this is not going to work". I tried to intervene many times by saying "Isn't it time to stop?", but he had some kind of bit between his teeth that justice should be done. But you could never get it into his head that the law had nothing to do with morality.*¹⁰⁶

The main barrier to participation that appears to arise from this type of behaviour is that these litigants are perceived to be difficult to deal with,¹⁰⁷ and so they very quickly lose their credibility. Akin to the "boy who cried wolf", legal service providers and other workers in the legal system become annoyed by excessive complainants, and become less likely to believe what they are saying. It becomes difficult for people to decipher the truth, which creates the risk of a legitimate complaint not being addressed.¹⁰⁸

In *A Question of Justice*, the Disability Council reported that there is a tendency in the justice system to label people with a disability as vexatious or unreasonable, where they had been previously involved in other legal actions.¹⁰⁹ The report stated that people with disabilities felt that these assumptions did not take into account the difficulties they face in trying to exercise their rights.¹¹⁰ A director from the SSAT referred to an appeal (the person's identity was not disclosed) where a man who had been seeking an internal review at Centrelink

¹⁰⁵ Consultation with registrar, Local Courts & Sheriff, July 2004.

¹⁰⁶ Consultation with clinical psychologist, Sydney, July 2004.

¹⁰⁷ Also G Lester, "The Vexatious Litigant", *Judicial Officers' Bulletin*, vol. 17, no. 3, April 2005, pp. 17–19.

¹⁰⁸ Consultation with community worker, Sydney, October 2004; also consultation with solicitor in charge, MHAS, December 2004.

¹⁰⁹ Disability Council, *A Question of Justice*, p. 63.

¹¹⁰ Disability Council, *A Question of Justice*, p. 63.

for a failed activity test breach, was wrongly labeled as “vexatious”, when in fact he had a valid complaint.¹¹¹

Identification of mental illness

*People with a mental illness sometimes don't know they're mentally ill. So they will go to court and they won't tell anyone that they have a mental illness. The court thinks they don't have one and if they can keep themselves focused for a period of time, nobody will know until they end up in prison.*¹¹²

As noted in Chapter 4, people with a mental illness may pass through the legal system without their illness being identified or recognised. Failure to identify that a person has a mental illness may mean that no attempt is made to cater to that person's particular needs in a way that would improve their participation in the process or that the illness is not taken into consideration in determining the outcome of a matter. For example, where a person accrues a debt with Centrelink, the debt may be waived if special circumstances (such as mental illness) are identified.¹¹³

If a person is identified as having a mental illness during a legal process, their illness may in some cases be taken into account in determining the outcome of the matter, or in simply catering to their particular needs throughout the legal process. For example, in the criminal process, if a person is suspected as having a mental illness, they may be referred to the Statewide Community and Court Liaison Service (SCCLS). This service is in operation at 19 courts throughout NSW, and provides a full-time clinical nurse to assist people identified as having a mental illness. The aim of this service is to divert people with a mental illness who have been charged with minor offences away from the criminal justice system and back into the community, where they can receive appropriate mental health treatment in lieu of incarceration.¹¹⁴ The

¹¹¹ Consultation with director, SSAT, September 2004.

¹¹² Consultation with senior public servant, NSW Centre for Mental Health, April 2005; also consultation with CLC workers, Shopfront, September 2004.

¹¹³ Consultation with case manager, WRC, Sydney, November 2004.

¹¹⁴ Justice Health, *The Statewide Community and Court Liaison Service*, <http://www.justicehealth.nsw.gov.au/services/mental_health.html> (accessed August 2005).

SCCLS tries to identify people with a mental illness who have been charged with minor offences, through a questionnaire administered by the Local Court that asks people about self-harm and any medication they might be on. In consultation, however, one court liaison worker believed that, in some circumstances, people do not wish to disclose their illness.¹¹⁵

In other processes, such as before the SSAT, adjustments—for instance, allowing a support person or more flexibility in relation to time—can be made, to maximise the participation of a person with a mental illness.¹¹⁶

Facilitating participation in the legal system for people with a mental illness

This section will discuss those features of existing legal processes identified in this study as increasing participation for people with a mental illness. The first part of this section looks at the way in which flexible service delivery of legal processes to people with a mental illness can improve their participation in these processes. The second part of this section explores the way in which courts that adopt a ‘therapeutic jurisprudence’ model may also improve participation.

Flexible service delivery

*To the credit of the staff here, they are very experienced and very compassionate about dealing with people with mental illness. We have developed sensitivity and an understanding that we may need to adjust our processes to accommodate, and ensure that, the barriers to access can be overcome for the particular client that is in front of you.*¹¹⁷

¹¹⁵ Consultation with NSW Statewide Community & Court Liaison Service workers, Justice Health, August 2004.

¹¹⁶ Consultation with director, SSAT, September 2004.

¹¹⁷ Consultation with manager, ADB, November 2004.

In *A Question of Justice*, the Disability Council reported that people with disabilities see flexible service delivery as important in addressing barriers to participation.¹¹⁸ The report argued that flexible service delivery includes:

- ◆ training staff
- ◆ implementing procedures for identifying disability-related requirements
- ◆ implementing flexible work practices
- ◆ providing alternative ways of lodging and making complaints
- ◆ allowing flexible timeframes to be built into procedures
- ◆ using plain English in the provision of information.¹¹⁹

In NSW, the Attorney-General's Department (AGD) has implemented a Disability Strategic Plan (2003–05) aimed at ensuring equal access to its services and programs, so that people with disabilities are not discriminated against in its services and workplaces and to ensure that disability principles are incorporated into the AGD's policies and practices.¹²⁰ As part of the plan, managers across the AGD are to implement:

- ◆ A Flexible Service Delivery Program (Strategy 1.3) that allows for the modification of court procedures and other practices, the relocation of services, the development of specialist resources and the recruitment of specialist staff.
- ◆ A communications strategy (4.1) that provides advice on communicating appropriately with people who have particular disabilities.
- ◆ A staff training strategy (6.1) that involves the introduction of staff training programs that promote awareness and skills to provide effective services to people with a disability.

NSW courts and tribunals must implement the Disability Strategic Plan into their services. In consultation for this study, a manager from the ADB

¹¹⁸ Disability Council, *A Question of Justice*, p. 88.

¹¹⁹ Disability Council, *A Question of Justice*, p. 15.

¹²⁰ See NSW Attorney-General's Department (AGD), *Disability Strategic Plan 2003–2005*, Sydney, 2004.

discussed the way in which “flexible service delivery” was incorporated into ADB services, and how this related to people with a mental illness.¹²¹

Workers from other federal courts and tribunals, such as the Family Court and the SSAT, also discussed ways in which they had adjusted their processes to be more flexible, with particular reference to people with a mental illness.¹²²

Simplifying the application process

As noted above, people with a mental illness may possess a degree of cognitive impairment, or have problems with organisation. This can lead to people with a mental illness having problems coping with written material. Having to deal with complex written applications may deter people with a mental illness from making applications to participate in particular legal processes. Thus, these people may benefit from simplification of the application process. A manager from the SSAT reported such changes to their application procedures:

*It's a simple process to apply to the SSAT; you can actually lodge an appeal by telephone. You don't need to fill in a form or sign anything, although most of our appeals do come in writing. People can simply just phone up and say, "I don't agree with the decision", and the staff will ask them questions to get the information they need to lodge an appeal.*¹²³

Less adversarial and less formal courtroom/tribunal processes

The SSAT manager also discussed how SSAT processes were designed to be less formal and less adversarial, which may be beneficial to people with a mental illness, who can find the experience of complex and formal legal processes highly stressful:

It is very informal. It's an inquisitorial style of hearing, so if the person isn't able to articulate what the legal issues are, that is not a problem. It's our expectation that it's the tribunal members' responsibility to make sure that they know what issues need to be considered, so they can make the correct

¹²¹ Consultation with manager, ADB, November 2004.

¹²² Consultations with project officer, Family Court of Australia, September 2004; manager, SSAT, Sydney, September 2004; policy officer HREOC, June 2004.

¹²³ Consultation with manager, SSAT, Sydney, September 2004.

*decision ... it's their job to help that person to give them the information that's needed.*¹²⁴

The Family Court is also trialling a less adversarial process, the Children's Cases Program. The aim of this program is to reduce the "adversarial nature" of Family Court proceedings relating to disputes about children.¹²⁵

*Instead of the traditional adversarial courtroom processes, whereby it is often difficult for the judge to engage with the parties to a dispute, the judge takes a much more hands-on approach to managing the case in a manner appropriate to the individual needs of each case. The judge is less constrained in exploring appropriate avenues for resolution of disputed issues, but the ultimate objective remains for the Judge to make an informed determination of issues in dispute.*¹²⁶

The less adversarial nature of the Children's Cases Program, which enables the judge to better adapt courtroom processes to meet the individual needs of each case, may be beneficial to people with a mental illness.

As part of its flexible service delivery model, the AGD recommends that court staff "minimise the sense of intimidation felt by people with disabilities in the court ... [through] the use of plain English in their communications and in court proceedings".¹²⁷ In relation to clients with cognitive impairment who are witnesses in sexual assault cases, the Disability Discrimination Legal Service in Victoria also recommends that "courtroom language should be modified to meet the needs of the individual with a cognitive impairment ... to allow maximum participation in the process".¹²⁸

¹²⁴ Consultation with manager, SSAT, Sydney, September 2004. See also Forell et al., *No Home, No Justice?*, p. 254.

¹²⁵ Family Court of Australia, *The Children's Cases Program: A New Way of Working With Parents and Others in Children's Cases*, <http://www.familycourt.gov.au/presence/connect/www/home/about/childrens_cases_program/> (accessed June 2005).

¹²⁶ Consultation with the project officer Family Court of Australia, December 2005.

¹²⁷ AGD, *Disability Strategic Plan 2003–2005*, p. 9 (section 2).

¹²⁸ Goodfellow & Camilleri, *Beyond Belief, Beyond Justice*, p. 68.

Being flexible and responsive to the specific needs of people with a mental illness

From the barriers identified earlier in this chapter, it is apparent that people with a mental illness have particular needs that must be addressed during the legal process. They might need more time to communicate, breaks in proceedings in order to address anxiety and stress, and clarification of the process itself. Both representatives from the ADB and the SSAT described how they were willing to adjust their processes to suit the needs of people with a mental illness. For example, an ADB manager said:

*We adjust the process so that it's not too onerous for them, and we look at things like taking breaks and having a support person available to them. We try to do a lot of preparation so that people with a mental illness know what to expect, can be involved in the process, can participate fully, and ... hopefully have a sense of what it is that we are going to be talking about and how we are going to talk about it. [We] provide them with as much information as possible prior to the meeting, so that when they come in it's not a foreign intimidating process.*¹²⁹

A director of the SSAT also recommended that there be an increase in personal service delivery, whereby processes are adjusted to fit the individual client.¹³⁰

*We will take into account too that some people have a phobia, and don't want to come into the office because they're scared about the lifts. We try to accommodate that ... in some cases ... we have done home visits.*¹³¹

He also argued that there should be a general focus on customer service delivery, such as writing decisions in plain English, making sure that the reception area is accessible and comfortable, providing information to participants, and acknowledging that people are intimidated by legal processes and forums, even where those processes have been made as accessible as possible.¹³²

¹²⁹ Consultation with manager, ADB, November 2004.

¹³⁰ Consultation with director, SSAT, September 2004.

¹³¹ Consultation with director, SSAT, September 2004.

¹³² Consultation with director, SSAT, September 2004.

Higher level of assistance to people with a mental illness

People with a mental illness may benefit from a higher level of assistance throughout the legal process, particularly if they are unrepresented. Representatives from the ADB, HREOC and the SSAT argued that they try to assist people with a mental illness when they lodge a complaint or an appeal. For example, the ADB manager said:

*We have always taken the view that if someone has difficulty in putting the complaint in writing we will assist them. That's difficult over the telephone, but then we might say to them, "If you are in Sydney, or you are close to our Wollongong or Newcastle office, please come into the office and we will sit down and we will write out the complaint for you". That involves actually interviewing the person to try and draw out the relevant details, and put it in a way that is going to be meaningful to them, and accurate, and meaningful to a respondent who may not even know of these issues.*¹³³

However, this manager also acknowledged that ADB workers cannot provide too much assistance to people because this raises bias problems:

*We have to be careful about our neutrality in this as well. We are not an advocate for complainants or respondents, and we need to be mindful of the principles of administrative or natural justice and procedural fairness, that we don't seem to be formulating the complaint for someone. At the same time, we are providing a service as part of our commitment to our clients, we give them assistance. But we can't give them advice, we can't advocate; we can write the complaint for them but we can't formulate the complaint. It can be a very fine line sometimes, and often if people do have a comprehension issue, then getting that message back to them is also an issue that we face as a provider of services. It's hard for people to understand our neutrality—"You have just sat down with me, you have asked me all these questions, you have written it up for me, and now you are telling me that you are not helping me"—so there is a conceptual difficulty there sometimes.*¹³⁴

¹³³ Consultation with manager, ADB, November 2004.

¹³⁴ Consultations with manager, ADB, November 2004; policy officer, HREOC, June 2004. See also Disability Council, *A Question of Justice*, p. 90.

