

Considering Mental Health Courts for South Africa: Lessons from Canada and the United States of America

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Abstract

Under the South African criminal justice system, mentally ill persons in conflict with the law spend long periods awaiting forensic assessment, owing to resource shortages (staff and available beds). Accused persons awaiting forensic assessment are often kept in correctional facilities where mental health care services are lacking. This leaves many accused individuals who are mentally ill at risk of falling between the proverbial cracks of the system. The diversion of the accused with mental illness from the criminal justice system into a treatment programme could address this problem. Currently no such formal diversion option exists in South Africa. Mental health courts as a formal diversion option are gaining popularity in jurisdictions such as Canada and the United States of America, where delays with forensic assessments and, in particular, pre-trial fitness assessments are rife. These courts employ therapeutic jurisprudence to deliver justice. This contribution explores the nature of a mental health court and looks at such courts in Canada and the United States of America and considers whether South Africa could benefit from such a court and whether it would be viable within the South African legislative framework.

Keywords: Mental Illness; Therapeutic Jurisprudence; Criminal Justice System; Mentally Ill Offender; Mentally Ill Accused; Mental Health Court; Fitness to Stand Trial; Fitness to Plead; Diversion; Canada; United States of America

Introduction

Mental illness can affect an accused's fitness to stand trial and his/her criminal capacity. Fitness to stand trial is a pre-trial issue whereas criminal capacity is relevant for the purposes of sentencing. The focus of this article is primarily on fitness to stand trial, which is determined by mental health professionals during a court-ordered forensic assessment,¹ after which the court may find the accused either fit or unfit to stand trial.² Should the accused be found unfit to stand trial, the court may order that he/she be treated in a psychiatric hospital. There will be no trial until the accused regains his/her fitness.³ However, a finding of fitness does not imply that the accused is not mentally ill. In fact, most accused persons sent for fitness assessments in South Africa, Canada and the United States of America (USA) are found fit to stand trial⁴ even though many are diagnosed with a mental illness.⁵ Such an accused is 'fit to stand trial but mentally ill.' The Criminal Procedure Act 51 of 1977 (CPA) does not cater for such a category. This accused is often being detained in prison awaiting trial after the forensic assessment, with little or no mental health support.

The mental health of an accused generally deteriorates during contact with the criminal justice system.⁶ Therefore, the provision of mental health support during this time is essential but is seriously lacking in South African correctional facilities. To aid in the provision of mental health care services to those in need thereof, pre-trial diversion away

1 CPA 51 1977 s 79.

2 CPA ch 13 regulates the position regarding mentally ill accused persons. S 77 specifically deals with fitness to stand trial.

3 CPA s 77(7). Also see Fawzia Cassim, 'The Accused Person's Competency to Stand Trial—a Comparative Perspective' (2004) 45 (1) *Codicillus* 17 at 20.

4 See Tiaan Schutte, "'Single" Versus "Panel" Appointed Forensic Mental Observations: Is the Referral Process Ethically Justifiable' (2013) 6(2) *South African Journal of Bioethics and Law* 64 at 67 for the position in South Africa. See Roy O'Shaughnessy, 'AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial: Canadian Legal Perspective' (2007) 35 (4) *The Journal of the American Academy of Psychiatry and the Law* 505 at 507 for the position in Canada. Also see Christopher Slobogin, Arti Rai and Ralph Reisner, *Law and the Mental Health System Civil and Criminal Aspects* (5th edn, West 2008) 1020 for the position in the USA.

5 This is arguably because there is a very low threshold to determine fitness to stand trial. This is especially the case in South Africa and the USA. See Letitia Pienaar 'Low-threshold Fitness Test in South Africa and the USA: Consequences for the Fit but Mentally Ill Accused' (2019) 52(1) *CILSA* 126–42 where the fitness tests applied in South Africa and the USA are compared.

6 In *Phuneuf v Ontario* 2010 ONCA 901 para 28 the Ontario Court of Appeal stated that: 'There can be no doubt that the incarceration of mentally ill persons in a jail setting risks further deterioration of their mental state and potentially places them at real risk of physical harm.' Also see Natasha Bakht, 'Problem Solving Courts as Agents of Change' (2005) 50 *Criminal Law Quarterly* 224 at 245 where it is stated that prisons are not always equipped to deal with the needs of mentally ill persons as they lack staff with the necessary training. See further Robert Bernstein and Tammy Seltzer, 'Criminalization of People with Mental Illness: The Role of Mental Health Courts in System Reform' (2003) 7 (1) *DCL Review* 143 at 145 who point out that, in addition to the deterioration of the mental condition of the accused, mentally ill incarcerated persons are at a higher risk of assault and intimidation by other inmates.

from the criminal justice system into treatment could be considered as an alternative to the traditional criminal justice process. Considering diversion is apt as the Department of Correctional Services shifted its focus from punishment to rehabilitation.⁷

In this article, selected issues surrounding the fit, but mentally ill accused in the South African criminal justice system will be explored. Formal diversion of accused persons from the criminal justice system is explored as a means to ensure that mental health treatment is provided where needed. A formal diversion option that has gained popularity in recent times is the Mental Health Court.⁸ The nature of these courts in Canada and the USA are explored, since their workings are well documented. The focus on these two jurisdictions was motivated by the fact that the reasons for establishing these courts are particularly relevant to the South African context, as will be elucidated in this contribution. The possibility of establishing a South African Mental Health Court is explored. The procedural dynamics of these courts are not considered here as these warrant a separate discussion.

The Mentally Ill Accused in the South African Criminal Justice System

Introduction

Mental illness is increasingly prevalent in South African society,⁹ but it is, however, difficult to establish the exact number of accused persons so afflicted in the South African criminal justice system, since it often goes undetected among detained individuals¹⁰ and frequently only comes to light when a court-ordered forensic assessment is carried out.

7 See Department of Correctional Services *White Paper on Remand Detention Management in South Africa* (Department of Correctional Services 2014) <https://www.gov.za/sites/default/files/gcis_document/201607/white-paper-remand-detention-management-south-africa.pdf> accessed 14 June 2019. This sets out the goals of the South African Department of Correctional Services for the next twenty years, commencing 2005.

8 These courts have been established in, inter alia, New Zealand, Australia, Canada and the USA. See Elizabeth Richardson, Katey Thom and Brian McKenna, 'The Evolution of Problem-solving Courts in Australia and New Zealand: A Trans-Tasman Comparative Perspective' In Richard Wiener and Eve Brank (eds), *Problem Solving Courts: Social Science and Legal Perspectives* (Springer Science and Business Media 2014) 185–210. Also see Suzanne Coghlan and Scott Harden, 'The Queensland Mental Health Court: A Unique Model' (2019) 16(4) *BJ Psych Int* 86–89. For a discussion of mental health courts in Canada and the USA, see Richard Schneider, Hy Bloom and Mark Heerema, *Mental Health Courts—Decriminalizing the Mentally Ill* (Irwin Law 2007).

9 Barbara Simpson and Jennifer Chipps, 'Mental Health Legislation: Does it Protect the Rights of People with Mental Health Problems?' (2012) 48(1) *Social Work* 47. According to Adolph Landman and Willem Landman, *A Practitioner's Guide to the Mental Health Care Act* (Juta 2014) 4, 16.5 per cent of the adult population in South Africa suffers from a mental illness.

10 This could be attributed to the fact that mentally ill remand detainees are often detained without any reference to mental health, even for those known to have a mental illness who should be receiving medication. See Department of Correctional Services *Discussion Document on Management of*

Chapter 13 of the CPA¹¹ provides for a court-ordered forensic assessment to determine the accused's fitness to stand trial. Currently, there are severe delays with forensic assessments in South Africa owing to a shortage of available beds and staff at licenced facilities where assessments may be conducted.¹² An accused could wait several months for a bed to become available.¹³ Such delays cause the accused with suspected mental illness to remain in the criminal justice system for longer periods,¹⁴ which suggests that the system's capacity is inadequate to cater for such individuals. The prolonged contact of the mentally ill accused with the criminal justice system has a negative impact on the accused.

