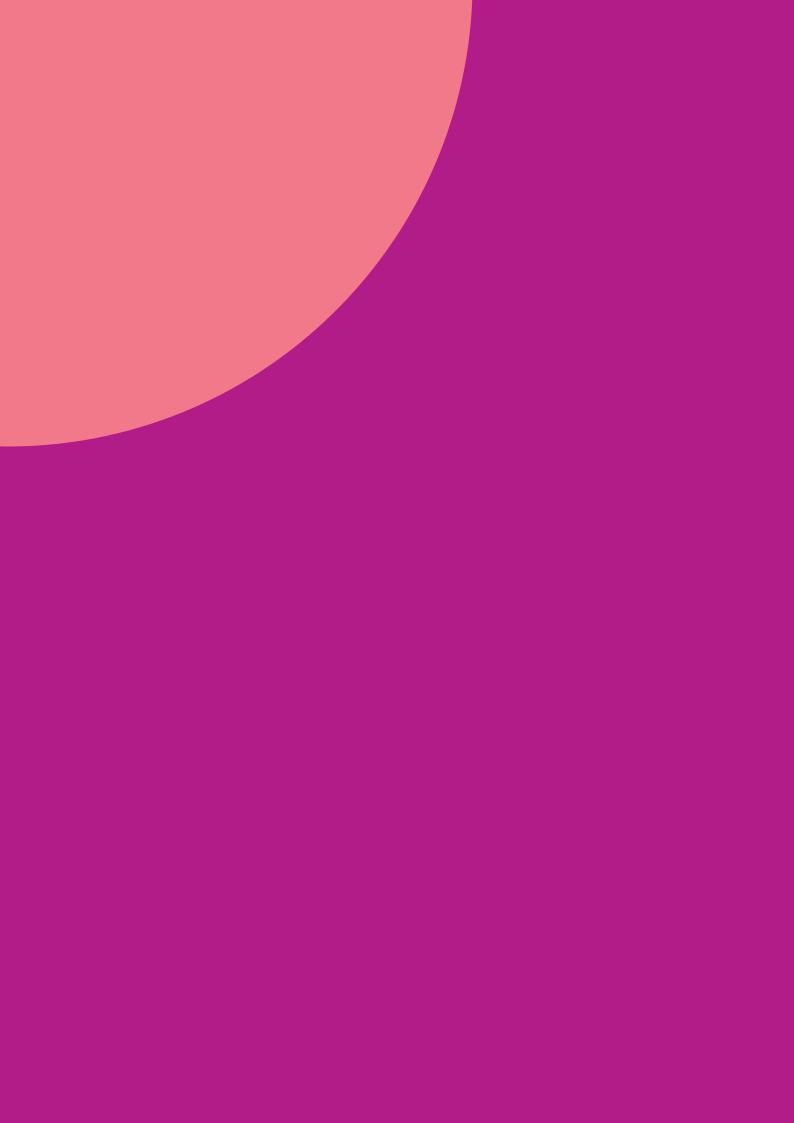


# Compulsion, convergence or crime?

Criminal justice system contact as a form of gambling harm





### **Executive Summary**

### This Report calls for a conversation about gambling and contact with the criminal justice system.

Rarely mentioned as a legal policy consideration, this report suggests that gambling may be a feature of offenders' lives in more ways than the community might expect — a 'sleeper' issue, as project participants described it. Yet the overwhelming presence of mental illness, Acquired Brain Injury, family violence; childhood trauma; drug and alcohol abuse; homelessness and other forms of vulnerability in offender populations mean that the existence of less visible problems like gambling is not always clear.

Given that it is only in the last few decades that gambling has shifted from a predominantly unlawful pursuit to one encouraged as a mainstream leisure activity, it is not surprising that it has failed to register in any meaningful way on the legal system's radar. Similarly, clinical understanding of the severity with which gambling problems can manifest — reflected in the relatively recent inclusion of gambling within clinical tools which diagnose other forms of addiction — has been slow to reach legal discourse.

In fact, despite previous recommendations that relevant data collection occur, the legal system does not ask *any* questions about the presence of gambling within offender populations, outside specific and quite limited contexts. What's more, the small amount of information that we *do* have from the 'front end' of the system, being presentation for legal advice or at court, conflicts with available studies of problem gambling prevalence in prison populations. This means that we simply do not know, overall, the exact extent to which gambling harm intersects with the criminal justice system and, if it does, in what way.

When funded by the Victorian Responsible Gambling Foundation to explore the intersection of gambling harm and the criminal justice system, therefore, the CIJ's task was to start to draw together the information which *does* exist, but also to open a door for it to be collected in the future.

Through comprehensive literature review; analysis of raw data provided by various agencies; an audit of submissions to the Royal Commission on Family Violence; analysis of sentencing remarks in over 100 cases in Victorian superior courts; and through focus group discussions and targeted consultations, the CIJ gained access to views not previously explored in existing Australian research. This was not only to capture the understanding which currently exists, but to create opportunities for this understanding to grow.

In order to create these opportunities, this project started to map the pathways which propel problem gamblers into contact with offending, offenders into gambling, and any context in between. The most obvious example of this occurs along a linear pathway in which a person develops a gambling problem and then commits an offence — such as theft or drug trafficking — to resource it.

As the CIJ's research across legal and support sectors confirmed, however, this is only one of the pathways which take people between gambling and offending — and sometimes back again. Others include the way in which gambling; gambling venues or gambling related debt can, amongst other things:

- increase the risk of recidivism upon release for people convicted for non-gambling related offences;
- propel people from disadvantaged socio-economic status into crime just to feed their families;
- lead people (including a gambler's partner or family members) to be coerced into offending;
- manifest as a form of economic abuse in the context of family violence;
- be foisted on a victim of family violence by her partner;
- draw victims of family violence into criminogenic environments as a way of seeking respite;
- lead to theft and deception of extended family by adult children in the context of elder abuse.

In other words, there are many potential pathways which can take people between gambling and crime. As the diagram below suggests, there are many factors often converging to make people more vulnerable to gambling; more vulnerable to various forms of harm which both *contribute to* and *result from* gambling behaviour; and then more vulnerable to contact with the criminal justice system as a result.



The pressing questions then become: what does and *should* the justice system do when this convergence occurs?

Having explored a more diverse and rich picture of the pathways which lead between gambling and crime, this report then turns to answer the first of these questions. In terms of what the system currently does, the CIJ commenced this project with the assumption that a gambling problem or addiction may be taken into account in sentencing; or that raising it before a court may present an opportunity for a person with a gambling problem to be referred to relevant treatment. In reality, however, the situation is less clear. In fact, as this research revealed, issues of gambling problems or addiction are rarely raised by clients with their lawyers and, where they are, rarely led before a court.

In fact, the CIJ's analysis suggests that, along any pathway which leads people to the superior courts, individuals experiencing gambling problems are rarely met with a warm reception. Certainly, as will be explored in some detail, recent case law sets the bar fairly high in terms of recognising a sufficient nexus between a gambling problem and the offending to which it is argued the gambling contributed. What's more, the case law seems to suggest a subtle variation in the way in which courts assess the question of 'choice' depending on whether an offender has an alcohol, illegal drug or gambling addiction. Meanwhile, a substantial proportion of gambling related offending involves such a significant amount of money or drugs, for example, that judges are often compelled to impose a custodial sentence.

Even when the offending is of a less serious nature and the contact is at the local court level, however, this report finds that individuals face somewhat of a legal lottery when presenting at court. In fact, some lawyers described the decision about whether or how to lead evidence about their client's addiction as 'playing the odds', depending on who is on the bench. This means that, although some clients may receive the referrals to services which they need (as well as the leverage of the justice system to support these referrals) others can receive a predominantly punitive response.

The report's resulting findings are not that courts should take a more sympathetic approach to offenders who present with gambling problems *per se*. Certainly, the CIJ readily acknowledges the challenges of identifying those whose crimes are motivated purely by greed, and those who are driven by genuine addiction or other forms of hardship. Rather, the findings are that courts are not currently furnished with adequate information, either about therapeutic options for sentencing; nor about the contemporary neuroscience which links gambling addiction to other forms of addiction in fairly irrefutable ways. Pleasingly, the process of conducting the research opened doorways to sharing this information, with judges and lawyers alike indicating that they wished to be informed and to develop a greater understanding of the complexities involved.

Improving this understanding is vital if approaches within the criminal justice system are to keep pace with the policy shift away from focusing solely on problem gambling as a problem for the individual — a pathology which needs to be addressed, or an affliction which needs to be cured — towards a broader concept of gambling harm. This includes harm not only caused to individuals, but to their families, friends, employers and community at large.

Accordingly, in seeking to answer the second question — being what *should* the criminal justice system do when gambling and crime converge — this report argues that contact with the criminal justice system should be perceived as one of those harms. It therefore recommends various ways in which this intersection with the criminal justice system can be reconceived and redirected — not as an interaction which entrenches harm, but one which functions as a positive intervention in a gambler's life. The report also recommends that this intervention should occur *regardless* of whether or not gambling is the driving factor which has brought someone to court.

To do this, of course, the criminal justice system must start tuning into gambling as a factor which may be 'in the mix' of an offender's life. In other words, it needs to start asking questions — not just to interrogate this 'sleeper' issue and indicate prevalence, but also to use this interaction to draw out underlying issues, and to motivate offenders to contemplate future change.

It also means that the criminal justice system must start engaging with emerging science concerning addiction — grappling with the evidence which suggests that addiction to gambling and addiction to drugs or alcohol, for example, may be far more similar than the community might expect. Equally, the system of supports available to problem gamblers must start to understand the imperatives of the criminal justice system, engaging with the challenges involved in sentencing, and developing a considered and robust program to which offenders might be referred.

Meanwhile, the report also urges Gambler's Help support services to identify and respond more effectively when family violence is in the mix for the clients that they see. To do this they must be supported with adequate training to ensure that disclosure does not inadvertently increase risk; and to know where to refer clients when this issue is exposed. In other words, people need to come out of their silos, to build on the cross-disciplinary work already occurring and recognise that gambling and vulnerability of *any* kind are a potentially dangerous mix.

Overall, this Report has not been about identifying a magic number. With so little data gathered and so few questions systematically asked, we are still at the beginning of the conversation about how gambling should be approached in the criminal justice system. This report is therefore intended to function as a first port of call for legal *and* social policy audiences who might want to start engaging with the complexity of gambling harm and its implications for the criminal justice system a little more deeply.

Through its exploration of the ways in which gambling can contribute to offending and the other way around; through analysis of the data that *is* available; and through discussion with judges, Magistrates, lawyers, and service providers of multiple kinds, the CIJ's aim for this project has been not only to increase *understanding* about the intersection of problem gambling and the criminal justice system, but also to increase the *interest* of this system in finding a more useful way to respond.

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#### **Background and methodology**

In 2016, the Centre for Innovative Justice ('the CIJ') was funded by the Victorian Responsible Gambling Foundation ('the VRGF') to examine the intersection of gambling harm and the criminal justice system. The purpose of the project was to inform the existing knowledge base of how gambling and the criminal justice system interact and to identify what action should be taken to minimise this harm.

Given a short timeframe, the CIJ opted to train its lens on people's contact with the court system. This decision was made in part because the only comprehensive work previously conducted on this subject in Victoria — research originally done under the auspices of the Department of Justice and Regulation (DOJR) — gave particular emphasis to the Corrections system, but did not capture the views of *any* members of the legal profession; court personnel or the judiciary.

Nearly ten years on from when the bulk of this initial work by DOJR/VRGF was conducted, questions about the relevance of gambling in offenders' lives are still not asked by agencies or services with whom they have contact at this earlier point in the legal system. The decision to focus primarily on the courts and legal profession was therefore made to lay the ground for this data collection to occur in the future.

With these parameters identified, the CIJ also confined its exploration to the intersection of *legal* gambling activities and criminal justice system contact, rather than various forms of illegal gambling. The project has therefore not considered the challenging issues of underage gambling (an issue, nevertheless, of emerging concern) or gambling-related organised crime. Rather, the focus of the research was on the pathways which take ordinary individuals between gambling activity which *is* legal and other activities which are *not* — and where and how the legal system might step in to intervene.

For the purposes of an exploratory project in an area in which limited data is collected, a mixed methods approach was considered necessary. This approach involved Literature Review; examination of small samples of de-identified data provided by various agencies; audits of submissions to the Royal Commission into Family Violence; analysis of sentencing remarks from over 100 Victorian superior court cases; qualitative focus group discussions with legal professionals and a range of service providers; and targeted consultations with judicial officers and certain individual stakeholders.

#### Literature Review

To support the project, the CIJ conducted a comprehensive literature review, focusing primarily on literature emerging since 2010, when the bulk of the work for the research initiated by DOJR (mentioned above) was conducted. The wide-ranging review searched for literature relevant to the subject of: 'issues surrounding the intersection of legal gambling within the criminal justice system', using the following multidisciplinary databases: JSTOR; Academic Search Complete; combined Informit databases; Google scholar; TROVE; Google. The search also targeted specialist databases, for example PubMed and Austlii (research). The search used combinations of the following key words and Boolean operators: 'gambl\*' AND 'criminal justice'; 'gambl\*' AND 'crime'; 'gambl\*' AND 'illegal beahvi\*'. In order to locate additional articles and reach 'saturation' — the point at which the collection of new articles sheds no further light on the issue under investigation — a manual search was conducted through the reference lists of articles. Finally, additional efforts were made to find unpublished or grey literature through contacting organisations and other researchers working in this area.

Given the number of resources returned through this search strategy, it was necessary to exclude some studies and resources. A single reviewer was responsible for screening all titles and abstracts that were retrieved for relevance. All studies on gambling disorders within youth justice and on illegal gambling were excluded. Also excluded were 'false positives' — studies which were retrieved in the search but clearly were not related to the subject of inquiry.

Despite using the year 2010 to bracket the review, the project still draws on findings from older studies, where considered pertinent. In these instances, however, reference and reinforcement of the work through recently published or unpublished work are provided to ensure ongoing significance and relevance. Also worth noting is that the review gives priority to knowledge in an Australian context because there are limitations in transferring some of the knowledge across jurisdictions. However, the discussion throughout the report also involves examples of international research where authors touch on policy and practical issues in productive and innovative ways, thereby aligning with aims of undertaking the literature review.

Overall, the literature review provided a theoretical basis and some empirical evidence in support of the project. Despite the methodological debates apparent in the literature — much of which was self-defeating — the literature also indicated the shift towards a broader and more nuanced concept not only of gambling-related offending but gambling-related harm.

#### Data collection

De-identified data was provided to the research team by a small number of agencies. The samples of data were purposive and determined by availability and willingness of the people and organisations contacted. Rather than reporting findings that apply to overall offender or other populations, therefore, these informed a deeper and more nuanced understanding of the relevant issues, including the way in which gambling can co-exist with other forms of disadvantage or offending. The extent of this data ranged from:

- 'Snapshot figures' of callouts to the statewide FV helpline, Safe Steps, made at a certain time of the year;
- Client data collected by the Magistrates' Court of Victoria in relation to clients referred to the Courts
  Integrated Services Program (CISP) during 2015/2016, where 'problem gambling' was identified at
  the point of intake (118 out of 3447 clients) and 'problem gambling, past and present' identified during
  case management (273 out of 1574 clients).
- Results from surveys administered to clients (N = 226) by Victoria Legal Aid at the point of duty lawyer intake. Surveys were concurrently distributed to clients at five court locations (Melbourne, Sunshine, Werribee, Frankston & Heidelberg) over a period of four weeks from 18 October to 18 November 2016.

Clients seen by duty lawyers in the summary crime lists were given the survey, in order to minimise the imposition on the time of lawyers and court staff. Clients were informed that the survey was voluntary and that, if they chose to complete it, they did not need to complete all the questions if they did not wish to. This was to ensure that clients did not feel pressured in any way to complete the survey or that their receipt of a duty lawyer service was dependent upon their participation.

Given that participation in this project was entirely voluntary and was conducted with the explicit consent of the VLA clients, the sample therefore represents clients who elected to complete the survey at the time, rather than the number of clients overall who were seen by the duty lawyer services. Given the demographics of clients in this cohort and the stressful context of their appearance at court, the completion rate of 226 surveys was considered by the CIJ and VLA alike to be substantial.

No identifying information was collected and all data collected was stored securely. The survey tool consisted of 15 questions: 6 relating to the gambling practices of the client, and 9 regarding basic demographic information (some of which participants opted not to answer). The survey was designed by VLA in consultation with the CIJ, and finalised through internal VLA processes. Results from the data were analysed by VLA internally and provided to the CIJ in de-identified form. The survey instruments can be found as an Appendix to this report (Appendix A).

#### Case law search and analysis of sentencing remarks

An analysis of the sentencing remarks in over 100 Supreme and County Court cases built on a source used in the earlier VRGF report. The approach to this analysis was purposive, being primarily aimed at identifying specific information to illustrate theory or previous findings in a local context. The search was then pruned for false positives, excluding a number of cases where gambling was mentioned but unrelated to the case or the research questions. Cases remaining for inclusion were then read and interpreted purposively from a qualitative perspective, informed by the literature review.

#### Audit of submissions to the Royal Commission into Family Violence

To start to explore the intersection of family violence and gambling harm beyond emerging peer reviewed and grey literature, an audit of submissions to the Victorian Royal Commission into Family Violence was conducted. The audit indicated that submissions from at least 47 organisations (and numerous additional individuals) out of approximately 1000 submissions overall addressed the issue of gambling. Once identified, organisational documents were then analysed in greater detail, reflecting considerable practitioner and cross-sectoral support for a range of findings in the peer-reviewed literature regarding the nexus of gambling and family violence.

#### Focus group discussions, interviews and targeted consultations

To complement the limited quantitative information available, as well as the case analysis and audits described above, the CIJ conducted a series of focus group discussions and interviews with legal practitioners and service providers across a range of metropolitan and regional locations, as well as some targeted consultations.

Participants were recruited through their relevant agency, with the CIJ's initial Literature Review and substantial existing networks facilitating the identification of agencies to be contacted. Invitations to participate in discussions were provided to the relevant peak body; regional office (in the case of Victoria Legal Aid) or agency senior officer. The invitation was then distributed to relevant staff by the respective senior personnel. Given the demands on the legal and service provision sector, participants elected to attend subject to availability or as a representative of their agency as agreed internally within the organisation. Information regarding who was unable to attend or who declined to participate was therefore not made available to the CIJ.

Sites for focus group discussions with VLA staff were nominated by VLA head office to offer a representative geographic spread and to complement, to an extent, the burden imposed on VLA staff conducting the surveys in other locations. The exception was the focus group with staff at the Sunshine VLA office, who were keen to participate in both activities, given the relevance of the issue for their particular clientele. The CIJ then attended these sites for the purposes of each focus group, being Geelong (N = 8); Sunshine (N = 10) Ringwood (N = 8) and Morwell which also included practitioners from the Bairnsdale office via teleconference (N = 9).

The CIJ also attended focus groups facilitated by the Law Institute of Victoria (N = 18); Victorian Association for the Care and Rehabilitation of Offenders (N = 6) and the Victorian Aboriginal Legal Service (N = 6) as well as several other sites for the purposes of individual interview (Odyssey House in Richmond (N = 1); Australian Vietnamese Women's Association in Braybrook, (N = 2); and Sunshine Magistrates' Court court support and CISP staff (N = 3)).

Remaining focus groups were held at the CIJ with representatives from Community Legal Centres (two sessions — N = 5 & N = 6 respectively); Financial Counselling and Gambler's Help services (N = 5); Family Violence services (N = 5) and other community-based services, including drug and alcohol (N = 2) and offender support programs (N = 1). A handful of further interviews were conducted over the phone with participants who expressed an interest in the research but could not attend the focus groups in person (EACH Eastern Gambling Service (N = 1); Aboriginal Family Violence Prevention Legal Service (N = 1); Financial counsellor from the Neighbourhood Justice Centre (N = 1) the Defendant Health Liaison Service at the Tasmanian Magistrates' Court (N = 1); and the Salvation Army (N = 1).

Consultations were also conducted with judicial officers (County Court, Magistrates' Court and Children's Court) at the relevant court location, with participants responding to the invitation of the relevant head of jurisdiction. Consultations were possible at the County Court (N = 6); Melbourne Magistrates' Court (N = 9); Melbourne Children's Court (N = 7) and Geelong Magistrates' Court (N = 3). Limitations on the time and sitting obligations of relevant courts ultimately meant that individual consultations were conducted with Magistrates sitting at Dandenong, Morwell and Sunshine Magistrates' Courts respectively.

In addition to these broader discussions (which included participants with varying levels of interest and knowledge) specific individuals were identified for the purpose of targeted consultations where their specialist knowledge or experience made their contributions particularly valuable. This included:

- Magistrates and court staff from the SA Problem Gambling Treatment List (N = 4);
- Staff from Offenders' Aid and Rehabilitation Service, SA who run a specialist gambling counselling program (N = 2);
- The Director of a specialist Gambling Legal Service, Wesley Legal Mission in NSW (N = 1);
- The Sentencing Advisory Council (N = 1);
- The Adult Parole Board (N = 1);
- The NSW Office of Gaming & Liquor (N = 1);
- Judge Mark Farrell, the US judge who established the first specialist Gambling Treatment Court in Amherst, New York; and
- His Honour Justice Robert Redlich of the Victorian Court of Appeal, whose 2008 decision and sentencing remarks have been so influential in relevant case law.

Comments have not been attributed to project participants beyond a description of the relevant setting. Participants were notified at the beginning of the discussion that there would be no direct attribution. This was particularly important where legal practitioners may have otherwise felt reluctant to comment on judicial practices or attitudes. Attribution of comments is limited instead to those identified for targeted consultation and already named in this Report.

Given the limited timeframe in which the project was conducted, this qualitative data collection was not exhaustive and the CIJ expects that there will be many more legal practitioners and service providers who will have more to add upon release of this Report, and the CIJ welcomes their ongoing feedback.

Nevertheless, the CIJ is extremely grateful to all project participants — agencies, members of the legal profession, court staff and members of the judiciary — for their participation and for identifying data or background information where possible, particularly given the current demands on the criminal justice system and human services sector overall. No other project in Australia has been able to engage with the legal profession or judiciary on this topic to the extent reflected here and the CIJ is hopeful that this process has opened the door to further engagement with this issue down the track.