Case management

Consultations indicated that some people with a mental illness may benefit from case management throughout the legal process. They argued that this approach may reduce the potential stress experienced by people with a mental illness as they participate in the legal process. To a certain degree, a case management approach incorporates some of the features mentioned above, such as individualised service delivery and increasing the participation of the client as much as possible. However, it also involves having one case manager at a court or tribunal who is responsible for coordinating the person as they participate in a particular process.¹³⁵

*Staff at the [SSAT] registry are mostly case managers, so when people phone and want to lodge an appeal, they are put directly through to a case manager. These case managers manage a case from beginning to end. We see that as a very important part of the service that we provide to the applicant, because they build up a relationship with that person, they don't have to find a different person who doesn't know where their case is up to every time they speak to them. So that person manages the process.*¹³⁶

One solicitor said that a case management approach to service delivery might reduce the delay in matters, a delay that can contribute to enormous pressure and stress on people with a mental illness:

*If there could be a way of identifying these matters and perhaps case managing them ... There have been times where people who have some sort of anxiety or depression, and the hearing and judgment have been delayed for 6 months, 8 months, 10 months, and that puts an enormous amount of pressure on that person, after they have had to go through all the procedures as well.*¹³⁷

Training staff on mental health issues

The AGD's Disability Strategic Plan (2003–05) states that training programs promoting awareness of mental illness, and teaching skills to provide effective

¹³⁵ Case Management Society of Australia, *What is Case Management?*, <<http://www.cmsa.org.au/definition.html>> (accessed August 2005).

¹³⁶ Consultation with manager, SSAT, Sydney, September 2004.

¹³⁷ Consultation with family law solicitor, October 2004.

services to people with a disability, should be implemented by NSW courts and tribunals.¹³⁸ For example, the ADB and the Community Services Division of the NSW Ombudsman provide their staff with training on mental health issues. A disability awareness trainer consulted for this study suggested that people working in the legal system should be taught about the lived experience of having a mental illness:

*I try to provide education that takes the view that the starting point is the inside-out experience of having a mental illness. So I talk people through the lived experience of mental illness, and [about] circumstances that they can relate to in their workplace, behaviours that they might have encountered and so on. What I am trying to do is give people an insight into what's actually happening in your mind when people may be saying or doing these things that people find quite hard to know what to do about.*¹³⁹

One consumer advocate interviewed for this study said that she had participated in a forum on mental illness with the local magistrate.¹⁴⁰ As a result of her participation, the magistrate had sent court staff to training sessions on mental illness, at the NSW Institute of Psychiatry.¹⁴¹

Research indicates that divorced and separated people have higher rates of mental health problems than married people, both in the short and long term.¹⁴² Accordingly, the Family Law Courts have obtained funding from the Department of Health and Ageing to conduct the Mental Health Support Project, a pilot project being conducted in Adelaide and Darwin. The project aims to better support the emotional wellbeing of clients who may be distressed, have mental health issues, and/or be suicidal. Under the project, Adelaide and Darwin staff are being trained in mental health first aid—i.e. to assist someone experiencing a mental health problem before professional help is obtained.

¹³⁸ See AGD, *Disability Strategic Plan 2003–2005*.

¹³⁹ Consultation with disability awareness trainer, August 2004.

¹⁴⁰ Consultation with consumer advocate, Sydney, August 2004.

¹⁴¹ Consultation with consumer advocate, Sydney, August 2004. The NSW Institute of Psychiatry is a statutory body that runs courses for professionals who come into contact with people with a mental illness. See NSW Institute of Psychiatry, *Community, Consumer and Carer Programs 2005*, <http://www.nswiop.nsw.edu.au/coursemenu_consumer.htm> (accessed September 2005).

¹⁴² E Robinson, “Mental Health and Changing Families”; Rodgers et al., “Mental Health and the Family Law System”, pp. 50–70.

Skilled staff are then able to directly link clients to appropriate support and treatment provided by community and government-based providers of mental health services.¹⁴³

Therapeutic jurisprudence and problem-solving courts and lists

‘Problem-solving courts’ are specialised courts that aim to provide new responses to criminal activity by addressing the behaviour underlying many criminal offences. Problem-solving courts originated in the United States, with the establishment of the Florida Drug Court in 1989. Since then, many other problem-solving courts, including drug courts, mental health courts and family violence courts, have been established throughout the United States.¹⁴⁴ Problem-solving lists serve the same functions as problem-solving courts, only on particular days at a ‘regular’ court.

Problem-solving courts are influenced by therapeutic jurisprudence, which is “the study of the role of the law as a therapeutic agent”.¹⁴⁵ Therapeutic jurisprudence examines the role of the law as a therapeutic agent in relation to legal rules, legal processes and the role of the legal profession.¹⁴⁶ In relation to the court process, therapeutic jurisprudence focuses on the role of the court in improving the wellbeing of parties to its processes. More specifically, in the criminal jurisdiction, therapeutic jurisprudence involves the consideration of “rehabilitation as a factor in sentencing”.¹⁴⁷ Hence, the aim of these courts is to address the “underlying cause” of the offending behaviour, by fashioning sentences that involve linking offenders to various services, such as drug

¹⁴³ Consultation with the project worker, Family Court of Australia, December 2005.

¹⁴⁴ Center for Court Innovation, *Chronology*, <http://www.problem-solvingcourts.org/ps_chronology.html> (accessed September 2005).

¹⁴⁵ As noted in Chapter 1, the Law and Justice Foundation of NSW is partnering with the Universities of Sydney and Canberra and the Mental Health Tribunals in NSW, the Australian Capital Territory and Victoria in a project investigating mental health tribunals. This project draws on ‘therapeutic jurisprudence’ literature and aims to assess the ‘fairness and justice’ of tribunal hearings, and to identify best practice reforms.

¹⁴⁶ D Wexler, *Therapeutic Jurisprudence: An Overview*, <<http://www.law.arizona.edu/depts/upr-intj/>> (accessed November 2005).

¹⁴⁷ M S King & K Auty, “Therapeutic Jurisprudence: An Emerging Trend in Courts of Summary Jurisdiction”, *Alternative Law Journal*, vol. 30, no. 2, 2005, pp. 69–74 at 73.

treatment or mental health services. Other features of problem-solving courts include collaboration with social services, assessment of offenders' needs by caseworkers, a less adversarial courtroom and increased interaction between judges and offenders.¹⁴⁸

One North American example of a problem-solving court is the Brooklyn Mental Health Court in New York. The aim of this court is to link offenders with serious mental illnesses—who would normally be incarcerated—with appropriate mental health care and support.¹⁴⁹ A number of Mental Health courts have also been established in various counties throughout California.¹⁵⁰ An example of a problem-solving court found in the civil jurisdiction is the Manhattan Family Treatment Court in New York. Launched in 1998, this court aims to address the drug and alcohol problems of parents of neglected children, by referring them to support services so that they can regain custody of their children.¹⁵¹

In NSW, examples of problem-solving courts and lists, and other court services that are relevant to people with a mental illness, include:

- ◆ the NSW Drug and Youth Drug Courts
- ◆ the Magistrates Early Referral into Treatment (MERIT) Program (in NSW)
- ◆ the NSW Statewide Court Liaison Service.

The Enforcement Review Pilot Program (Special Circumstances List) in Victoria is also of interest, because of its applicability to people with a mental illness.

¹⁴⁸ Center for Court Innovation, *Principles*, <<http://www.courtinnovation.org/>> (accessed September 2005).

¹⁴⁹ Center for Court Innovation, *Mental Health Court*, <http://www.ccourtinnovation.org/demo_mhealth.html> (accessed September 2005).

¹⁵⁰ *California Courts Programs, Collaborative Justice: Mental Health Courts*: <<http://www.courtinfo.ca.gov/programs/collab/mental.htm>> (accessed April 2005).

¹⁵¹ Center for Court Innovation, *Manhattan Family Treatment Court*, <http://www.ccourtinnovation.org/demo_05mftc.html> (accessed September 2005).

NSW Drug Courts

The NSW Drug Court is a program which commenced in 1999 that aims to reduce drug dependency, promote re-integration of drug-dependent people into the community, and reduce the need for drug-dependent people to resort to criminal activity.¹⁵² If an offender is eligible, they are remanded for detoxification and assessment at the Drug Court clinic. Their sentence is suspended on condition that they adhere to the requirements under their treatment plan. This plan requires participants to enter a residential rehabilitation centre, or live in accommodation approved by the court.¹⁵³ Currently, the NSW Drug Court is restricted to people living in Western Sydney. Offenders who have committed an offence of a sexual or violent nature are not eligible for the program.¹⁵⁴

Similar in its aims to the adult Drug Court, the NSW Youth Drug and Alcohol Court was established in July 2000 in two children's courts in Western and South Western Sydney (Cobham Children's Court on Monday and Campbelltown Children's Court on Thursday). The court tries to address young offenders' social needs, by tailoring a treatment plan that covers areas such as education, housing, employment and health.¹⁵⁵

Magistrates Early Referral into Treatment (MERIT) Program

The MERIT program is a pre-plea NSW Local Court-based diversion program for adult offenders with substance abuse problems. The aim of the program is to address substance abuse associated with criminal behaviour. While the NSW Drug Court targets offenders who have committed more serious offences, the MERIT program is aimed at those offenders who are eligible for bail. Indeed, the program may be undertaken as part of a person's bail conditions, and an admission of guilt is not required. Participants may be identified by magistrates, the police, solicitors or even by themselves as being suitable for the program. The program may involve counselling, detoxification, methadone

¹⁵² *Drug Court Act 1998* (NSW), s. 3.

¹⁵³ AGD, *About the Drug Court of NSW*, <<http://www.lawlink.nsw.gov.au/drugcrt/drugcrt.nsf/pages/drugcrt2>> (accessed September 2005).

¹⁵⁴ AGD, *About the Drug Court of NSW*.

¹⁵⁵ AGD, *New South Wales Youth Drug and Alcohol Court*, <http://www.lawlink.nsw.gov.au/lawlink/drug_court/ll_drugcourt.nsf/pages/ydrgcrt_aboutus> (accessed September 2005).

treatment, residential rehabilitation and case management, depending on the needs of the defendant. The person's matter will be adjourned until they have completed the program. It is only then that the outstanding matter is heard and sentencing occurs. Offenders who have committed an offence of a sexual or violent nature are not eligible for the program.¹⁵⁶

The Statewide Community and Court Liaison Service

As noted earlier in this chapter, the Statewide Community and Court Liaison Service provides specialist mental health advice to 19 local courts across NSW.¹⁵⁷ The aim of the service is to assist magistrates to identify whether a person charged with a minor offence has a mental illness, and to assist in referring them to appropriate treatment in lieu of incarceration.¹⁵⁸ The use of caseworkers to evaluate defendants is one of the main principles adopted by problem-solving courts.¹⁵⁹ Thus, although this service is not in itself an example of a problem-solving court, it provides a similar service to that offered by US Mental Health Courts, whereby defendants with mental illnesses are identified and referred to appropriate treatment.

Enforcement Review Program (Magistrates Court of Victoria)

The Enforcement Review Program assists people with “special circumstances”—mental illness, neurological disorders, and physical disabilities—who have outstanding fines registered at the PERIN (Penalty Enforcement by Registration of Infringement Notice) Court.¹⁶⁰ If a person is identified as having a mental illness, the magistrate can take this into account in tailoring a sentencing order. Defendants may also be referred to other support services, such as mental health services or accommodation services, at this point. The Victorian Homeless Persons' Court project reported that homeless participants who had appeared before the Special Circumstances

¹⁵⁶ AGD, *Magistrates Early Referral into Treatment Program*, <<http://www.lawlink.nsw.gov.au/cpd/merit.nsf/pages/index>> (accessed September 2004).

¹⁵⁷ Justice Health, *The Statewide Community and Court Liaison Service*.

¹⁵⁸ Justice Health, *The Statewide Community and Court Liaison Service*.

¹⁵⁹ Center for Court Innovation, *Principles*.

¹⁶⁰ Magistrates Court of Victoria, *Guide to Court Support Services*, 2005, <<http://www.magistratescourt.vic.gov.au>> (accessed September 2005).

List had a positive perception of the court, because it allowed them to tell their story directly to the magistrate.¹⁶¹

Barriers to the effectiveness of problem solving courts

The principal aim of problem-solving courts is to address the underlying causes and behaviour of criminal offences. However, concerns have been raised over the limited support services attached to problem-solving courts and the fact that many problem-solving courts are found only in capital cities or other major cities.¹⁶²

In its report *Improving the Administration of Justice for Homeless People in the Court Process*, the Victorian Homeless Persons' Court project raised the concern that the support services that people are referred to by the Special Circumstances List are not able to provide ongoing support. It reported that participants expressed some frustration at the lack of ongoing support attached to specialist lists.¹⁶³ This suggests that in order for problem-solving courts and lists to be successful, they need services that are able to provide ongoing support to the people who are referred to them.