Should an accused be found unfit to stand trial on account of mental illness, the court can make an order under section 77 of the CPA, which includes either treatment in a psychiatric hospital or release, depending on the circumstances.¹⁵ Accused persons with mental illness are, however, often found fit to stand trial. This fit, but mentally ill accused's trial proceeds without any mental health support or any further consideration of the mental illness during the trial (unless he/she raises the insanity defence).

Remand Detainees in South Africa (Department of Correctional Services 2013) <<https://www.yumpu.com/en/document/view/4539584/management-of-remand-detainees-in-south-africa-dcs-home>> accessed 20 June 2019.

- 11 This chapter consists of ss 77, 78 and 79 where s 77 contains provisions regarding fitness to stand trial, s 78 contains provisions regarding criminal capacity and s 79 contains provisions regarding the forensic assessment process to determine either fitness to stand trial and/or criminal capacity.
- 12 Anthony Pillay, 'Could *S v Pistorius* Influence Reform in the Traditional Forensic Mental Health Evaluation Format?' (2014) 44(4) *South African Journal of Psychology* 377 at 378 points out that there are few psychiatrists in South Africa and even fewer who specialise in forensic psychiatry. There are only ten licenced facilities across South Africa where court ordered forensic assessments may be conducted. Also see Anthony Pillay, 'Competency to stand trial and criminal responsibility examinations: are there solutions to the extensive waiting list?' (2014) 44(1) *South African Journal of Psychology* 48 51.
- 13 See *S v Pedro* 2015 1 SACR 41 (WCC) where the accused had to wait for many months before a bed for observation became available at Valkenberg hospital. In *S v Vika* (14519) 2014 ZAWCHC 155 (14 October 2014) (unreported) the accused had to wait eleven months for an available bed at Valkenberg hospital. In *S v Dlali* (3/2015) 2015 ZAECBHC 2 (27 February 2015) (unreported) it took seven months for a bed at the Fort England psychiatric hospital to become available. Also see *De Vos v Minister of Justice and Constitutional Development* 2015 (9) BCLR 1026 (CC) where the shortage of beds in psychiatric facilities is accepted as common cause.
- 14 Especially since accused persons with mental illness are often denied bail. See Schutte (n 4) 67 who stated that the presence of a mental illness rather than the seriousness of the charges, appeared to be the deciding factor as to whether bail should be granted or not.
- 15 CPA s 77(6)(a)(i)(aa) provides for treatment in a psychiatric hospital where the accused is charged with and found to have committed a violent offence. The Criminal Procedure Amendment Act 4 of 2017 introduced conditional and unconditional release as options of orders to be made where an accused is found unfit to stand trial. See s 77(6)(a)(i)(dd) in the case of a violent offence and s 77(6)(a)(ii)(bb) and (cc) in the case of a non-violent offence. Also see in general Letitia Pienaar, 'The Unfit Accused in the South African Criminal Justice System: From Automatic Detention to Unconditional Release' (2018) 31(1) *South African Journal of Criminal Justice* 58–83 where a comparison is drawn between the legal position before and after the Amendment Act.

A fit but mentally ill accused is often returned to custody after the forensic assessment, to await trial. The accused's mental health care needs remain and may even intensify while he/she awaits trial. As intimated earlier, mental health care services in the South African correctional setting is seriously lacking.¹⁶ Accused persons with mental illness have no or limited access to mental health care treatment while they await trial in South Africa.¹⁷ Since the possibility exists that the accused's mental illness will deteriorate during contact with the criminal justice system, it follows that mental health support should be provided to accused persons for the duration of their contact with the system. The South African Department of Correctional Services does try to address this problem by fast-tracking forensic assessments.¹⁸ These initiatives, however, are reported to be ineffective due to inadequate resources in the forensic mental health care system.¹⁹ Untreated mental illnesses can lead to recidivism, causing the mentally ill accused to cycle in and out of the criminal justice system, perpetuating the 'revolving door' phenomenon.²⁰ Recidivism poses a threat to public safety and contributes to prison overcrowding since these persons will be housed in prison repeatedly.

16 *De Vos* case (n 13).

17 *ibid* para 43, where it is stated that: 'It should be noted that the Correctional Services Act behoves the department of correctional services to provide psychological services to detainees with mental illnesses or intellectual disabilities. However, the uncontested evidence presented by Cape Mental Health is that prisons do not have the facilities to provide appropriate treatment and care. This evidence appears to have been accepted by the minister of health before the high court' (sic) [footnotes omitted].

18 Forensic assessments are also referred to as 'mental observations.' The large number of remand detainees, among whom are accused persons with suspected mental illness, presents a huge problem to the state. See Department of Correctional Services (n 7).

19 Resource shortages at facilities where forensic assessments can be conducted as well as a shortage of psychiatrists to conduct such forensic assessments. The resource shortages in South Africa are also confirmed by the Department of Correctional Services (n 10).

20 Greg Denckla and Derek Berman, *Rethinking the Revolving Door* (Court Innovation 2001) <www.courtinnovation.org/sites/default/files/rethinkingtherevolvingdoor.pdf> accessed 7 March 2019. Also, see the information in Canadian Mental Health Association, *Police and Mental Illness: Increased Interactions* (Canadian Mental Health Association, 2005) <<https://www.publicsafety.gc.ca/lbrr/archives/cnmcs-plcng/cn34078-2005-1-eng.pdf>> accessed 13 March 2020, where it is pointed out that persons with mental illnesses are more likely to be arrested and detained again after their release. See further Sharon Garner and Thomas Hafemeister, 'Restorative Justice, Therapeutic Jurisprudence and Mental Health Courts: Finding a Better Means to Respond to Offenders with a Mental Disorder' (2003) 60(1) *Developments in Mental Health Law* 1 at 4 who point out that the fact that many persons with mental illness are homeless, adds to the revolving door problem. Andrea Odegaard, 'Therapeutic Jurisprudence: The Impact of Mental Health Courts on the Criminal Justice System' (2007) 83(1) *North Dakota Law Review* 225 at 231 explains that the revolving door phenomenon is one of the motivations for establishing the mental health court. See further Kelly Frailing, 'The Genesis of Mental Health Courts in the USA and their Possible Applicability for the United Kingdom' (2008) 4(1) *CSLR* 63 at 69; Kelly Frailing, 'Issues Affecting Outcomes for Mental Health Court Participants' (2009) 5(1) *CSLR* 145 at 148 and Alison Read, 'Psychiatric Deinstitutionalisation in BC: Negative Consequences and Possible Solutions' 2009(1) *University of British Columbia Medical Journal* 25.

Given these challenges, accused persons with mental illness should ideally be diverted away from the criminal justice system to treatment programmes where their mental illness could be identified and addressed. The concept of diversion in the South African criminal justice system is explored below.

Diversion of an Accused in the South African Criminal Justice System

The idea of diverting the mentally ill away from the criminal justice system is not foreign to South African law, as traces thereof can be found in the now repealed Mental Health Act.²¹ This Act catered for pre-arrest or pre-booking diversion,²² where an accused is diverted away from the criminal justice system before a criminal charge is filed. A police officer could apply for a treatment order for a mentally ill person when it would be a more suitable option than to put such a person through the criminal justice system.²³ However, this provision was seldom used.²⁴ The Mental Health Care Act²⁵ contains a similar provision.²⁶ It allows police to take a presumably mentally ill person to the hospital for psychiatric evaluation to determine the need for further treatment.²⁷ Effectively, establishing the need for further mental health care treatment is offered as an alternative to arrest.