Centre for Innovative Justice

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#### A note on gambling terminology

When initiating this project, the CIJ was careful to recognise the distinction between 'responsible gambling' and 'problem gambling' which government policy makes. Certainly, the VRGF aims to encourage people to be 'responsible' when gambling, rather than to allow it to become a 'problem' or to gamble more than they can afford.

To this end the VRGF recently commissioned and released a study which defined responsible gambling consumption as 'exercising control and informed choice to ensure that gambling is kept within affordable limits of money and time, is enjoyable, in balance with other activities and responsibilities, and avoids gambling-related harm'. Principles for responsible consumption of gambling outlined by that study are:

- affordability
- balance
- informed choice
- control
- enjoyment
- a planned approach to gambling (gambling for entertainment rather than to make money)
- harm-free.<sup>2</sup>

At the same time, of course, governments of all persuasions rigorously encourage gambling to an unprecedented and, many would say, concerning extent. This tension — or contradiction — is therefore important to identify, as was noted by almost all project participants. In other words, almost all suggested that, while they were keen to learn more and to develop more effective responses, those responses would only achieve so much while governments prosecute the case for gambling as a mainstream leisure activity to the extent that currently occurs. This should therefore be a consideration which readers bear in mind.

For people with lived experience of gambling problems, of course, the distinction between 'responsible' and 'problem' gambling can become rather blurred. So too, it seems, can the distinction between 'problem' or 'pathological' gambling and fully blown gambling addiction — at least as far as individual experience and contact with the justice system is concerned. This is particularly the case when myriad other factors which propel people into contact with the justice system are at play. For example, the harm of debt experienced by a person who has a relatively minor gambling problem can be far greater when compared with the same debt experienced by a fully blown addict, depending on the level of socio-economic advantage that these individuals enjoy.

Accordingly, while recognising the value of clinical diagnoses of addiction in facilitating their access to support, the CIJ is cautious about pathologising individuals at the expense of any analysis which keeps structural and systemic factors in view. For this reason, this Report maintains fluidity in the terminology it employs, using the term 'problem gambling' and 'gambling addiction' where specifically appropriate, but overall preferring an analysis based on concepts of 'gambling harm'. This is in accordance with recent research commissioned by the VRGF which looks at the extent that this harm can have, not only on the individual who gambles, but on those around them. Notably, the predominant term used by the VRGF in its public advertising material is now 'gambling harm'.

Part One of this Report therefore examines issues of problem gambling prevalence and this conceptual shift towards concepts of gambling harm. Part Two then examines its application to the criminal justice system and the pathways which lead more generally between gambling harm and crime. Part Three examines the way in which the criminal justice system is currently responding to these pathways and Part Four offers examples and opportunities for this response to shift towards functioning as a positive intervention, rather than becoming a further form of gambling-related harm.

<sup>1</sup> Hing, N., Russell, A., and Hronis, A., "Behavioural indicators of responsible gambling consumption," (2016) Melbourne: Victorian Responsible Gambling Foundation. 3.

<sup>2</sup> Ibid. 3-4.

#### A note on legal terminology

This report is intended to bring legal and clinical/therapeutic spheres together to develop a better response when contact with the criminal justice system becomes a form of gambling harm. As such it covers a wide range of legal terminology which may not be familiar to all readers. Below is a glossary of certain acronyms or terminology which may need clarification for those working outside the legal sphere.

**CISP** — Courts Integrated Services Program. A service which provides holistic assessment and supports to offenders with complex needs.

**CLC** — Community Legal Centres — independent state and federally funded centres providing free legal advice.

**CV** — Corrections Victoria

**DPP** — Department of Public Prosecutions

**HCA** — High Court of Australia — the highest/most authoritative court in the nation, to which appeals of certain cases in state and territories can be made.

**MCV** — Magistrates' Court of Victoria — the local court level, which hears the greatest volume of criminal matters in any jurisdiction.

**Precedent** — case law made by judges, in which a decision and reasoning on a certain matter is followed by other judges in subsequent decisions.

**Offender Support Programs** — publicly and philanthropically funded agencies which provide community based support to offenders once they are released from prison, sometimes while they are still in prison, and sometimes for their families as well.

 ${f R}-{f in}$  case citatations, 'R' stands for Regina, or the Crown, being the body prosecuting the offence.

 ${\bf SC}$  — Supreme Court of Victoria — the most superior court in Victoria, though appeals from this court go to the VSCA — the Victorian Supreme Court of Appeal

**VCC** — County Court of Victoria — the district court level, which hears criminal matters of a certain gravity and the biggest volume of offences directly related to gambling.

**VLA** — Victoria Legal Aid — body providing publicly funded legal assistance to those on limited incomes.

## Part One – Understanding the journey towards concepts of gambling harm

## Prevalence of gambling problems within the community

Far from an occasional 'flutter', gambling is now a prominent leisure activity in Australian culture. In fact, Australia has the dubious honour of spending more per capita on gaming than any other population — including countries with destinations considered to be gaming Meccas.<sup>3</sup> The revenue for jurisdictions from gambling is increasing yearly, with poker machine losses for Victorians rising to \$26 billion in 2016.<sup>4</sup>

Certainly, in 2010, when national gambling statistics were most recently published, around 70% of Australians participated in some sort of gambling activity.<sup>5</sup> Given the increasing availability of Electronic Gaming Machines (EGMs) and online gaming 'apps' — as well as an abundance of advertisements which alternatively attribute a kind of masculinity or mateship to online sports betting; a community or 'family' flavour to pokies venues; or a certain glamour to casino visits — the number of Australians gambling in one way or another may well have increased since that time.<sup>6</sup>

There is a significant difference, of course, between recreational gambling that remains within the individual's control and 'problem gambling'. To this end, the same 2010 study estimated that 115,000 Australians were 'problem gamblers' and that 280,000 were at 'moderate risk'. This represents 0.7 percent and 1.7 percent of the adult population respectively. Meanwhile, problem-gambling prevalence rates of each jurisdiction, established through more recent, single-jurisdiction studies, are set out below:

VIC 2014	ACT 2009	TAS 2013	QLD 2011-12	NSW 2011	SA 2012
0.72	0.50	0.50	0.48	0.80	0.60

If 70% of Australians gamble but only 0.7% have a problem with it, to what extent should that be a concern? As the Productivity Commission cautions, 'small population prevalence rates do not mean small problems'. For example, in 2011, 0.5% of the population were estimated as homeless; 10 and in 2013, approximately 2% of Australians over 14 years had used methamphetamines in the previous 12 months. 11 If we view homelessness or drug addiction as significant policy or criminal justice issues, this means that harm from gambling problems also requires our attention.

<sup>3</sup> http://www.theaustralian.com.au/business/business-spectator/australians-are-worldleading-gamblers-but-the-houses-winnings-are-slipping/news-story/b1c2369c7c1634b353697421c3bb3b74

<sup>4</sup> http://www.theage.com.au/victoria/victorians-poker-machine-losses-rise-to-26-billion-20160724-gqch5g.html

<sup>5</sup> Productivity Commission, "Gambling: Productivity Commission Inquiry Report — Volume 1," (2010).

<sup>6</sup> This said, a systematic review of worldwide prevalence rates released in 2016 found Australia at 0.05%, below the rates of Canada and the US respectively. F Calado and M Griffiths, 'Problem Gambling Worldwide: An Update and Systematic Review of Empirical Research (2010–2015)' (2016) 5(4) Journal of Behavioural Addictions 592.

<sup>7</sup> Productivity Commission, above note 5.

<sup>8</sup> VRGF, "Study of Gambling and Health in Victoria: Findings from the Victorian Prevalence Study 2014," (2015) p 60.
At: https://www.responsiblegambling.vic.gov.au/\_data/assets/pdf\_file/0018/25551/Study\_of\_gambling\_and\_health\_in\_Victoria.pdf

Productivity Commission, above note 5, p 12.

 $<sup>10 \</sup>quad \text{http://www.homelessnessaustralia.org.au/index.php/about-homelessness/homeless-statistics} \\$ 

<sup>11</sup> http://www.druginfo.adf.org.au/topics/quick-statistics

#### Costs: economic and social

The common refrain of state and territory governments, of course, is that the gaming industry reaps myriad benefits for the Australian taxpayer. Almost a decade ago, when the Productivity Commission examined this issue, these benefits ranged between \$12.1 and \$15.8 billion. While no more recent *national* estimates exist for revenue, this provides an indication of what governments argue they are then able to spend on roads, hospitals and schools — as well as, of course, support for those who experience gambling harm.

The tension identified by many project participants, however, is that these benefits are not necessarily assessed against the *costs* of gambling. The Productivity Commission has attempted this assessment, identifying that costs such as suicide, depression, relationship breakdown, lowered work productivity, job loss, bankruptcy and, most relevantly to this project, crime — are estimated to be at least \$4.7 billion.<sup>13</sup> The Productivity Commission contends that greater investment in minimising these significant costs — including measures with even 'modest efficacy' — would increase the *net* benefits generated through gambling activity, at least from a financial perspective.<sup>14</sup>

This point was echoed in the project's discussions and consultations, a number of participants recalling previous practice by gambling venues, such as clubs and hotels, which included the investment of a significant portion of their revenue back into local communities. Perceptions were that this practice had decreased in recent years, meaning that the cost to the local community through gambling losses was no longer being mitigated by the investment being returned to the community in other ways.

Efforts to quantify gambling problems in more meaningful, holistic terms, of course — efforts which assess both the direct and *indirect* costs, being an analysis of 'gambling harm' — suggest that it is a social issue on 'a similar order of magnitude' to major depressive disorder and alcohol misuse and dependence.<sup>15</sup>

In fact, recent Victorian estimates indicate that the total burden of gambling-related harm in 2016 was greater than most of the state's other common health conditions — including diabetes, epilepsy and eating disorders. <sup>16</sup> Meanwhile, recent research also suggests that the public may have reached saturation point in terms of the encroachment of gambling that it is prepared to accept. <sup>17</sup>

<sup>12</sup> Productivity Commission, above note 5.

<sup>13</sup> Ibid, p 21.

<sup>14</sup> Ibid.

<sup>15</sup> Browne, M. et al., "Assessing gambling-related harm in Victoria: a public health perspective," (2016). Melbourne: Victorian Responsible Gambling Foundation. 3.

<sup>16</sup> Ibid

<sup>17</sup> McAllister, I., "Public opinion towards gambling and gambling regulation in Australia," International Gambling Studies 14, no. 1 (2013).

#### Vice, disease or addiction?

Certainly, conceptions of gambling have shifted dramatically over the last century. It might be hard for younger generations to believe that gambling activity was once portrayed as a vice and interpreted from a purely moral stance. In North America, for example, psychiatrists, clergy, and some politicians characterised it 'as an ideologically insidious affront to the Puritan work ethic; [undermining] faith in thrift, industry, and Providence, not to mention belief in the value of a dollar'.18

In fact, gambling was demonised right around the world due to the activity's associations with and — ironically in the context of this project — regulation through crime and the criminal justice system. In 1950s America, all forms of gambling were illegal; <sup>19</sup> while India's laws have still only legalised some forms of gambling, namely horse racing; the card game 'rummy'; lotteries conducted by a few state governments; and casinos in certain states. <sup>20</sup>

In Australia, different forms of gambling have been prohibited at different times. Though prohibitions have almost never been effective, it is useful to remember that a modern day phenomenon like sports betting was still illegal until the 1980s. Equally, though celebrated for its nostalgic associations, 'two-up' — where players gamble on how two coins fall when thrown in the air — was only legalised for the first time in 1973 when Australia's first casino also opened in Hobart. Until that year, casino gambling had been prohibited — a far cry from contemporary contexts in which it is a central activity in many Australian jurisdictions, including Victoria. Similarly, EGMs were first allowed in registered clubs in NSW in 1956, but were not introduced into other jurisdictions until decades later, with Victoria entering the fray in the early 1990s. As in NSW, they quickly became the most popular form of gambling activity.<sup>21</sup>

Overall, for much of the twentieth century, public policy was predominantly directed at reducing gambling's association with crime, and its regulation involved criminal justice authorities. However, the symbolic centre of government policy-making in relation to gambling has now shifted significantly to 'sporting and leisure', and with it, the authorities involved have also changed.<sup>22</sup> In Victoria, as in most other jurisdictions, this includes being regulated through agencies charged with regulating liquor, gaming and racing, rather than with regulating criminal justice. It appears, then, that this is a mainstream issue here to stay — that it is too late, as one Federal Government spokesperson suggested, to 'unscramble that egg'.<sup>23</sup>

<sup>18</sup> Cavion, L., Wong, C., and Zangeneh, M., "Gambling: a sociological perspective," in In the pursuit of winning problem gambling theory, research and treatment, ed. Masood Zangeneh, Alex Blaszczynski, and Nigel E. Turner (New York: Springer, 2008). 96.

<sup>19</sup> Bernhard, B., 'The Voices of Vices: Sociological Perspectives on the Pathological Gambling Entry in the Diagnostic and Statistical Manual of Mental Disorders,' *American Behavioral Scientist* 51, no. 1 (2007). 30.

<sup>20</sup> Benegal, V., "Gambling experiences, problems and policy in India: a historical analysis," *Addiction* 108, no. 12 (2013). 21

<sup>21</sup> For further discussion and debates regarding the history of gambling in Australia see Australian Institute for Gambling Research, 'Australian Gambling: comparative history and analysis,' (1999); and Breen, H., 'Visitors to Northern Australia: Debating the History of Indigenous Gambling,' International Gambling Studies 8, no. 2 (2008).

<sup>22</sup> McAllister, above note 19, 146.

<sup>23</sup> Alan Tudge, at the time Parliamentary Secretary for Finance, Sydney Morning Herald, 27.09.16 http://www.smh.com.au/business/consumer-affairs/gambling-is-killing-one-australian-a-day-but-it-rakes-in-billions-in-tax-20160927-grpypl.html

#### Medical models

Though encouraged as a mainstream *leisure* activity, contradictions continue to pervade our perceptions once gambling falls into the 'problem' domain. While some continue to view excessive gambling as a moral failing of the individual, clinical and therapeutic spheres now frame it through the language of medicine. In fact, gambling disorder has now been recognised as an addiction. Though late to the diagnostic party when compared with other variations, clinical tools now exist which can assess the extent to which an individual may indeed be suffering from an addiction to gambling. The most well-known is the American Psychiatrists' *Association's Diagnostic & Statistical Manual of Mental Disorders* (the 'DSM').<sup>24</sup>

The DSM has had various iterations. The fourth edition, released in 1994, included problem gambling for the first time, but designated it as one of many 'impulse control disorders', as well as including a criterion of 'illegal acts'. DSM 5 in 2013 reframed 'gambling disorder' as an 'addiction' and removed 'illegal acts' (now more broadly included in 'lying to others'). For diagnosis under the DSM 5, a person's behaviour in the past year must meet at least four of the following:

- 1. Is often preoccupied with gambling (such as reliving past experiences, or thinking of ways to get money with which to gamble in the future);
- 2. Needs to gamble with increasing amounts of money in order to achieve the desired excitement;
- 3. Repeated, unsuccessful resorts to control, cut back or stop gambling;
- 4. Feels restless or irritable when attempting to cut down or stop gambling (withdrawal symptoms);
- 5. Often gambles when feeling distressed;
- 6. After losing money gambling, often returns another day to get even ('chasing' one's losses);
- 7. Lies to family members, therapist or others to conceal the extent of gambling;
- 8. Jeopardised or lost a significant relationship, job or educational opportunity because of gambling;
- 9. Relies on others to provide money to relieve a desperate financial situation caused by gambling.

The fourth and fifth editions of the DSM caution that diagnosis is not to be used for the legal purpose of demonstrating the presence of a mental disorder or other legal standard, for instance disability.<sup>25</sup>

The Problem Gambling Severity Index (PGSI) of the Canadian Problem Gambling Index is the most widely used in Australian studies and asks individuals how often they participate in gambling activities (i.e., casino gambling, sports betting, lottery); how much money they bring to the gambling venue; how much money is risked per occasion; and the harmful consequences the individual has experienced as a result (i.e. health consequences, stressful events). Scores range from zero to eight or higher, with the higher scores indicating severe negative effects on a person's life.<sup>26</sup>

This medical discourse has simultaneous advantages and disadvantages. On one view, the characterisation of problem gambling as a public health concern — and problem gamblers as ill — has facilitated increases in support. It has also potentially facilitated an increase in disclosures and help seeking behaviour, although research has found that legal problems can be associated with reduced help-seeking behaviour, a challenge which will be further discussed later in this report.<sup>27</sup>

<sup>24</sup> American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (DSM-5®), (Washington, D.C: American Psychiatric Publishing, 2013).

<sup>25</sup> National Centre for Responsible Gambling, "Gambling and Health in the Justice System: A Research-based Guide about Gambling Disorders for Judges, Parole Officers, Attorneys and Other Professionals Involved in the Justice System," (2015). 12–13.

<sup>26</sup> For a complete review of the screens available for problem gambling, see Victorian Responsible Gambling Foundation, "Problem Gambling and the Criminal Justice System," (2013). Melbourne: Victorian Responsible Gambling Foundation.

<sup>27</sup> For further discussion of the barriers to, and factors of, help-seeking see Gainsbury, S., Hing, N., and Suhonen, N., 'Professional help-seeking for gambling problems: awareness, barriers and motivators for treatment,' *Journal of Gambling Studies* 30, no. 2 (2014).

Conversely, this kind of framework can risk pathologising the individual concerned, while leaving the structural imperatives intact. Certainly, today's diagnostic criteria remain entrenched in ideas of 'vice', individualising a problem which, in reality, is socially and politically constructed. Indeed, based on a comparison of the diagnostic criteria with how gambling is portrayed in historical writings, one commentator contends:

...the degree of certitude invoked by today's experts is eerily reminiscent of the certitude possessed by yesterday's experts. We might wonder, then, how the legacy of our own unique chapter in problem gamblers' history—a chapter when psychology, medicine, and academe have custody of this sensitive population—might be interpreted when tomorrow's accounts are written.<sup>28</sup>

Nevertheless, the medical model has enabled a range of services to become available to gamblers who need help. Across each jurisdiction in Australia a combination of clinical; non-clinical, financial counselling and community education services are funded through a 'hypothecated tax or levy on gamblers' losses'.<sup>29</sup>

Many of these respond to the high rates of other comorbid issues which appear among problem gamblers in general populations. Of these, the most common is nicotine dependence (60.1%), followed by a substance use disorder (57.5%). Certainly, co-existing drug and alcohol problems amongst clients was a constant theme in the project, with multiple participants suggesting that the stigma associated with gambling meant that clients would 'rather tell their family that they have a serious drug problem than that they gamble'. For example, Odyssey House, an agency which offers drug and alcohol services but which also screens for gambling, reported that help-seeking behaviour and disclosure for gambling was still a struggle for many clients.<sup>30</sup>

Meanwhile, the literature also associates comorbidity of gambling and anxiety at a rate of 37.4%.<sup>31</sup> To this end, project participants reported that 'depression is the norm, it goes without saying', but that this then also comes with overlays of 'agoraphobia, obsessive compulsive disorder....the list goes on.' In other words, individuals with gambling problems or disorder frequently indicate other problems or disorders. The question then becomes: which issue comes first?

Research suggests that progression from non-problem gambling to at-risk gambling is associated with alcohol dependence, anxiety and/or obesity, with these other problems *preceding* the development of a gambling problem.<sup>32</sup> Research also suggests that addictions such as pathological gambling may serve as a means of coping with pre-existing trauma, including childhood sexual abuse, a finding confirmed by the observations of project participants. This means that gambling (like other addictions) is used to soothe and regulate emotion and to 'heal' damage caused by traumatic life events.<sup>33</sup>

To this end, members of the *Three Sides of the Coin* performance group — a group of people with lived experience of problem gambling — speak of seeking refuge from depression or anxiety in gambling, only to seek further refuge from the depression and anxiety that gambling *itself* had then caused in the same activity.

'After a while, the only identity I had was as a loser. It was all I had, though, so I kept going back'.34

<sup>28</sup> Bernhard, "The Voices of Vices: Sociological Perspectives on the Pathological Gambling Entry in the Diagnostic and Statistical Manual of Mental Disorders," *American Behavioral Scientist* 51, no. 1 (2007). 30.

<sup>29</sup> Martyres, K. and Townshend, P., "Addressing the Needs of Problem Gamblers With Co-Morbid Issues: Policy and Service Delivery Approaches," Journal of Gambling Issues, no. 33 (2016). 69.

<sup>30</sup> Odyssey House, "Statewide training package and resources, alcohol and other drugs services," in Many Ways to Help conference 2016 (Melbourne).

<sup>31</sup> The term diagnostic comorbidity is used commonly to refer to co-occurring disorders, and subsumes conditions that occur simultaneously (i.e., current comorbidity), and disorders that occur independently in time (i.e., lifetime comorbidity) Cowlishaw, S. et al., "Pathological and problem gambling in substance use treatment: a systematic review and meta-analysis," *Journal of Substance Abuse Treatment* 46, no. 2 (2014). 98.

<sup>32</sup> Billi, R. et al., A longitudinal study of gambling and health in Victoria 2008–2012, (2014). Victoria: Victorian Responsible Gambling Foundation. xi.

This study also found that the progression is associated with being male, speaking a language other than English, having a year 10 education or less.

<sup>33</sup> Blaszczynski, A. and Nower, L., "A pathways model of problem and pathological gambling," Addiction 97 (2002).; Dion, J. et al., "Sexual abuse, residential schooling and probable pathological gambling among Indigenous Peoples," Child Abuse & Neglect 44 (2015).

<sup>34</sup> Three Sides of the Coin performance, Many Ways to Help Conference, Melbourne, October 2016.