People living in rural and regional areas may not have access to problem-solving courts that are found only in capital cities. For example, the NSW Drug Court is only found in Sydney. One way of overcoming this would be to implement the features of problem-solving courts into mainstream courts. In a study conducted by the Center for Court Innovation and the California Administrative Office of the Courts, judges from California and New York were asked which features of problem-solving courts could be so implemented. They responded that judges in non-problem-solving courts could adopt a more "problem-solving orientation", tailoring sentences based on the needs of each offender (such as mental health and drug and alcohol needs), engaging more

¹⁶¹ Homeless Persons' Court Project, *Improving the Administration of Justice For Homeless People in the Court Process*, PILCH Homeless Persons' Legal Clinic, Melbourne, 2004, <www.pilch.org.au> (accessed September 2005), p. 25.

¹⁶² See Simpson et al. for a discussion of the need for coordination between community services and the justice system to allow for diversionary options. Simpson et al., *The Framework Report*, para 4.20.

¹⁶³ Homeless Persons' Court Project, *Improving the Administration of Justice For Homeless People in the Court Process*, p. 29.

directly with the defendant, and encouraging a non-adversarial approach to conversing with lawyers and offenders.¹⁶⁴

Summary

According to consultations, barriers such as stress, cognitive impairment, problems with time management, communication problems and complicated legal technology may prevent people with a mental illness from complying with timeframes, understanding legal documents, and understanding what is occurring once they are at court.

Confronted with these barriers, people with a mental illness may benefit from a higher level of assistance, and a simplification of the application process, particularly in terms of filling out forms and lodging complaints. People with a mental illness who are affected by stress, and who have problems with time management, may also benefit from a case management approach throughout the legal process.

Consultations also indicated that individual barriers are exacerbated by the structure and features of the courtroom environment. They suggested that the formality of the courtroom can be intimidating to people with a mental illness, and that its lack of flexibility can also prevent people from communicating effectively with their lawyers. Even the atmosphere and the physical environment of the courtroom were reported as being intimidating and frightening for some people with a mental illness.

Service providers argued that less formal and less adversarial legal processes may not be as stressful for people with a mental illness. Furthermore, a greater awareness of their needs and a greater flexibility within court processes would also be beneficial. The principles of therapeutic jurisprudence, which in addition to referring people to therapeutic services also encourage more direct engagement between judges and defendants, and a less adversarial environment, may also be highly beneficial.

¹⁶⁴ D J Farole & N Puffett, *Can Innovation be Institutionalized? Problem-Solving in Mainstream Courts*, 2004, <www.courtinnovation.org/pdf/can_innovation.pdf> (accessed September 2005).

To some extent, ADR is a lot more flexible, and was considered by service providers to be more appropriate for people with a mental illness. However, it was not considered as beneficial to people with a mental illness, if they were unrepresented. Indeed, the importance of both legal representation and general support for people with a mental illness in any legal process was stressed in consultations.

Of course, recognition of the needs of people with a mental illness during the legal process is also dependent on the fact that a mental illness has actually been identified as such. However, it is apparent that people are not always identified as having a mental illness. Consultations for this study also highlighted the perception by those in the legal system that people with a mental illness are less honest and less credible as a result of their illness. Training workers in the legal system about disability awareness may overcome problems relating to identification and misperceptions about credibility.

6. Non-legal Support

*I'm not just an Aboriginal health worker; I am a social worker; I am a psychologist; housing officer, Centrelink officer, legal officer, core support, you name it. I am also a community development officer, a community capacity building officer, a prevention and promotions officer. You name the job, I am doing it.*¹

Data for this and other studies indicate that when people have a legal problem, they tend to turn to friends or family, social workers, health workers, church-based organisations and other non-legal service providers for information and advice.² Consultations with service providers and participants for this study indicated that this was also often true for people with a mental illness.

*Oh, with the pension, with more like legal [problems] and ... bureaucracy, I'd go and talk to my caseworker.*³

[If you did have a problem with housing, where could you go for help with that?] *Initially I would talk to [my caseworker] about it, which I have done already. If that did not work I think I would have to go straight to Foster House and see someone there.*⁴

[If you did have a problem with your pension at work, where could you go for help?] *First of all it all depends on what type of a problem it is. For some problems I would probably go to a social worker. Other problems, to the federal disability office centre.*⁵

¹ Consultation with Aboriginal mental health worker, Sydney, September 2004.

² Interviews nos. 2, 8, 9, 10, 11, 14, 15, 24 and 29 (interview no. 29 taken from the Foundation's study into homeless people). See also Forell et al., *No Home, No Justice?*, p. 181; S Scott & C Sage, *Gateways to the Law: An Exploratory Study of How Non-Profit Agencies Assist Clients with Legal Problems*, Law and Justice Foundation of NSW, Sydney, 2001, p. 30; Coumarelos et al., *Justice Made to Measure*. However, it should be noted that participants interviewed for this study were contacted through non-legal agencies and were therefore already in touch with them.

³ Interview no. 14.

⁴ Interview no. 24.

⁵ Interview no. 9.

[So you came to the [youth] centre when you got caught?] *Yeah, that's right. They can help you out here.*⁶

People with a mental illness access a number of non-legal services, ranging from mental health workers, youth and social workers, financial counsellors, church groups, tenant advocates and other housing workers, to government departments (such as the NSW Police, Centrelink, DOH, the OPG and the OPC). People with a mental illness may access non-legal services for a variety of reasons, including mental health treatment, financial assistance, housing assistance, other welfare assistance and recreation. People may approach a service voluntarily or be referred by another service provider. Others may be involuntarily taken by the police to hospital for mental health assessment where they come into contact with other service providers (such as social workers). People with a mental illness may also turn to other support networks including their carers and family and friends for assistance with their legal problems.

Consultations for this study and other studies indicate, however, that some people with a mental illness do not access non-legal assistance. This can be due to a range of reasons, including a lack of awareness of services, a lack of available services and fear of stigma.⁷

The type of assistance provided by non-legal service providers to a client with a mental illness, who has a legal problem, will vary according to the role of the service, their level of resources, the client's problem and the level of support required by that particular client.⁸

This chapter will look at the ways in which non-legal services assist people with a mental illness with their legal problems. This chapter will also look

⁶ Interview no. 14.

⁷ Consultations with CLC workers, Shopfront, September 2004; barrister, Sydney, January 2005; national program manager, MMHA, July 2004; also roundtable consultation, 16 June 2004. See also G Kamieniecki, "Prevalence of Psychological Distress and Psychiatric Disorders among Homeless Youth in Australia: A Comparative Review", *Australian and New Zealand Journal of Psychiatry*, vol. 35, no. 352, 2001; L Cullen, *Out of the Picture*; Szirom et al., *Barriers to Service Provision For Young People*; HREOC, *Human Rights and Mental Illness*, pp. 730–40; Nicholson et al., *Critical Issues For Parents With Mental Illness and Their Families*, p. 15.

⁸ Some non-legal services do not see assistance with legal issues as part of their role, while at the other end of the spectrum the OPC and tenancy workers have specialised workers who will advocate on behalf of a client at the CTTT.

at the barriers that people with a mental illness face in accessing non-legal assistance and the support that non-legal service providers need to assist their clients with legal issues.

The role of non-legal service providers in assisting clients with a legal problem

Consultations for this study suggest that non-legal services provide the following types of assistance to people with a mental illness:

- ◆ identification of a legal issue and the provision of preliminary legal information
- ◆ referral to legal service providers
- ◆ support for a client when they seek legal assistance
- ◆ advocacy
- ◆ education, training and awareness raising about mental illness.

Identifying legal issues and the provision of preliminary legal information

The only reason we are acting for him is that he has been linked in with us through a youth service that we have very good contact with. So he has accessed a service that is able to identify this as a legal problem and send him over to us and we are able to assist him, otherwise he would just be falling through the net.⁹

Consultations for this study indicate that non-legal service providers play an important role in identifying legal issues for their clients and providing their clients with preliminary information about a legal issue and the process of resolving it.¹⁰ This is important as lack of awareness of legal rights was raised

⁹ Consultation with the CLC workers, Shopfront, September 2004.

¹⁰ Consultations with caseworker, South Coast, NSW, November 2004; community worker, October 2004; consumer advocate, Sydney, August 2004; Aboriginal mental health worker, Sydney, September 2004; mental health worker, Western NSW, August 2004; interview nos. 14 and 18.

as a barrier to accessing legal assistance in Chapter 4. For example, a solicitor commented that youth workers play an important role in identifying whether one of their clients may have a potential claim for victims compensation:

*Usually it is something, in my experience, that comes up through youth workers.*¹¹

One participant interviewed for this study was told by a community worker that she may be eligible for victims compensation.¹²

Stakeholders and participants also reported that non-legal service providers can play an important role in the provision of legal information, both on an individual and group level to people with a mental illness.¹³ For example, a social worker commented that when a person is hospitalised they tend to have access to social workers, and that once someone is placed on a compulsory treatment order they are usually allocated a case manager from a community health centre or mental health team. These non-legal service providers can become an important source of information about the legal system.¹⁴

An example of where non-legal workers had provided legal information on a group level was given by a mental health worker from Maroubra Mental Health Centre. This person talked about how Maroubra Mental Health Centre had organised a legal education day for Aboriginal women in partnership with WLS:

*They [WLS] came down with all this printed stuff in layman's terms [about AVOs and wills] ... They were fantastic, I have nothing but high praise for them.*¹⁵

¹¹ Consultation with CLC workers, Shopfront, September 2004.

¹² Interview no. 18.

¹³ Consultations with caseworker, South Coast, NSW, November 2004; community worker, October 2004; consumer advocate, Sydney, August 2004; Aboriginal mental health worker, Sydney, September 2004; mental health worker, Western NSW, October 2004; solicitor in charge, MHAS, Legal Aid, December 2004; interview nos. 14 and 18.

¹⁴ Consultation with social worker, MHAS, Legal Aid, August 2004.

¹⁵ Consultation with Aboriginal mental health worker, Sydney, September 2004.

Referral

It was suggested in consultations that people with a mental illness may not be aware of available legal services.¹⁶ Non-legal workers therefore play an important role in assisting clients with a legal problem by referring them to a legal service provider.¹⁷ This is supported by Genn et al. who found:

*General practitioners, religious organisations, social workers or local authority information desks may not be viewed as traditional purveyors of legal services, but their potential role in directing the public to fruitful avenues for problem resolution must be recognised.*¹⁸

Service providers were of the opinion that if clients were in contact with non-legal services they had a better chance of finding out about legal services and being referred on.¹⁹

*If you think in your mind now about all the clients that you have currently with mental health issues, mine are all referrals. They are not walking into the centre; they are coming from youth centres.*²⁰

[How are people referred to CCLC?] *We tend to get them from other people. We have had them from community workers, who hand them across.*²¹

Two participants reported having been referred by a non-legal service provider to a lawyer:

¹⁶ Interview no. 8; consultations with caseworker, South Coast, NSW, November 2004; mental health worker, Sydney, September 2004; convener of the NCSMC, December 2004. See also Coumarelos et al., *Justice Made to Measure*. Awareness of legal services was raised by one roundtable attendee as a particular issue for people from a NESB: roundtable consultation, 16 June 2004. See also Worthington Di Marzio and Cultural Partners Australia, *Access to Information about Government Services among Culturally and Linguistically Diverse Audiences*, Victorian Department of Premier and Cabinet, Melbourne, 2001, <http://www.info.vic.gov.au/resources/cald_report.htm> (accessed March 2006).

¹⁷ Consultations with caseworker, South Coast, NSW, November 2004; CLC workers, Shopfront, September 2004; caseworker, Blue Mountains, July 2004; solicitor, CCLC, August 2004; investigation officers, NSW Ombudsman, September 2004; solicitor, regional CLC, September 2004; mental health worker, Sydney, September 2004; NSW Police inspector, South Coast NSW, November 2005.

¹⁸ Genn et al., *Understanding Advice Seeking Behaviour*, p. 35.

¹⁹ This is consistent with findings in Forell et al., *No Home, No Justice?*.

²⁰ Consultation with CLC workers, Shopfront, September 2004.

²¹ Consultation with solicitor, CCLC, August 2004; also consultation with investigation officer, NSW Ombudsman, September 2004.

I went to the resource centre and they told me that they don't do this sort of thing, and they gave me a number and told me to see the Legal Aid guy.²²

Exodus is probably the best of the lot. They have access to everything, all these different organisations from the law onwards, all these contacts. If you have a problem you go to the office, you tell them what your problem is at the reception, like "I've got a legal issue" and they say "Sit down, we'll go and get our legal person for you". From there, they refer you either to Legal Aid or somebody else who will tell you what your options are, and you take it from there.²³

Two non-legal services providers commented that assistance to a client may also involve referral to another non-legal service provider who can assist a person with their legal problems (such as a debt problem) or a complaint handling body:

I also put them in contact with the Electricity and Water Ombudsman who is an independent body.²⁴

We do referrals to Lifeline's credit people and to the Salvation Army credit people.²⁵

Recognising that disadvantaged consumers are more likely to contact a "shop-front agency" (such as Legal Aid or a community organisation) to make a complaint about a consumer issue, the Australian Competition and Consumer Commission (ACCC) has produced a referral guide for both legal and non-legal community centres on how to make a complaint on behalf of a vulnerable client (which includes people with a mental illness). The referral guide, which has been distributed to over 200 agencies across Australia and is available upon request, allows an agency to refer trade practices conduct that is affecting their clients (such as debt collection or telecommunications selling practices) to the ACCC for regulation and enforcement.²⁶

²² Interview no. 18.