Pre-arrest diversion will be the most effective way in limiting the number of mentally ill persons coming into contact with the law. However, mental illness is often only detected after the accused has formally entered the criminal justice system after an arrest. Post-arrest or post-booking diversion²⁸ should be available in such instances. Such diversion takes place pre-trial.

21 18 of 1973.

22 Pre-arrest or pre-booking diversion is discussed by Frank Sirotych, 'The Criminal Justice Outcomes of Jail Diversion Programs for Persons with Mental Illness: A Review of the Evidence' (2009) 37(4) *J Am Acad Psychiatry Law* 461 at 462. See further Schneider, Bloom and Heerema (n 8) 72–74 for a discussion on the pre-charge diversion programmes available in Canada.

23 Section 14 of the Mental Health Act 18 of 1973. Also see Albert Kruger, *Mental Health Law in South Africa* (Butterworths 1980) 160. This person would then be sent for treatment at an institution by way of a reception order in terms of the Mental Health Act.

24 Kruger (n 23) 160 n 70.

25 17 of 2002.

26 Mental Health Care Act s 40.

27 *ibid* s 34(3)(b). If there is no sign of mental illness after the psychiatric evaluation, the apprehended person will be discharged from the psychiatric institution unless he/she consents to further treatment. See Mental Health Care Act s 34(3)(a).

28 The terms pre-arrest and post-arrest are clearer descriptors than pre-booking and post-booking of the stage in the South African criminal process at which the diversion option occurs.

Post-arrest diversion in South Africa is either formal or informal.²⁹ Formal diversion exists for child offenders through the Child Justice Act (CJA).³⁰ The CJA formalises diversion for youth offenders and aims to avoid or limit youth offenders' contact with the traditional criminal justice system.³¹ Where diversion is not appropriate, the child justice court hears the youth offender's case in a setting other than the traditional criminal court.³²

Informal diversion is usually applicable in the case of petty crimes.³³ It does not follow a set programme and allows the prosecutor to be innovative about the programmes that the accused should complete.³⁴ The prosecutor can exercise his/her discretion and decline to prosecute and opt for pre-trial diversion or the non-criminal resolution of the matter.³⁵ Although participation in informal diversion programmes is voluntary,³⁶ the accused must acknowledge liability for the offence.³⁷ Compliance with the diversion programme usually leads to the withdrawal of the charge(s) against the accused,³⁸ thus avoiding a criminal record.³⁹

29 See NPA of South Africa, *Prosecution Policy* (National Prosecuting Authority, 2013) 24–29 <<https://www.npa.gov.za/sites/default/files/Library/Prosecution%20Policy%20%28Final%20as%20Revised%20in%20June%202013.%2027%20Nov%202014%29.pdf>> accessed 17 December 2020.

30 75 of 2008. Diversion of youth offenders via the Child Justice Act 75 of 2008 is very successful as is evident from the reduction in the number of children in remand detention. See Department of Correctional Services (n 10) 53 where it is reported that children in detention decreased with 86.9 per cent in the period from 2007 to 2012.

31 See in general Jamil Mujuzi, 'Diversion in the South African Criminal Justice System. Emerging Jurisprudence' (2015) 1 SACJ 40–58.

32 Child justice courts may also divert youth offenders if it deems diversion appropriate. See the Child Justice Act s 67(1). These courts assist to provide for the special treatment of children in a justice system designed to break the cycle of crime, and to prevent children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in accordance with the constitution, including the use of diversion.

33 NPA of South Africa, 'Awaiting Trial Detainee Guidelines' as discussed in Centre for Applied Legal Studies, *A Measure of Last Resort: Research Report on Remand Detention in South Africa* (Centre for Applied Legal Studies 2013) <<https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/resources/A%20measure%20of%20last%20resort%20Research%20report%20on%20remand%20detention%20in%20South%20Africa.pdf>> accessed 14 April 2020.

34 Catherine Clarke, 'Message in a Bottle for Unknowing Defenders: Strategic Plea Negotiations Persist in South African Criminal Courts' (1999) 32(2) CILSA 141 at 159.

35 NPA Prosecution Policy (n 29) 4–5.

36 The voluntary nature of diversion is stressed in NPA Prosecution Policy (n 29) 29.

37 Clarke (n 34) 159. This requirement is in line with the principle of taking responsibility for one's actions as promoted by therapeutic jurisprudence, that is typically applied in diversion programmes. See NPA Prosecution Policy (n 29) 29 where it is stated that the accused must admit his involvement in the crime.

38 Clarke (n 34) 160. The accused will have to submit a certificate or proof of completion of the diversion programme. See NPA Prosecution Policy (n 29) 29.

39 Clarke (n 34) 160.

No formal diversion options currently exist in South Africa for mentally ill accused persons who are fit to stand trial. Informal diversion through prosecutorial discretion could be used to divert the mentally ill accused away from the criminal justice system by placing him/her in a treatment programme rather than pursuing the prosecution. This is most likely not done in all cases involving mental illness, though, since the exercise of discretion leaves room for a variety of options in terms of disposal of the case. Whether this indeed happens in practice and how often is uncertain, as these diversion practices are often not documented. However, formal diversion options are preferred as it creates certainty in terms of the process to be followed and will ensure that all accused persons who qualify for diversion are granted the opportunity to access a treatment programme.

As alluded to earlier, a formal diversion programme showing particular promise is the mental health court. The concept of this court and what it sets out to achieve is discussed below.

Mental Health Court: A Therapeutic Response

Introduction

A growing number of mentally ill persons are coming into conflict with the law.⁴⁰ These individuals are over-represented in the Canadian and American criminal justice systems.⁴¹ This increase poses a challenge to traditional criminal justice systems as they are generally ill-equipped to deal with the complex issues associated with mentally ill accused persons.⁴² Mental health courts aim to provide a solution to the unique

40 Schneider, Bloom and Heerema (n 8) and Fuller Torrey and others, *Criminalizing the Seriously Mentally Ill. The Abuse of Jails as Mental Hospitals* (Public Citizen's Health Research Group and the National Alliance for the Mentally Ill 1992) 40–42.

41 Sirotych (n 22) 461; Tanya Dupuls, Robin MacKay and Julia Nicol, *Current Issues in Mental Health in Canada: Mental Health and the Criminal Justice System* (Parliamentary Information and Research Service 2013) 1 where it is pointed out that mental illness in the Canadian federal system is three times more prevalent than in the general population. See further Torrey and others (n 40) 41 who explains that the number of mentally ill persons encountering the criminal justice system in the USA rapidly increased since 1970 due to the deinstitutionalisation movement.

42 Kelly Frailing, 'How Mental Health Courts Function' (2010) 33(4) *Intl JL Psychiat* 207; Jeffrey Draine, Amy Wilson and Wendy Pogorzelski, 'Limitations and Potential in Current Research on Services for People with Mental Illness in the Criminal Justice System' (2007) 45(3/4) *Journal of Offender Rehabilitation* 159–164 who ascribes the emergence of mental health courts to the lack of effectiveness of traditional court proceedings. Also see Bernstein and Seltzer (n 6) 162; Casey Welch and John Fuller, *American Criminal Courts Legal Process and Social Context* (Routledge 2014) 464 and Odegaard (n 20) 225. The increase of mentally ill persons in the Canadian and American criminal justice systems could also be linked to the fact that mental illness is the leading cause of disability in Canada and the USA. See World Health Organisation, *World Health Report: Mental Health: New Understanding, New Hope* (WHO, 2001) <http://www.who.int/whr/2001/en/whr01_en.pdf> accessed 19 November 2020 where mental illness is identified as the main cause of disability in Canada and the USA.

challenges that mental illness brings to the criminal justice system. These courts deliver justice through therapeutic jurisprudence to address mental illness as the underlying cause of the accused's conflict with the law. What follows is a discussion of the nature of mental health courts and therapeutic jurisprudence. The mental health courts in Toronto, Canada and Brooklyn in the USA are discussed as examples of these courts.