Of particular and obvious concern, this pre-existing trauma or anxiety may culminate in contemplation of — and even attempts at — suicide, with 11.5% of problem gamblers in the studies referred to above reporting that they had seriously considered or attempted suicide.<sup>35</sup> Suicide and gambling are certainly correlated, but an exact assessment is not possible with existing data — particularly given that problem gamblers usually disguise their problem from family members and those around them. (See discussion of gambling-related suicide in relation to crime, below in Part Two).<sup>36</sup>Available treatment

Within these broad parameters, therapeutic and other treatment approaches differ, depending on the individual receiving support and their particular needs. The CIJ heard that a principle of Victorian gamblers' counselling is being 'client-led', 'putting the client at the centre of the system design' or 'working on what the client is prepared to work on'.<sup>37</sup>

For Gambler's Help counsellors, this can include working on life-skills or past trauma, with 'gambling just a speck of what is going on for the client', right through to practical measures, such as helping with self-exclusion from gaming venues. Treatment and counselling in custodial environments obviously involves a range of different considerations. Detail on the various types of help available can be found on gambling service websites, though these resources are of differing quality across the country. Currently, Victoria's current gambling help is divided into core services, specialist services and self-help, as follows:

#### Core services

- Problem gambling therapeutic counselling, including local face-to-face service delivery.<sup>38</sup>
- Problem gambling financial counselling, including local face-to-face service delivery.
- Gambler's Help Line, a 24-hour, seven days per week, statewide service. The helpline also offers
   Ready to Change?, a scheduled therapeutic telephone counselling service.
- Gambling Help Online, a national service providing 24-hour live (text-based) online counselling, email-based counselling and support, and a range of self-help information and information on local support services.
- Recovery Assistance Program (RAP), financial assistance for individuals and their families when gambling has resulted in financial crisis. RAP is administered by the problem gambling therapeutic and financial counselling services.
- Community Education, a range of locally appropriate interventions.

This figure compares with 1.1% of non-problem gamblers, according to The Centre for Gambling Research at the Australian National University (cited in Stone, C., Yeung, K., and Billi, R., "Technical Report Four: Social Determinants and Co-Morbidities: Multivariate Models of Co-Morbidities," The Victorian Gambling Study: A Longitudinal Study of Gambling and Health in Victoria 2008–2012 (2016). Melbourne: Victorian Responsible Gambling Foundation. 17.)

<sup>36</sup> Browne, above note 15.

<sup>37</sup> Focus group participant, Financial counselling and Gambler's Help services, September 2016

<sup>38</sup> Counselling providers are spread out across Victoria to allow statewide help. At the time of writing, they can be classified as:
Metropolitan Melbourne: EACH, The Salvation Army, Banyule Community Health, Bentleigh Bayside Community Health, IPC Primary Care. Regional services: Bethany Community Support, Latrobe Community Health Service, Primary Care Connect, Child and Family Services Ballarat, Nexus Primary Health, Grampians Community Health, Gateway Community Health, St Luke's Anglicare. Aboriginal and Torres Strait Islander services: Victorian Aboriginal Health Service, Gippsland and East Gippsland Aboriginal Co-operative, Mallee District Aboriginal Service, Rumbalara Aboriginal Co-operative. https://www.responsiblegambling.vic.gov.au/getting-help/find-a-counsellor

#### **Specialist services**

According to the most recent review of the current service model available, Victorian Aboriginal Health Service (VAHS) provides referrals and treatment for Aboriginal and Torres Strait Islander communities, while a number of 'in-language' gambling counsellors operate in other Victorian services.<sup>39</sup> A number of agencies provide in-language counselling for CALD communities, including the Australian Vietnamese Women's Association; Indo-Chinese Community Support Organisation; and Victorian Arabic Social Services. The Victorian Gambler's Help Youthline also provides assistance for those under 25. Community education services are also provided through a range of different agencies, including the Bouverie Centre, while a number of self-help tools are online, through Gambler's Help Online and the 100 Day Challenge.

General financial counsellors, meanwhile (as opposed to those who specialise in both gambling and financial counselling), 'focused on the head stuff, not the heart'. For example, focus group participants reported that, for many gamblers, working on payment plans for debts and utility bills — and developing crucial 'financial literacy' — was a less confronting door to assistance than addressing the more significant reasons underlying their addictive or compulsive behaviour.

To this end, gambler's help counsellors and financial counsellors often saw the most crucial step in this as just limiting clients' access to cashflow which, due to online banking and 'pay day lenders' or 'Cashies', was unrestricted:

Fifty years ago, you waited till the Bank opened at 9am and then you wrote it all down in a little bank book. Now, you can have access to cash and to gambling 24/7 — you never see it come or go.<sup>40</sup>

People have separate gambling accounts — they don't realise it's real money...41

I ask when an individual comes in for treatment 'when did you last gamble?' Ten years ago, it would be 'on the weekend'. Now because of smart phones, it's 'just then, in the waiting room outside'.<sup>42</sup>

I encourage clients to find their own strategies. One decided that freezing his credit card in a bucket of ice was the best strategy. He still had it available, but if he wanted to use it he had to wait until the ice thawed. That gave him time to call me and talk it through.<sup>43</sup>

While all jurisdictions offer a range of services, a laudable emphasis in Victoria appears to be on cross-sector collaboration, illustrated through the VRGF's publication of cross-sector collaboration 'guidelines' and associated funding streams. Nevertheless, given this predominantly individualised approach — and a lack of cross-jurisdictional evaluations — it is not possible to compare the effectiveness of Australia's help service provision, particularly as it is difficult to evaluate these client-led approaches. This means that approaches such as web-based and self-help interventions; twelve-step programs; financial counselling and assistance; self-exclusion and alternative therapies (e.g. acupuncture) attract less empirical support.

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<sup>39</sup> KPMG, "Review of Problem Gambling Treatment Services — Final report: service model," (2013). 23–25.

<sup>40</sup> Focus group participant, Financial Counselling and Gambler's Help services, CIJ, September 2016.

<sup>41</sup> Focus group participant, Law Institute of Victoria, October 2016.

<sup>42</sup> Focus group participant, Financial Counselling and Gambler's Help Services, CIJ, September 2016.

<sup>43</sup> Interview, Financial Counsellor, Odyssey House, November 2016.

<sup>44</sup> Bouverie Centre, "Practice guidelines for cross-sector collaboration between health and welfare services and Gambler's Help," (2014).

<sup>45</sup> Martyres et al, above note 29, p 74.

<sup>46</sup> Any examination of the reviews of gambling services undertaken in each Australian jurisdiction is limited by a number of weaknesses, including the fact that only the reviews of systems in Victoria and NSW are publicly available; that neither of those reviews provides a sufficiently comprehensive interstate comparison; and that there are redactions in parts of the review documents. For these reasons, only limited conclusions can be drawn about different models across Australia.

<sup>47</sup> Miller, H., "Seeking help for gambling problems," (2014). Victoria: Victorian Responsible Gambling Foundation.

#### Bringing science and therapy together

By comparison, robust evidence does exist for psychological interventions using variations of Cognitive Behavioural Therapy (CBT). 48 These have been assessed as 'significantly [reducing] symptoms of disordered gambling and associated behaviours such as frequency of gambling and expenditure'.49 It is therefore of note that CBT is the predominant approach to treating pathological gambling across Australian therapeutic practice.

Of course, variations on CBT are far from 'the final word' on effective treatment of gambling disorder, with experts calling for 'increased diversification of well-designed outcome studies, focusing on all potential types of interventions' (our emphasis).50 To this end, there are suggestions that American Psychiatrist Association standards 'set the bar too low' because it is possible to prove efficacy via only two studies.51

That said, those who work with gambling addicts in less clinical, client-led contexts may be justifiably frustrated by the failures of empirical frameworks to reflect the value of the work that they do, or the ethical challenges of evaluating these against the theoretical 'gold standard' of empirical research.<sup>52</sup> As commentators point out, the demands of empirical research often mean that it takes decades to establish an evidence base — a long time for desperate clients to wait.53

The CIJ suggests that, like any other community challenge, no single model of treatment or response is appropriate, but that instead a suite of approaches is required. Certainly, public health approaches to problem gambling reflect success in other areas — success which can often only be properly understood in considerable hindsight.<sup>54</sup> To this end interventions are now being designed to target the entire population along a 'spectrum' of intrusiveness - from limiting the availability of gambling; through community education; to more intensive treatments for individuals. This is about balancing the 'need' for each health program with the importance of maintaining people's personal sovereignty and, in this case, their liberty to gamble.

A further question, of course, is how much this should involve expanding public conceptions of gambling disorder, and bringing together current understanding in different spheres. Certainly, just as the community has taken time to understand that mental health problems can be as debilitating as physical health problems, so it has also been slow to accept that the impact of a gambling addiction may, in some cases, be as debilitating as the more visible effects of something like a drug and alcohol addiction. This challenge as it relates to the criminal justice system will be discussed in more detail in Parts Two and Three of this Report. More broadly, however, it is not all that surprising that the comparison has only recently been made. This is because a substance addiction — particularly an addiction to a substance like heroin or methamphetamine - can have a visible effect on someone's appearance, and can often make them unable to maintain any grasp on the rest of their life. Frequently losing employment, housing or social networks (if they previously existed), the physical effects of an addiction of this kind can make an addict appear quite unwell. Meanwhile, we assume that the substance itself is having an addictive impact, making the individual unable to exercise any control or choice over their actions.

<sup>48</sup> Smith, D. et al., "Effects of Affective and Anxiety Disorders on Outcome in Problem Gamblers Attending Routine Cognitive-Behavioural Treatment in South Australia," Journal of Gambling Studies 31, no. 3 (2015).

<sup>49</sup> Yakovenko, I. and Hodgins, D. C., "Latest Developments in Treatment for Disordered Gambling: Review and Critical Evaluation of Outcome Studies." Current Addiction Reports 3, no. 3 (2016). 300. Effect sizes have been demonstrated for up to 12 months.

Ibid, p 304.

lbid.

A similar problem is faced by other programs which focus on psycho-educational approaches, such as Men's Behaviour Change Programs. See Centre for Innovative Justice, (2015) Opportunities for early intervention: bringing perpetrators of family violence into view, RMIT University, Melbourne.

Yucel, M., "Virtual reality: new avenues for research and therapy," in Many Ways to Help conference 2016 (Melbourne).

Healy, M., "Lessons from the field: evaluating prevention projects and programs," in Many Ways to Help conference 2016 (Melbourne).

By contrast, individuals with a gambling addiction may appear to be quite high functioning and physically healthy, often maintaining their job; their home; their car or their family and social life — sometimes over many years — without anyone else suspecting a thing. What's more, the behaviour that is necessary to sustain this addiction — not only gambling in secret but finding the resources to do it — often occurs over a long period and involves a significant amount of deception. While this is akin to drug addicts who may steal from family members in order to fund their addiction, the community perception may be that the drug addict has no control, but that a gambler, by contrast, has a 'choice'.

Emerging evidence from neuroscience, however, brings understanding about substance addiction and gambling addiction closer together. Studies in this field use neuroimaging to demonstrate that gambling activity can 'hijack' our brain's reward system — a system which evolved to trigger behaviours which ensure survival, such as eating — by binding to the same receptor sites, producing dopamine and causing adaptations which can change the brain's circuitry.<sup>55</sup> For example, a controlled study in the UK examined the neural basis of participants' reactions to gambling 'cues' and found that craving ratings in participants with gambling disorder increased following exposure to gambling cues compared to non-gambling cues.<sup>56</sup>

Professor Marc Lewis — a Canadian researcher currently working in the Netherlands — commenced his work in neuroscience to understand his own previous experience of addiction. He found that the physical changes to the brain which occurred in the process of addiction were not caused by drugs themselves, but by the brain's 'motivational engine being driven by the dopamine pump', with less activity occurring in addicted brains and time collapsing into an 'eternal present of the chase'.

People think that it's the substance we introduce that changes the brain, i.e. the drugs, but it's the substance we manufacture ourselves, the dopamine — that does the job'.<sup>57</sup>

Lewis suggests that gambling addicts get trapped by 'now appeal', with the dopamine privileging momentary fulfilment over longer term priorities. <sup>58</sup> Gamblers, like substance users, may also develop what Lewis refers to as 'ego fatigue', with the capacity to resist gambling becoming weaker over time.

Ultimately, this system reinforces and escalates gambling behaviour, with an addict's brain needing higher odds and bigger stakes to achieve the same effect. This includes, as research suggests, through the use of 'near-misses' — moments where an EGM game's 'winning' symbols appear, making players believe that they are controlling the odds and that they should continue playing. Near-misses of this kind have been shown to trigger a brain stimulus equivalent to the effect of 'real-wins', meaning that it is the release of dopamine which satisfies the addicted gambler's urge, rather than the win or loss involved in the gambling activity itself.<sup>59</sup>

<sup>55</sup> Seear, K. and Fraser, S., "Beyond criminal law: The multiple constitution of addiction in Australian legislation," Addiction Research & Theory 22, no. 5 (2014). 439.

<sup>56</sup> EH Limbrick-Oldfield et al, 'Neural Subtrates of Cue Reactivity and Craving in Gambling Disorder'(2017) 7(1) *Translational Psychiatry* 1

<sup>57</sup> Lewis, M., "Addiction, Brain Change, and Gambling: Deep Learning, not Disease," Presentation to Many Ways to Help conference 2016 (Melbourne); See also Lewis, M. D. "Dopamine and the Neural "Now": Essay and Review of Addiction: A Disorder of Choice." Perspectives on Psychological Science 6, no. 2 (2011).

<sup>58</sup> Ibid

<sup>59</sup> Labuzek, K. et al., "The latest achievements in the pharmacotherapy of gambling disorder," Pharmacological Reports 66, no. 5 (2014).

The suggestion that this neuroscience has been deliberately used to induce, mislead and entrap vulnerable gamblers is the focus of current legal claims and policy concern. Regardless of developments in these broader contexts, however, understanding the exact neuro-mechanisms at play in individuals suffering from gambling disorder may also assist to treat the disorder and regulate the activity more effectively. In the suggestion of the sugge

For example, the Statewide Gambling Treatment Clinic in South Australia offers clients an inpatient treatment service, where the 6–12 sessions of CBT and the kind of graded exposure therapy typically offered in an outpatient program are condensed into an intensive 2-week program of daily sessions in a hospital setting. <sup>62</sup> This therapy involves triggering gambling urges that are not overwhelming and managing the associated feelings of anxiety in a controlled setting (i.e. with therapist supervision) until there is a reduction in the client's urge for that particular trigger.

Participants achieve this 'habituation' as they are exposed to a series of graded tasks, from simple sensory cues (such as pictures and sounds of gaming machines) to walking past a venue. Clients then repeat the graded tasks as 'homework' (i.e. without supervision). As confidence grows, the tasks become more demanding until the client no longer needs to avoid aspects of daily life which previously triggered gambling behaviour. Meanwhile, the aim is for participants to gain 'refuge and relief from their usual psychosocial distractions and day to day responsibilities'. Participant feedback about this service suggests there are other advantages, particularly the range of procedures which made them feel that they had been 'checked from head to toe'. 64

This 'whole of person' care is crucial to addressing the underlying issues that contribute to the development of an addiction in the first place. This includes the childhood trauma; anxiety; depression; substance addiction or range of other issues identified as predisposing people to addiction as identified above.

To this end, Lewis found that effective recovery required individuals to teach their brain to look beyond the stigma associated with gambling to a 'future self who is good and trustworthy'. This includes identifying and 'surfing' the urges to gamble which come and go; and by addressing any trauma which creates a vulnerability to addiction in the first place.<sup>65</sup>

More broadly, surveys of gambling counsellors suggest that, similar to the Statewide inpatient program, the techniques of CBT (role playing, in vivo exposure) are used in Victoria as well. <sup>66</sup> In fact, researchers at Monash University have been exploring the potential of virtual reality to increase the potency — and theoretically the effectiveness — of these kinds of treatments. Subjects of this trial wear a headset and enter a virtual casino, gambling away virtual money, while researchers monitor heart rate; sweat gland activity; body temperature; and brain activity. The idea is to help the subjects — and eventually, it is hoped, patients — 'regain mindfulness'. More broadly, the aim is also to improve assessment and treatment in practice. <sup>67</sup>

 $<sup>60 \\ \</sup>text{http://www.smh.com.au/federal-politics/political-news/pokieleaks-campaign-calls-for-gambling-industry-secrets-20160926-groino.html}$ 

<sup>61</sup> Labuzek, K. et al. above note 59.

<sup>62</sup> During the period 2008–2009, approximately 1000 clients with gambling disorders sought treatment through SGTS. Of these clients, 53 were admitted to an inpatient program. Morefield, K. et al., "An Inpatient Treatment Program for People with Gambling Problems: Synopsis and Early Outcomes," International Journal of Mental Health and Addiction 12, no. 3 (2013), 367.

<sup>63</sup> Ibid. 369.

<sup>64</sup> Ibid. 370.

<sup>65</sup> Lewis, above note 57.

<sup>66</sup> Victorian Responsible Gambling Foundation, above note 26, p 117.

<sup>67</sup> Yucel, above note 53. See also, http://www.smh.com.au/technology/innovation/retraining-the-brain-to-halt-the-money-drain-20151024-gkhjq0.html

Finally, the CIJ understands that medical trials of pharmacotherapy for gambling problems are also underway in Australia.<sup>68</sup> However, the various pharmacotherapies for gambling problems have received only limited support.<sup>69</sup> The newest meta-analyses conclude that *only* opioid antagonists (naltrexone and nalmefene) have demonstrated a small but significant effect, compared with placebo.<sup>70</sup> These drugs influence the dopamine system, reducing the intensity of gambling urges.<sup>71</sup> Some service providers said that this evidence has convinced their organisations that there is merit in using these treatments in some contexts.<sup>72</sup> However, Lewis suggests that the treatments must be understood as a 'conduit to survival, not to life'.<sup>73</sup>

Other commentators note that:

...pharmacotherapy may not be considered an evidence-based treatment for disordered gambling alone, but limited evidence exists for its use in the treatment of comorbid gambling and mood/anxiety disorders such as bipolar spectrum...and obsessive compulsive disorder[s].<sup>74</sup>

While it is unclear where these developments in science will lead, overall it is worthwhile recognising how they help us to understand addiction and where gambling may sit in this equation.

<sup>68</sup> http://www.sbs.com.au/news/article/2012/12/18/anti-gambling-pill-goes-trial

<sup>69</sup> At this stage, those examined include elective serotonin reuptake inhibitors (SSRIs), mood stabilizers, dopaminergic medications, opioid antagonists, and glutamatergic medications.

<sup>70</sup> Yakovenko and Hodgins, 'Latest Developments in Treatment for Disordered Gambling: Review and Critical Evaluation of Outcome Studies', Current Addiction reports 3, No. 3 (2016), 302.

<sup>71</sup> These drugs may also have side-effects, including nausea. Brown, J. et al., "Problem Gambling: A Beginner's Guide for Clinical and Forensic Professionals," *Behavioral Health 2*, no. 2 (2016). 25. At the time of writing, the U.S. Food and Drug Administration (FDA) had still not approved medication for the treatment of disordered gambling.

<sup>72</sup> Focus group participant, Alcohol and Drug service providers, CIJ, September 2016.

<sup>73</sup> Lewis, M., "Addiction, Brain Change, and Gambling: Deep Learning, not Disease," in Many Ways to Help conference 2016 (Melbourne).

<sup>74</sup> Yakovenko et al, above note 70.

#### An analysis of gambling harm

The developments described above may progress our response to *individual* gamblers and their problem behaviour. As referred to earlier, however, attention has begun to shift towards a focus on broader gambling-related harm, harm which extends beyond the effects on the individual gambler.<sup>75</sup>

While the community underestimates the severity of this harm,<sup>76</sup> this is in part because of a failure to distinguish the behaviour from its associated outcomes. For instance, 'financial difficulties' and 'lying to significant others' are often seen as symptoms *and* as harms of an individual's gambling problem. This may mean that individual harms have been emphasised at the expense of family and population harms.

Moving towards a broader conceptualisation, gambling-related harm has been defined as '[a]ny initial or exacerbated adverse consequence due to an engagement with gambling that leads to a decrement to the health or wellbeing of an individual, family unit, community or population'. The Australian Gambling Research Centre offers further insight into what these consequences might include:

Adverse consequences typically involve financial problems (including mortgage foreclosure, inability to pay bills/rent or inability to purchase essentials such as food) and relationship breakdown. These harms extend to the family and friends of [problem gamblers]...Work performance is often affected, resulting in absenteeism and potential job loss. Clinical distress is frequently reported, with suicide attempted in the worst cases. Problems extend to legal or even criminal issues when debts remain unpaid, or when theft or domestic violence result from financial or emotional strain.<sup>78</sup>

Further research has developed a 'taxonomy' of harm, which researchers developed by analysing data obtained from interviews; extant literature; focus groups; and public gambling help or support forums on the internet.<sup>79</sup> Categories of harm proposed in this taxonomy are, broadly:

- financial harms;
- emotional or psychological distress;
- detriments to health;
- reduced performance at work or study;
- cultural harm;
- lifecourse and intergenerational harm;
- relationship disruption, conflict or breakdown; and
- criminal activity.

The following discussion addresses the final three dot points.

<sup>75</sup> See for example, Australian Gambling Research Centre, "Self-exclusion," and "Limit setting" Review of elentronic gaming pre-commitment features (2016).

<sup>76</sup> Australian Gambling Research Centre, "Communication needs and the Australian gambling field," (2015). 11.

<sup>77</sup> Langham, E. et al., "Understanding gambling related harm: a proposed definition, conceptual framework, and taxonomy of harms," BMC Public Health 16, no. 1 (2016). 4. For further detail, see Langham et al.'s discussion (p. 5).

<sup>78</sup> Australian Gambling Research Centre, above note 75, 2.

<sup>79</sup> Langham et al., above note 77. See also, Browne et al, above note 15.