²³ Interview no. 25 (taken from the Foundation's study into homeless people).

²⁴ Consultation with caseworker, South Coast, NSW, November 2004.

²⁵ Consultation with clinical psychologist, Sydney, July 2004.

²⁶ See Australian Competition and Consumer Commission, *ACCC Referral Guide*, <<http://www.accc.gov.au/content/index.phtml/itemId/386270>> (accessed April 2006).

Supporting a client when they seek legal assistance

As discussed in Chapter 4, people with a mental illness face a number of barriers that may prevent them from being able to contact a legal service and make an appointment to see a lawyer. People with a mental illness may have difficulties keeping appointments or communicating, they may be overwhelmed and/or appear threatening and/or difficult, and they may be affected by the physical environment, which may contribute to feelings of ill-ease and/or agitation. This may be exacerbated by the side effects of medication, which can make a person feel sleepy and cloud their thinking.²⁷ In addition, legal service providers may not be aware of the effects of a mental illness and/or medication on a client and, as a result, may not be aware of their particular needs.

This may mean that, for those clients who require a higher level of support, simply giving them the telephone number of a lawyer is not enough. A lawyer may need to be contacted and an appointment made on their behalf.

I think it is incredibly easy just to refer them out. But I think with mental illness, or anyone that is seriously disadvantaged, that is not going to work because they won't [take] the referral. So there needs to be more hand-holding. So that means possibly people being able to go between a number of resources and act as a central coordinator to assist that person instead of just a referral. They don't just ring ... [they] make sure they don't fall through the cracks.²⁸

In addition, people with a mental illness may benefit from someone attending an appointment with them to ensure that they actually get to the appointment, and once there, assist the client in overcoming anxiety and communication problems.²⁹ Consultations for this study suggest that this role depends on

²⁷ Consultations with caseworker, Blue Mountains, July 2004; CLC workers, KLC, August 2004; solicitor, CCLC, August 2004; pro bono solicitor, Sydney, September 2004; legal officer, Tenants' Union, September 2004.

²⁸ Consultation with solicitor, CCLC, August 2004; also consultations with CLC worker, Western NSW, September 2004; caseworker, South Coast, NSW, November 2004; CLC workers, KLC, August 2004.

²⁹ Consultations with CLC workers, KLC, August 2004; Solicitor, CCLC, August 2004; CLC worker, Western NSW, September 2004; CLC workers, Shopfront, September 2004; pro bono solicitor, Sydney, September 2004; family law solicitor, October 2004. The importance of this role was also mentioned in CCLC NSW, *Submission to the Senate Select Committee on Mental Health*.

the objectives and resources of the non-legal agency (or support person), the capacity of the client and, in some respects, the relationship between the non-legal agency and the legal service provider.

A number of legal services (including CLCs, pro bono services and Legal Aid) interviewed for this study believed that legal services benefit greatly when a non-legal service provider assists a person with a mental illness to have contact with a lawyer.³⁰ First, having a non-legal worker involved can also help to ensure that the client actually makes it to their appointments.³¹ In addition, non-legal services can provide legal services with information about the client's illness, the effects of medication, their general life circumstances (including how much support they have, what other services are involved) and what their current legal issue is. This information can assist legal service providers to make important judgments about how much support the person may require to remain in the process and how best to work with that particular client. This can be particularly important in cases where a client may not divulge themselves what is going on in their lives and in particular the fact that they have an illness.³²

I personally find it very useful when someone who suffers from a mental illness brings someone else with them. Not because I talk to the other person, but because [they] can put it in context. Sometimes people can't explain their illness, or the effect of the illness, and it's helpful to have people who can say "Well this is what the effect is". If you have some other input, I find that helpful.³³

The mental illness group won't do things and won't ring back. So it's hard without someone who is a social worker saying: "Look you are not going to be able to just say 'these are the practical steps that you take', they are

³⁰ Consultations with CLC workers, KLC, August 2004; solicitor, CCLC, August 2004; CLC worker, Western NSW, September 2004; CLC workers, Shopfront, September 2004; pro bono solicitor, Sydney, September 2004; family law solicitor, October 2004. The importance of this role was also mentioned in CCLC NSW, *Submission to the Senate Select Committee on Mental Health*.

³¹ Consultation with CLC workers, KLC, August 2004.

³² The importance of non-legal services providers and non-government organisations is highlighted in A Freeman, G Hunt, E Evenhuis, D Smith & J Malone, *High Support Accommodation for People with Psychiatric Disabilities—A Survey of High Support, Very High Support and Residential Rehabilitation Services in NSW and Assessment of the Needs and Satisfaction of Consumers Residing There*, Aftercare, Sydney, 2003, p. 13.

³³ Consultation with CLC worker, Western NSW, September 2004.

not going to do it". You want someone to be able to tell you that this person needs more help than you would think. That's the limitation; I have to make judgement calls on very limited information. The more information the better I can make a judgement call on what sort of help they need. Where it works best is where I get a call from the community worker, they go through it with me, they get handed over and I know I can talk to them again. It is extremely difficult to gauge the severity [of mental illness] over the phone. Where it has been successful is where I have had a community worker in the mix.³⁴

I have clients who are very unwell. I acted for one last week [who said], "No my house is fine". But the reality is that he is not an Australian citizen; he is not eligible for Centrelink; he has no access to money; he has been working up at 'the wall'; he met somebody who is now funding him if he stays in his house with him, who is 66. So this young person will say to you "No, I live in a comfortable unit, it's fine". These sorts of clients are referred to us through youth workers generally, and [if] we have that conversation we get a fairly well-rounded view of what is happening.³⁵

One pro bono solicitor commented that mental health professionals can also assist legal services in determining the most appropriate ways to work with a traumatised client.

I have from time to time spoken to psychiatrists, if I am concerned about approaching [the client]. For example, you get the client's file that tells you all about what happened to them in the past, and why they were removed [from their families]. You read through it, and you think, there is some horrific stuff in there about the client. You know that the client has a right to read that, but they are very vulnerable. So I have spoken to the psychiatrist about the best approach to taking the client through that.³⁶

In turn, this pro bono solicitor suggested that it was important for lawyers to be aware of support networks to which they could refer clients:

The lawyer needs to be aware of other support services, because these people do come with a number of problems. It's not just the legal issue that they are dealing with ... their whole life could be a complete mess, because of a

³⁴ Consultation with solicitor, CCLC, August 2004.

³⁵ Consultation with CLC workers, Shopfront, September 2004.

³⁶ Consultation with pro bono solicitor, Sydney, September 2004.

*particular thing that has happened, and they just need a lot of support. So I think having those back-up structures is really relevant, otherwise you can't do it, you can't provide the proper service to the client if you are just going to take a legalistic view.*³⁷

Advocacy

Consultations for this study indicate that non-legal service providers also advocate on behalf of their clients with a mental illness to other services and to government departments such as Centrelink and DOH.³⁸ The role of advocacy generally “involves the caseworker directly engaging with other service providers on the client’s behalf”.³⁹

*We usually do it for them actually; we'll ring up on their behalf because they're apprehensive and not knowledgeable of what to say. If the person at the other end said “Sorry, see you later”, they'd probably accept that. In most cases we would probably ring up for them ... because we think we might have a better influence in being able to explain the situation.*⁴⁰

Consultations for this study indicate that non-legal service providers engage in advocacy in a variety of ways and to varying degrees depending on the complexity of the issue, the role of the service, the resources available to the service, the needs of the client and the individual worker’s background and experience. Advocacy undertaken by non-legal services ranged from calling Centrelink to sort out a payment problem, trying to negotiate with DOH, to advocating on behalf of a client to the police:

*We help them before DOH; I have taken them, even in tears, to the [DOH] office, sat them down and said “Look I am the representative from St Vincent de Paul, you can observe that this client of mine is severely depressed and we are speaking on her behalf and this is what we are trying to achieve.”*⁴¹

³⁷ Consultation with pro bono solicitor, Sydney, September 2004.

³⁸ Consultations with caseworker, Blue Mountains, July 2004; mental health worker, Sydney, September 2004; investigation officers, NSW Ombudsman, September 2004; caseworker, South Coast, NSW, November 2004; community worker, Sydney, October 2004; OPG, August 2004; solicitor, OPC, September 2004; also interview nos. 10 and 14.

³⁹ Forell et al., *No Home, No Justice?*, p. 208.

⁴⁰ Consultation with caseworker, South Coast, NSW, November 2004.

⁴¹ Consultation with caseworker, Blue Mountains, July 2004.

*The word just got around that I helped them with a Centrelink problem. So they come to me [and say] "I have got this problem with Centrelink" and I try and iron it out for them.*⁴²

*He was targeted by the police officer who arrested him and brought him in for an interview a number of times but not charged. Scott's mental health caseworker actively advocated with police and legal services to assist.*⁴³

One participant made the following comment about the assistance provided by caseworkers to people with a mental illness to support them in sorting out their debt problems:

*... someone will come in and they'll have a thousand dollar phone bill, and they're just falling to pieces because the creditors are coming after them. And they get it sorted here; they [the caseworker] can ring up and they can [organise for the client to] pay it in installments and organise how much they [client] can pay.*⁴⁴

Another mental health worker discussed the ways in which she had assisted a client who had had their child removed by DoCS:

*We notified DoCS that we believe that the crisis situation has attenuated to the point where the child is safe.*⁴⁵

In some specific cases, non-legal services will advocate on behalf of a mentally ill client at tribunal hearings. Caseworkers from the OPC and specialist tenancy workers will advocate on behalf of their clients with a landlord or real estate agent or appear on their behalf at the CTTT if the person is facing eviction.⁴⁶ In cases of discrimination, the OPC may take a complaint to HREOC, or attempt to resolve it directly with the "perpetrator".⁴⁷

⁴² Consultation with Aboriginal mental health worker, Sydney, September 2004; also interview no. 10.

⁴³ Case study provided by the OPG.

⁴⁴ Interview no. 14.

⁴⁵ Consultation with mental health worker, Sydney, September 2004.

⁴⁶ Consultation with solicitor, OPC, September 2004.

⁴⁷ Consultation with the OPG, August 2004.

One mental health worker commented that she would also advocate on behalf of a client before the Mental Health Review Tribunal (MHRT) to keep them out of hospital:

*If I have a client going before the MHRT ... I will actually go in there and I will advocate for the client. If I feel that there is enough support out there in the community rather than them being in hospital, I will bring the family in and actually let them explain what we will put in place. We all know what our roles are and what needs to be done, in order to keep somebody out of hospital.*⁴⁸

A number of service providers reported that due to the presence of an advocate, the client had a more successful outcome.⁴⁹ For example:

[How much do you think it is because you are there to help the client as opposed to the client walking in themselves and seeking help?] *I know for a fact that if the client was present by themselves they would achieve very little. Because of their depressive state because [they are] quite inarticulate, teary [and] helpless. The office staff do not know how to deal with them but if they have an advocate it can be done successfully.*⁵⁰

*The more effective complaints that I have dealt with, the complainant has actually been accompanied by a support person, and that is either through a community health organization or a charitable organisation.*⁵¹

Education, training and awareness raising about mental illness

A couple of non-legal service providers reported conducting general community education about mental illness with community members, the courts and legal services. For example, a consumer advocate participated in an education forum with the local court to inform court staff and magistrates

⁴⁸ Consultation with mental health worker, Sydney, September 2004.

⁴⁹ Consultations with investigation officer, NSW Ombudsman, September 2004; Caseworker, Blue Mountains, July 2004; caseworker, South Coast, NSW, November 2004; barrister, Sydney, January 2005; mental health worker, Sydney, September 2004.

⁵⁰ Consultation with caseworker, Blue Mountains, July 2004.

⁵¹ Consultation with investigation officer, NSW Ombudsman, September 2004.

about the effects of mental illness and medication on the ability of a person with a mental illness to participate effectively in the court process.

Some of the things I take for granted now is that some of the people don't understand [the] effects of medication. Like the fact that [people] get a dry mouth from their medication, or the agitation, [or] someone being heavily sedated and having a court hearing at 8 am the next morning, well they might not be able to get there so they end up with an extra charge. Or people might get up and walk out because they can't sit still and once again they get in trouble. The magistrate was very pleased to hear that these were common mental health issues. [We] like to educate people on mental health issues.⁵²

In order to help combat and, indeed, prevent licensed boarding house residents from accruing debt with local shop keepers, one community worker spoke to local shop keepers to educate them about the effects of extending credit to some of the people in the area with mental illnesses.

We actually sat down with a number of the shopkeepers locally and said "Don't extend credit, would you do that for an ordinary person? Then don't do it for people with disabilities."⁵³

Challenges facing non-legal service providers

The aim of this chapter has been to highlight the important role that non-legal agencies play in assisting people with a mental illness to identify a legal issue and contact a legal service provider and in helping them through the legal process. However, consultations for this study suggest that non-legal agencies face a number of challenges in assisting people with their legal issues. These include lack of legal knowledge and knowledge of referral networks amongst non-legal workers, lack of resources and availability of non-legal services, and the fact that people with a mental illness may not access a particular service. In addition, circumstances in which non-legal service providers may face a conflict of interest in assisting a client with a legal problem were also raised.