What is a Mental Health Court?

Mental health courts are alternatives to traditional prosecutions aimed at diverting the mentally ill accused away from the criminal justice system into the mental health care system.⁴³ The accused is 'ordered' to undergo a treatment programme that addresses his/her unique mental health care needs. The accused, although mentally ill, must be fit to stand trial for his/her case to be processed through this court.

There is no uniform mental health court model as each jurisdiction creates its model based on its community's needs.⁴⁴ This makes finding an exact universal definition for a mental health court challenging. Steadman and others⁴⁵ offer a functional definition of mental health courts as courts that deal with mentally ill offenders in a separate docket, use a collaborative team to make linkages to treatment, and monitor the treatment programmes with possible criminal sanctions for non-compliance. Schneider and others,⁴⁶ however, suggest a definition that focuses on the characteristics of a mental health court, which include rehabilitation of the mentally ill accused, reducing or avoiding time spent in jail, a collaborative and co-operative⁴⁷ rather than an adversarial approach, decriminalisation of the mentally ill and re-integration of the accused into the community.⁴⁸ A combination of these two definitions describes the essential elements of a mental health court and highlights its therapeutic approach to cases involving mental illness.

As stated, one of the characteristics of mental health courts is the focus on rehabilitation. These courts offer a rehabilitative response that focuses on treatment rather than criminal sanctions.⁴⁹ The philosophy behind a rehabilitative response is that the

43 Garner and Hafemeister (n 20) 5.

44 Amy Watson, Patricia Hanrahan, Daniel Luchins and Arthur Lurigio, 'Mental Health Courts and the Complex Issue of Mentally Ill Offenders' April (2001) 52(4) *Psych Serv* 477. Also see Arthur Lurigio and Jessica Snowden, 'Putting Therapeutic Jurisprudence into Practice: The Growth, Operations, and Effectiveness of Mental Health Courts' (2009) 30(2) *The Justice System Journal* 196 205.

45 Henry Steadman, Susan Davidson and Collie Brown, 'Law and Psychiatry: Mental Health Courts: Their Promise and Unanswered Questions' (2001) 52(4) *Psych Serv* 457 458. Also see Lurigio and Snowden (n 44) 205 where the characteristics of mental health courts are discussed.

46 Schneider, Bloom and Heerema (n 8) 85.

47 *ibid* 92. Also see Susan Goldberg, *Judging for the 21st Century: A Problem Solving Approach* (National Judicial Institute 2005) 26.

48 Schneider, Bloom and Heerema (n 8) 85 advocate that these characteristics should be incorporated into the actual definition of a mental health court and offers it as an alternative to the functional definition offered by Steadman, Davidson and Brown (n 45) 458.

49 Sirotych (n 22) 461 and Schneider, Bloom and Heerema (n 8) 3.

traditional approach to deviant behaviour (punishment and incarceration), where the behaviour is predominantly the product of a mental disorder, is inappropriate and ineffective.⁵⁰ There is an understanding in these courts that a rehabilitative approach will best serve the wellbeing of the mentally ill accused and the public's interests.⁵¹ The result of such rehabilitative response is reduced recidivism⁵² which in turn contributes to a safer society.

A characteristic of mental health courts mentioned in both Steadman and Schneider's definitions is a collaborative approach. These courts aim to improve collaboration between the criminal justice system and the mental health care system.⁵³ Since expertise from both these systems is required to deal with cases of mentally ill persons effectively, these courts follow a multi-disciplinary approach.⁵⁴ Each mental health court treatment programme is designed with input from a multi-disciplinary team based on the unique circumstances and particular treatment-needs of the accused individual.⁵⁵

Mental health courts are more effective than traditional courts in connecting mentally ill persons in the criminal justice system with mental health care services.⁵⁶ This is arguably due to mental health care professionals' involvement in the early stages of the criminal court process. The involvement of mental health care practitioners in the legal

50 Schneider, Bloom and Heerema (n 8) 3. Also see Odegaard (n 20) 250 who agrees that it is inappropriate to process cases of persons with mental illness through a specialised court rather than the traditional criminal justice system.

51 Schneider, Bloom and Heerema (n 8) 93.

52 Bernstein and Seltzer (n 6) 144, 148, where it is stated that the extent to which community mental health care facilities provide access and treatment to the mentally ill, has a big role to play in reducing re-offending. Also see Craig Hemmens, David Brody and Cassia Spohn, *Criminal Courts. A Contemporary Perspective* (SAGE publications 2013) 440 who reiterate that the goal of all problem-solving courts is to reduce recidivism and to produce productive members of society. Also see Jay Albanese, *Criminal Justice* (SAGE publications, 2013) 244; Alison Redlich, Henry Steadman, John Monahan and others, 'Patterns of Practice in Mental Health Courts: A National Survey' (2006) 30(3) *Law and Human Behaviour* 347–362.

53 Hemmens, Brody and Spohn (n 52) 454. The lack of cooperation might be attributed to the difference between these two systems in that the mental health care system focuses on patient-centred treatment whereas the criminal justice system is driven by public safety and individual responsibility. See Draine, Wilson and Pogorzelski (n 42) 170 and Shelli Rossman and others, *Criminal Justice Interventions for Offenders with Mental Illness: Evaluation of Mental Health Courts in Bronx and Brooklyn, New York* (USA National Institute of Justice, 2012) 7, 57 where better collaboration between these two systems is set as an objective of the Brooklyn Mental Health Court.

54 See Odegaard (n 20) 238 for a discussion of the unique way in which each role player contributes to the mental health court's functioning.

55 Schneider, Bloom and Heerema (n 8) 58.

56 Lauren Almquist and Elizabeth Dodd, *Mental Health Courts: A Guide to Research-informed Policy and Practice* (Council of State Governments Justice Centre, New York, 2009) vi (also available at <https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/CSG_MHC_Research.pdf>).

process helps shape the interpretation and application of laws relating to the mentally ill in the criminal justice system.⁵⁷

As specialised criminal courts for the mentally ill accused,⁵⁸ mental health courts aim to address mental illness as the underlying cause for the accused's contact with the criminal justice system.⁵⁹ This is achieved through the application of therapeutic jurisprudence.⁶⁰

Therapeutic Jurisprudence

Therapeutic jurisprudence is applied in problem-solving courts such as mental health courts.⁶¹ The term emerged as a mental health law theory and is a direct response to the mentally ill's criminalisation.⁶² Bernstein and Seltzer⁶³ explain the underlying principles of therapeutic jurisprudence within the context of mental health courts as:

From the Criminal Law perspective, two rationales underlie the therapeutic court approach: first, to protect the public by addressing the mental illness that contributed to the criminal act, thereby reducing recidivism, and second, to recognise that criminal sanctions, whether intended as punishment or deterrents, are neither effective nor morally appropriate when mental illness is a significant cause of the criminal act.

Therapeutic jurisprudence aims to address and alleviate underlying problems that may cause a person to come into conflict with the law.⁶⁴ It entails that therapeutic goals should be incorporated in applying the law⁶⁵ to facilitate the accused's rehabilitation. Therapeutic jurisprudence further aims to address barriers in the existing criminal justice system that hampers the optimal processing of cases involving mental illness.⁶⁶ The traditional adversarial approach may, for instance, be perceived as a barrier since it does not allow for the adequate consideration of the unique circumstances and treatment needs of an accused. As part of therapeutic jurisprudence, mental health courts

57 Sean Kaliski (ed), *Psychological Assessment in South Africa* (Oxford University Press 2006) 1.

58 Redlich and others (n 52) 348.

59 Bernstein and Seltzer (n 6) 148; Hemmens, Brody and Spohn (n 52) 462 and Albanese (n 52) 244.

60 See Schneider, Bloom and Heerema (n 8) 39; Kathleen Stafford and Dustin Wygant, 'The Role of Competency to Stand Trial in Mental Health Courts' (2005) 23(2) *Behav Sci Law* 245 at 246 and Odegaard (n 20) 228.