#### Intergenerational harm

Examinations of harm experienced at the family level<sup>80</sup> can be built on to identify 'legacy harms'<sup>81</sup> — those that continue to occur (or emerge) even if the person's engagement with gambling ceases and which potentially become life course and intergenerational. Certainly, research indicates that the children of problem gamblers are two to ten times more likely to experience gambling problems than people without a parent or sibling with a gambling problem. Specifically, people whose fathers have gambling problems are reported as 11 to 14 times more likely to have gambling problems, while those with mothers with gambling problems were 7 to 11 times more likely.<sup>82</sup> These children may experience other harm, including various forms of maltreatment, with some evidence suggesting that problem gamblers may be more likely to physically abuse; punish harshly; or neglect their children.<sup>83</sup>

To this end, one AGRC project — part of the Australian Temperament Project (ATP) — may shed light on the intergenerational experience of gambling harm. ATP, a longitudinal study running for over 30 years which has followed a large group of children from infancy to adulthood, is currently collecting data from these children, their parents and now the children's offspring. Data previously collected concerned participants' emotional and behavioural adjustment; risky behaviours (e.g. drug and alcohol use, driving); and antisocial behaviour.

More recently, Wave 16 of ATP also included questions about gambling, specifically concerning gambling participation; problem gambling; and early modelling and exposure to gambling. The results from the AGRC's analysis should provide valuable lessons for the way in which we approach concepts of gambling harm.<sup>84</sup> A recent AGRC International Youth Development Study also suggests that there is a need to focus on other biological; personality; cognitive; and community level factors as possible targets to reduce risk of problem gambling.

<sup>80</sup> Australian Gambling Research Centre, "The impact of gambling problems on families," AGRC Discussion Papers (2014).

<sup>81</sup> Langham et al., above note 77.

<sup>82</sup> Dowling et. al, cited in Australian Gambling Research Centre, above note 80, p 5.

<sup>83</sup> Lane, W. et al., "Child maltreatment and problem gambling: A systematic review," Child Abuse & Neglect 58 (2016).

<sup>84</sup> Australian Gambling Research Centre, https://aifs.gov.au/agrc/projects/gambling-australian-temperament-project See also K Scholes-Balog and N Dowling, 'Longitudinal Protective Factors for Problem Gambling and Related Harms: Building Resilience Among Young Adult Gamblers' (Victorian Responsible Gambling Foundation, 2017).

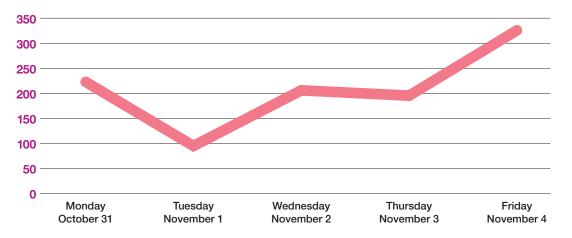
#### Family violence

Also important to focus on more effectively in any analysis of gambling harm is the category of 'relationship disruption, conflict or breakdown' or, as the AGRC definition describes, 'domestic violence [which] result[s] from financial or emotional strain'.

These characterisations are concerning, in the CIJ's view, for reasons which are explained below. Regardless, however, a recent meta-analysis of 14 different studies found that, among problem gamblers, 38.1% report being victims of intimate partner violence and 36.5% report being perpetrators. Interrogated the other way, 11.3% of perpetrators of family violence more broadly identify as problem gamblers.<sup>85</sup>

Meanwhile, another recent study found that, when adjusted for other indicators, there was a statistically significant correlation between poker machine density and police-recorded domestic violence rates among postcodes. Similarly, police recorded 20% fewer family violence incidents when postcodes with no poker machines were compared with postcodes with at least 75 pokies per 10,000 people. In other words, there were more police-recorded violence in areas with more poker machines. The statistically significant correlation between poker machines and police-recorded violence in areas with more poker machines.

Safe Steps (Victoria's statewide family violence crisis response service), provided raw data which indicated that calls to this service spiked uniquely following periods of significant gambling activity. These figures showed that calls on Cup Day were significantly lower than on most Tuesdays, reflecting the fact that women are less likely to call while perpetrators are at home, but that after Cup Day, total calls increased by 115% and by the end of the week still sat at almost 80% more than average. It should be noted, of course, that this period in Victoria's calendar is also associated with a significant increase in alcohol consumption, with international trends showing an association between large scale sporting events overall, such as football finals, and increases in domestic violence hospital admissions. Be



The CIJ welcomes the recognition of the impact of gambling on family relationships, and of the co-existence of family violence and gambling. However, it cautions against slipping into any assumption that the violence or abuse has been *caused* by gambling-related 'financial or emotional strain' as it is described the taxonomy of harms above. This is because this classification risks excusing the violence, and fails to examine its core motivation.

<sup>85</sup> Dowling, N. et al., "Problem Gambling and Intimate Partner Violence: A Systematic Review and Meta-Analysis," Trauma Violence Abuse 17, no. 1 (2016).

<sup>86</sup> Markham, F., Doran, B., and Young, M., "The relationship between electronic gaming machine accessibility and police-recorded domestic violence: A spatio-temporal analysis of 654 postcodes in Victoria, Australia, 2005–2014," Social Science & Medicine 162 (2016).

<sup>37</sup> Ibio

<sup>88</sup> Figures provided to the CIJ by Safe Steps, email from Annette Gillespie, CEO, Safe Steps Family Violence Response Centre, 30 November 2016.

<sup>89</sup> Turning Point Alcohol & Drug Centre and Vichealth, (2011) *Drinking cultures and social occasions: alcohol harms in the context of major sporting events*; Sachs, CJ., & Chu, L.D., "The association between professional football games and domestic violence in Los Angeles county." *Journal of Interpersonal Violence* 1192 (2000).

On this construction, violence or abuse becomes an almost inevitable and forgiveable consequence of emotional or financial strain — strain either caused by a woman gambling and her partner 'lashing out' in frustration, or a man gambling and lashing out because his wife has allegedly been 'nagging' him about the financial pressure they are under. Either way, the violence or abusive behaviour in this analysis is constructed as the fault of the woman. If we had any doubts, this conceptualisation appears amongst some of the earlier — and more disturbing — theorising about intimate partner violence itself:

Interfering with a partner's attempt to punish the children, nagging, arguments over drinking and gambling...these are all part of the role of the victim in family violence.90

In the CIJ's view, this analysis is abject nonsense. As the Victorian Royal Commission into Family Violence clearly stated, gambling or other co-morbidities do not cause violence-supportive attitudes or behaviour, nor the control and coercion which perpetuates them. Just like issues such as mental health or substance abuse, however, gambling can co-exist with family violence, and often escalate its frequency or severity.

As described by one participant, gambling can be 'the spark that fuels the tinder underneath',<sup>91</sup> one of the factors which function as a barrier and make it harder for a perpetrator to 'choose non-violence'.<sup>92</sup> Certainly, throughout the CIJ's broader work around family violence, problem gambling has frequently been mentioned — though almost as an afterthought — 'in the mix' co-existing with family violence.<sup>93</sup>

For this current project, project participants similarly reported that a history of family violence was in the background of many of the female problem gamblers that service providers and lawyers saw. Furthermore, it almost always *preceded* the gambling, and sometimes drove victims to seek respite in the warmth and relative security of a gaming venue, or in the repetitious nature of a pokies addiction.

In fact, in its audit of over 1000 publicly available submissions to the recent Royal Commission into Family Violence, the CIJ identified 47 of these mentioning the interrelationship of gambling and family violence in a variety of ways, supporting and reinforcing from a practitioner perspective the findings emerging from recent peer-reviewed literature. For example, Whittlesea Community Connections (a family services provider) reported that 1 in 10 cases with a family violence component also featured problem gambling.<sup>94</sup>

Particularly worrying was the suggestion that victims of family violence not only sought refuge from family violence in gaming venues of their own volition, 95 but that they had been *encouraged* to do so by some specialist services. 96 In its submission, VCOSS calls for recognition of the dangers of this practice, noting that 'the long opening hours, solo nature of the activity and presence of security are reasons why pokies facilities and gaming venues might be considered appropriate safe spaces'. 97 Given what Part Two of this Report finds about the criminogenic nature of many gaming venues, the CIJ sees this as of significant concern.

Also concerningly, one submission — the highly regarded Domestic Violence Resource Centre's discussion paper Just Say Goodbye: Parents who kill their children in the context of separation — notes that one perpetrator type known as 'civil reputable' may 'kill themselves and their families to avoid facing disgrace arising from gambling, embezzlement, financial mismanagement or bankruptcy'. 98

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<sup>90</sup> Gelles, cited in Houston, C., "How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases." Michigan Journal of Gender & Law 21 (2014).

<sup>91</sup> Focus groups participant, Family Violence Services, September 2016.

<sup>92</sup> Citing Rodney Vlais, submission from Centre for Forensic Behavioural Science and Forensicare, "Understanding and responding to complex criminal behaviour resulting in family violence: submission to the Royal Commission on Family Violence," (2015).

<sup>93</sup> Centre for Innovative Justice, (2015) Opportunities for early intervention: bringing perpetrators of family violence into view, RMIT University, Melbourne.

<sup>94</sup> Whittlesea Community Connections, "Submission to the Royal Commission into Family Violence" (2015).

<sup>95</sup> WIRE, cited in Victorian Primary Care Partnerships, "Submission to the Royal Commission into Family Violence" (2015). 33.

<sup>96</sup> Victorian Council of Social Service, "Royal Commission into Family Violence: VCOSS Submission" (2015). 72.

<sup>97</sup> Ibid

<sup>98</sup> Domestic Violence Resource Centre Victoria, "Submission to the Royal Commission into Family Violence" (2015). 12.

More broadly, the CIJ's audit of submissions to the Royal Commission into Family Violence indicates that many specialist family violence services see gambling services as a setting in which there is a 'strong case for building capacity for 'upstream' intervention'. Many submissions recommended integration between the associated sectors (i.e. family violence and problem gambling); professional development in both sectors to reduce gaps in respective knowledge; harm minimisation measures due to EGMs; research on the use of gambling as a safe place for victims; and the inclusion of gambling as a risk factor in the pending revision of the state's family violence risk assessment and management framework.

Clearly, family violence victimisation — just like other forms of vulnerability — can be a prelude to problem gambling. What is less well understood, however, is that gambling can not only co-exist or contribute to the abuse, but be an *instrumental part* of it when gambling is a feature of the perpetrator's behaviour. This can take the form of economic abuse — using a woman's pay or Centrelink funds to resource a gambling habit; taking a bank loan in a woman's name, potentially on the premise that it is for a family holiday, and then gambling it all away; or simply in the fact that gambling defines the environment of fear in the family's home, depending on whether the perpetrator has won or lost.<sup>100</sup>

As the *Stepping Stones* report by the Women's Legal Service explains, this form of abuse can not only keep women trapped in contexts of family violence, but also undermine their recovery post-separation. <sup>101</sup> In fact, through driving their partners into debt during the relationship; and then by gambling existing resources away post-separation, perpetrators can continue to exercise significant coercion and control. To this end, it may be that there is a correlation between a perpetrator's desire for control over his family members and his search for a feeling of control in a gaming environment — a correlation which may warrant future research.

Similarly, perpetration of economic abuse can also form a part of other forms of family violence — including elder abuse. In fact, project participants gave many accounts of individuals perpetrating economic abuse against their parents or extended family members in order to resource their addiction. This included adult children draining their parents' existing resources; or forcing their parents to act as guarantor for a mortgage, the payments for which were then foregone as a result of the gambling addiction. While further examples of this in the criminal justice sphere are explored in Part Two of this Report, the CIJ heard that, in the civil sphere, lawyers could help by pursuing the relevant financial institution for failing to conduct due diligence before agreeing to the loan.

Overall, the submissions to the Royal Commission identified in the CIJ's audit reflected a clear need for better identification and understanding of family violence within problem gambling service settings, and of course vice versa. To this end, the CIJ is aware that a number of specialist services, such as Berry Street Family Services and Relationships Australia (who provide Men's Behaviour Change Programs) are beginning to include gambling related questions in their risk assessments and intake, while a Department of Health and Human Services assessment tool also includes a question about gambling concerns.<sup>102</sup>

Echoing the pattern emerging across this subject area, however, the existing strain on specialist family violence services mean that data from these assessments are not collected or collated. The CIJ therefore suggests that, though it highlighted financial and economic abuse comprehensively, the recent review of the CRAF may have missed a vital opportunity to give specific focus to the value of questions about gambling in its conclusions.<sup>103</sup> It is therefore hopeful that the pending release of the revised Multi-Agency Risk Assessment and Management Tool, or 'MARAM', will not have overlooked this opportunity as well.

<sup>99</sup> Ibid, 20.

 $<sup>100 \ \ \</sup>text{Focus group participant, Community Legal Centres, CIJ, September 2016.}$ 

<sup>101</sup> Women's Legal Service Victoria, "Economic Abuse and Economic Recovery of Family Violence Victims — Royal Commission Into Family Violence," (2015).

<sup>102</sup> Monash University, 'Final Report, Review of the Family Violence Risk Assessment and Risk Management Framework (CRAF), 23 September 2016.

<sup>103</sup> Ibid.

#### **Criminal activity**

For the purposes of this Report, of course, 'criminal activity' is the most relevant category of gambling-related harm. This includes the harm that this criminal activity causes to the victim, as well as to the offender themselves.

As Part Three of this Report explores, the harm caused to those from whom a significant amount of money has been embezzled, for example, has certainly been viewed very seriously by the courts and has drawn more attention than the harm caused to the offender's immediate family or wider community. In fact — despite the Institute of Public Affairs suggesting that this kind of 'white collar' crime was essentially 'victimless' 104 — breach of an employer's trust is seen by the courts to be one of the most significant parts of an offender's culpability.

While large corporations may have insurance against this kind of theft, recent research suggests that many are reluctant to report the theft for fear of adverse publicity or other reputational damage. Small businesses or sole employers, meanwhile, are likely to be left quite devastated by the theft of the substantial amount of money which is often involved in these cases. To this end, the CIJ heard that an employer's reaction, as well as their potential compassion for a longstanding employee, can have a significant impact on whether the criminal activity is reported, as well as what other attempts to repair the harm are taken. Potential for developments in this regard are discussed in Part Four.

In terms of the harm caused by criminal activity to the individual offender themselves, however, it is potentially a conceptual leap to distinguish what was for a time seen as a *symptom* of gambling disorder, and see it as a harm instead. Certainly, as discussed above, for some years the DSM 4 listed 'illegal acts' as a criterion for *diagnosing* problem gambling. With its removal from the 2013 edition, this prompted significant debate about whether gambling-related crime should be seen as a symptom or harm.<sup>106</sup>

Regardless of how criminal activity is seen within diagnostic contexts, the broader work of the CIJ demonstrates clearly that contact with the criminal justice system is a significant and often enduring harm. Whether as a victim who may be further traumatised by the criminal prosecution process, <sup>107</sup> or one of the significant number of people in Victoria's prisons with a mental illness or Acquired Brain Injury, <sup>108</sup> contact with the criminal justice system can entrench pre-existing vulnerability. In fact, the vast majority of people who interact with the criminal justice system are already highly vulnerable for a range of reasons — as a result of Aboriginal and Torres Strait Islander status; of disability; of mental illness; of previous family violence victimisation or childhood sexual abuse; of low educational attainment; or of intergenerational unemployment and poverty.

In other words, no matter what brings individuals to court, an arrest can escalate risk of harm to the offender or to others; while incarceration separates people from housing and employment; temporarily from medication and other treatment while new regimes are imposed; and of course from children. Pre-existing trauma and mental illness are also frequently compounded by the custodial environment.

Meanwhile, just as problem gambling by parents can increase the likelihood of problem gambling in their children (see 'Intergenerational harm', above), the incarceration of parents can also increase the chance that their children will come into contact with the criminal justice system later in life.<sup>109</sup>

<sup>104</sup> Chris Merritt, 'Jump in prison numbers cost \$3.8 billion a year', 2 December 2016, The Australian.

<sup>105</sup> Warfield & Associates, Gambling-Motivated Fraud in Australia 2011–2016, August 2016, Sydney, Australia.

<sup>106</sup> Granero, R. et al., 'Subtypes of Pathological Gambling with Concurrent Illegal Behaviors,' Journal of Gambling Studies 31, no. 4 (2015); Granero, R. et al., 'Contribution of illegal acts to pathological gambling diagnosis: DSM-5 implications,' Journal of Addictive Diseases 33, no. 1 (2014); Grant, J. and Potenza, M., 'Commentary: Illegal Behavior and Pathological Gambling," The Journal of the American Academy of Psychiatry and the Law 35, no. 3 (2007).

<sup>107</sup> Centre for Innovative Justice, Innovative Responses to Sexual Offending: pathways to better outcomes for victims, offenders and the community, May 2014, RMIT University, Melbourne.

<sup>108</sup> Centre for Innovative Justice, Enabling Justice project. At https://www.rmit.edu.au/about/our-education/academic-schools/graduate-school-of-business-and-law/research/centre-for-innovative-justice/what-we-do/enabling-justice-abi/

<sup>109</sup> Centre for Innovative Justice, Opportunities for early intervention: bringing perpetrators of family violence into view, March 2015, RMIT University, Melbourne. Submission to Royal Commission, Mental Health Legal Centre, Inside Access & Centre for Innovative Justice, May 2015. At http://www.rcfv.com.au/getattachment/8E5F49BB-1D8C-4893-B6EC-F39B4C3F0B79/Mental-Health-Legal-Centre-Inc;-Inside-Access;-Centre-for-Innovative-Justice-See also Submission to Victorian Law Reform Commission Inquiry into the Role of Victims of Crime in the Criminal Trial Process At http://www.lawreform.vic.gov.au/sites/default/files/Submission\_CP\_36\_centre\_for\_Innovative\_Justice\_30-10-15.pdf

If this is not sufficient harm, there is no more criminogenic environment than prison. In other words, incarceration not only causes individuals a range of further harm, it also makes them more likely to offend again. For first time offenders, in particular, prison represents 'no better school for further offending', 110 while contact with other offenders can introduce individuals who may be in custody for property theft to contacts which can lead them to drug trafficking or other more serious crime.

For recidivist offenders, meanwhile — many of whom may have been in and out of institutions all their life due to profound disadvantage — the cycle in and out of prison erodes an individual's hope that they may ever live a 'normal' life in the community.

This means that contact with the criminal justice system (which, as Parts Two and Three will explain, frequently leads to incarceration when gambling related offences are involved) should be seen as a double whammy in the taxonomy of gambling harms. Not only does incarceration compound the existing harms which gamblers may already be experiencing, but it increases the likelihood of those offenders causing further harm to others down the track — hardly the purpose for which the community would expect it was designed.

Echoing this conception of compounded harm, perhaps one of the most interesting developments concerning the subject of gambling-related harm are emerging from an ARGC project entitled *Gambling in Suburban Australia*. This work suggests that gambling addiction is having a much bigger impact — that is, causing much more significant harm, from a subjective perspective — on families in Melbourne's more disadvantaged suburbs, than it is in wealthier areas.<sup>111</sup>

This conclusion and associated concerns are found in a number of the submissions to the Royal Commission that were the subject of the CIJ's audit. These submissions argued that those populations which were already the most vulnerable in Victoria were experiencing further harm by greater exposure to gambling opportunities. The City of Greater Dandenong, for example — located in the region with one of the state's highest family violence callout rates — has the second highest number of EGMs per capita in Victoria. The City of Greater Dandenong is a second highest number of EGMs per capita in Victoria.

Though the AGRC was yet to publish this project's complete findings at the time of writing, a media release reports that:

...socioeconomic disadvantage [...] magnifies the harm from gambling. For example, one gambler in the east said losses meant their family had to go without repairing the dishwasher for six months, while several gamblers in the west said gambling losses meant they literally could not afford food for their children.<sup>114</sup>

While this in many ways seems self-evident, it does remind us to guard against measuring harm with purely objective yardsticks. In other words, we need to remember that — if a person is vulnerable for a range of other reasons — they may be more likely than another person to develop a gambling problem, while that problem is also likely to cause them more harm.

It is clear that vulnerability — whether through pre-existing trauma, depression or anxiety; through family violence victimisation; through substance abuse; or socio-economic disadvantage to name a few — can contribute to and compound gambling harm. As Part Two of this Report explores, this includes tipping people onto, or keeping them on, the wrong side of the law. Added to the layers of harm already experienced, this contact with the criminal justice system then compounds this pre-existing vulnerability. Whatever pathway brings people between gambling and offending, therefore — whether it be the linear pathway or others discussed later in this Report — this suggests that contact with the criminal justice system is a form of gambling harm which requires more policy attention than it currently receives.

<sup>110</sup> Consultation with Judge Mark Farrell, Amhurst Gambling Treatment Court.

<sup>111</sup> https://aifs.gov.au/media-releases/tale-two-suburbs-gambling-suburban-australia

<sup>112</sup> For example, see Hobson Bay City Council, "Submission Royal Commission into Family Violence," (2015).

<sup>113 &#</sup>x27;Gambling & the City of Greater Dandenong', at http://www.greaterdandenong.com

<sup>114</sup> AIFS, "Tale of two suburbs: Gambling in suburban Australia" (7/7/2016) https://aifs.gov.au/media-releases/tale-two-suburbs-gambling-suburban-australia

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## Part Two – Contact with the criminal justice system as a form of gambling harm: prevalence and pathways

#### Prevalence — what figures do we have?

An initial challenge for this project was the fact that there is little data regarding the total number of problem gamblers who have contact with the Victorian justice system. This is despite recommendations from research initiated by the Department of Justice and Regulation in 2008 (ultimately published by the VRGF in 2013 and referred to already throughout this current report), which recommended that data collection occur right across the spectrum of the system.

In the absence of official data collection, academic prevalence studies can provide indicative estimates. Some relatively recent published local estimates indicate that:



- 33.5% of 173 respondents or 1 in 3 Victorian prisoners were classified as problem gamblers based on gambling behaviour in the 12 months preceding incarceration;<sup>115</sup>
- Of 105 South Australian prisoners, 52% of prisoners had 'lifetime prevalence' that is, they
  had experienced problem gambling at some point prior to assessment;<sup>116</sup>
- 43.5% out of 100 offenders in a South Australian community support program were classified as problem gamblers;<sup>117</sup>
- Five earlier problem gambling studies in offender populations in Australia report prevalence rates ranging between 12 and 51 per cent.<sup>118</sup>

Of course, prevalence studies use inconsistent approaches, making it hard to draw solid conclusions and potentially also influencing research, data collection and self-reporting. In fact, the definition of gambling-related offending appears to be highly subjective, with some analysis assuming a direct nexus while others take broader approaches. One study examining cases heard by local and district courts in NSW between 1995 and 1999 offers a definition of gambling-related offending which has been consistently referred to in literature since. This classifies an offence as 'gambling related' if it was committed:

- as a consequence of;
- in order to support;
- as a significant result of; or
- significantly related to the defendant's desire, need or compulsion to gamble. 120

<sup>115</sup> Victorian Responsible Gambling Foundation, above note 28.