⁵² Consultation with consumer advocate, Sydney, August 2004.

⁵³ Consultation with community worker, Sydney, October 2004.

Lack of legal knowledge and knowledge of referral networks

While non-legal workers are not lawyers, the important role they play in assisting people with a mental illness through the legal system highlights the fact that in order for them to fulfil this role effectively, they need a basic degree of legal knowledge. A few service providers raised concerns that non-legal agencies do not always possess sufficient legal knowledge to effectively assist their clients.⁵⁴ For example, one solicitor commented that some non-legal service providers are not able to recognise a legal problem and/or they may not be able to give a client correct advice about a specific legal process:

*Yeah, they won't recognise a legal issue, and they will give the person wrong advice, and deal with it badly and not in the interest of the person.*⁵⁵

One participant reported receiving incorrect advice from a non-legal service provider about their eligibility for the disability support pension. The participant said that this meant that for a couple of years they were unable to receive a benefit when they had actually been entitled to it.⁵⁶

One roundtable attendee felt that some particularly vulnerable clients, such as people who have agoraphobia and are confined to their home, may be especially reliant on those non-legal workers they come into contact with for assistance with a legal issue. They felt that it was particularly important that a worker could identify a legal issue and know where to seek help.⁵⁷

A CLC worker commented that a lack of legal knowledge can also prevent non-legal workers from knowing when to refer a client to a solicitor:

*There are some youth services whose workers are not as well-trained [or] as well-organised and sometimes they make inappropriate referrals. Or either they just send anyone down here, who has even a whiff of a legal issue, even though it's probably something they could sort out with some advocacy. Or they won't refer people who have quite serious issues.*⁵⁸

⁵⁴ Consultation with CLC workers, Shopfront, September 2004; also roundtable consultation, 3 June 2004.

⁵⁵ Consultation with CLC workers, Shopfront, September 2004.

⁵⁶ Interview no. 3.

⁵⁷ Roundtable consultation, 3 June 2004.

⁵⁸ Consultation with CLC workers, Shopfront, September 2004.

Similarly, a Scottish study found that non-legal agencies are not always able to identify that a client has a legal issue and may not know when to refer a client to a solicitor:

There were nevertheless concerns raised [largely by solicitors] that, in a very small minority of cases, the advisers at agencies were unable to recognise that a legal solution might exist. Some solicitors had also had experience of receiving referrals later than they would have preferred. This had on occasions resulted in restricting the options open to the solicitors to resolve the problem, e.g. in a case of eviction or debt.⁵⁹

Consultations for this study indicated that a non-legal service provider's knowledge of available legal services is also an important factor in how well the referral role works.⁶⁰ Roundtable attendees were of the opinion that non-legal service providers have varying levels of awareness about legal services they could refer their clients to.⁶¹ One solicitor suggested that a greater awareness of referral networks to specialist legal centres and financial counsellors would assist non-legal service providers in finding appropriate assistance for their clients.

I think educating community workers about the roles of the various specialist legal centres and the generalist ones ... would be very valuable.⁶²

The same CLC solicitor felt that community workers may not contact a legal service provider on behalf of a client because they are intimidated by solicitors.

I don't hear from community workers enough. It takes a bit of oomph for them to find us. I try to get out in the community and let people know about us, but for whatever reason, it doesn't translate into community workers ringing for help. I don't know why that it is; maybe it is scary ringing up a group

⁵⁹ Carole Millar Research, *Referrals Between Advice Agencies and Solicitors*, Legal Studies Research Findings No 21, The Scottish Office Central Research Unit, Edinburgh, 1999, <<http://www.scotland.gov.uk/cru/resfinds/lsf21-00.htm>> (accessed March 2006).

⁶⁰ Consultations with CLC workers, Shopfront, September 2004; solicitor, CCLC, August 2004; clinical psychologist, July 2004; also interview no. 25 (taken from the Foundation's study into homeless people).

⁶¹ Roundtable consultation, 3 June 2004.

⁶² Consultation with solicitor, CCLC, August 2004.

*of solicitors. Once they meet you and they realise that you are a normal dude then they are happier. But they still have visions that we are hardnosed solicitors, but we are not like that at all. It's something that I spend a lot of time trying to address through networking.*⁶³

Lack of resourcing of non-legal agencies

*These people we are in contact with don't have one problem; they have a multitude of legal issues. They also have a multitude of other issues that are not specifically legal. But if there was more support and funding for appropriate medical services, then that would make our job a hell of a lot easier.*⁶⁴

Service providers reported that non-legal agencies are not always adequately funded to provide the level of assistance required by people with a mental illness. In particular, mental health services, which provide a great deal of assistance to people with a mental illness, face a general lack of resources across all sections of mental health service provision, including preventative services, outpatient services, emergency care, rehabilitation services and specialist services for people with dual diagnosis.⁶⁵ This is supported by the literature and by submissions to the current Senate inquiry into mental health care in Australia.⁶⁶ There is also evidence that other non-legal agencies that provide services to people with a mental illness are under-funded.⁶⁷

⁶³ Consultation with solicitor, CCLC, August 2004. A psychiatrist also observed that health workers can be intimidated by solicitors. This can be exacerbated by the difference in communication styles between the sectors. He suggested that the relationship between the two sectors may be assisted by joint conferences and other activities: consultation with psychiatrist, August 2004.

⁶⁴ Consultation with CLC workers, WLS, October 2004.

⁶⁵ Interview no. 25 (taken from the Foundation's study into homeless people); roundtable consultation, 3 June 2005; also consultations with executive officer, Human Services CEOs' Forum, March 2005; social worker, MHAS, August 2004. See also Szirom et al., *Barriers to Service Provision for Young People*, p. 7.

⁶⁶ Select Committee on Mental Health, *Mental Health Services in NSW: Final Report*; HREOC, *Human Rights and Mental Illness*; MHCA, *Submission to the Senate Select Committee on Mental Health*; CCLC NSW, *Submission to the Senate Select Committee on Mental Health*; WRC, *Submission to the Senate Select Committee on Mental Health; Not for Service*.

⁶⁷ NCOSS, "Productivity Commission Report on Government Services: Health", *NCOSS News*, vol. 32, no. 2, March, 2005, pp. 8–9.

This chapter has highlighted the important role that non-legal service providers, particularly mental health workers, play in assisting people with a mental illness with their legal problems. The reported crisis in mental health care may mean that in many areas of NSW mental health services are simply not available to people who need them. Hence, people with a mental illness may not necessarily be accessing non-legal assistance. Where services do exist, they do not necessarily have the resources to assist clients with legal issues.

One regional mental health worker commented on the impact that limited resources in mental health care has had on the support role his service used to play in assisting clients with a mental illness in going to court:

*We don't do much actual physical support; we don't have the time or the resources. When I first came here four years ago, staff would go all day to court, and be a support person, but they had to stop that because we don't have the time or the resources.*⁶⁸

It was suggested that a lack of resources may also mean that services are unable to provide a client with support in actually getting to and from a legal service.⁶⁹ As discussed in Chapter 4, actually getting to a legal service can be a serious problem for people with a mental illness. Two CLC solicitors also reported that, in their experience, it was not very common for a non-legal service provider to stay involved with a client once they had accessed a legal service.⁷⁰

*They [caseworkers] just hand over. As far as I know they don't do what financial counsellors and community legal centres do. They can't run the case without resources, [so] they just want to hand over. That's something that needs to be questioned because sometimes you want the community worker in the mix, particularly a social worker for someone with a mental illness. I think it is a good idea, but it just isn't happening that way.*⁷¹

⁶⁸ Consultation with mental health worker, Western NSW, August 2004.

⁶⁹ Consultations with CLC workers, WLS, October 2004; solicitor, CCLC, August 2004.

⁷⁰ Consultations with CLC worker, Western NSW, September 2004; solicitor, CCLC, August 2004.

⁷¹ Consultation with solicitor, CCLC, August 2004.

Two legal service providers commented that if mental health and community services are under resourced they may not be able to act as advocates on behalf of a client.⁷²

Lastly, as discussed in Chapter 4, the lack of availability of mental health care and support for people with a mental illness means that it is more difficult for them to stabilise the effects of their illness. Consultations for this study indicate that this may make people with a mental illness less able to access legal assistance and less able to participate effectively in the legal system.⁷³

People not accessing services

*The majority of Australians with a DSM-IV anxiety, mood or substance related disorder had not utilised health services during the survey year.*⁷⁴

It is also evident that people with a mental illness may not be accessing non-legal services, particularly mental health services for a number of reasons. A CLC worker from WLS commented that people with a mental illness may not be accessing mental health services because of the stigma of being identified as mentally ill. This is supported by the recent work of Kamieniecki, Cullen and Szirom.⁷⁵ A study into the barriers young people with dual diagnosis (mental illness and drug and alcohol issues) face in accessing mental health services found that stigma was a particular issue for young people and acted as a barrier to them accessing services:

*The stigma that is frequently associated with mental health conditions was also reported as a significant barrier to service access, insofar as young people were extremely reluctant to access mental health services for fear of being labelled a “mental case”.*⁷⁶

⁷² Consultations with solicitor, regional CLC, September 2004; barrister, Sydney, January 2005.

⁷³ See Chapters 4 and 5.

⁷⁴ Kamieniecki, “Prevalence of Psychological Distress and Psychiatric Disorders among Homeless Youth in Australia”; see also Andrews et al., *The Mental Health of Australians*.

⁷⁵ Kamieniecki, “Prevalence of Psychological Distress and Psychiatric Disorders among Homeless Youth in Australia”; Cullen, *Out of the Picture*; Szirom et al., *Barriers to Service Provision for Young People*.

⁷⁶ Szirom et al., *Barriers to Service Provision for Young People*, p. 3.

A legal service provider consulted for this study commented:

*There are some [young people] that are not linked with any services. They might have had contact with other services, but they don't want to be involved because all these youth workers are telling them "You've got to go and get an assessment or you have to take your medication". [They say] "Who are they? I don't want to do that!"*⁷⁷

A few service providers indicated that clients with a mental illness from a NESB don't tend to access mental health services because of language difficulties, lack of awareness of services and cultural factors relating to stigma.⁷⁸ This is supported by both the Burdekin Report and the more recent *Not for Service* report.⁷⁹

Roundtable attendees felt that some families were reluctant to seek help from child support organisations for fear of having their children removed.⁸⁰ They argued that this fear prevents families from accessing drop-in centres and therefore from receiving the support they may need to maintain custody.⁸¹ This is supported by Nicholson:

*The stigma of mental illness ultimately translates for parents into the fear of custody loss particularly because of the assumptions made by society at large about individuals with mental illness. Fear of losing custody can keep parents from acknowledging problems and requesting services.*⁸²

Conflict of interest

Whilst the majority of service providers and participants interviewed for this study talked about the supportive role non-legal services played in assisting people with a mental illness with their legal problem, two important studies into the mental health system discuss situations where these service providers

⁷⁷ Consultation with CLC workers, Shopfront, September 2004.

⁷⁸ Consultations with barrister, Sydney, January 2005; national program manager, MMHA, July 2004; also roundtable consultation, 16 June 2004.

⁷⁹ HREOC, *Human Rights and Mental Illness*, pp. 730–40; *Not for Service*, pp. 8, 243, 259.

⁸⁰ Roundtable consultation, 16 June 2004.

⁸¹ Roundtable consultation, 16 June 2004.

⁸² Nicholson et al., *Critical Issues for Parents with Mental illness and Their Families*, p. 15.

are involved in the denial of legal or human rights and/or the obstruction of a client's access to legal recourse.

In the 1993 Burdekin Report, HREOC stated that people who had been the victims of sexual assault in hospital reported not being able to pursue the matter because staff claimed that they were delusional as a result of their mental illness.⁸³ This was also true in cases of more general abuse.⁸⁴ The more recent *Not for Service* study reported widespread concern about the continuing exposure of people with a mental illness to abuse in mental health services and their lack of access to complaints procedures.⁸⁵

In addition, as mentioned in Chapter 3 of this report, people with a mental illness may be afraid of complaining about conditions in boarding houses because they fear being either subjected to more abuse or evicted.⁸⁶ HREOC reported concerns regarding the private sector providing housing for people with psychiatric disabilities:

*This can lead to a conflict of interest in some cases where a profit-making business has the day-to-day responsibility for a vulnerable group of people.*⁸⁷

Non-legal services may face a conflict of interest when clients who are dependent on them call their services into question. One participant interviewed for this study alleged that they had received incorrect advice regarding their eligibility for the disability support pension. They had subsequently attempted to change caseworkers but felt that they were obstructed in this by their existing caseworker.⁸⁸

⁸³ HREOC, *Human Rights of People with a Mental Illness*, p. 273.

⁸⁴ HREOC, *Human Rights of People with a Mental Illness*, p. 271.

⁸⁵ *Not for Service*, p 143; also interview no. 2

⁸⁶ NSW Ombudsman, *Report under Section 26 of the Ombudsman Act*, paras 8.13 and 7.3.58; also consultation with community worker, Sydney, October 2004.

⁸⁷ HREOC, *Human Rights of People with a Mental Illness*, p. 360.