61 See Schneider, Bloom and Heerema (n 8) 39 and Stafford and Wygant (n 60); Odegaard (n 20) 228.

62 The term was coined by Wexler. See Mark Heerema, 'An Introduction to the Mental Health Court Movement and its Status in Canada' (2005) 50 *Crim LQ* 255 at 261 and Schneider, Bloom and Heerema (n 8) 43.

63 Bernstein and Seltzer (n 6) 148.

64 Steadman, Davidson and Brown (n 45) 261.

65 Schneider, Bloom and Heerema (n 8) 3; David Wexler, 'Therapeutic Jurisprudence and the Criminal Court' (1993) 35 *91 WM and Mary Law Review* 279 280. Also see Sean Kaliski, M Borchers and F Williams, 'Defendants are Clueless—the 30-day Psychiatric Observation' (1997) 87(10) *SAMJ* 1351 at 1354 where it is stated: 'Mental illness should not be used to escape justice but should certainly be important in deciding on disposal ie treatment.'

66 Heerema (n 62) (2005) 261.

overcome this barrier by following a collaborative and cooperative approach.⁶⁷ This different approach does not aim to replace the traditional goals of the criminal justice system—instead, it aims to function within the parameters of such goals to benefit the mentally ill accused⁶⁸ and society.

Although all mental health courts apply therapeutic jurisprudence, the models and goals of these courts differ from one jurisdiction to the next, as they are guided by the substantive and adjectival law of the particular jurisdiction and the specific needs of the community that it serves.⁶⁹ The mental health courts' goals in Toronto, Canada and Brooklyn in the USA are briefly discussed below to illustrate what they set out to achieve.

The Mental Health Court in Canada

The Mental Health Court in Ontario was established in May 1998; the first in Canada and one of the world's first.⁷⁰ It is the only full-time mental health court in Canada.⁷¹ Many jurisdictions in Canada are developing diversion programmes for mentally ill accused persons or have pilot projects in place,⁷² suggesting that more mental health courts could be established.

The Toronto Mental Health Court was established because of the rise in the number of mentally ill persons entering the criminal justice system. The lack of proper consideration of mental illness in the traditional criminal justice system and the delays in resolving pre-trial issues such as fitness to stand trial further motivated this court's establishment.⁷³

67 See Goldberg (n 47) 26 and Schneider, Bloom and Heerema (n 8) 92.

68 Schneider, Bloom and Heerema (n 8) 43, 44.

69 The Mental Health Court in St Johns, New Brunswick, for example, set its specific goals as follows: i) To offer an effective mechanism for dealing with those with a mental disability who are involved in the criminal justice system; ii) To provide accused with the least restrictive intervention or treatment; iii) To protect the rights of the accused and society and the integrity of the justice system; and iv) To hold those accused accountable for their actions. See Heerema (n 62) 273. See further Emily Slinger and Ron Roesch, 'Problem-solving Courts in Canada: A Review and a Call for Empirically-based Evaluation Methods' (2010) 3(4) *International Journal of Law and Psychiatry* 258 at 260 where it is stated that the goals of a mental health court depend on the resources available in that community.

70 See Schneider, Bloom and Heerema (n 8) 97 and Slinger and Roesch (n 69) 259.

71 Joan Barrett and Riun Shandler, *Mental Disorder in Canadian Criminal Law* (Thomson Reuters Canada Limited 2006) 1. Also see Slinger and Roesch (n 69) 259 who explain that other mental health courts such as the one in New Brunswick, operate on a part-time basis and sit every second Friday whilst some mental health courts in Ontario sit once or twice a week.

72 Schneider, Bloom and Heerema (n 8) 107.

73 See Sherry Van de Veen, 'Some Canadian Problem-solving Court Processes' (Canadian Association of Provincial Court Judges Pre-Institute Conference, September 2003, St John's, Newfoundland National Judicial Institute) 19. It is stated that many cases of persons with mental illness, do not belong in the criminal justice system to start with and this view was part of the impetus behind

The Canadian Mental Health Court accommodates any accused person with a mental illness regardless of the seriousness of the offence. However, only those accused persons who committed non-violent offences are allowed into the court's diversion programme.⁷⁴ Therefore, the Toronto Mental Health Court is not a diversion programme as such, but a specialised criminal court with a diversion component attached to it.

The Toronto Mental Health Court aims to expedite fitness to stand trial as a pre-trial issue.⁷⁵ Even though the Criminal Code limits the default period for a fitness assessment to five days,⁷⁶ delays in such assessments in the criminal justice system are rife. On-site screening at the Toronto Mental Health Court assists in expediting the resolution of fitness issues. Before this court was established, accused persons had to spend long periods in custody before their fitness issues were addressed,⁷⁷ with the result that these accused persons spent more pre-trial days in custody than those not presenting with mental illness.⁷⁸

The Toronto Mental Health Court further aims to reduce recidivism.⁷⁹ The court achieves this goal by ensuring that its court workers support the mentally ill accused after completing the court-monitored treatment programme. The court workers assist the accused to obtain any social assistance that the accused may need, including connection with a mental health facility.⁸⁰

establishing the Toronto Mental Health Court. Also see Slinger and Roesch (n 69) 260 who confirm that the concerns regarding delays in finalising pre-trial issues was a force behind the establishment of the Toronto Mental Health Court.

74 Schneider, Bloom and Heerema (n 8) 100.

75 *ibid* 92, 97; National Judicial Institute, *Problem-solving in Canada's Courtrooms. A Guide to Therapeutic Justice* (National Judicial Institute 2011) 10 <<https://www.nji-inm.ca/index.cfm/publications/problem-solving-in-canada-s-courtrooms-a-guide-to-therapeutic-justice-2nd-edition/?langSwitch=en>> accessed 31 March 2021. Slinger and Roesch (n 69) 260; Heerema (n 62) 263 and Sarah Ryan and Darius Whelan, 'Diversion of Offenders with Mental Disorders: Mental Health Courts' (2012) 1 *Web Journal of Current Legal Issues* 1 at 8.

76 See s 672.14(1) of the Criminal Code of Canada. Also see Barrett and Shandler (n 71) 3–5.

77 Heerema (n 62) at 271 indicates that accused persons had to wait up to two weeks. See however Schneider, Bloom and Heerema (n 8) 52, 53 who estimate that mentally ill accused had to wait up to four weeks in jail before they were assessed for fitness to stand trial.

78 Schneider, Bloom and Heerema (n 8) 97. Also referred to as the 'revolving door' principle as explained above. Also see Mark Reiksts, 'Mental Health Courts in Canada' (2008) *Law Now* 31 32.

79 Schneider, Bloom and Heerema (n 8) 92, 97.

80 Also referred to as 'court support workers'. See Schneider, Bloom and Heerema (n 8) 119–121 for a list of duties entrusted to the court support worker. Also see Centre for Addiction and Mental Health, *Evidence Summary: Mental Health Diversion Framework in Canada* (Centre for Addiction and Mental Health 2014) 4 <http://www.antonioacasella.eu/archipsy/Canada_diversion_April2014.pdf> where the court workers are described as 'navigators of the legal system' since they help to connect the mentally ill with the available resources.

It is a secondary objective of the Toronto Mental Health Court to process cases of those accused who wish to enter a plea of not criminally responsible.⁸¹ This court also assists accused persons who may wish to plead guilty or bring a bail application.⁸² The court assists with these cases as part of the non-diversion component of its mandate.