<sup>116</sup> Paterson, A. and Garrett, L., 'Report into the possible connection of problem gambling, drug usage and criminal activity among client of OARS SA' (2010).

<sup>117</sup> Riley, B. and Oakes, J., 'Problem gambling among a group of male prisoners: Lifetime prevalence and association with incarceration,' Australian & New Zealand Journal of Criminology 48, no. 1 (2014).

<sup>118</sup> Ibid,. 75

<sup>119</sup> Neal, L. 'An Analysis of the Courts' Assessment of Problem Gambling in Sentencing." Criminal Law Journal 40, no. 2 (2016).

<sup>120</sup> Crofts, P., "Gambling and criminal behaviour: an analysis of local and district court files," (2002).

This study also made the point, frequently noted in contemporary commentary,<sup>121</sup> that it is likely that all research will 'grossly underestimate the incidence of gambling-related crime'.<sup>122</sup> Either way, even on the narrow definition of the data currently collected, it does seem that gambling problems, as determined by PGSI score, appear more commonly in criminal justice settings than they do in the wider community. If even the lowest of the above statistical estimates are true, problem gambling is more common among offenders than it is among the general Australian adult population, which is estimated to be 0.7% of the adult population, as noted above.

Outside prevalence studies, a number of other studies point to the extent to which gambling is a feature of criminal matters. In fact, a Danish Population-Based Survey (based on data from the Danish Health and Morbidity Surveys in 2005 and 2010, linked at the individual level with data from the Danish National Criminal Register), found there was a strong association between problem gambling and 'being charged'. 123

Certainly, gambling is a regular feature in criminal courts across all Australian jurisdictions, a simple scan of Austlii case law databases indicating that NSW and Victorian superior courts hear the greatest number of matters which can be clearly identified as gambling-related. This is consistent with a regular national study conducted by Warfield & Associates, a forensic accountancy firm, which examines the specific connection of gambling to fraud committed across Australia. Key findings from the most recent edition of this study were drawn from 265 cases involving 267 offenders and included that:

- The total amount stolen was over \$104,143,790;
- Victoria had the highest number of frauds and the largest overall losses;
- EGMs were the most preferred form of gambling, particularly for female offenders;
- Male offenders stole nearly twice as much as female offenders overall (potentially related to the fact that men are still more likely to be employed in positions with access to significant resources);
- Only 19% of offenders had a prior criminal history;
- Government and Financial Services were the hardest hit in terms of frequency and amounts stolen;
- Depression was commonly reported amongst all offenders.

Given the significant limitations on this study — including that only publicly reported cases involving a conviction were included; as well as that, where gambling was not accepted as relevant by a court, the case was discounted from the study — the authors themselves suggest that this study reflects a significant underestimate of the prevalence of gambling-motivated fraud in Australia.<sup>124</sup>

Meanwhile, a recent report of the Sentencing Advisory Council indicated that approximately a quarter of all prosecutions for cultivating a commercial quantity of narcotic plants were gambling related. Three major drug offences were included in this study: cultivating a commercial quantity of narcotic plants (20%); trafficking in a drug of dependence in a commercial quantity (15%); and trafficking in a drug of dependence in a large commercial quantity (24%). The Council concludes that problem gambling — and perhaps financial difficulties — may constitute 'a pathway to offending, which is being exploited by principals/proprietors of cultivation operations in a targeted manner'. 126

These studies seem to fit within the narrower definition of gambling-related offending, with associated research confirming that 'problem gamblers who then offend' are more likely to commit property or drug related offences as the most direct avenue towards resourcing their addiction. To this end, a sample audit of all matters heard by one County Court judge sitting in the criminal list between 2010 and 2016 and provided to the CIJ indicated that 18 out of 220 cases — or 8% — involved gambling. Of these, offence type was evenly split between charges relating to cannabis cultivation and charges relating to employee theft.<sup>127</sup>

<sup>121</sup> See for example, Brading, R. and Rollason, J., "Gambling, counselling and treatment programs in NSW," Judicial Officers' Bulletin 28, no. 3 (2016). 27.

<sup>122</sup> Crofts, above note 120.

<sup>123</sup> Binde, P. "Preventing and Responding to Gambling-Related Harm and Crime in the Workplace." Nordic Studies on Alcohol and Drugs 33, no. 3 (2016): 247–65.

<sup>124</sup> Warfield & Associates, Gambling-Motivated Fraud in Australia: 2011–2016, August 2016, Sydney.

<sup>125</sup> Sentencing Advisory Council, Major Drug Offences: Current Sentencing Practices, 17 March 2015, Victoria.

<sup>126</sup> Ibid, 21

<sup>127</sup> Figures reported by Judge Gabrielle Cannon, County Court of Victoria, November 2016.

Studies in this context also suggest that problem gamblers who go on to offend are generally first time offenders. Anglicare Tasmania studied 42 cases in the Supreme Court of Tasmania and found 'half the cases involved defendants who had no prior convictions... in their determinations the judges stated that it was the defendants' gambling problems that had led them to commit these, their first offences'.<sup>128</sup>

While these various prevalence or quantitative studies give us a picture of the extent to which problem gambling features in a certain kind of criminal matter, being primarily property or drug related charges, the CIJ wanted to know how much gambling was a feature in the lives of offenders more generally.

In the context of lower level offending, the CIJ heard from project participants that gambling problems were not seen as pressing issues or at least disclosed in initial instructions or assessments with clients. This statement was then somewhat contradicted by subsequent comments that gambling was frequently 'in the mix' of offenders' broader lives, suggesting that it was apparent to lawyers and Magistrate regardless of the charges being heard before the court.

To understand this contradiction in a bit more detail, the CIJ sought access to what limited data existed at the local or Magistrates' Court level, being data collected by the Courts Integrated Services Program (CISP). CISP is a program which works with offenders who have complex needs (such as homelessness and ABI, for example) and often very chaotic existences. The program involves detailed assessment upon intake, as well as ongoing case management with certain offenders over a period of some months.

Data for the 2015–2016 period was provided to the CIJ and, consistent with low levels of self-disclosure, 118 out of a total 3447 defendants referred to the CISP program were identified with gambling problems at the point of referral. However, a slightly larger proportion — 273 out of 1574 — were identified during the course of case management, with the court reporting that this was not surprising given that clients did not immediately identify gambling issues as their most pressing need at intake.<sup>129</sup>

Data was not always recorded by the court under each field for each client, meaning that the data provided to the CIJ was incomplete. Within these limitations, however, it is notable that:

- 17.3% of clients who proceeded to case management disclosed gambling related problems in the context of fairly chaotic existences;
- the highest proportion of these clients identified as 'Australian'; 'ATSI' and Vietnamese; and
- only 52 had a history of prior incarceration.

It may be, therefore, that similar themes in relation to problem gambling are playing out even in the cohort of CISP clientele, suggesting that there may be significant value in further data collection at this type of point of interaction with the Magistrates' Court.

This sample represents a small number of individuals appearing before the court overall and therefore cannot be interpreted as a representation of the broader cohort of offenders. Given that the majority of gambling related offending as currently identified by the criminal justice system is related to significant property theft or drug offences, however, it may be notable that gambling is also a feature in the lives of some offenders who may not be in a position to commit these more serious kinds of offences.

Having glimpsed what limited data was collected about these more complex offenders, the CIJ sought access to data about people appearing in the 'bread and butter' criminal lists, being summary crime matters. To do this, the CIJ enlisted the help of Victoria Legal Aid, who agreed to administer surveys to clients at five different Magistrates' Court locations (being Melbourne, Frankston, Werribee, Sunshine & Heidelberg) over a period of four weeks towards the end of 2016.

<sup>128</sup> Margie Law, 'Nothing Left to Lose: problem gambling and crime' Anglicare Tasmania Social Action and Research Centre, 2010.

<sup>129</sup> Only a certain number of those referred to CISP proceed to the case management stage, reflecting the lower number in this second equation.

Given the surveys were completely voluntary and were provided to clients at a highly stressful time in their lives, the response of 226 surveys overall was considered by VLA and the CIJ alike to be significant. As indicated in the description of the methodology at the beginning of this report, the survey instruments can be found as an Appendix to this report (Appendix A).

Just as it is not possible to generalise findings about overall prevalence of gambling in the criminal justice system from the CISP data, nor is it possible to do so from the sample of VLA clients surveyed. However, it is significant that a consistent pattern emerged over the four-week period in which 9% of the total clients surveyed (21 out of 226) self-reported as gambling AND having gambling issues. Given that this is likely to be under-representative, this stable number of self-disclosures is important to acknowledge, as is the fact that many reported experiencing several problems with their gambling, the most predominant one being having to borrow money from family and friends.

Furthermore, of those who self-reported having gambling issues:

- 71% (N= 15) saw the lawyer for non-violent crimes (though 3 of these were for multiple infringements)
- 52% (N = 11) had sought help for their gambling issue
- 24% (N = 5) gambled more than once a day
- 76% (N = 16) were male (though 3 respondents did not specify gender)
- 24% (N = 5) had a disability (though 3 respondents did not specify)
- 48% (N = 10) were unemployed (though 3 respondents did not specify)
- 10% (N = 2) identified as Aboriginal (though 3 respondents did not specify)
- -38% (N = 8) were 22–34 years old (though 3 respondents did not specify).
- 33% (N = 7) said they were living with their parents (though 2 also ticked that they were living alone, suggesting transient arrangements)
- 33% (N = 7) said they were living alone (though 2 also ticked they were living with their parents, suggesting transient arrangements)
- 52% (N = 11) said that they were on a benefit.

Additional analysis of the figures indicates that a further four respondents indicated that they had experienced gambling issues but no longer gambled (N = 2) and two others that they had experienced problems as a result of their family members' gambling.

Meanwhile, a comparison with those who gambled but did not report having gambling issues (N = 49) indicate that a similar proportion of respondents were unemployed or on government benefits (being features that are common not just to problem gamblers, but rather to VLA clients in general).

However, a smaller proportion of the comparison group (being those who gambled but did not have gambling issues) were male (55%, as opposed to 71% though 8 people did not answer); a smaller proportion were living alone (10%, as opposed to 33% though 8 people did not answer); and a smaller proportion were living with parents (16% as opposed to 33% though 8 people did not answer). In other words, gamblers with a gambling problem were more than two times as likely to live with their parents and more than three times as likely to live alone. They were also more likely to be male.

Overall the figures from the CISP list and from the VLA snapshot survey indicate that gambling issues are a feature in the lives of people who are in contact with the criminal justice system for other reasons. This includes relatively low level offenders accessing Victoria Legal Aid duty lawyer services, as well as more complex offenders using the CISP case management service. What's more, if the VLA survey results are indicative, it is a feature of offenders' lives more often than it is of the general population, with 9% of the VLA duty lawyer clients self-reporting the presence of gambling issues, compared with 0.07% of the general population.

Though a relatively crude analysis limited by the parameters of existing data collection mechanisms, the fact that other studies indicate higher prevalence rates once participants are in prison suggests that the problem may still be remaining relatively 'hidden', perhaps until people are already entrenched in the criminal justice system and have less to lose through disclosure.

The question then becomes whether people who are in prison are reporting gambling problems at a higher rate because of having less to lose by doing so; because gambling problems are a feature of serious offenders' lives more broadly than they are in the lives of other offenders; or even because the fact that gambling-related crime often attracts a custodial sentence (as Part Three will discuss) simply means that a higher proportion of gambling-related offenders are in custody.

## Pathways between gambling and crime

Given the incomplete and somewhat contradictory nature of prevalence studies, it became necessary to adopt a more narrative approach to the project's inquiry. As the CIJ's research revealed, distinct and complex pathways connect gambling and offending, meaning that better awareness of these pathways may assist in tailoring and timing treatments and interventions for both behaviours. For example, research in New Zealand demonstrates that gambling causes criminal behaviour, but also that criminal behaviour and contact with the criminal justice system may lead to gambling. That research proposes two possible categories of crime committing gamblers: those who have criminal tendencies prior to becoming problem gamblers as well as those who turn to crime to fund their gambling.

Along these pathways, research indicates that people who follow the latter pathway are more likely to commit property theft or drug related offences — given that they are entirely concerned with gaining proceeds to fund their addiction. Those who already have criminal tendencies and then become problem gamblers are more likely than the former category to have committed violent or a range of other types of offences.<sup>131</sup>

The CIJ suggests, however, that the pathways between gambling and offending are perhaps even more varied and complex than this analysis suggests.

<sup>130</sup> Gambling and Addictions Research Centre, Problem Gambling — Formative Investigation Of The Links Between Gambling (Including Problem Gambling) And Crime In New Zealand, ed. M. Bellringer, et al. (2009). 9.

<sup>131</sup> Victorian Responsible Gambling Foundation, above note 26.

# From gambling to offending - a criminal debut

As described above, the most obvious pathway — and the one most likely to be recognised by the wider community — is a linear trajectory. This starts with recreational gambling, through development of a gambling disorder or addiction, and finally to a spiral into offending to resource that addiction. As the Warfield report discussed above highlights, every now and then the community becomes aware of a story involving a 'corporate high flyer' who embezzles a significant amount of money from their company to pay for their expensive gambling habit. The recent High Court case of *Kavakas v Crown Casino Limited* 132 highlighted the dim view that a court will take of this kind of alleged conduct. This issue is discussed later in this report.

A step away from these more sensationalist cases, however, a relatively common journey along this pathway is one trodden by more ordinary members of the community — ones who develop a gambling disorder, potentially driven by depression; previous childhood trauma; or experience of family violence — and who then start to 'borrow' money from their employer (or potentially from Centrelink) in order to secure that 'big win'.¹³³ While evidence indicates that men are more likely to develop problem gambling,¹³⁴ and that, overall, are more likely to commit gambling-motivated fraud, project participants reported that many of those who take this pathway seem to be women employed in small business who may have oversight of relevant accounts.

My client genuinely believed she was going to pay it back — that she was due for a win and that she would put the accounts right as well as get rid of all her debt. Instead she's embezzled \$1 million, the employer is seeking to freeze her assets, the husband's left and the house is in hock...<sup>135</sup>

This pathway is characterised by shame, deceptive and potentially deluded behaviour which takes place over months or years, with the offender genuinely believing that 'there is no other way out but to keep digging'.<sup>136</sup> In fact, the CIJ heard that a client's detection and arrest were often the only 'circuit breaker' which could stop this downward spiral. Although the circuit breaker can sometimes come as a form of relief for the offender, the stigma associated with exposure can also often mean an increased risk of suicide, particularly for those who were already experiencing depression or previous trauma.<sup>137</sup>

At the very least, arrest can trigger a complete collapse of the offender's social and family structure.

A local woman was chased down the street by the media...she was accused of embezzling a significant amount from her employer to fund her gambling habit and it ended up here in court for a committal. No matter what happens, in such a small community, she and her family will never live that down.<sup>138</sup>

Lawyers working with problem gamblers reported that it was common for their clients to have suicidal thoughts, and recent literature supports this. For example, some researchers argue that management in workplaces must take suicide risk seriously when preventing and responding to gambling-related harm and crime, indicating that problem gamblers sometimes consider suicide to be a way of relieving their family of debt.<sup>139</sup> However, the CIJ heard that relief from the debt was not always realised.

We had a client... her husband suicided because of gambling debts, thinking that would free his family, but then they came after the family. The wife started gambling to try and pay it back.<sup>140</sup>

Given that it is uncommon for grieving family members or service providers to be aware of all the factors contributing to a person's suicide, these self-reports are a significant contribution to evidence suggesting that gambling, certain types of crime and suicidal thoughts may be causally linked in some cases.<sup>141</sup>

<sup>132</sup> Kakavas v Crown Melbourne Limited [2013] HCA 25 (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ). (No dissenting judges).

<sup>133</sup> Of note, the CIJ heard that workers in the criminal justice sector workforce may be more vulnerable to this kind of pathway. Consultation with NSW Office of Liquor & Gaming, October 2016.

<sup>134</sup> Billi et al, above note 32.

<sup>135</sup> Consultation with Wesley Legal Mission, November 2016.

<sup>136</sup> Consultation with Offender's Aid and Rehabilitation Services, August 2016.

<sup>137</sup> Binde, above note 121; Crofts, above note 120, p 94.

<sup>138</sup> Interview with Magistrates' Court of Victoria, La Trobe Valley, November 2016.

<sup>139</sup> Binde, above note 121, p 261.

<sup>140</sup> Interview with CISP Clinician, Sunshine Magistrates' Court, October 2016.

<sup>141</sup> Crofts, above note 120, notes that a self-assessment approach — asking gamblers whether gambling has contributed to an adverse event or not — can provide a good perspective on causality because it makes use of the knowledge of the respondents.

## From offending to problem gambling

As some of the prison prevalence studies suggest — as well as the data collection from the CISP list and VLA duty lawyer services — the path between gambling and crime can also move in the opposite direction, with the onset of gambling disorder *following* contact with the criminal justice system. In this scenario, offenders fall into gambling behaviour after or concurrently with their commission of other offences.

These particular offenders are more inclined to have committed other kinds of offences, including violent or sexual offences, as mentioned above. Gambling problems then developed through anti-social or criminal criminal networks become 'part of the mix' in an offender's life, just one ingredient in the cocktail of chaos in which many offenders become entrenched.

To this end, a valuable finding of the 2013 VRGF report referred to earlier highlighted the way in which gambling venues and networks can be especially appealing to individuals who — as is the case with the majority of the population of any prison — have no pro-social networks; low educational attainment and employment; potential mental illness or Acquired Brain Injury; and a history of family dysfunction.

I think most of the people who do crime have low...self-esteem... So when you win, you feel 'I can do something, I can achieve....plus it's a loneliness thing...it's the only place [you] can go where someone smiles... and says hello and gives [you] a coffee and listens to [your] bullshit, because they're paid to... More than anything, I reckon that is the main reason that people have problems on the machines.<sup>142</sup>

As well as the suggestion that children of problem gamblers are more likely to develop gambling problems themselves, the ClJ's analysis of sentencing remarks in the County Court confirms this pathway to gambling-related *offending*. In particular, a history of being neglected as a child — including being left alone for long periods while parents gambled — was a feature of these cases, echoing the intergenerational harm identified in the taxonomy in Part One.

You were an only child... Your mother and father were heavy gamblers. You would often spend the evening at home on your own... because [they] went gambling. As you grew older, your parents would leave you alone for the entire weekend. You were exposed to gambling at a young age. Your parents took you to the "Pokies" when you were 14 years old. Your father owned greyhounds and you accompanied him to races... Having seen your parents gamble, you began gambling when you turned 18.143

...you grew up in difficult circumstances, playing a parenting role to your younger brother and becoming responsible for a financially dependent mother addicted to gambling in a scenario where your father was largely absent and where overall you experienced parental neglect.
[...] your history suggested you had suffered low mood for many years due to your family difficulties and the burden of protecting your mother's gambling problem and caring for your younger brother.<sup>144</sup>

<sup>142</sup> Victorian Responsible Gambling Foundation, above note 26, p 97.

<sup>143</sup> DPP v Philistin [2015] VCC 1535 (Lewitan J).

<sup>144</sup> DPP v Cheng [2014] VCC 1927 (Gaynor J).

In other words, people who are already offenders in other ways can be particularly attracted to gambling activities and venues because they provide them with a sense of belonging and achievement, of 'feeling like a winner' or 'like a big man', 145 as well as a sense of being treated with respect that they cannot experience elsewhere. More pragmatically, these venues are also often open for 24 hours a day and provide warmth and shelter for those who otherwise have none.

For those with a history of offending, of course, the appeal of a gambling activity or venue can then have additionally criminogenic consequences.<sup>146</sup>

Some clients don't have the competency to manage a sudden influx of cash. One recently won \$90,000 gambling and blew it in 5 days. This included buying a fancy car, even though he didn't have a licence. Then he got done for driving without a licence! Because he had priors, the court wasn't too thrilled.<sup>147</sup>

Clients in this group often need help to manage their finances. The best thing we can do for them sometimes is to get State Trustees to manage their money just so they don't lose their house. 148

Compounding the appeal of gambling to existing offenders, however, research suggests that gambling is uniquely associated with general recidivism three years after release. The CIJ heard from offender support organisations that prisoners themselves sometimes identified gambling as their biggest risk factor upon release. The CIJ also heard that this is largely due to the debt that might await an offender post sentence or incarceration, including debt from a 'loan shark':

I had a client who had been up on drug offences and we got him clean. After his last court date he said 'it's good I'm off the [drugs], I'll have more money to spend on the horses and pay back my debts...<sup>151</sup>

We can help them with all their other issues — at least in theory. We can treat their mental health problems; we can treat the drug and alcohol issues; we can even treat the gambling problem. But we can't help with the debt, especially when they won't tell us who it is they owe...<sup>152</sup>

Drug dealers will usually forgive the debt when someone goes inside, but not the loan sharks. The sharks will keep coming after the family.<sup>153</sup>

<sup>145</sup> Ibid.

<sup>146</sup> The CIJ heard that the vicinity of gaming venues was a common place of illegal activity — such as drug trafficking in the carparks of local hotels. Focus group with Victoria Legal Aid, Sunshine, October 2016.

<sup>147</sup> Focus group participant, Law Institute of Victoria, October 2016.

<sup>148</sup> Focus group participant Law Institute of Victoria, October 2016.

<sup>149</sup> Lloyd, C. D., Chadwick, N., and Serin, R. C., "Associations between gambling, substance misuse and recidivism among Canadian offenders: a multifaceted exploration of poor impulse control traits and behaviours," *International Gambling Studies* 14, no. 2 (2014).

<sup>150</sup> Focus group participant, Offender Support Organisations, September 2016.

<sup>151</sup> Focus group with Victoria Legal Aid, Ringwood, October 2016.