⁸⁸ Interview No. 3.

Supporting non-legal agencies

[It depends on] whether or not their youth service provider is linked in and understanding of their legal needs through the system. So again, legal education of the youth workers is fundamental in that sense.⁸⁹

Stakeholders made a couple of suggestions to improve the ability of non-legal service providers to provide support to clients with a mental illness who have a legal problem. A few non-legal service providers commented that if they were going to help their clients with legal problems, then they needed to be able to access legal information and advice.⁹⁰ A couple of non-legal service providers commented that they would like access to a centralised call centre that provides legal information and advice.⁹¹

I think that they should have a legal call centre that can offer quick advice, like a hotline. Where you can ring and say "I have this person, and this has happened, and that happened, can you either direct me to where I need to go, or is there another way of dealing with it other than through the court system."⁹²

Two non-legal service providers and one roundtable attendee suggested that it would be useful to be able to access a service that could provide information about legal referral networks so that they can better support their clients who have legal problems.⁹³

Several stakeholders also stressed the importance of building relationships between non-legal and legal service providers.⁹⁴ Such a relationship may mean that non-legal services are more comfortable calling a legal service to ask about potential legal issues. For example, Maroubra Mental Health Centre

⁸⁹ Consultation with CLC workers, Shopfront, September 2004.

⁹⁰ Consultations with senior public servant, NSW Centre for Mental Health, March 2005; mental health worker, Sydney, September 2004; also roundtable consultation, 3 June 2004.

⁹¹ Consultations with mental health worker, Sydney, September 2004; psychiatrist, Sydney, August 2004.

⁹² Consultation with mental health worker, Sydney, September 2004.

⁹³ Consultations with mental health worker, Sydney, September 2004; official visitor, October 2004; also roundtable consultation, 3 June 2004. For example, to assist its workers in their referral role, Centrelink has developed a referral database containing both legal and non-legal services.

⁹⁴ Consultation with mediator, community justice centre, September 2004. Also roundtable consultation, 16 June 2004; consultations with CLC workers, Shopfront, September 2004, mental health worker, September 2004; solicitor, CCLC, August 2004.

and Shopfront work together to assist disadvantaged young people. The availability of a service like Shopfront allows social workers and counsellors from Maroubra to have access to information about legal issues and the legal process. It also allows Shopfront solicitors to benefit from support provided by Maroubra Mental Health Centre to the client, through the legal process.

Most of our clients are referred by youth services or mental health services. If we get a referral from one of these community centres we know it's a serious referral, and they think they will need extra help through the process. We haven't refused one yet, I don't think.⁹⁵

As part of their commitment to community legal education and as a way of raising their profile in the local community, both Marrickville and Kingsford Legal Centres run a program of legal workshops for community workers. Subjects covered include victim's compensation, legal problem-solving and referral, social security, anti-discrimination laws, tenancy, powers of attorney and enduring guardianships, family law/domestic violence and employment. These workshops are in recognition of the need for relationship building between legal and non-legal service providers and of the latter's need for legal education in order to better assist their clients with their legal problems.⁹⁶

Summary

Consultations for this and other studies indicate that people with a mental illness are likely to be in contact with a range of non-legal service providers for a variety of reasons, including mental health treatment, financial assistance, housing assistance, other welfare assistance and recreation. Consultations for this study also indicate that non-legal services are often the first point of call for disadvantaged people when they have a legal problem and that non-legal service providers often assist their clients with their legal problems and can be important pathways to legal services.

Non-legal services may support clients with a mental illness who have legal issues, first by assisting them to identify that they have a legal problem and

⁹⁵ Consultation with CLC workers, Shopfront, September 2004.

⁹⁶ Consultation with CLC workers, Marrickville Legal Centre and KLC, January 2006.

by providing them with legal information. They may refer clients to solicitors and accompany them to appointments with solicitors. Non-legal services can assist legal service providers by communicating the client's situation, including the client's illness, the effects of medication, their general life circumstances (including how much support they have) and what their current legal issue is. Non-legal service providers may provide support to people through the legal process and also advocate on a client's behalf to government departments such as Centrelink and DOH and in some cases, before tribunals.

This assistance can be very important in helping clients to overcome the barriers to accessing legal assistance that were raised in Chapter 4. However, consultations for this study suggest that non-legal workers may not always possess the legal knowledge and knowledge of legal assistance required in order to give a client information about a legal issue or refer them onto a lawyer. A few non-legal service providers suggested that it would be useful to be able to access legal advice and information as issues arise. Legal and non-legal service providers also suggested that relationships between non-legal and legal agencies could be further developed to improve gaps in knowledge.

Furthermore, non-legal agencies may not be equipped in terms of resources and availability of staff. The reported crisis in mental health care and constraints on resources may mean that non-legal agencies are not always able to provide support to clients with a mental illness who have a legal problem, or if they can it may need to be of a more limited nature (e.g. a referral to a legal service rather than accompanying the client to the appointment).

In addition, for a number of reasons, some people with a mental illness may not be accessing non-legal services. Again, lack of services as a result of the reported crisis in mental health care, lack of resources, lack of awareness of services and the stigma associated with having a mental illness may be preventing people with a mental illness from accessing non-legal services and agencies. This suggests that some people with a mental illness may be isolated from both legal assistance and non-legal assistance. This creates a major barrier to accessing justice for this group of particularly marginalised people, who could benefit greatly from some form of assistance with their legal problems.

7. Discussion and Conclusion

The aim of this project was to examine the capacity of people with a mental illness in NSW to obtain legal assistance and participate effectively in the legal system. It also examined the role that non-legal service providers play in supporting people with a mental illness during the legal process and in accessing legal assistance. The Project sought the views of people with a mental illness, as well as legal service providers, court and tribunal staff, and non-legal service providers who provide support and advocacy to people with a mental illness. Qualitative methods of data collection, including semi-structured interviews and focus groups, were employed to gather these views. Information was also drawn from the relevant literature, available statistics and from case studies provided by stakeholders.

Social and economic disadvantage and mental illness

A considerable number of Australians currently have a mental illness, or will have a mental illness at some time during their lives. Approximately one in five Australian adults had a mental illness in 1997.¹ While the experience of mental illness differs according to the nature of the illness and its severity, people who have a mental illness can face many barriers to participating in everyday activities, such as employment and education.² Hence, while not all people with a mental illness are financially disadvantaged, an overwhelming theme raised in the Project is that many people with a mental illness face great social and financial disadvantage. The overview of available data presented in Chapter 1 indicated that people with a mental illness have lower rates of educational attainment, are less likely to be employed full-time, and are often

¹ Andrews et al., *The Mental Health of Australians*.

² Andrews et al., *The Mental Health of Australians*; Jablensky et al., *People Living with Psychotic Illness*.

reliant on social security benefits. People with a mental illness are less likely to be married or living in a relationship, and have high rates of divorce and separation. Previous literature has indicated that many people with a mental illness are dependent on private rental accommodation, public and community housing and boarding house accommodation. Housing stress and homelessness is a reality facing many people with a mental illness.³

The data collected in the Project suggested that the legal issues facing people with a mental illness (see Chapter 3) reflect the disadvantage that they experience. These people experience social security problems which can place them at risk of having a very low income. Problems with proving eligibility for the DSP may mean that many receive other social security benefits, which are paid on less generous terms (both in the base rate and the generosity of the ‘taper’ for any non-pension income) and have much stricter ‘compliance’ obligations attached to them. Due to the nature of their illness, they may also have problems adhering to these requirements, and face being breached and cut off from payments. This places them at risk of increased financial disadvantage.

The Project also found that people with a mental illness can be vulnerable to credit card debt and other contract-related debt. Consultations indicated that they are also vulnerable to receiving fines, particularly those who are young and homeless. These legal issues are compounded by the fact that people with a mental illness may face discrimination in seeking and maintaining employment. If unresolved, these issues can place them at risk of experiencing even greater financial disadvantage.

Housing-related legal issues, including housing-related debt and eviction from both public housing and private rental accommodation, can make people with a mental illness vulnerable to housing stress and homelessness. According to consultations, neighbourhood disputes and the recent introduction of ABAs by DOH could affect them and place them at risk of homelessness. It was reported that people with a mental illness living in both licensed and unlicensed boarding

³ Jablensky et al., *People Living with Psychotic Illness*; Select Committee on Mental Health, *Mental Health Services in New South Wales*; HREOC, *Human Rights and Mental Illness*.

house accommodation lack privacy, contend with dangerous and unsanitary conditions, face abuse from other residents and operators and are without legislative protection against arbitrary eviction. Again, the vulnerability to homelessness generated by these legal issues is also compounded by the fact that people with a mental illness can face discrimination in accessing private rental accommodation.

In addition, the data suggests that people with a mental illness are vulnerable to a range of legal issues that are related to violence and family breakdown, such as, family law and victim of crime related legal issues. They can also face problems in retaining their children under Commonwealth family and state care and protection laws.

The fact that these legal issues may have serious financial and personal consequences if not addressed highlights the importance of accessing legal assistance and resolving these issues through the legal system. The next section will outline the barriers faced by people with a mental illness in accessing legal assistance and participating in the legal system.

Mental illness and participation in the justice system

As noted in Chapters 4 and 5, this report found that there are a number of barriers related to the experience of being mentally ill that can prevent people from accessing legal assistance and participating in the legal system. Being susceptible to stress and not coping with stress may deter people with a mental illness from accessing legal assistance, or from lodging a complaint or an appeal. The stress they experience in the legal system is also compounded by the fact that legal processes can be intimidating and frightening. Courtrooms can be particularly formidable and austere environments. In addition, the adversarial process may not be conducive to their needs as these processes do not enable people to relate more directly with judges and other legal stakeholders. For these reasons, people with a mental illness can benefit greatly from being legally represented, particularly when they have to go to court.

Cognitive impairment, which can be associated with mental illness, may prevent some people from being able to comprehend legal documents, understand what is going on during the legal process and communicate with their lawyer. Furthermore, a lack of organisation and problems with time management—sometimes a characteristic of people with a mental illness—can prevent people from keeping appointments with lawyers and turning up to court on time.

Problems with communication can also pose a barrier to accessing legal assistance and participating in the legal process. People with a mental illness may have problems communicating information, complaints and instructions to their solicitor, which may result in their legal issue not being correctly addressed. These barriers are compounded for people with a mental illness whose first language is not English. According to consultations with service providers, communicating over the phone can also be a barrier for people with a mental illness who are often more comfortable communicating face-to-face. Problems communicating at court or at a tribunal may also present a barrier to people participating effectively in the process, if they are not able to communicate the substance of their complaint.

Need for flexibility

Barriers related to the experience of mental illness could be addressed through the adoption of a more flexible approach to legal service provision, courts, tribunals and other legal processes (see Chapter 5). For example, to overcome communication difficulties with solicitors, more time could be allowed for appointments with clients who have a mental illness. Implementing a case management approach for people who have difficulties with organisation and complying with time frames could also be highly beneficial. They may require more intensive assistance with tasks such as filling out forms.

In terms of legal processes, this could involve establishing processes that are less adversarial and less formal, such as those found at the SSAT and HREOC. Not only were processes like these reported to be less stressful and intimidating, but they can also allow for more engagement between litigants, advocates and

other staff, which may be beneficial in overcoming communication issues. Furthermore, being aware of and being flexible towards the needs of people with a mental illness, such as allowing for breaks and allowing more time to explain things, may also assist in overcoming stress and communication problems.

The adoption of a more therapeutic jurisprudence based approach to courtroom processes may also assist in breaking down some of the barriers to people with a mental illness participating in the legal system. Problem-solving courts and problem-solving lists, such as the NSW Drug Court and the NSW Local Court MERIT program, are examples of courts that have adopted a therapeutic jurisprudence approach to delivering justice. These courts attempt to address the behaviour of offenders that contributed to the offence being committed. This is done by tailoring an outcome that addresses the particular needs of the offender, such as drug and alcohol treatment. In addition to tailoring a more ‘therapeutic’ outcome, courts such as these also attempt to involve the offender in the process as much as possible, by implementing a less adversarial approach within the courtroom, thus allowing for a more direct interaction between judges and offenders. Although many of the courts that implement a therapeutic jurisprudence approach are specific courts or lists, it has been suggested by the Center for Court Innovation and the California Administrative Office of the Courts that the features of this approach be implemented on a day-to-day basis in mainstream courts.⁴

Training programs promoting awareness of mental illness and disability, and teaching service providers how to provide effective services to people with a mental illness, could also be beneficial for legal service providers, judges, court staff and other legal stakeholders.

Credibility

Although there is now a greater awareness and understanding of mental illness in the community, it is still commonly misunderstood. Negative perceptions of mental illness—including that people with a mental illness have violent

⁴ Farole & Puffett, *Can Innovation be Institutionalized?*

tendencies—lead to stigma and discrimination in the community. Those interviewed for this study indicated that people with a mental illness also face stigma in the legal system, where they are often viewed as lacking credibility. As discussed in Chapters 4 and 5, the perception that people with a mental illness are unable to perceive the ‘reality’ of events, and are therefore not telling the truth, can create a barrier to accessing legal services, and prevent people from participating effectively in the legal system.