The Toronto Mental Health Court achieved its primary goals of reducing delays in fitness assessments⁸³ and reducing recidivism.⁸⁴ Critiques of the mental health court movement raised concerns that mental health court participants will skip the line to receive services first, ahead of those equally entitled to it but outside the criminal justice system.⁸⁵ The response to this is that more resources should be made available, and perhaps specific resources should be allocated to individuals in the mental health court programme.⁸⁶ This will ensure that sufficient resources are available to all in need.

The Mental Health Court in the USA

Most mental health courts in the USA began operations under the auspices of drug courts.⁸⁷ Mental illness is often a result of substance abuse.⁸⁸ Reports by drug court practitioners indicate that those who battle with mental illnesses do not always fare well

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- 81 Schneider, Bloom and Heerema (n 8) 6, 98. These cases may include persons whose fitness has been restored and who now wish to raise the insanity plea. Michaël van der Wolf and others, 'Understanding and Evaluating Contrasting Unfitness to Stand Trial Practices: A Comparison Between Canada and the Netherlands' (2010) 9 *International Journal of Forensic Mental Health* 245 at 251, who explains that twelve per cent of persons who eventually succeed with the insanity plea were found unfit to stand trial at some point prior in the proceedings. The full trial on the issue of criminal responsibility is usually conducted in the criminal court unless the parties agree to proceed with the trial in the mental health court. See Schneider, Bloom and Heerema (n 8) 99–102.
- 82 Schneider, Bloom and Heerema (n 8) 6 and further at 98, 99.
- 83 Richard Schneider, 'Mental Disorder in the Court' (1998) *Criminal Law Association Newsletter* 57.
- 84 Heerema (n 62) 272.
- 85 Schneider, Bloom and Heerema (n 8) 32; Heerema (n 62) 270. See further Glen Luther and Mansfield Mela, 'The Top Ten Issues in Law and Psychiatry' (2006) 69 *Sask LR* 401 424 who discuss this phenomenon as queue-jumping in the forensic mental health setting.
- 86 This would be in line with the objective set by the Mental Health Commission of Canada that aims to prioritise the availability of resources and services to mentally ill persons in the criminal justice system. It also aims to reduce the number of mentally ill persons in the criminal justice system. See Centre for Addiction and Mental Health (n 80) 3. Heerema (n 62) 227 states that the funding for the social services used by the mental health courts should increase to ensure resource availability to those in need thereof.
- 87 Risdon Slate, 'Mental Health Courts' in Larry Mays and Peter Gregware, *Court and Justice* (Waveland Pr Inc, 2004) 423; Frailing (2009) (n 20) 145; Hemmens, Brody and Spohn (n 52) 436; Steadman, Davidson and Brown (n 45) 457; Rossman and others (n 53) 11.
- 88 Frailing (n 20) (2009) 152–153 stresses that, where there are co-occurring conditions, both must be treated, failing which, it will result in an ineffective use of resources as optimal progress will not be achieved. Also see Stanley Sacks and Frank Pearson, 'Co-occurring Substance Use and Mental Disorders in Offenders: Approaches, Findings and Recommendations' (2003) 67(2) *Federal Probation* 32.

in the drug court programmes, thus the idea of separate mental health courts gained momentum.⁸⁹

In the USA, the mental health courts usually only hear non-violent (misdemeanour) offences.⁹⁰ The recent trend, however, seems to be for mental health courts to consider more serious offences.⁹¹ The Brooklyn Mental Health Court opened its doors in 2002 and is regarded as a second-generation mental health court because it offers diversion in cases of petty crimes as well as felonies.⁹²

The Brooklyn Mental Health Court's primary goals are to divert persons with serious and persistent mental illness away from prison into treatment programmes.⁹³ The Court strives to improve the criminal justice system's ability to identify, assess, and monitor accused persons with mental illness.⁹⁴ The court further aims to reduce the accused's time in the criminal justice system by expediting the determination of eligibility for diversion to the court-monitored treatment programme.⁹⁵

89 Frailing (2008) (n 20) 68; Schneider, Bloom and Heerema (n 8) 5 and Carol Fisher, 'Towards a New Understanding of Mental Health Courts' (2015) 54 *The Judge's Journal* 8.

90 Schneider, Bloom and Heerema (n 8) 88. Also see John Parry, *Criminal Mental Health and Disability Law, Evidence and Testimony* (American Bar Association 2009) 191 where it is indicated that this was the initial focus of the mental health court but that the goals have changed over time as the justice department became more involved. See however, Bernstein and Seltzer (n 6) 152, 153 where this practice is questioned as it might exclude accused persons in need of mental health treatment who, because of their mental illnesses, committed more serious offences.

91 Schneider, Bloom and Heerema (n 8) 88; Tammy Seltzer, 'Mental Health Courts: A Misguided Attempt to Address the Criminal Justice System's Unfair Treatment of People with Mental Illnesses' (2005) 11(4) *Psychology, Public Policy and Law* 570 576, 577 and Bernstein and Seltzer (n 6) 155 where it states that mental health courts consider crimes against the person, property and public order.

92 Kelly O'Keefie, *The Brooklyn Mental Health Court Evaluation: Planning, Implementation, Courtroom Dynamics, and Participant Outcomes* (New York Centre for Court Innovation 2006) 4. Also see Frailing (2009) (n 20) 155 who discuss the Washoe County mental health court as a second-generation mental health court. See Schneider, Bloom and Heerema (n 8) 106. Second generation mental health courts rely on court staff to monitor treatment programmes, whereas the initial mental health courts relied on supervision by community treatment programmes.

93 Matthew D'Emic, 'The Promise of Mental Health Courts: Brooklyn Criminal Justice System Experiments with Treatment as an Alternative to Prison' (2007) *Criminal Justice* 25. Also see O'Keefie (n 92) v.

94 O'Keefie (n 92) 57.

95 The average number of days from the first court appearance to the eligibility determination is twenty-one. The determination period for those found not eligible, were eighteen days, whereas it was twenty-four days for those eventually found eligible. See O'Keefie (n 92) 21. See, however Henry Steadman, Alison Redlich, Patricia Griffin and others, 'From Referral to Disposition: Case Processing in Seven Mental Health Courts' (2005) 23(2) *Behavioural Science and Law* 215, 221 who report that the average time it takes for a mental health court to reach a decision on whether an accused is eligible for the mental health court programme, is thirty-two days.

The Court achieved its diversion goal by offering successful diversion programmes that prevent re-offending (particularly violent crime) by mentally ill persons.⁹⁶ The Court also succeeded in reducing the time spent by the accused in jail as more time is spent in the treatment programme.⁹⁷ Studies found that mental health court participants also spend fewer days in psychiatric hospitals in the year after they have graduated from the mental health court programme than the year before their enrolment.⁹⁸ The same results applied concerning days spent in jail.⁹⁹

Critiques of the mental health court movement in the USA raised concerns about the stigma attached to being labelled a mentally ill person, and that processing the case through a specialised mental health court docket contributes to the marginalisation of the mentally ill accused.¹⁰⁰

A response to this argument offered by Slate is:

Surely, the possibility of avoiding a criminal record, obtaining appropriate treatment and averting future contact with the criminal justice system as a result of compliance with mental health court requirements and follow-up is less stigmatising, more encouraging and more compassionate than the repeated and callous recycling of persons with mental illness through the system.¹⁰¹

96 Fisher (n 89) 10 where reduced recidivism is stated as one of the consistent outcomes reported by those who conducted research on the state of mental health courts in the USA.

97 Albanese (n 52) 243 and O'Keefie (n 92) 3. The psycho-social functioning of mental health court participants has been found to improve during the mental health court treatment programme. See Eric Trupin and Henry Richards, 'Seattle's Mental Health Courts: Early Indicators of Effectiveness' (2003) 26(1) *International Journal of Law and Psychiatry* 33. This was also the case in the Brooklyn Mental Health Court according to O'Keefie (n 92) viii, 3. Also see Rossman and others (n 53) 17 where it is pointed out that the functioning of those who participated in the mental health court programme improved further than those who did not participate.