<sup>152</sup> Interview with CISP Clinician, Magistrates' Court of Victoria, Sunshine, October 2016.

<sup>153</sup> Interview with Court Support Worker, Magistrates' Court of Victoria, Sunshine, October 2016.

# **Dual pathway**

In addition to these two directions, several studies (and previous editions of the DSM, which classified problem gambling as an 'Impulse-Control Disorder Not Elsewhere Classified') suggest that impulsive personalities — those with poor premeditation; sensation seeking; poor perseverance; and reward sensitivity — may concurrently lead to the commission of crime *and* to the search for stimulation.<sup>154</sup>

Certainly, problem gamblers who offend are thought to face a particularly severe subtype of impulse control disorder from a neurological perspective. For example, this behaviour appears to be associated with 'elevated risk of suicidal ideation, financial problems, alcohol and drug use, and mental health treatment'. 156

Throughout the project, lawyers reported that some clients with drug addictions gambled to fund their addiction, because 'it was a better option than dealing'. Similarly, providers who worked with offender populations also noted that clients had 'poor ways of regulating emotion and self-destructive impulses'. 158

Meanwhile, the CIJ also heard that lawyers in one region had seen a small but identifiable spate of offenders with co-existing child exploitation and gambling addictions. The practice of these particular offenders — who were almost always socially isolated — was compulsive and obsessive, with them often spending hours cataloguing and collating the child exploitation material, rather than necessarily viewing it. Online gambling addictions were then a companion to this reclusive and distorted behaviour.<sup>159</sup>

Overall, research suggests that problem gamblers who *offend* — regardless of whether their offence is related to gambling, reported or ends in contact with the criminal justice system — may experience more severe symptoms of gambling *disorder*. This includes the neurological changes mentioned earlier, as well as the social problems that determine health and other life outcomes generally.

...I have worked out that I have an addictive nature and the best way for me to deal with my gambling problems is complete abstinence...<sup>160</sup>

<sup>154</sup> Preston, D. L. et al, 'Problem Gambling and Mental Health Comorbidity in Canadian Federal Offenders,' *Criminal Justice and Behavior* 39, no. 10 (2012). 1734; Magoon, M. E., 'Juvenile Delinquency and Adolescent Gambling: Implications for the Juvenile Justice System," *Criminal Justice and Behavior* 32, no. 6 (2005); Meyer, G. and Stadler, M., "Criminal behaviour associated with pathological gambling," *Journal of Gambling Studies* 15, no. 1 (1999); Mishra et al. above note 1.

<sup>155</sup> Ledgerwood, D & Petry, N, 'Subtyping pathological gamblers based on impulsivity, depression & anxiety', Psychology & Addictive Behaviour (2010) 24: 680.

<sup>156</sup> Ibid, p 295.

<sup>157</sup> Focus group participant, Victoria Legal Aid, Ringwood, October 2016.

<sup>158</sup> Focus group participant, Community Support Organisations, September 2016.

<sup>159</sup> Focus group participants Victoria Legal Aid, Morwell, November 2016.

<sup>160</sup> Victorian Responsible Gambling Foundation, above note 26, p 98.

# Convergence... and coercion

Perhaps the least well understood in the literature — but frequently identified in the focus group discussions — is what the CIJ calls the 'convergence' pathway. This is when gambling problems are compounded by other forms of vulnerability to increase gambling harm, including the likelihood of contact with the criminal justice system.

This includes, in the ClJ's view, the scenario described above, in which individuals who are already offenders — potentially as a result of intergenerational poverty, or exposure to family violence or childhood sexual abuse — fall into gambling and then become even more vulnerable to offending. It also includes individuals from lower socio-economic backgrounds for whom gambling related losses or debt can have far greater impacts than it does on people with greater financial resources, as referred to in Part One. This can further include people with other forms of disadvantage, such as intellectual disability or ABI, which already make them vulnerable to poverty, but also potentially less likely to be able to regulate their gambling behaviour or to fully understand its consequences.

Clients with ADHD or ABI, can be more easily drawn to — almost reassured by — the repetitive nature of EGMs.<sup>161</sup>

Sarah was a client referred for multiple counts of Dishonestly Take Property. She had a clinical presentation consistent with Borderline Personality Disorder, as well as Gambling Disorder...[and] Anxiety and Depression... She was unemployed and on the Disability Support Pension, spending a portion of that income on on-line slot machines. Sarah would at times shoplift consequent to her funds being gambled...<sup>162</sup>

The CIJ's research, however, identified some further cohorts in the population who are not only particularly vulnerable to gambling harm as described in Part One, but also to falling into offending as a result of this harm. One of these cohorts is victims of family violence. As mentioned above in Part One, recent studies confirm a disproportionate level of family violence perpetration and victimisation amongst people with significant gambling problems.<sup>163</sup> However, the case study referred to above also suggests that gambling, family violence and offending can be in the mix together, with part of the wrap-around support the client received in this case being referral to a Domestic Violence service.<sup>164</sup> When this occurs, it is essential that services screen for and respond to the potential for family violence presentation, as this may well be underlying all the other issues which appear to be present in the offender's life.

More specifically — and as described in Part One — victims of family violence often seek refuge or respite in gambling activities or venues. The CIJ heard that this was occurring in growth corridors where there were high levels of debt, isolation and financial hardship, as well as where there was sparse other social infrastructure. <sup>165</sup> Concerningly, as the CIJ's audit of submissions to the Royal Commission suggests, victims have sometimes been encouraged by some services to seek refuge in EGM venues as 'safe spaces'. Losses then incurred in these venues can entrench the fear and vulnerability of these victims. Terrified to disclose the loss, women in this cohort can then resort to theft in order to cover the household expenses.

<sup>161</sup> Focus group participant, Law Institute of Victoria, October 2016.

<sup>162</sup> Excerpts from case study provided to the CIJ by the Offender's Aid and Rehabilitation Service (OARS), South Australia, September 2016.

<sup>163</sup> Dowling, N., Suomi, A., Jackson, A., Lavis, T., Patford, J., Cockman, S., ... Abbott, M. (2014). Problem Gambling and Intimate Partner Violence: A systematic review and Meta-Analysis. Trauma, Violence, and Abuse, p. 1–19.

<sup>164</sup> Case study provided to the CIJ by the Offender's Aid and Rehabilitation Service (OARS), South Australia, September 2016.

<sup>165</sup> Focus group participant, Relationships Australia, September 2016.

One client spent her morning at the pokies and her afternoons at the local shopping centre, pinching purses out of people's handbags. She was terrified to go home until she'd recovered her losses...<sup>166</sup>

A woman appeared before me accused of stealing groceries and other household items. It didn't make sense, she had a steady job and no priors, no apparent reason why she would need to do this. It emerged she had a serious gambling problem. However, counsel then asked to submit further evidence on the papers. It turned out she was also a victim of serious long term abuse. The husband was there in court at the time — apparently very supportive of his wife while she appeared on criminal charges — yet she was terrified of what she would face when she went home.<sup>167</sup>

Seeking refuge in a gaming venue is a concern for women because of their exposure to significant financial loss and the additional vulnerability and direct pathway to offending which can result. It's also a concern because of the potential for vulnerable women to be targeted by 'loan sharks' who will lend them money to recover losses at the venue and, when this only results in more significant losses, then coerce women into offending such as drug trafficking or crop sitting to repay this loan.<sup>168</sup>

As discussed below, women can be vulnerable to this pathway whether or not they are victims of family violence. Where they are terrified beyond the usual measure to disclose their losses, however, they may be more likely to resort to debt to a loan shark and the dire consequences that follow.

Beyond this, there is further potential for victims of family violence to be propelled into offending as a form of gambling harm, even where they are not the gambler. This includes victims being coerced into offending by their partners to resource the *perpetrator*'s gambling addiction or debt.

It also includes victims assuming culpability for their partner's offending because they are too afraid to do otherwise. In fact, as one of the CIJ's submissions to the Royal Commission into Family Violence explained, women experiencing family violence often assume culpability for their partner's offences. This submission featured a random audit of de-identified case files of the Mental Health Legal Centre's program Inside Access — which provides civil legal advice and support, as well as social work support, to women in maximum security prison. The audit suggested that this can include assumption of Centrelink debts, which the woman's partner has gambled away. The woman is then still liable for the debt post-release, leaving her with a 'double whammy' as a result of his offending.<sup>169</sup>

This issue was further explored in focus group discussions for this project:

We had a client, affluent family, kids in private school, he was a bit of a corporate high flyer and she ran a small business from home while experiencing serious family violence from him. He started to use that cash flow to resource his gambling habit and then started [offending more broadly] and fell into serious debt. She took the rap for it — she was scared of him but also thought she couldn't support the kids alone. She went inside and that week the kids saw Rosie Batty on the TV and realised what they had been experiencing for so long...Only teenagers, they marched into the local police station and asked for help to get an IVO...<sup>170</sup>

This and other work by the CIJ suggests that there are women in Victoria's maximum security women's prison solely because they are victims of family violence — hardly the purpose for which the criminal justice system was designed.<sup>171</sup> Where gambling harm is converging with this other devastating form of social harm, the CIJ suggests that there is not only an imperative for future research, as the VRGF and Australia's National Organisation for Women's Safety (ANROWS) have recently recognised, but for governments and policy makers to act.

<sup>166</sup> Focus group participant VLA Regional Office, Ringwood, October 2016.

<sup>167</sup> Interview with Magistrates' Court of Victoria, Dandenong, October 2016.

<sup>168</sup> Le, R. and Gilding, M., "Gambling and drugs: The role of gambling among Vietnamese women incarcerated for drug crimes in Australia," Australian & New Zealand Journal of Criminology 49, no. 1 (2016).

<sup>169</sup> Submission to Royal Commission, Mental Health Legal Centre, Inside Access & Centre for Innovative Justice, May 2015. At http://www.rcfv.com.au/getattachment/8E5F49BB-1D8C-4893-B6EC-F39B4C3F0B79/Mental-Health-Legal-Centre-Inc;-Inside-Access;-Centre-for-Innovative-Justice-

<sup>170</sup> Focus group participant, Mental Health Legal Centre, November 2016.

<sup>171</sup> Mental Health Legal Centre, Inside Access, and Centre for Innovative Justice, "Submission to Family Violence Royal Commission," (2015).

#### **Cultural vulnerabilities**

In addition to vulnerability from certain forms of disadvantage, such as family violence, the ClJ's research indicates that certain cultural and linguistic communities are also especially vulnerable to gambling harm, including contact with the criminal justice system. Many communities experience disproportionate impacts, including the Vietnamese community — a theme that was echoed in interstate consultations.<sup>172</sup>

When highlighting this vulnerability, of course, it is crucial not to make claims about propensity which might fuel cultural stereotypes. Certainly, the caution with which many stakeholders alluded to this subject indicates a reticence to stigmatise certain groups in the community, particularly when assumptions about CALD populations already abound in the criminal justice system.

An elderly Vietnamese client, who was basically homeless, carried a significant amount of cash sewed in her coat. It was her life savings and she kept it on her in case she had to leave the country quickly, as she done previously when coming to Australia — it was all recorded in a little book... She was picked up on an unrelated, minor charge. The police found the cash and book on her and, because she was Vietnamese, assumed she was running an illegal gambling racket. They took the cash from her and we spent months trying to get it back.<sup>173</sup>

While taking care not to perpetuate these assumptions, the CIJ also believes that it is crucial to highlight where certain groups in the community are experiencing additional and unnecessary harm — and accordingly may benefit from additional support.

Certainly, the CIJ's analysis of County Court cases since 2013 suggests that the Indo-Chinese population feature disproportionately in gambling-related offences appearing before Victorian courts. This was echoed in consultations.<sup>174</sup> The relevant charges generally relate to drug offending, with it then emerging that the offending was allegedly committed in order to resource a gambling addiction or pay back a debt.

...the pathological gambling habit of the prisoner... appears to have been longstanding, connected to the Vietnamese community in Victoria...and also allegedly, initiated from contacts made by her at the Crown Casino. I have already expressed on a number of occasions...my concerns about the Crown Casino...<sup>175</sup>

You came to Australia in September of last year on a three month visa...you became involved in gambling and ended up with a \$10,000 debt. It was at that time that this venture was put to you as your only way out. This is a scenario which this court has heard on many occasions.<sup>176</sup>

A description of this pathway was echoed specifically in a recent qualitative study by researchers Roselyn Le and Michael Gilding,<sup>177</sup> who interviewed 35 Vietnamese women imprisoned in Melbourne for drug crimes (i.e. trafficking of heroin and cultivation of cannabis). Half of the women interviewed were motivated by debts incurred through casino gambling, and gambling networks had then forged their involvement in illicit drug markets. While the median maximum sentence for the women in the study was 19 months, some had been sentenced to as much as eight years.<sup>178</sup>

<sup>172</sup> Consultations with Office of Liquor and Gaming, NSW, November 2016; Consultations with Magistrates' Court of South Australia and Organisation for the Aid and Rehabilitation of Offenders, South Australia, August 2016.

<sup>173</sup> Focus group discussion, Mental Health Legal Centre, November 2016.

<sup>174</sup> Focus group discussions with Victoria Legal Aid, September – November 2016; Focus group discussions with Magistrates' Court of Victoria, October – November 2016.

<sup>175</sup> DPP v Thai [2016] VCC 624 (McInerney J).

<sup>176</sup> DPP v Mai [2013] VCC 1331 (Hannan J).

<sup>177</sup> Le et al, above note 168.

<sup>178</sup> Ibid, p 47.

While this disproportionate representation is a cause for concern alone, it is vital to consider how and why this might be impacting certain CALD communities more broadly. To this end, some studies have suggested that certain migrant communities — who may be already inclined to see gambling as a normalised social activity — may be more likely to increase involvement in that activity as a way of maintaining cultural networks upon arrival in a new place. To Conversely, other new arrivals, unaccustomed to the prevalence and ready availability of gambling activity now on tap in Victoria, may be more overwhelmed by it and unable to regulate their attraction to a new and exciting environment.

It is a mistake to suggest, however, that because one community may be more inclined to participate in gambling, this creates an inevitable path to offending. In short, gambling-related offending cannot be lazily explained as a 'cultural thing'. Rather, the CIJ suggests that the *convergence* of a range of factors make members of some communities more *vulnerable to contact with the criminal justice system* when gambling is also in the mix.

For some CALD groups, this may be around economics and education. For example, the CIJ heard that international students may be vulnerable to gambling problems because they often worked shift work, including in the hospitality context, and therefore sought recreation in venues open in the small hours of the morning. New arrivals from war torn regions in the Middle East and Horn of Africa, meanwhile, brought with them experience of past trauma and were emotionally vulnerable in other ways. 182

Certainly, the CIJ heard of the disproportionate impact that this ready availability of gambling activity had on Arabic speaking communities, whether newly arrived or more established. This is despite the fact that gambling did not necessarily play a substantial role in these cultures back home. Having often experienced significant trauma as a result of conflict in their home countries, many immigrants from Middle Eastern countries arrive already highly vulnerable — a factor which puts them at greater risk of gambling harm.

What's more, the CIJ heard of the additional vulnerability created by the contrast between the highly integrated social and family networks in Arabic speaking home countries and the profound isolation which many new arrivals experience when migrating to Australia. Often living in outer suburban areas with little access to public transport, working long hours and living a comparative distance from any friends and family, the CIJ was told that the density of gaming venues in these areas served as an attraction for Arabic communities who sought an accessible venue for social interaction. Many of these venues specifically cater for local populations in terms of atmosphere and food provided, making the appeal even greater.

Practitioners interviewed, meanwhile, indicated that various factors may be at play in particular communities. Prevented from entering professions or trades, potentially, for lack of evidence of qualifications, a significant number of migrants established small businesses upon arrival more than a generation ago.<sup>183</sup> With economic downturns, and the dominance of large commercial business chains, however, many small businesses are struggling, leading people to resort to desperate measures.

One client ran a small business, supporting her child and elderly mother. Business dropped as big chains took over. She fell to gambling to escape stress and get out of financial pressure. She ended up in debt to a loan shark and offended to pay it back. She's inside and mum and teenage son are working multiple jobs to get the family out of debt...They're terrified, and we can't help.<sup>184</sup>

<sup>179</sup> Keen, B. et al., "Problem gambling and family violence in the Asian context: a review," Asian Journal of Gambling Issues and Public Health 5, no. 1 (2015).

<sup>180</sup> Ibid.

<sup>181</sup> Focus group participant, Financial Counselling Australia, CIJ, September 2016.

<sup>182</sup> Interview with Gambler's Help Eastern, November 2016.

<sup>183</sup> Interviews with Vietnamese interpreter and court staff, Sunshine Magistrates' Court, October 2016.

<sup>184</sup> Interview with CISP Clinician, October 2016.

This last example — and many others that the CIJ heard — indicated the way in which gambling harm can extend to broader family members, with children, parents, siblings and extended family trying to limit, repay and simultaneously hide their relative's gambling debt, for fear of the stigma attached. Alternatively, the stigma attached to gambling in some communities can mean that the individual is isolated from other family and friends once the gambling is revealed. To this end, the support offered by the culturally specific community organisations is crucial and the CIJ heard that it may be only after a relationship of trust is established through counselling on other issues that the gambling is revealed.

As if the stigma of gambling losses or debt was not enough, the CIJ also heard about the stigma associated with family violence victimisation and the consequent reluctance to disclose or seek help. As has been clearly acknowledged by the Royal Commission, women from CALD communities face significant additional barriers when experiencing, reporting or fleeing family violence. These include where immigration status is uncertain and they risk the threat of losing their children or being deported.

These also include the systemic discrimination they may face from various parts of the system from which they are seeking help, or certain cultural imperatives which place the burden on women to hold the family structure together and to put family before self.<sup>187</sup> Disclosure of family violence can seem impossible in these circumstances — leaving women more vulnerable and entrenched in harm.

Similarly, the CIJ heard that help seeking behaviour for mental health problems more generally — problems which we know can lead people to seek solace and relief in gaming venues — is especially low in some CALD communities. The intersection of mental health problems; family violence victimisation; CALD status and gambling harm is reflected in the sentencing remarks of County Court cases:

I take into account your prior good record, your depression and loneliness which led to your gambling addiction, the spiraling of that gambling out of control to the extent that you became indebted to loan sharks, your vulnerability in being pressured to commit offences to repay the debt, your poor English, social isolation, depression and sole responsibility for two young daughters, the fact that you have ceased gambling, undertaken counselling and voluntary work, and the anguish you feel at the prospect of your...daughter being taken into State care if you are imprisoned.<sup>189</sup>

...you are isolated in the community by your lack of English language and education. Your life has been limited to the care of your children and your husband. Your husband's compromised mental health and alcoholism have resulted in violence being visited upon you by him.<sup>190</sup>

Conversely, practitioners told the CIJ that work counseling and educating perpetrators of family violence from CALD backgrounds was at least supported by a legal framework:

We can say: family violence is against the law. Whatever you may have thought was acceptable in the back country is not acceptable here. What can you say about gambling, though, when there's a venue on every corner? All we can do is educate about the risks.<sup>191</sup>

For all these reasons and more, the CIJ considers it essential that further research be conducted *with* CALD community agencies about the impacts of problem gambling on the specific populations they serve, and the various barriers which prevent individuals from seeking or receiving help.

<sup>185</sup> Interview with Victorian Arabic Social Services, September 2017.

<sup>186</sup> Royal Commission into Family Violence, "Summary and recommendations," (2016). 34.

<sup>187</sup> Submission of Southern Melbourne Integrated Family Violence Partnership to Royal Commission, May 2015.

<sup>188</sup> Interview with Australian Women's Vietnamese Association, October 2016.

<sup>189</sup> DPP v Nguyen [2016] VCC 43 (Davis J).

<sup>190</sup> DPP v Truong [2014] VCC 2028 (Carmody J).

<sup>191</sup> Interview with Victorian Arabic Social Services, September 2017.

# Gambling harm to Aboriginal and Torres Strait Islander communities

No sector of the Australian population is more vulnerable to contact with the criminal justice system than Aboriginal and Torres Strait Islander communities. Disproportionate arrest, prosecution and incarceration rates experienced by these communities mean that any study of contact with the criminal justice system must consider how its particular subject is impacting on Indigenous populations.

That said, it is not known how prevalent gambling problems are in Aboriginal communities. Relevant studies have significant limitations but suggest a 13.5% prevalence rate, with a significant proportion of gambling activity thought to relate to card games — although this too is shifting.<sup>192</sup>

Where Indigenous clients live in more remote communities, they don't have access to EGMs.

They have to come a long way into town to access them, so cards are more likely...<sup>193</sup>

Certainly, the majority of the limited research focuses on gambling in remote communities, arguably ignoring the diversity of gambling experience amongst Indigenous communities more generally. This existing research, however, does suggest that card games are more prevalent in many more remote Indigenous communities around Australia and often not viewed as gambling per se.<sup>194</sup>

Contradictory views are then expressed about whether or not this activity is significantly harmful, with indications that the money exchanged usually stays in the community; raises funds for 'big ticket items' such as fridges; passes time and has a primarily social function.<sup>195</sup>

Other commentators, however, express concern that money is actually leaving communities; and that card games are contributing to children being left alone and neglected for considerable periods of time. <sup>196</sup> One particular study identified statistically significant associations between poor child health outcomes and reported gambling problems in households in remote Indigenous communities. <sup>197</sup> This study involved interviews with 229 Indigenous participants and 79 non-Indigenous gambling help counsellors, gaming venue managers and others who reported child neglect and violence. <sup>198</sup>

It is vital not to stereotype perhaps the most stigmatised community in Australia by making unsubstantiated assertions about gambling, just as it is crucial not to draw unassailable conclusions from projects which do not involve Indigenous communities at the helm. In particular, it is vital to avoid western constructions of 'Aboriginal gambling'. 199

That said, when we know that gambling harm is felt particularly acutely by populations who are already disadvantaged, it is reasonable to assume that this same harm is disproportionately impacting Indigenous Australians, regardless of prevalence rates and regardless of geographic location.

<sup>192</sup> Stevens & Young, cited in Hing, N. et al., "Risk factors for problem gambling among indigenous Australians: an empirical study," Journal of Gambling Studies 30, no. 2 (2014). 389.