For example, service providers reported that, in some circumstances, lawyers have difficulties believing or taking seriously a complaint from a person with a mental illness, particularly if what they are saying is not clear. This may be exacerbated by communication problems between lawyers and clients. Not being taken seriously could also prevent people from addressing their legal issues. A recommendation was for solicitors working with clients who have a mental illness to treat all their claims as legitimate, and to work together with their client to try and gain a clear understanding of events.

Similarly, in the legal system people with a mental illness (particularly those who have been the victim of sexual assault) may not be taken seriously when they are giving evidence or even making a complaint to police. This can in turn deter those who have been the victim of an assault from making a complaint to the police. People with a mental illness who are viewed as being ‘excessive complainants’ are also seen to lack credibility. Where people have legitimate complaints, perceptions that they are being vexatious may prevent them from being taken seriously by people in the legal system.

Misconceptions of mental illness within the legal system could be addressed by providing training to people in the legal system to make them more aware and more understanding of people with a mental illness. This may overcome common beliefs that people with a mental illness are less credible.

Identification of mental illness

In order to address the needs of people with a mental illness within the legal system, there need to be systems in place to identify that people actually have a mental illness. However, one of the major barriers raised in this report is

that people with a mental illness, for a variety of reasons, are not identified as having a mental illness, either by legal service providers or in the legal system (see Chapters 4 and 5). This is because it is either not obvious that people have a mental illness—people may not wish to disclose that they have an illness because of potential stigma and discrimination, or they may be reluctant to disclose this information for cultural reasons—or people themselves might not be aware that they have a mental illness.

The implications of not being identified as having a mental illness are that many do not have their needs met by either legal service providers or in the legal system. For example, if a solicitor is aware that a person has a mental illness, they may set aside more time or be more flexible in response to the needs of a particular client. Furthermore, eligibility for legal aid representation, and decisions regarding whether representation should be granted to a client by a CLC, often include an assessment of whether a person is particularly disadvantaged—including whether they have a mental illness. Hence, if people do not disclose that they have a mental illness, they reduce their chance to be eligible for further legal assistance.

Furthermore, failure to identify that a person has a mental illness during a legal process may mean that person's particular needs are not catered for during the process. For example, options such as allowing a person to take breaks, allowing for more time, or conducting processes over the phone, may not be offered to a person, unless it was recognised that they had a mental illness. In addition, in those matters where mental illness is taken into consideration in determining the outcome of a case, failure to recognise that a person has a mental illness would mean that the illness is not taken into consideration in determining the outcome. That said, it should be recognised that in family law, and care and protection matters, people with a mental illness may be reluctant to disclose that they have a mental illness, for fear that it will be used in a way that does not favour them.

Problems with identifying that a person has a mental illness may be improved by the provision of training on mental health issues to lawyers and others in the legal system. However, it should be acknowledged that it is not the role of legal professionals to make mental health assessments of clients. Creating an

environment whereby people feel comfortable and are encouraged to divulge that they have a mental illness may address some of the concerns people have about disclosure. Court-based assessment services such as the NSW Statewide Community and Court Liaison Service also provide valuable assistance to courts in identifying those clients who have a mental illness.

The role of non-legal service providers

By virtue of their mental illness and their financial disadvantage, Chapter 6 discussed the way in which people with a mental illness are likely to come into contact with a range of non-legal service providers to assist them with various day-to-day financial, social and health issues. Consultations suggested that people with a mental illness are in contact with mental health workers, social workers, youth workers, community groups, church services and other government services, such as the OPC and the OPG, Centrelink and DOH. One of the aims of this project was to examine the role that these non-legal service providers play in assisting people with a mental illness through the legal process and in accessing legal service provision.

Instead of accessing a legal service, people with a mental illness may turn to their mental health caseworker, social worker or community group if they have a legal problem. In this respect, non-legal service providers can assist them to identify that they have a legal issue, provide them with information about that legal issue, or refer them to a legal service provider. The ability of the non-legal service provider to offer this information will depend on the individual worker's knowledge about the particular legal issue and their networks, and their knowledge of where to refer a person for legal assistance. Building relationships and sharing information (including training) between non-legal service providers and legal service providers may assist non-legal service providers in this role. In turn, non-legal agencies also provide support and assistance to legal service providers and their clients.

Noting the barriers facing people with a mental illness that prevent them from accessing legal assistance and from participating effectively in the legal process, non-legal service providers can also play a role in helping people with

a mental illness overcome barriers such as communication problems, stress, cognitive impairment and problems with organisation. For example, having a non-legal service provider go along to an interview with a solicitor may assist a person with a mental illness to communicate more effectively and feel more at ease with the solicitor. Furthermore, having a support person at court may also assist people with a mental illness who find the courtroom experience stressful, or who have problems turning up to court on time and understanding what is going on. This aspect of non-legal support to people with a mental illness participating in the legal system is limited by the capacity of many services to provide such support.

The impact of mental health care in NSW

Although the purpose of this project was not to investigate whether people with a mental illness are accessing appropriate mental health care and treatment, an unavoidable theme that emerged during the Project was that many people with a mental illness face great difficulties in accessing mental health care and treatment. This was linked to their experience of certain legal issues, as well as their ability to access legal assistance and to participate in the legal system. That there is a crisis in mental health care in NSW has been documented in the media and the literature.

For example, not having access to appropriate mental health care and treatment may prevent people who face having their children removed by DoCS from accessing the support they need to be able to keep them. Fines and public disorder crimes may arise as a result of not receiving appropriate treatment. It was suggested that many of the barriers related to being unwell, which prevent people from accessing legal services and participating in the legal system, might also be addressed if people had access to mental health care treatment. Finally, diverting people with a mental illness from the criminal justice system, through programs such as the NSW Statewide Community and Court Liaison Service, is undermined by the limited availability of mental health services in NSW. These problems also exist for people with dual diagnosis, who are often ineligible for both drug and alcohol treatment and mental health treatment or who will be refused by mental health service because of their addiction.

Further research

There are a number of issues that were raised in this study which require further research and investigation. For example:

- ◆ This study collected information indicating the particular disadvantage faced by Indigenous people with a mental illness experiencing legal issues. However, as previous researchers have indicated (see Chapter 1 for discussion on this), targeted and carefully designed studies are needed to do justice to the complexity of the issues involved (e.g. issues such as intergenerational grief and cultural conceptions of mental illness).
- ◆ Further investigation could be made into how identification of mental illness in the legal system can be improved. We have highlighted this as a significant barrier facing people with a mental illness, in terms of both accessing legal assistance and participating effectively in the legal system. Several of those interviewed believed that this was a complex issue and not easily resolved. Further research could be done to develop strategies to overcome this barrier.
- ◆ Further investigation could also occur into how the needs and viewpoints of people with a mental illness can be incorporated into legal service delivery.
- ◆ Findings and suggestions raised in this study warrant investigation into the establishment of a specialist legal service for people with a mental illness that would provide legal advice and undertake community legal education, law reform and legal policy analysis for people with a mental illness.
- ◆ A number of strategies and innovations that could improve access to justice for people with a mental illness were discussed in the report. Further research and evaluation into the practical implications of these innovations would be required.

Conclusion

A great number of people in NSW experience mental illness, many of whom are both financially and socially marginalised. The legal issues they face reflect this marginalisation, and if unaddressed, can place people with a mental illness at risk of increased financial disadvantage, homelessness and physical vulnerability. A number of barriers outlined in this report prevent people with a mental illness from addressing these legal issues, which contributes to the relegation of people with a mental illness to the social and financial fringes of our community. Addressing and resolving these barriers reflects a wider community need to develop a better understanding and awareness of the needs of people with a mental illness.

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Appendix 1: Agencies

Legal

- ◆ Mental Health Legal Centre, Victoria
- ◆ Consumer Credit Legal Centre
- ◆ Disability Discrimination Legal Centre
- ◆ Western NSW Community Legal Centre
- ◆ Gilbert + Tobin
- ◆ Legal Aid Commission of NSW
- ◆ Kingsford Legal Centre
- ◆ Redfern Legal Centre
- ◆ Inner City Legal Centre
- ◆ Welfare Rights Centre, Sydney
- ◆ Mental Health Advocacy Service, Legal Aid NSW
- ◆ Shopfront Youth Legal Centre
- ◆ Tania Evers, solicitor
- ◆ Tenants' Union of NSW
- ◆ Women's Legal Services
- ◆ Western Aboriginal Legal Service, Dubbo
- ◆ Maurice Blackburn Cashman Lawyers

Non-legal

- ◆ People with Disability Australia
- ◆ Genderlight, St Vincent de Paul

- ◆ IPS Worldwide (Employee Assistance Program)
- ◆ Maroubra Mental Health Centre
- ◆ Bondi Junction Mental Health Centre
- ◆ Multicultural Mental Health Australia
- ◆ NSW Official Visitors Program
- ◆ Ryde Community Mental Health
- ◆ Relationships Australia
- ◆ St Vincent de Paul Society
- ◆ Lightning Ridge Mental Health Service
- ◆ Service for the Treatment and Rehabilitation of Torture and Trauma Survivors
- ◆ Greg Hugh, psychiatrist
- ◆ Sydney City Council (Homeless Services)
- ◆ Transcultural Mental Health Centre
- ◆ Multicultural Disability Advocacy Association of NSW
- ◆ Richmond Fellowship
- ◆ Schizophrenia Fellowship of NSW
- ◆ Australian Mental Health Consumer Network
- ◆ NSW Consumer Advisory Group—Mental Health Inc
- ◆ NSW Aboriginal Health and Medical Research Council
- ◆ Mental Health Coordinating Council
- ◆ Council of Social Services of NSW
- ◆ South Western Sydney Area Health Service
- ◆ Mental Health Association NSW
- ◆ Mental Health Council of Australia

Courts and tribunals

- ◆ Human Rights and Equal Opportunity Commission
- ◆ NSW Statewide Community and Court Liaison Service, Justice Health
- ◆ Newtown Local Court
- ◆ Waverley Local Court
- ◆ Mental Health Review Tribunal
- ◆ Anti-Discrimination Board
- ◆ Social Security Appeals Tribunal
- ◆ Wollongong Community Justice Centre

Government

- ◆ Australian Competition and Consumer Commission
- ◆ NSW Attorney General's Department
- ◆ Office of the Public Guardian (NSW)
- ◆ Office of the Protective Commissioner (NSW)
- ◆ Centrelink
- ◆ NSW Centre for Mental Health
- ◆ NSW Department of Housing
- ◆ NSW Department of Community Services (SAAP services)
- ◆ NSW Department of Community Services (Care and Protection)
- ◆ NSW Ombudsman
- ◆ NSW Police Force, South Coast (Lake Illawarra, Southern Region)
- ◆ Human Services CEOs' Forum

Academics

- ◆ Terry Carney, Professor, Faculty of Law, University of Sydney.
- ◆ Ian Hickie, Executive Director, Brain & Mind Research Institute, University of Sydney
- ◆ David Abello, Research Officer, Social Policy Research Centre, University of New South Wales
- ◆ Elspeth McInnes, Lecturer, Division of Education Arts and Social Sciences, School of Education, University of South Australia

Appendix 2: Legal Service Questions

General

1. Can you tell us briefly about your role?
2. Who do your clients tend to be? (specific type of mental illness, specific demographics)

Legal needs

3. From your experience, what are the legal issues facing people with a mental illness? (e.g. criminal law issues, family law issues, credit and debt, social security law issues, housing-related issues)
4. Are there any particular issues facing people with a mental illness from particular demographics (e.g. rural/regional, indigenous, women, culturally and linguistically diverse)
5. Are there any particular issues facing people with particular mental illnesses (e.g. schizophrenia vs. depression vs. substance abuse disorders) that you are aware of?

Legal services

6. What barriers do people with a mental illness face in accessing legal information?
7. What barriers do people with a mental illness face in accessing legal services?
8. What gaps (if any) are there in relation to the general provision of legal services to people with a mental illness?
9. What support do you need to better assist your clients with a mental illness?

10. In your experience, what are some of the more effective initiatives that have been implemented in delivering legal services to people with a mental illness?
11. Do you have any other suggestions or comments concerning appropriate models for providing legal services to people with a mental illness?

Participation in the legal process

12. In your experience, what are some of the barriers facing people with a mental illness in accessing and participating in the legal process?
13. What features exist within the courtroom setting that operate to present barriers to people with a mental illness?
14. What are the barriers facing people with a mental illness in accessing and participating in alternative dispute resolution?
15. What barriers do people with a mental illness face in accessing and participating in complaints mechanisms processes (e.g. through Centrelink, Department of Housing)
16. Are you aware of any initiatives that have been put in place to overcome these barriers to participation in the legal process?
17. Could you make any suggestions on ways to improve participation for people with a mental illness in the legal process?
18. Can you think of any examples where access to justice has been improved for people with a mental illness?

Data

19. Do you have any particular case studies that highlight some of the issues we have discussed here today?
20. Do you have any data (such as statistics, annual reports, other reports) that would be relevant to our project?

Is there anything that we have discussed today that you would not like quoted or used in our report?