98 Frailing (n 42) (2010) 209. Albanese (n 52) 243 confirms that mental health court participants are admitted to psychiatric hospitals less often than accused persons who do not participate in the programme. Also see O'Keefie (n 92) viii who confirms that this was also the case for the Brooklyn mental health court. See further Lurigio and Snowden (n 44) (2009) 209.

99 Frailing (n 42) (2010) 209. Also see Fisher (n 89) 10 who reports that fewer days spent in incarceration is a success of mental health courts reported by those who conducted research on the outcomes across mental health courts in the USA. Also see O'Keefie (n 92) 3 who explains that they were significantly fewer in the year after the completion of the mental health court programme than the year prior to their enrolment therein.

100 Nancy Wolff, 'Courts as Therapeutic Agents: Thinking Past the Novelty of Mental Health Courts' (2002) 30(3) *Journal of the American Academy of Psychiatry* 434. Also see Steven Lamberti and Robert Weisman, 'Persons with Severe Mental Disorders in the Criminal Justice System: Challenges and Opportunities' (2004) 75 *Psychiatric Q* 151 162 where this concern has been raised about diversion programmes in general.

101 Slate (n 87) 431.

A further response to the concern is to stress that the mentally ill accused's treatment in the mental health court is an improvement on the way their interests were served in the traditional criminal justice system.¹⁰²

Mental Health Courts for South Africa?

Introduction

Since there are no formal pre-trial diversion programmes for the mentally ill accused in South Africa, mental health courts should be considered to fill this gap. In the discussion that follows, reasons similar to those behind the establishment of mental health courts in Canada and the USA are identified in the South African context. A mental health court in South Africa could be the answer to South African scholars' call to divert the mentally ill accused away from the criminal justice system. The scholars' suggestions for diversion are fleshed out below with due regard to some unique considerations for the establishment of mental health courts in South Africa

Similarities in Reasons for Establishing Mental Health Courts

The lack of proper consideration of mental illness in the traditional criminal justice system is currently a challenge for South Africa, as inadequate provision is made to manage mentally ill accused persons throughout the criminal justice process.¹⁰³ The CPA's current provisions could arguably be perceived as contributing to the problem in that no orders are available to the court in the case of an accused who is fit to stand trial but is mentally ill. This accused's case will proceed through the traditional criminal process. Such an accused may, however, need mental health care treatment throughout his/her time in the criminal justice system, whether he/she is remanded in prison awaiting trial or not. The mentally ill remand detainee's position is especially concerning due to the severe lack of mental health services in South African prisons.

As in Canada, a further reason for establishing a mental health court would be to address the delays in resolving pre-trial issues; specifically, fitness to stand trial. As alluded to earlier, South Africa is currently experiencing severe delays with fitness assessments due to resource shortages in the forensic mental health care system. Once the accused eventually reaches the designated facility for assessment, he/she is assessed for a longer period than in Canada. According to South African law, the prescribed observation period is thirty days,¹⁰⁴ as opposed to the compulsory five-day assessment period in

102 See in general Susan Stephan and Bruce Winick, 'A Dialogue on Mental Health Courts' (2005) 103(1) *Psychology, Public Policy and Law* 507. Also see Schneider, Bloom and Heerema (n 8) 95.

103 Gaps in the management process is explained in Department of Correctional Services (n 7) 19.

104 Section 79 of the CPA. Opinion exists that thirty days is generally excessive for purposes of a psychiatric observation and that the requisite process for assessment can be conducted within a seven-day period in the event of a single psychiatrist assessing the accused. Shorter periods of assessment can lead to a reduction in the waiting period for assessment. See Pillay (n 12) (2014) 48 at 54. Also see in general Hennie Oosthuizen and T Verschoor, 'Verwysing van Onverhoorbare Beskuldigdes

Canada. It appears, therefore, that the mentally ill accused in the South African criminal justice system spends more time in the system for purposes of forensic assessment than is the case in Canada. The establishment of the mental health courts in Canada addressed such delays and had the added benefit of reducing recidivism which, in turn, reduces overcrowding in prisons.¹⁰⁵ For South Africa, overcrowding is a serious issue that requires urgent attention.¹⁰⁶

Turning to mental health courts in the USA, these courts were established to reduce the time spent by mentally ill accused persons in the criminal justice system. Accused persons with suspected mental illness currently spend long periods in the South African criminal justice system awaiting fitness assessments, as explained above. In the USA, mental health courts were further established to improve the criminal justice system's ability to identify, assess, and monitor accused persons with mental illness in the criminal justice system. These are similar to the current challenges in the South African criminal justice system concerning the management of the cases involving mentally ill accused persons, including tracking accused persons in prison who need to undergo forensic assessment.¹⁰⁷ Mental illness is further often not detected by correctional personnel,¹⁰⁸ and as pointed out earlier, mental health treatment services in the correctional setting are lacking.

The Need for Formal Diversion of Mentally Ill Accused in South Africa

The mentally ill accused in remand detention was identified as a vulnerable group¹⁰⁹ in need of special programmes.¹¹⁰ The diversion for mentally ill accused persons could

en die Daarstelling van 'n Verhoorbaarheidvasstellingseenheid' (1993) 6 SACJ 155–164 who explore alternatives to admitting an accused to a psychiatric institution for purposes of a fitness assessment.

105 Sirotich (n 22) 461.

106 South Africa has the highest number of prisoners on the African continent and the ninth highest prison population in the world. See Department of Correctional Services (n 7) 53. As of 31 March 2019 the prison population stood at 162 875 whilst the approved bed space in correctional facilities was 118 572. These statistics confirm the problem with overcrowding as it shows that South African prisons currently hold 44 303 more prisoners than its maximum capacity. See Department of Correctional Services, *Annual Report 2018/2019* (Department of Correctional Services 2019) <http://www.dcs.gov.za/wp-content/uploads/2019/12/DCS-Annual-Report-_web-version.pdf> accessed 25 October 2020.

107 Pollsmoor Prison authorities, for instance, could not confirm the number of detainees who had to be assessed at the Valkenberg hospital. Chris Bateman, 'The Insanity of a Criminal Justice System' (2005) 95 (4) SAMJ 208 209. There is no system in place to officially determine which accused persons in detention have to be sent for observation.

108 Some correctional facilities admit between 200 and 400 prisoners daily. This high number of admissions combined with a shortage of nursing staff makes it almost impossible to detect mental illnesses, especially since these conditions are not always 'visible' at first glance and are often only detected after further investigation. Department of Correctional Services (n 10) 87.

109 Department of Correctional Services (n 7) 11.

110 The Department of Correctional Services acknowledges that special measures must be taken to protect the human rights of remand detainees and mentions remand detainees with mental illness. See Department of Correctional Services, *Strategic Plan for 2015/2016-2019/2020* (Department of

serve as such a programme. South African scholars have long identified the need to divert the mentally ill accused from the criminal justice system. Cassim identified the need for diversion and suggested that the mentally ill accused be treated in the mental health care system rather than the criminal justice system.¹¹¹ She adds that such diversion could relieve the burden of backlogs on the criminal courts with cost- and timesaving in the long run.¹¹² These suggestions are in line with the aim set by mental health courts to divert mentally ill accused persons away from the criminal justice system into treatment programmes, which are more cost-effective¹¹³ by breaking the costly cycle of crime and punishment,¹¹⁴ especially in the long run when treating a mentally ill individual in a non-prison setting.¹¹⁵

Gagiano, Van Rensburg and Van Schoor¹¹⁶ suggested that those with known psychiatric disorders and those who exhibit signs of mental illness should not be referred for forensic assessment in terms of the CPA. They should, therefore, not be channelled through the criminal justice system. Resources spent on such forensic assessments should instead be spent on community programmes where they could receive support.¹¹⁷ They suggest that in the case of minor offences, the state should withdraw the charges and refer the accused for psychiatric treatment in terms of the relevant mental health legislation.¹¹⁸

The essence of the above suggestions is that accused persons with mental illness should be diverted away from the criminal justice system. This could be achieved by implementing a mental health court to divert qualifying accused persons with mental illness into appropriate treatment programmes. These suggestions confirm a need for an alternative criminal justice process for the mentally ill accused.