<sup>193</sup> Focus group participant, Victoria Legal Aid, Morwell, November 2016.

<sup>194</sup> However, the CIJ also heard of an alarming increase in the number of EGMs being 'shipped' to remote communities.

<sup>195</sup> Stevens, M. and Young, M., 'Betting on the evidence: reported gambling problems among the Indigenous population of the Northern Territory," Australia and New Zealand Journal of Public Health 33, no. 6 (2009). 557.

<sup>196</sup> Ibid. See also Gordon, A., 'Aboriginal Communities & Gambling,' in Many Ways to Help conference 2016 (Melbourne).

<sup>197</sup> This was after adjustment for other covariates of poor child health.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid, p 565

Clearly, more detailed work needs to be conducted. Given that a significant proportion of Victoria's Indigenous population lives in urban areas, including in areas of socio-economic disadvantage, it is vital to understand how the prevalence of gaming venues interacts with *other* factors to propel Koori Victorians into contact with the justice system. Though gambling does not appear to be the most pressing issue, it is then picked up in case management processes, such as that offered in the Courts Integrated Services Program as described above.<sup>200</sup> Where a broader analysis of gambling harm is then applied, the CIJ heard that the impact of an individual's gambling debt can have more wide-reaching consequences in Aboriginal communities, with the broader kinship networks assuming responsibility for the debt.<sup>201</sup>

Meanwhile, for many ATSI clients of specialist family violence services, many other more pressing issues — such as the fact that their partner or former partner has taken the children; or that the children may be removed by child protection once their partner's violence becomes known — mean that gambling problems are rarely raised. <sup>202</sup> Given the current demands on Aboriginal controlled community organisations, the lack of resources and the need for research to be community-led, the CIJ therefore suggests that this is another vital area for future consultations and detailed research 'and welcomes the recent call from the VRGF for research in this area'.

What this convergence analysis suggests is that, like the analysis of gambling harm at the end of Part One of this report, multiple forms of vulnerability and gambling problems are a potent mix when it comes to propelling people into contact with the criminal justice system.



Given the further harm that contact with the criminal justice system can then cause to people with these various forms of pre-existing vulnerability, or anyone for that matter, the question then becomes: is the criminal justice system responding in the most constructive way that it can?

<sup>200</sup> Focus group discussion with Victorian Aboriginal Legal Service, January 2017.

<sup>201</sup> Focus group discussion, Victorian Aboriginal Legal Service, January 2017.

<sup>202</sup> Interview with Aboriginal Family Violence Prevention & Legal Service, December 2016.

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# Part Three – When gambling related offending hits the courts

# The role of precedent

So what happens when someone following one of these myriad different paths between gambling and crime hits the criminal justice system? Given the complexities identified in the first two Parts of this report, it might be reasonable to expect that, as many broader stakeholders expected, that gambling 'would just be a factor in mitigation of sentencing' or that an otherwise therapeutic approach might be applied.

The CIJ discovered, however, that the reality is somewhat different. In fact, case law reveals that Victorian courts rarely see gambling addiction as a sufficient reason to reduce or mitigate sentence. This is for a variety of reasons, which will be explored throughout this section of the Report.

Given the importance of legal precedent, the CIJ's research went straight to analysis of case law in the superior courts. This started with case law from the Supreme Court since the introduction of EGMs and launch of the Casino in the early 1990s, which reveals a reluctance to open the floodgates to what the court anticipated would be a new influx of offending. As Tadgell J in *R v Cavallin* cautioned:

It would be optimistic...to say that the courts will not see more and more cases of criminal activity which, to some extent, is associated with, or even a direct product of, poker machine gambling. Some of it, no doubt, will be the result of a pathological and, therefore, an obsessively addictive urge....It is, however, ...important that the public does not assume that a crime which is to some extent generated by a gambling addiction, even if it is pathological, will, on that account, necessarily be immune from punishment by imprisonment'.<sup>203</sup>

In the years which followed, decisions continued to reinforce this sense of caution, with the court urging that it would be an 'unusual'<sup>204</sup> or 'rare case indeed where an offender can properly call for mitigation of penalty on the ground the crime was committed to feed a gambling addiction'.<sup>205</sup>

...the concept that an appropriate sentence... should be moderated by the prisoner's gambling addiction is not one which should loom large in the exercise of the Judge's discretion.<sup>206</sup>

Indeed, only in 'unusual' cases was the court inclined to take gambling problems into account. In one of these exceptions, a woman who had been the primary carer for her ill mother; who led a lonely life; and who had been introduced to poker machines by her former partner, had an appeal on sentence by the DPP dismissed when the court viewed her whole background as 'constituting a degree of mitigation'.<sup>207</sup> To this end, the court noted that previous decisions had not said that gambling addiction could never be taken into account as part of the relevant circumstances as a mitigating factor.

<sup>203</sup> R v Cavallin, Unreported, Victorian Court of Criminal Appeal, 24 July 1996 (Full court: Tadgell, Ormiston and Phillips JJ. No dissenting judges).

<sup>204</sup> R v Pascoe [1998] VSCA 287 (Winneke P). (Full court: Winneke P, Brooking and Charles JJ. No dissenting judges).

<sup>205</sup> Rv Petrovic [1998] VSCA 95 (Charles J). (Full court: Tadgell, Ormiston and Charles JJ. No dissenting judges).

<sup>206</sup> Rv Luong, Nguyen & Cao [2005] VSCA 94 (Winneke P). (Full court: Winneke P, Charles and Chernov JJ. No dissenting judges).

<sup>207</sup> DPP v Raddino [2002] VSCA 66 (Chernov J) (Full judges: Phillips CJ, Charles and Chernov JJ) (No dissenting judges). Conversely, in a subsequent case citing this decision, the Court appeared to give no consideration to the specific facts of the case, instead making a general statement that gambling would not usually be taken into account. In some cases, gambling addiction was not relied on by counsel as a factor in mitigation, meaning that the court did not hear relevant argument.

In a series of decisions in the late 2000s, developments took a new turn. On the one hand, the *Verdins*<sup>208</sup> decision laid new ground for courts to consider mitigation more generally, stating more clearly than before that mental impairment was relevant to sentencing in a range of ways, including to:

- reduce the offender's moral culpability (but not his or her legal responsibility) for the offence —
   this could affect the weight given to just punishment and denunciation as purposes of sentencing;
- influence the type of sentence that could be imposed and the conditions in which the sentence could be served;
- reduce the weight given to deterrence as a purpose of sentencing this would depend on the
  nature and severity of the mental impairment and how this impairment affected the mental capacity
  of the offender at the time of his or her offending and at the time of sentencing;
- increase the hardship experienced by an offender in prison if he or she suffered from mental impairment at the time of sentencing;
- justify a less severe sentence where there was a serious risk that imprisonment could have a significant adverse effect on the offender's mental health.

This meant that lawyers for offenders with gambling addictions might potentially be able to argue that the addiction was a mental impairment that was therefore relevant to sentence. It seemed, however, that the highest court in Victoria had other ideas:

... just as **Verdins** explains that the absence of a label for the condition does not preclude the operation of the principle, so the ability to attach a label to the condition will not necessarily mean that the principle will apply. A diagnostic label is only the beginning, and not the end of such an enquiry. It is not the classification of the condition which matters but 'what the evidence shows about the nature, extent and effect of the mental impairment' at the relevant time. The focus must be on how the particular condition affected mental functioning of the offender in the circumstances'.<sup>209</sup>

If we were left in any doubt, the decision of *R v Grossi* (reported in 2008), put the matter arguably to rest.<sup>210</sup> In this case, Justice Redlich in the Court of Appeal explained that there was no tension between the Verdins principle and previous authorities which had dealt with gambling addiction. He also explained that gambling does not generally warrant a reduction in the offender's moral culpability nor moderate the sentencing objective of general deterrence, for the following reasons (emphasis added):

[T]he presence of a gambling addiction should not, on that ground alone, result in any appreciable moderation of the sentence. There are a number of reasons why that will be so.

Firstly, **in most cases**, the nature and severity of the symptoms of the disorder, considered in conjunction with the type and circumstances of the offending will not warrant a reduction in moral culpability or any moderation of general deterrence.

Second, it will **frequently** be the case that crimes associated with gambling addiction will have been repeated and extended over a protracted period. The long term chase to recoup losses is characteristic of those with such a disorder.

Third, in cases involving dishonesty, the crimes will **commonly** be sophisticated, devious, and the result of careful planning.

Fourth, the gravity of such offences, if there is a breach of trust or confidence, will commonly attract an increased penalty making such offences more appropriate vehicles for general deterrence.

Fifth, when offences of this nature are committed over extended periods, the prominent hypothesis will be that the offender has had a degree of choice which they have continued to exercise as to how they finance their addiction. This has **often** provided a reason for a general reluctance to temper the weight given to general deterrence or to reduce moral culpability because an offender has found it difficult to control their gambling obsession.

Finally, and perhaps most importantly, the nexus of the addiction to the crime will **often** be unsubstantiated. The disorder will not **generally** be directly connected to the commission of the crime, the addiction providing only a motive and explanation for its commission. Hence, by contrast to a mental condition that impairs an offender's judgment at the time of the offence, such addiction will **generally** be viewed as only indirectly responsible for the offending conduct.

This case has subsequently set the tone in the higher courts of Victoria and has been reinforced in a number of ways, including with a court determining that *Grossi*, which involved multiple offences, could also apply to a single impulsive criminal episode.<sup>211</sup> The above statement is also said to provide the 'most expansive explanation [...] from an Australian court of appeal'<sup>212</sup> and, as well as being based on a review of case law up to that point, has been subsequently endorsed in the Tasmanian, Victorian and Western Australian Courts of Appeal and the ACT Supreme Court. It has also been applied to Commonwealth criminal law.<sup>213</sup> <sup>214</sup>

<sup>211</sup> R v Cusack [2009] VSCA 207 (Redlich J) (Full court: Nettle, Redlich and Lasry J) (No dissenting judges); DPP v Scassaioli [2012] VCC 816 (Cannon J);

<sup>212</sup> Neal, above note 119, p 81.

<sup>213</sup> Ibid.

<sup>214</sup> The NSW and South Australian Courts of Appeal have justified not reducing the moral culpability of the offender on the basis that the offender had a choice to not offend. Ibid.

Some of its underlying emphasis has arguably being echoed in a civil context in the High Court:<sup>215</sup>

In *Kakavas v Crown Melbourne Limited*, the plaintiff — who claimed a severe gambling addiction — suffered losses totaling \$20.5 million and sued Crown to recovery these losses. The plaintiff's original claim was based on negligence; misleading and deceptive conduct; restitution; breach of statutory duty; and unconscionable conduct. However, the trial judge struck out the negligence claim following an earlier authority that a casino operator does not owe a duty of care to protect a problem gambler from financial loss just because the Casino knows the gambler has a problem.

On appeal to the High Court, the plaintiff argued unconscionable conduct, arguing that the Court should have regard to what he claimed was Crown's exploitation of his 'special disadvantage' 'when he was actually at the gaming table, that being the time when his pathological urge to gamble adversely affected his ability to make rational decisions...'

The court rejected that the plaintiff's pathological gambling was a special disadvantage which made him susceptible to exploitation. The court also found that the plaintiff 'was able to make rational decisions to refrain from gambling. He was certainly able to choose to refrain from gambling with Crown'.

The CIJ can obviously draw no conclusion about the merits of any particular decision, given it was not privy to all the evidence before the relevant court. More broadly, however, it is worth highlighting the way in which 'choice' continues to be a feature of a court's decision making matrix — including in certain Victorian decisions in which courts have noted that:

Just as with other forms of addiction, his gambling may be viewed as indirectly responsible for the offending conduct, but the **decision to offend** was not the consequence of a disorder which impaired his judgment as to either the nature of seriousness of the conduct he was contemplating. The nexus of the addiction to the crime remained unsubstantiated, providing only motive and explanation for its commission. The evidence fell well short of it being shown that this addiction was a disorder which could reduce moral culpability'.<sup>216</sup> (our emphasis)

In some cases, of course, the requirement that there be a 'nexus' of the addiction to the offending seems to have become a little confused, one sentencing judge reported as stating:

...I've had difficulties in connecting some of the thefts and perhaps your extravagant behaviour with in any way relating to your pathological gambling. **Your offending behaviour was often well away from gambling venues...**<sup>217</sup>

Nevertheless, as with prior to the *Grossi* decision, some exceptions continue to have been made. These have echoed the tendency of the court to take the offender's wider circumstances — which included the addiction — into account. One such decision involved a young woman who had been diagnosed with obsessive compulsive disorder; anxiety and depression; had undergone risky neurosurgery following detection of a brain tumour; and who had developed a gambling addiction as a way of coping with all of this hardship. In this case, the court found a clear link between the young woman's depression; trauma; gambling addiction; and offending.<sup>218</sup>

<sup>215</sup> Kakavas v Crown Melbourne Limited [2013] HCA 25.

<sup>216</sup> R v Cusack [2009] VSCA 207.

<sup>217</sup> Cited in R v Harris [2009] VSCA 189 (sentencing judge referred to Barnett J).

<sup>218</sup> Department of Public Prosecutions (Cth) v Golic [2014] VSCA 355 (Joint judgment by: Neave, Whelan and Beach JJ) (No dissenting judges). See also Chuan Wei Chan v R [2014] VSCA 301 (Joint judgment by: Redlich and Almond JJ).

#### Other forms of addiction

Taking a step back, it is worth considering how superior courts treat other forms of addiction, such as drug and alcohol addiction. In the CIJ's brief analysis of recent case law some strong similarities — but important distinctions — could be found which offer some clues about how the courts view addiction in general. For example, the crucial question in relation to gambling addiction appears to be whether the offender was mentally impaired by the addiction at the time of contemplating or committing the offence. However, case law regarding drug and alcohol addiction suggests that the court tends to look at whether the decision to take the substance in the first place was freely made, and whether an offender knew when taking drugs for the first time that it might cause him or her to be addicted and to commit crimes.

Examples of relevant case law include R v Nagy, in which the court stated that:

The law does not preclude a court... from regarding it as an important factor that [the offender] and his de facto wife were heroin addicts and that the crimes were committed with a view to obtaining heroin and money to enable their addiction to be satisfied...<sup>219</sup>

More pointedly, in R v McKee, the court found that:

...a sentencing judge may have regard to the circumstances which led to an addiction that caused the commission of the offence and to whether the addiction has continued or is being treated in deciding upon a sentence appropriately tailored to the personal circumstances of the offender'.<sup>220</sup>

In this particular case, the offender's drug use started when the offender was a child and also a victim of abuse. The offender went on to develop a long, drug-related, history of offending, with the judge further stating that:

The extent to which a decision to experiment with drugs is freely made, in my view, bears upon the moral culpability of the offender who commits a crime as a consequence of addiction to drugs.<sup>221</sup>

These cases were relied on in the decision of *R v Lacey*, reported in 2007, when the Court of Appeal stated that 'there is clear and binding authority that, in Victoria, drug addiction may constitute a significant mitigation factor'.<sup>222</sup> A short time later, however, the court appeared to be moving towards a different position. In *R v Koumis*, a heroin trafficking case, the court cited the (at the time) recent *Grossi* decision and stated that:

The general reluctance of courts to take drug addiction into account rests in part, at least, upon the view that the decision to begin to use drugs was voluntary and the commission of crimes to feed an addiction was a likely consequence of that choice.

...A number of general propositions may be stated about the relevance of addiction to the question of moral culpability and whether it should be viewed as a mitigating circumstance for the purpose of sentence. Drug addiction provides no justification...Generally speaking, addiction and any consequential impairment of judgment will not have any significant mitigatory effect upon... sentencing considerations.<sup>223</sup>

<sup>219</sup> Rv Nagy [1992] 1 VR 637 (McGarvie J) (Full court: Crockett, McGarvie and JD Phillips JJ) (No dissenting judges).

<sup>220</sup> R v McKee and Brooks [2003] VSCA 16 (Buchanan J) (Full court: Buchanan, Vincent and Eames JJ) (No dissenting judges).

<sup>221</sup> R v McKee and Brooks [2003] VSCA 16.

<sup>222</sup> Rv Lacey [2007] VSCA 196 (Joint judgment by: Vincent, Redlich and Habersberger JJ).

<sup>223</sup> Rv Koumis (2008) 18 VR 434 (Joint judgment: Redlich, Kellam and Osborn JJ).

Reported in the same year, and just on the back of the *Verdins* decision, the court in *DPP v Arvanitidis* explained that:

To lose the benefit of ... Verdins, it was not necessary that the respondent have foreknowledge that the psychotic symptoms would cause him to behave in the precise manner in which he offended or make him generally dangerous or violent. If the respondent was aware that by taking the drug his judgement would be so affected that he would behave irrationally or that it would affect his ability to exercise control, his self-induced mental state would not constitute a mitigating circumstances. It was for the respondent to establish on the balance of probabilities that he did not know that the drug would have such effects. This he failed to do.<sup>224</sup>

Similar 'foreknowledge' has been viewed as essential in subsequent cases, with the court finding that an addiction '...will only constitute a mitigating factor in the rare circumstance where it is established that the offender did not have any foreknowledge of the mental state that would be induced by the taking of drugs'.<sup>225</sup>

Interestingly, this 'foreknowledge' seems to come into play even more heavily in cases involving alcohol dependence. To this extent, courts considered it likely that offenders would be well aware of the effects that alcohol would have on them, in part because of prior experience. In a case involving a range of serious driving offences, the defendant suffered from alcoholism and depression. The court acknowledged that this stemmed from sexual abuse as a child, with the defendant having started drinking at only 8 years old. Referring to the *McKee* decision above, the court noted that:

There are...important statements of principle, emphasising as they do the duty of the sentencing court to pay careful attention to the personal circumstances of the offender and to the potential significance of deprivation, abuse or disadvantage in early life as explaining the offending or — as is the present case — as explaining the addiction.

The court went on to say, however, that, despite this:

Neither her depression nor her alcohol dependence — nor the sexual abuse from which they stemmed — was causative of her offending, in the sense discussed in Verdins. She had no need to drive while drunk, unlike the appellants in McKee who could at least explain their offending on the basis of their physical craving for heroin...she would have been well aware, with increasing intoxication during the day, that her judgment was becoming clouded and her capacity for decision making impaired.<sup>226</sup> (our emphasis)

More recently, however, the court took a slightly different approach, though considering *Verdins* only in relation to the defendant's diagnosed personality disorder.

Generally, the fact that such alcohol dependence arose out of a troubled childhood will not be sufficient for the court to consider intoxication as a factor in mitigation of culpability. However, in this instance, because of the very young age at which you started drinking, the direct role of your father in introducing you to alcohol and the fact that both your parents abused alcohol in the family home until you were 15, I treat this as a circumstance in mitigation...In summary, I accept that your upbringing and resultant personality disorder and alcohol dependence were, in part, causative of your committing the offence. I have therefore taken this into account in favour in determining your moral culpability for your crime.<sup>227</sup>

<sup>224</sup> DPP v Arvanitidis [2008] VSCA 189 (Redlich J) (Full judges: Buchanan, Nettle and Redlich JJ) (No dissenting judges).

<sup>225</sup> Johnston v R [2013] VSCA 362 (Redlich J) (Full judges: Redlich, Priest and Robson JJ) (No dissenting judges).

<sup>226</sup> R v Audino [2007] VSCA 318 (Maxwell J) (Full judges: Maxwell, Ashley and Neave JJ) (No dissenting judges).

<sup>227</sup> R v Steve Ray Cook [2015] VSC 406 (Elliott J).

#### Discussion

So what does all of this tell us? Again, the CIJ makes no comment about individual court decisions. That said, the pattern of these cases does hint at a number of factors for consideration.

The first is a detectable element of reluctance to 'open the floodgates' in the wake of the *Verdins* decision. The CIJ heard that, unsurprisingly, lawyers for offenders who had gambling and other addictions were all, at least initially, keen to try their clients' luck at this new sentencing terrain. However, this terrain was, at least in relation to gambling, quickly shut down by the *Grossi* decision.

Conversely, however, these decisions suggest a struggle by the courts to grapple with the realities and manifestation of a different kind of addiction and its relationship to choice. On the one hand, courts seem to consider that offenders who are alcohol dependent ought to have known, *from prior experience*, how they would be affected. It was at the point of repeating the behaviour, apparently, that they exercised the element of choice.

Offenders with a drug addiction, on the other hand, apparently exercised the 'choice' when they *first* began to use drugs. In fact, slightly illogically this choice was seen to have been significantly affected by the physical effect of the substance on the offender (i.e. the effect which occurred *after* the drug was taken) — with the defendant more in control of the physical effects of alcohol, for example; than of the 'physical craving for heroin' — the drug addict locked in the grip of the substance from thereon.

The question of choice to gambling addicts, however, was not necessarily in relation to their decision to gamble (although it was in *Kavakas*) but in their decision to *offend* — the addiction to gamble being seen as largely separate from the offender's apparent free will to commit a crime. Notably, the exceptions to all these cases — whether relating to gambling, drug or alcohol addiction — seem to have been when an offender's mental health is seriously impaired by other, separate factors, or when an offender's life circumstances reflect significant hardship and the whole picture can then be taken into account.

In other words, it is the *substance* that is seen to have had a significant effect. Curiously, this does not seem to hold as much water when alcohol is involved — potentially because alcohol dependence (and/or the avoidance of one) is a more understandable phenomenon to most of the population.

What it does suggest, however, is that there may be inconsistent and underdeveloped engagement with the concepts and science of addiction in the legal context. Certainly, according to academic and grey literature, the issue of gambling addiction in sentencing remains confusing.<sup>228</sup> In particular, a recent critique by academic Luke Neal who suggests that the reasons in the *Grossi* decision are based on an unrealistic conception of the voluntariness of the offender's choice to offend.<sup>229</sup> Accordingly, Neal calls for a greater engagement with the available neuroscience, as well as evidence around co-morbid diagnosis, to argue for mitigation in certain cases of gambling-related crime.

<sup>228</sup> Allen Consulting Group, "Responding to gambling-related crime: Sentencing options and improving data collection in courts and prisons," (2011). 19. 229 Neal, above note 119.