Appendix 3: Non-legal Questions

Background information

1. Can you briefly tell us about the services that your organisation provides to people with a mental illness?
2. Can you briefly tell us about your role?
3. Who do your clients tend to be? (specific type of mental illness, specific demographics)

Legal needs

4. What are the legal issues facing people with a mental illness (e.g. criminal law issues, family law issues, credit and debt, social security law issues, housing-related issues)?
5. What barriers do people with a mental illness face in obtaining legal information?
6. What barriers do people with a mental illness face in obtaining legal advice?
7. What barriers do people with a mental illness face in accessing legal representation?
8. What are the gaps in legal service provision to people with a mental illness?
9. Do you have a role in assisting your clients with obtaining legal information and advice?
10. If so, what do you need to better support your clients in accessing advice and information?

Participation in the legal process

11. What barriers do people with a mental illness face in going to court?
12. What barriers do people with a mental illness face in going to tribunals (e.g. the Mental Health Review Tribunal or the Consumer, Trader and Tenancy Tribunal)?
13. What barriers do people with a mental illness face in accessing and participating in internal complaints mechanisms processes (e.g. through Centrelink, Department of Housing)?
14. What barriers do people with a mental illness face in accessing and participating in alternative dispute resolution mechanisms (e.g. mediation)?
15. Do you have a role in assisting clients in preparing for and participating at court, tribunals or mediation?
16. If so, what do you need to better support your clients?
17. Are you aware of any initiatives that have been put in place to overcome barriers to participation in the legal process?
18. Could you make any suggestions on ways to improve participation for people with a mental illness in the legal process?

Data

19. Do you have any particular case studies that highlight some of the issues we have discussed here today?
20. Do you have any data (e.g. statistics, annual reports, and other reports) that would be relevant to our project?

Is there anything that we have discussed today that you would not like quoted or used in our report?

Appendix 4: Interview Schedule

Introduction

Hi, thanks for agreeing to chat with me. I really appreciate your time.

I'm What is your name?

I work at a place called the Law and Justice Foundation. This is an independent organisation that is doing research about peoples' access to legal information and legal services.

Go to participant information and consent form.

This must be signed by both the interviewer and participant before continuing ...

1. So thinking about life recently, has there been a particular legal problem or issue you have had to deal with?
2. So when ... happened, what did you do?

If nothing/nowhere—go to Q. 5

3. Did you seek help regarding this problem?
4. If yes, who did you seek help from?
5. *If did nothing/nowhere—why was that? (prompt for other reasons)*
6. Has the problem been sorted/resolved? How?
7. Has there been any other major issue you have faced recently—perhaps where you think a lawyer may have been able to help you out? *(if yes, 1–6 again)*
8. *If there was a legal issue—did you end up getting any advice from a lawyer on this issue? If no, why was that?*
9. *If no legal problem mentioned—If you did have a legal problem, where do you think you might go for help?*

If the issue has been addressed above—skip any repetitive questions below.

I would like to ask you about other aspects of your life at the moment, starting with housing and accommodation issues.

Housing

10. What types of places have you lived in the last three months?

11. Have you had any problems staying in your accommodation in the last three months? (e.g. rent increases, eviction, disputes with the landlord, disputes with other tenants or neighbours)

If there was a problem—

12.
 - a. What happened?
 - b. What did you do about it/where did you go?
 - c. *If something—*did they/that help?
 - d. Was it sorted/is it still an issue for you?
 - e. *If nothing—*why is it still a problem?

13. If you did have a problem with housing, where would you go for help with that?

Employment and income

14. What has been your major source of income in the last three months?
Work (type?)
Benefits/payments (type?)
Other

15. *If employment—*Have you had any problems with your employment recently?

16. *If ceased work recently*—what happened there?
17. *If benefits*—Have you had any problems with your government benefit recently? (e.g. eligibility, calculation of benefit level, breaches, review on change of circumstances, allegation of fraud)

If no government benefit is mentioned—have you applied for any benefits in the last three months?

18. If you did have a problem with your pension/at work, where could you go for help?
19. *If no other income*—why not?

Education

20. Are you currently studying?
21. Have you had any problems relating to your study? (e.g. unfair exclusion or suspension, bullying or harassment)

Credit and debt

22. Have you had any financial problems recently? (e.g. debt, mobile phones, bills, banks, credit cards, someone owing money to you, insurance, unfair contracts, money owed to you)

If there was a problem—

23. a. What happened?
- b. What did you do about it/where did you go?
- c. If nothing, why was that?
- d. If something, did they/that help?
- e. Was it sorted/is it still an issue for you?
- f. If you did have a legal problem with a debt, where could you go for help?

Family

24. Have you been married/defacto?

25. Do you have kids?

If never married/de facto and no kids, go to Q. 28

26. Have you had legal problems related to your family—divorce, custody, problem with paying or receiving child support?

If there was a problem—

27. a. What happened?
- b. What did you do about it?
- c. If nothing, why was that?
- d. If something, did they/that help?
- e. Was it sorted/is it still an issue for you?

Before I move on, I just want to remind you that this is confidential and we will not be identifying any one in the report.

Victim of crime

28. Have you been the victim of a crime recently? (e.g. assault, robbery, stealing?)

If yes to assault—

29. Was that by:
- a. A family member
 - b. Someone else you know
 - c. Another person
 - d. Don't know

30. Did you report that to the police?

31. What happened then?

32. If not reported, why not?

Discrimination

33. Do you feel that you have been unfairly treated by somebody recently? (e.g. at work, school/university, accommodation, in a public place).

Police

34. Have you had any contact with the police in the last three months?
35. If yes, what type of contact have you had with the police?
- a. Reported a crime
 - b. Been asked to “move on” by police
 - c. Charged with a criminal offence
 - d. Been taken somewhere by the police
36. Have you had particular problems with police or the law?
- a. A problem about unfair treatment by the police, e.g. harassment, assault, false imprisonment, wrongful arrest, malicious prosecution, searches
 - b. A problem with bail or remand
 - c. Police failing to respond or investigate a crime
 - d. Police not identifying/catching/arresting someone who committed a crime against you.

If a problem—

37. a. What happened?
- b. What did you do about it?
 - c. If nothing, why was that?
 - d. If something, did they/that help?
 - e. Was it sorted/is it still an issue for you?

38. If you did have a problem with the law or police, who would you go to for help?

39. Have you had any fines—say for fare evasion or littering—in the last three months?

Your health

40. Have you had any injuries or accidents in the last 12 months? (e.g. an injury caused by a car accident; a work-related injury; an injury caused by something else occurring outside the home, e.g. a problem with medical treatment, accident in shopping mall or other public place)

If an injury—

41.
 - a. What happened?
 - b. What did you do about it?
 - c. If nothing, why was that?
 - d. If something, did they/that help?
 - e. Was it sorted/is it still an issue for you?

42. In the last 12 months, have you had any of the following problems:
 - a. Involuntary hospitalisation
 - b. Other problems with mental health care

43. Are you Aboriginal or a Torres Strait Islander?

44. Record ethnicity

45. Record gender

46. Record age

25 or less

Over 25

Record any communication issues

47. Nature/type of mental illness experienced (only ask if not clear)

That is all I wanted to ask you. Are there any other particular legal issues that we may have missed?

Thanks very much for talking with me about your experiences.

Appendix 5: Participant Contacts

Mentally ill participants were contacted through the following services:

- ◆ South Sydney Youth Services
- ◆ St Vincent de Paul, Ulladulla
- ◆ Como Leisure Centre
- ◆ Ryde Mental Health Consumer Network
- ◆ Centacare, Newcastle
- ◆ Mary McKillop Outreach
- ◆ Matthew Talbot Hostel
- ◆ The Big Issue
- ◆ Salvation Army, Outreach Services

Appendix 6: Consent Form

Access to Justice and Legal Needs Research Program Participant Information and Consent Form

The Law and Justice Foundation is undertaking a major research program to examine the legal needs of people in NSW. The Foundation is exploring where people go for help and how to make it easier for people to get legal information and legal services when they need it. We are collecting this information to inform service providers and policy makers about the types of legal problems faced by different people in NSW and to discuss ways to improve the access people have to legal information and legal services. I will not be recording your name on any copy of your interview. All the information you provide will be held securely and confidentially, within the law. If you want us to stop asking questions at any stage or if you want a break, that is not a problem. Please just say so and we will stop. If you decide during the interview that you do not want us to use anything you say in our report, please tell us and we will not use it.

1. Do you have any questions about the research or this interview?
 YES NO
2. Are you happy to talk with us for this research?
 YES NO
3. May I tape record our chat, so I am not writing things down while we are talking? I will erase the tape as soon as I have written up the interview.
 YES NO

Signed: Date:.....

If you have any concerns about the way this interview was conducted, please contact the LJF Principal Researcher Dr Christine Coumarelos, Ph: 9221 3900.

Appendix 7: Service Definitions

Plain language legal information

Plain language legal information is generic material written about legal issues that people might face. It is available in the form of pamphlets, comic books, by telephone or on the internet. It may be distributed directly to clients or passed on orally through support workers. Plain language legal information provides ‘jargon free’ information about specific laws, legal problems or legal processes, or about where to get legal advice or representation.

Legal advice

Legal advice involves the application of legal information to the individual circumstances a person is facing. Legal advice can be given face-to-face, by telephone or, in some cases, by email. An example of legal advice is when a community legal centre lawyer tells a client what her options are after she has received a letter of demand to pay a debt.

Initial legal assistance

Initial legal assistance is when a lawyer advocates or negotiates a matter for a client, without having to lodge formal court proceedings or commence litigation. An example of legal assistance is when a solicitor writes a letter on the client’s behalf in response to a demand to pay a debt. The vast majority of legal problems are resolved either through direct negotiations or correspondence from a legal professional to the other party.

Legal representation

Legal representation covers services provided by legal professionals that go beyond initial legal advice. These services may include drafting documents (e.g. wills, contracts) and representing a person in a legal matter (e.g. negotiating child residency and contact agreements). Legal representation also includes preparing documents for court appearances (e.g. statements of claim, affidavits), and representing people in court and tribunal processes.

Appendix 8: Legal Services in NSW

These are some of the key services providing free assistance to people with legal problems. There are also a range of specialist services such as the Tenants' Union for people with tenancy issues and the Welfare Rights Centre for people with social security issues. If you need help in finding an appropriate service, contact LawAccess NSW on 1300 888 529.

Law Access NSW

What: legal information, advice and referral

Who: information and referral is available to anyone. Priority for legal advice is given to clients with urgent inquiries, with disabilities, from non-English speaking backgrounds or from rural and regional areas.

Where: via a central call centre and the internet

Website: <http://www.lawaccess.nsw.gov.au>

Legal Aid Commission of NSW

What: legal advice and minor assistance in all areas of law, legal representation and dispute resolution

Who: free legal advice and minor assistance is available to anyone and is usually limited to 15 minutes: more complex assistance and representation in court is means-tested. Many people have to pay a contribution for legal representation.

Where: head office and 19 regional offices around NSW

Website: <http://www.legalaid.nsw.gov.au>

Legal Aid NSW Duty Solicitor Service

What: a free legal service available in criminal courts on list days for matters where a possible penalty could include a jail sentence (or the equivalent of). Means-tested (except if someone is applying for bail). Some courts which hear family matters also have a duty solicitor service as do the Children's Courts.

Who: legal advice and representation

Website: <http://www.legalaid.nsw.gov.au>

Community legal centres

What: legal information, referral, advice and limited representation. Community legal centres have a particular focus on civil law. Centres vary in the areas of law they cover.

Who: anyone is able to use the service, and services are not means-tested, but there is a focus on providing services to disadvantaged sectors of the community. Representation is usually limited to those matters that are determined to be in the public interest.

Where: there are 19 generalist community legal centres around NSW and more than 11 specialist community legal centres.

Website: <http://www.naclc.org.au/centres.html>

Chamber registrar service

What: basic legal information and referral. Provides guidance on Local Court procedures and with the drafting of simple documents used in the Local Court. Does not represent clients in court, determine cases or draft documents of a complex legal nature or documents for use in other tribunals or courts.

Who: anybody is able to use the service

Where: all local courts across NSW

Website: http://www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/lc_newwebsitecr

Mental Health Advocacy Service, Legal Aid NSW

What: the primary role of this service is to provide representation at *Mental Health Act* hearings. The two main legal issues the service deals with are compulsory hospitalisation and Compulsory Treatment Orders. Once someone is hospitalised the Mental Health Advocacy Service provides advice on appeals, rights regarding medication and treatment, financial affairs, the Mental Health Review Tribunal, Guardianship Community Treatment Orders and Community Counselling Orders.

Where: Burwood office NSW or via phone statewide.

Pro bono services

Pro bono legal services are provided by private solicitors, legal firms and barristers free or at a reduced fee to clients. Services may offer legal advice, court representation, and other legal work, including drafting documents. Services may also conduct community legal education and provide legal assistance to non-profit organisations. Pro bono services may be provided on a relatively ad hoc basis by individual lawyers or law firms, or in a more coordinated way through the Law Society Pro Bono Scheme.

Aboriginal Legal Services NSW

What: there are six regional Aboriginal Legal Services in NSW. Their role is to provide legal assistance, advocacy and representation to Aboriginal people in the areas of criminal, civil and family law. Some of the services have a larger role involving broader social advocacy for the rights of Aboriginal Australians.