Correctional Services, 2014) 21 <<http://www.dcs.gov.za/wp-content/uploads/2016/08/Strategic-Plan-2015-2016-2019-2020.pdf>> accessed 20 August 2020.

111 Cassim (n 3) 27.

112 Cassim (n 3) 27 and Pillay (n 12) 48.

113 Slinger and Roesch (n 69) 260. This is a goal of all problem-solving courts, including drug courts and community courts.

114 William Rich, 'The Path of Mentally Ill Offenders' (2009) 36(1) *Fordham Urban LJ* 89 116, 117; Almquist and Dodd (n 56) vi and Frailing (2009) (n 20) 148. Treatment instead of incarceration is more cost effective and also prevents future hospitalisation which contributes to a long-term cost saving. See Torrey and others (n 40) 56.

115 Heerema (2005) (n 62) 63. According to Slinger and Roesch (n 69) 259 the cost of incarcerating a mentally ill accused is almost twice as much as that of a non-mentally ill accused.

116 CA Gagiano, PHJJ Van Rensburg and T Verschoor, 'Unnecessary Committals for Forensic Observation: Section 77 and 78 of the Criminal Procedure Act 51 of 1977' (1991) 108 *SALJ* 714 715.

117 In the Free State in 1990, more than a 1000 individuals with schizophrenia were part of such a community programme. Gagiano, Van Rensburg and Verschoor (n 116) 717.

118 Gagiano, Van Rensburg and Verschoor (n 116) 715. Also see Kruger (n 23) 159 who points out that it was common when the CPA just came into operation, that charges against mentally ill accused persons charged with minor offences such as minor assault, were withdrawn.

Special Considerations for Establishing a Mental Health Court in South Africa

Legislation and, in particular, the CPA will have to be amended to make provision for a mental health court in South Africa. Such amendments will have to specify which candidates qualify for diversion and which candidates should, nonetheless, be sent for forensic assessment.

Currently, every accused with suspected mental illness must be referred for forensic assessment in terms of the CPA. This mandatory referral results in a large number of forensic assessments for which there are long waiting lists. Gagiano and others¹¹⁹ opine that the fact that section 77 to 79 of the Act allows any court to refer an accused for forensic assessment, without prior consultation with anyone—including a mental health care practitioner—contributes to the high number of forensic assessment referrals. They propose that only cases where there are complicated diagnostic problems should be referred for forensic assessment under the CPA and only after the court has heard evidence from a mental health care professional with training in forensic psychiatry.¹²⁰

This suggestion is supported and can be implemented within the mental health court framework. A mental health court could decide which matters should be referred for formal forensic assessments and which matters are eligible for diversion. A specialised mental health court with a diversion component, similar to the Toronto Mental Health Court model, would be ideal for South Africa. This model will also enable the court to assist accused persons with mental illness in other ways, for example it could be approached by an accused who does not qualify for diversion to apply for bail while awaiting forensic assessment. The court could also assist mentally ill accused persons in entering a guilty plea or employing the insanity defence. A mental health court model that accepts all cases involving mentally ill accused persons regardless of the seriousness of the offence will help reduce the case back log in criminal courts. This does not, however, mean that all mentally ill accused persons should automatically qualify for diversion. Whether diversion should be reserved for minor offences (as the case is in Toronto) or whether those who committed serious offences should also be eligible for diversion (as the case is in Brooklyn) will have to be determined in due course.

Alternatively, separate legislation containing a justice process for mentally ill accused persons could be considered. The goals of such an Act could be similar to the Child Justice Act. All cases involving mental illness should then be referred to the mental health court via such law. Where diversion is not suitable, the case can be heard by the mental health court with the involvement of mental health professionals. This correlates with the Toronto Mental Health Court model, where the court assists all accused persons

119 Gagiano, Van Rensburg and Verschoor (n 116) 715.

120 Gagiano, Van Rensburg and Verschoor (n 116) 716, 717 suggest that consultation with the forensic team will serve as a further sifting procedure to ensure that only cases with difficult diagnostic problems are sent for observation.

with mental illness, regardless of the seriousness of the offence. Diversion is, however, reserved for those who committed minor offences.

The decision about which matters should be formally assessed and which ones should be diverted into treatment programmes should be taken by a multi-disciplinary team employed at the mental health court. The early involvement of mental health care expertise in the criminal justice system will ensure that cases involving mental illness are dealt with effectively and with requisite skills. These professionals could, for example, do screenings at the court, ensuring that only those in serious need of treatment or in respect of whom observation is essential will be sent for off-site forensic assessments. All other cases can be channelled into treatment programmes that do not necessarily require in-patient care. This approach will relieve the burden on the mental health care institutions currently tasked with forensic assessments of all mentally ill accused referred for observation.¹²¹ Diversion and selective referrals to forensic assessment will have to be incorporated into the relevant legislation such as the CPA or the specific mental health justice legislation as proposed above.

Lastly, the Mental Health Care Act 17 of 2002 will most likely have to be amended to acknowledge referrals from the mental health court and to identify facilities that will accept such patients and on which basis. The maximum length of the treatment programmes will also have to be stated.

Conclusion

Alternative criminal justice processes for mentally ill accused persons in South Africa should be considered, given the lack of formal diversion for the mentally ill accused. Mental health courts, as a creative alternative to the traditional criminal justice process, show promise.

Mental health courts that involve expertise from both the legal and mental healthcare fields could provide the mentally ill who are in conflict with the law, with the opportunity to receive much-needed treatment rather than incarceration.¹²² Therapeutic jurisprudence as the vehicle through which justice is delivered in these courts, creates opportunities for the law to address mental illness as the underlying cause for the accused's contact with the criminal justice system. This approach will enhance the possibility of rehabilitation of the accused. Reduced recidivism (and, as a consequence, reduced overcrowding) has also been proven to be a by-product of therapeutic jurisprudence. A therapeutic response to mental illness is promoted as it is more appropriate and effective than the traditional response of punishment and incarceration.

121 This is at least the case in South Africa according to Schutte (n 4) 67.

122 Lamberti and Weisman (n 100) 162.

Mental health courts in Canada and the USA were established to address cases involving mentally ill accused persons, since the traditional criminal justice system was ill-equipped to do so. These courts set out to address challenges such as delays in fitness assessments, long periods spent by mentally ill accused persons in the criminal justice system, poor management of cases involving mental illness and lack of proper consideration of mental illness throughout the criminal process. These courts changed how cases involving mental illness are dealt with in the criminal justice system and appear to have been successful in the goals they set out to achieve.

The South African criminal justice system is currently facing challenges similar to those experienced by the Canadian and American criminal justice systems before the establishment of mental health courts. Considering the goals achieved by mental health courts in these jurisdictions and the beneficial changes that they brought concerning the processing of cases involving mental illness, it stands to reason that South Africa could benefit from a similar initiative. A mental health court or a similar alternative justice process for the mentally ill accused could be incorporated into South African law by amendment of the relevant legislation such as the CPA. Alternatively, new legislation that introduces formal diversion options for the mentally ill accused can be tabled.

A mental health court is certainly not proposed as the ultimate solution to the current challenges faced by the South African criminal justice system regarding cases involving mental illness. However, it could alleviate some of its burdens.

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