# A steady stream of cases

Given this pattern of case law in Victoria's most superior court, the CIJ decided it was worth asking how gambling-related offences have been dealt with in recent years in the jurisdiction that hears perhaps the greatest number of matters which are said to be *directly* related to gambling addiction. Certainly, County Court judges told the CIJ that they heard a steady stream of matters relating either to property theft or drug offences which could be traced back to gambling debt.<sup>230</sup>

To complement consultations, and to trace the impact of the *Grossi* decision, as mentioned above the CIJ conducted an analysis of sentencing remarks of over 100 cases in the County Court since *Grossi*; the VRGF 2013 report and the release of the latest edition of the DSM. The analysis found a growing irritation on the part of the court about the steady stream of gambling-related offending that it was seeing.<sup>231</sup>

Yet again the Court is called upon to deal with the consequences of the ubiquitous availability of gambling outlets in our society. Yet again it is required to balance the community interest in reclamation of those who fall prey to the temporary allure of the spin or jingle jangle of the poker machine against the need to punish those who steal other's property to facilitate that ephemeral pleasure, and to deter others who are in a position to breach the trust of others to their own benefit.<sup>232</sup>

The community continues to attend and promote gambling at these awful venues that produce this sort of tragedy. In this case there does not seem to be any dispute from either side, that the gambling addiction to the machines, was almost the total recipient of all the money involved in this case, which is getting up towards half a million dollars. It is marvellous to hear how they then contribute to the community, with small amount.<sup>233</sup>

...the prisoner told the psychologist that the gambling debts were the reason why she ultimately became involved in this criminality of loan sharks who had apparently lent her money to gamble, therefore leading to the incentive to commit crime to pay it back...in 2011, long before the offences took place, Ms Thai had indeed self-excluded from the Casino. One ponders to think how one so easily removes oneself from such self-exclusion, and is accepted back by the Casino.<sup>234</sup>

I think I have said enough about the Casino in the last two weeks.<sup>235</sup>

To this end, those judges participating in the project acknowledged that gambling addiction could be an 'ameliorating' factor, if not a mitigating one, and that the Court was 'not always alive to the potential of a therapeutic option'. That said, the parameters imposed by *Grossi* and associated case law left little room for flexibility, with judges indicating that — like Magistrates and lawyers — they had not seen the issue raised as much in recent years and had not seen it featuring as often in psychologist's reports.

As I say, these are never easy sentences. No one likes sentencing a person who has been subject to an addiction, however, the aggravating factors, the amount and the breach of trust is such that I agree totally with the comments made by the Chief Judge. There is no option...that a period of immediate imprisonment must be imposed...<sup>236</sup>

<sup>230</sup> Focus group discussion, County Court of Victoria, November 2016.

<sup>231</sup> The County Court now publishes 60% of its cases, making the sample audited by the CIJ a fairly substantial representation.

<sup>232</sup> DPP v Seamons [2013] VCC 1951 (Murphy J).

<sup>233</sup> DPP v Dwyer [2015] VCC 554 (McInerney J).

<sup>234</sup> DPP v Thai [2016] VCC 624 (McInerney J).

<sup>235</sup> DPP v Ut Nguyen [2015] VCC 1908 (McInerney J).

<sup>236</sup> DPP v Dwyer [2015] VCC 554 (McInerney J).

Some of the remarks (as with others featured earlier in this report) provide further confirmation of emerging themes. This includes the linear pathway from addiction to property theft:

Within 12 months you were gambling daily on poker machines and Tatts Lotto. In order to support this level of gambling, you borrowed heavily from friends and family. You came under increasing pressure to repay your debts. In these circumstances, you decided to steal from your employer to enable your creditors to be paid and... to continue your gambling.<sup>237</sup>

It also includes, however, remarks that reflect the additional recidivism risk that gambling can present:

As to your prospects of rehabilitation, you will have to address your gambling addiction. It may be that you will be able to commence that process whilst serving your sentence, but unless you do it successfully either during the course of your sentence or afterwards, perhaps during the period when you are on parole, then you are vulnerable, it seems to me, to committing further offences of this kind. It could become a blight on the rest of your life unless you deal with it... It will be difficult for you to live other than an isolated existence.<sup>238</sup>

The pathway from gambling debt to drug offending (noting the role of networks, loan sharks, and gambling venues) was also observed:

...you accumulated gambling debts... and it seems as a means of repaying that debt you were offered money to look after his crop in Shepparton...You say the house was set up when you arrived, and you remained there until your arrest.<sup>239</sup>

You agreed to be a 'crop sitter' because you had accumulated a gambling debt and needed money to pay it off. You were paid \$5,000 at the beginning and were to receive a further \$5,000 at the completion of your period of service.<sup>240</sup>

As an additional form of vulnerability, the sentencing remarks point to pathways which can be the 'result of a cumulative contributing effect of premorbid anxiety and/or depression, poor coping skills and negative family experience'. <sup>241</sup> In other words, people with mental health issues and poor coping skills — possibly co-occurring with but just as likely the result of — a difficult family background or childhood trauma, are more likely to find themselves at the intersection of gambling and crime.

You said you sought out the poker machines for the numbing experience of using them. You used the money [you gained from the offending behaviour] for your gambling.<sup>242</sup>

I also accepted into evidence a report from a clinical psychologist...who confirms that you suffer from a gambling addiction caused by depression.<sup>243</sup>

Despite this acceptance of the harmful effects of gambling, the remarks nonetheless reflect a judicial approach to sentencing consistent with the discussion above. More specifically, the sentencing judges typically endorse Redlich's general point that gambling addiction is not a mitigating factor.

<sup>237</sup> DPP v Appadoo [2015] VCC 227 (Grant J).

<sup>238</sup> DPP v Shiel [2016] VCC 1218 (Maidment J).

<sup>239</sup> DPP v Pham [2016] VCC 1117 (Mullaly J).

<sup>240</sup> *R v Bui* [2016] VCC 37 (Punshon J).

<sup>241</sup> Neal, above note 119, p 86.

<sup>242</sup> DPP v Arnall [2016] VCC 640 (Mullaly J).

<sup>243</sup> DPP v Chapman [2016] VCC 231 (Lacava J).

Addiction to gambling, as such, is not a mitigatory matter. It may well explain what you did with the money that you took from Medicare and it might be that you took solace from your financial issues and mental health issues and financial pressure through gambling, but that is the extent of the way in which I could factor in your gambling addiction.<sup>244</sup>

In such regard, the prosecution relied on R v Grossi [2008] VSCA 51 [56] where the reasons of Redlich JA are detailed. In that paragraph His Honour refers to five reasons which are relevant here and, in my view, apply totally to the facts in this case and support not only the proposition put to me by the prosecution but the conclusion I make, that while the gambling addiction is explanatory of this criminality, such is not mitigatory.<sup>245</sup>

Although I take into account your gambling addiction in a general way and in respect of its contribution to your offending, I do not regard it as something which you can call in aid as mitigatory or as attracting Verdins principles, for the reasons set out by His Honour Redlich JA...<sup>246</sup>

In particular, a number of cases signal the further considerations which sentencing judges are likely to take into account, including whether the proceeds of the crime had been directly used to fund further gambling or pay back gambling debts; or whether they were instead used to fund a 'lavish lifestyle' or for an offender's personal gain.

What's more, while approximately half the cases analysed involved an offender with no prior convictions, this did not necessarily work in the offender's favour:

...[the prosecution] agreed that you had no prior convictions, but submitted that is often the case with white collar offenders. Such offenders often do not have prior convictions: they are people of good character and have good prospects of rehabilitation. He submitted it is often those characteristics which allow offenders access to the position of trust which they have abused, and in such cases these mitigatory factors must be given less weight than the factor of general deterrence.<sup>247</sup>

Even where psychologist reports appeared to give significant credence to the existence of an addiction — making clear reference to diagnosis under the DSM 5 and even suggesting a clear nexus of this addiction to the offending — this was not always viewed as an excuse.<sup>248</sup>

Sentencing remarks even included a lack of sympathy, in some cases, for the plight of a recent arrival. Certainly, lawyers participating in the project suspected that courts may be becoming somewhat skeptical about the frequency with which the 'loan shark story' was appearing before them.<sup>249</sup>

...you had the privilege of coming to Australia to study. Many others do not enjoy such a privilege but are treated as criminals, locked in detention for doing nothing more than trying to find refuge and a better life. Within a number of months you were no longer studying and then you turned to this offending. I must say that this appears to be a familiar pattern with a number of drug offenders nowadays — coming in from overseas, abandoning studies and committing drug offences... In any event, drug and gambling addiction do not lessen your moral culpability — it's just that your moral culpability may be seen as even higher if you were offending for sheer profit.<sup>250</sup>

<sup>244</sup> DPP v Dewhurst [2016] VCC 1187 (Cannon J).

<sup>245</sup> DPP v Thai [2016] VCC 624 (McInerney J).

<sup>246</sup> DPP v Kelly [2014] VCC 1983 (Cannon J).

<sup>247</sup> DPP v Matthews [2016] VCC 1261 (Lawson J).

<sup>248</sup> DPP v Ut Nguyen [2015] VCC 1908 (McInerney J). See also Anh Tuan Nguyen v R [2017] VSCA 10, and DPP v Little [2016] VCC 1687, though in this latter case the psychologist conceded that, while the offender had a gambling addiction, the condition was not such as to have obscured the offender's intent to commit the offences.

<sup>249</sup> Focus group discussions, Victoria Legal Aid, Sunshine, October 2016 and Morwell, November 2016.

<sup>250</sup> DPP v Tiong [2016] VCC 833 (Cannon J).

In three cases, however, the sentencing judges appear to attribute reduced moral culpability — or more weight to rehabilitation than might otherwise be anticipated — because a defendant's gambling converged with other factors in that offender's life, such as mental health issues and social circumstances which may then give rise to a gambling disorder.

There have been a number of cases which have come before the appellate courts in Australia where the degree to which gambling addiction amounts to a mitigating factor in cases such as this has been the subject of debate. The balance of authority suggests that it is rarely the case that gambling addiction alone would amount to a mitigating circumstance. However it is put that when combined with the other mental impairments and the other physical issues spoken of by [the assessing psychologist] all of those factors operate to reduce your moral culpability. [...] It seems to me sensible to conclude that your gambling habit, gambling addiction if you like, does give a substantial reason for your engaging in this conduct. In my opinion it does not substantially, if at all, mitigate the offending in itself, but it seems to me that when you link in the mental impairments about which I have spoken then the picture is one of a person who at the time of the offending was at a very low ebb and your capacity to control your impulses was significantly reduced.<sup>251</sup>

I accept the matters put on your behalf in mitigation. This is a very unusual case. The offending is a serious example of armed robbery, committed against someone you knew, and who trusted you, and who had helped you financially in the past. It was committed for financial gain; albeit to satisfy a gambling debt in circumstances where you were being pressured to repay the debt, and to offend in order to do so. You are a person without prior convictions, relatively youthful, isolated in Australia with no family, caring on your own for your two youngest daughters in spite of having little English and no employment. You have pleaded guilty and shown remorse for your conduct, which occurred in the context of a gambling addiction brought on by the isolation and depression you felt after your marriage broke up, and you have ceased gambling, commenced counselling and taken full advantage of the CISP program you have undertaken. If imprisoned your middle daughter will be taken into the care of the State because there is no one available to care for her. I accept that you currently suffer from a mental disorder requiring treatment both by way of medication and counselling with a Vietnamese speaking psychologist, and that a sentence of imprisonment will weigh more heavily on you than on a person in normal health. I am also satisfied that there is a serious risk that imprisonment will have a significant adverse effect on your mental health.<sup>252</sup>

The fundamental issue before me is whether some imprisonment is required in the circumstances of dishonest appropriation of property from an employer and a supplier to the value of \$149,000 over two years, in order to gamble by a now remorseful man of previous good character, who went through the difficulty of declaring that he was gay while married with a young child. I have given this matter much anxious consideration and, with the guidance of the Court of Appeal in Bolton, I am of the view that in the end the gravity of the offending and the need for denunciation and deterrence would not be so undermined if the punishment was a community corrections order alone without any imprisonment. Since this analysis, the question then becomes whether the VRGF's 2013 assertion that 'the courts are beginning to soften their sentencing approach in cases involving gambling issues, by adopting a broader consideration of an offender's mental state sin fact the reality. Certainly, the finding that only three out of a sample of over 100 cases accept any mitigation suggests that the softening is far from widespread.

<sup>251</sup> DPP v Buckley [2014] VCC 1870 (Maidment J).

<sup>252</sup> DPP v Nguyen [2016] VCC 43 (Davis J).

<sup>253</sup> DPP v Arnall [2016] VCC 640 (Mullaly J) It is useful to note that, in this latter case, the psychologist's report very clearly stated the defendant had a Major Depressive Disorder and Gambling Disorder and that, in the psychologist's opinion, there was 'a nexus between [the] gambling disorder and [the] offence behaviour.'

<sup>254</sup> Victorian Responsible Gambling Foundation, above note 26, p 138.

Understandably, the County Court's approach echoes the pattern of Supreme Court case law both prior to and post the *Grossi* decision, in that courts are more willing to accept mitigation in relation to sentence for serious offences when other — potentially more sympathetic — factors are in play.

#### Often in the mix

Despite the comments from County Court judges (both in consultations and in the analysis of sentencing remarks) that gambling related offending features regularly in the matters that they see, the CIJ heard repeatedly from Magistrates that they 'do not see gambling issues as much as we used to'.

The CIJ suggests that this may be the result of a number of different factors.

The first is that those matters which clearly feature gambling as a factor contributing to offending are usually matters involving more serious offending — either in relation to the amount of money embezzled or stolen, or the seriousness of various drug offences. This means that these matters will be heard in the County Court jurisdiction. While committals for these matters are still heard in the Magistrates' Court, a consolidation of all committal hearings in the Melbourne Magistrates' Court a few years ago means that many of these matters will simply not be coming to the attention of suburban or regional courts.

The other reason, as suggested by lawyers participating in focus group discussions, is that the *Grossi* decision has impacted on the likelihood that lawyers will even *ask* their clients about gambling, let alone raise it before a court. Certainly, many lawyers indicated that they were reluctant to raise the matter on behalf of their clients, due to what was perceived as a lack of sympathy from some judicial officers.

Depends who you get — it's a bit of a judicial lottery. Some, it's a sure bet the client's going inside. 255

Most... are sympathetic but a few believe that severe punishment will act as a deterrent.<sup>256</sup>

One Magistrate says, 'I start from the position of jail and you have to talk me back'. 257

My client had no priors, severe depression and anxiety, long history of domestic abuse — but she stole [over \$10,000] from her employer and the Magistrate put her inside... [the court] only saw the gambling, the breach of trust...<sup>258</sup>

<sup>255</sup> Focus group participant, Victoria Legal Aid, Ringwood, October 2016.

<sup>256</sup> Consultation with Wesley Mission Legal Service, November 2016.

<sup>257</sup> Focus group participant, Victoria Legal Aid, Ringwood, 2016.

<sup>258</sup> Focus group participant, VLA Regional Office, Geelong, October 2016.

Even specialist gambling lawyers, such as those at Wesley Mission Legal Service, said they 'rarely raised [their] clients' gambling in court', preferring to rely on other matters, such as mental illness or family breakdown. While it is unlikely that *clients* are not raising their gambling because of case law, could it be that lawyers are not even considering whether it could still be one of the arguments they should make on behalf of their clients; and therefore not seeking relevant evidence (such as psychologists' reports) to lead?

It used to be a question we ask. Now we don't ask as we don't expect it to make a difference.<sup>259</sup>

Lawyers also confirmed that they do not usually ask about gambling issues with clients, unless there is an obvious reason to suspect it is relevant. In some cases, lawyers acknowledged that it was not in the interests of their client to disclose involvement in any more serious offending than what they admitted to:

If we're looking at bank statements for whatever reason and there's multiple large withdrawals from a hotel venue, then we know we might need to ask a few more questions.<sup>260</sup>

If a client's instructions are that he was coerced by a loan shark into trafficking a certain amount of drugs, they are the instructions I need to work with...<sup>261</sup>

As suggested above, some lawyers overtly reflected on the impact that the *Grossi* decision has had on the instructions that they seek from their clients. <sup>262</sup> What was striking about discussions with the Magistrates' Court, however, was that specific reference to the *Grossi* decision was not necessarily made, with discussion instead focusing around more general principles, including the 'objective seriousness' of the offending which, in some Magistrates' views, involved an element of choice.

This was echoed in the comparison offered in one consultation between someone in the grip of a gambling addiction and the grip of a drug addiction — in other words, the distinction between the moral culpability of someone who embezzles a 7-Eleven being likely to be seen as greater than that of 'an ice addict who holds up [that same] 7-Eleven with a kitchen knife'.<sup>263</sup>

In this way, the apparent distinction between a gambling disorder or addiction, and another form of addiction, seemed to work against the gambling-related offender. As discussed in Part One of this Report, just as clinical responses to, and diagnosis of, gambling disorder were slower to develop than responses to drug addiction, the legal system has not yet grappled with the emerging neuroscience which offers valuable explanations of the depths to which a gambling addiction can take someone.

Just as relevantly, the fact that an individual appearing on gambling-related theft charges may seem, in every other respect, to have their lives together — to be reasonably well dressed; to have a house; a family; a car and possibly still a job — is something that courts cannot necessarily compute. This is because the vast majority of individuals who courts see are experiencing multiple forms of disadvantage, with mental illness; ice addiction; ABI; unemployment; low educational attainment; and generalised or family violence all in the mix with a significant number of offenders that the Magistrates' Court sees.

This makes it more likely that the moral culpability of someone who otherwise appears in control—and who may seem to have chosen to offend over a long period of time—will seem higher in comparison with the culpability of someone who is otherwise incapable of making constructive or positive choices. For this reason, some gambling related offenders are likely to receive a custodial sentence despite this seeming relatively harsh in the circumstances, or despite this being their first offence.

<sup>259</sup> Focus group participant, Law Institute of Victoria, October 2016.

<sup>260</sup> Focus group participant, Victoria Legal Aid, Sunshine, October 2016.

<sup>261</sup> Focus group participant, Victoria Legal Aid, Sunshine, October 2016.

<sup>262</sup> Focus group participant, Victoria Legal Aid, Morwell, November 2016.

<sup>263</sup> Interview with, Magistrates' Court of Victoria, Geelong, October 2016.

Outside the scenario of offending as a direct result of gambling problems, lawyers reported that clients rarely encountered sympathy for their gambling in other contexts. For example, in the Special Circumstances List at the Magistrates' Court (which deals with applications for special consideration in relation to the payments of fines and infringements on the basis of disadvantage), lawyers said it was not a good idea to raise the issue of gambling, even where a gambling disorder is preventing a client from paying their fines. Currently, problem gambling is not listed in the eligibility criteria.

The court will think 'if he's got enough money to gamble, he's got enough money to pay his fines'.264

That said, most participating Magistrates could relate stories about parties who had appeared, either on property theft charges related to gambling, or on unrelated offences where gambling was 'in the mix'.

I had one recently, a young adult living at home on a CCO related to drug offences. There was a long history of other offending and family violence. The man had then used his father's credit card to fund his gambling addiction and Dad had finally reported him for theft. When you think about how desperate a parent has to get before they'll do that, you have to wonder how much else that situation is happening...<sup>265</sup>

Similarly, Magistrates also suggested that gambling problems were a 'hidden' issue, and that due to stigma they weren't being raised.

A first time offender — who otherwise appears to have her life together — would probably prefer to stand up in court and say "I have a narcissistic personality disorder, Your Honour, than admit to a gambling problem...' 266

The CIJ also heard that the Children's Court did not often hear matters involving gambling problems, potentially because families appearing in this jurisdiction were in such crisis that gambling would not likely be seen as the most pressing issue by the families themselves. They did relay, however, anecdotal suggestions that gambling was in the backdrop of a number of cases involving child neglect, with children more likely to be left alone at home, rather than in the car at gaming venues, as might previously have been the case.

<sup>264</sup> Focus group participant, Community Legal Centres, September 2016.

<sup>265</sup> Interview, Magistrates' Court of Victoria, Dandenong, October 2016.

<sup>266</sup> Focus group participant, Children's Court of Victoria, October 2016.

# Part Four – Opportunities for positive interventions

# Contact with the criminal justice system entrenching or preventing further harm?

It would seem that the various pathways which lead between gambling and contact with the criminal justice system seem to have custodial consequences more than might be originally expected.

Sending a first-time offender to prison, however — and therefore disconnecting them from family; potentially from housing; from relevant medication; and from any hope of ongoing employment can potentially only entrench the harm the gambling problems have already caused. What's more, any individual driven to gambling by mental illness or by family violence victimisation will likely have that harm compounded by an experience of incarceration, particularly one which is likely to be relatively long.

The first 12 months are enough of a shock, but after that they really start to deteriorate any rehabilitative potential is off the table...<sup>267</sup>

Meanwhile, individuals previously not exposed to anti-social networks will likely be schooled in other forms of offending — useful skills upon release to no housing or employment.

Sending them to jail just makes them better criminals – gamblers are targeted as drug mules because they don't look suspicious - this means that offenders who were previously shoplifting to fund their addiction have now met drug offenders and find a quicker way to make more cash...<sup>268</sup>

Just as importantly, for people with prior convictions - including those who may have spent their life cycling in and out of institutions - further incarceration reinforces and entrenches their identity as offenders, making it less and less likely that they will be able to establish any life beyond crime.

Focus group discussions revealed, however, that this trajectory to incarceration was not inevitable, depending on whether an individual's contact with the criminal justice system functioned as a positive, rather than a negative intervention. Given the emphasis of the CIJ's project, this Part of the Report will explore opportunities for these positive interventions by lawyers and by courts. Opportunities in other parts of the criminal justice system will then be briefly discussed.

# Legal practitioners

Starting with the first interaction that people in contact with the criminal justice system usually have — at least ideally — legal practitioners can serve as a positive intervention in a variety of ways. As emerged in Part Three, of course, these opportunities cannot be seized unless lawyers become aware of their clients' gambling problems in the first place. Even where gambling is the direct cause of the offending, however, lawyers reported that clients were reluctant to disclose, such was the stigma surrounding gambling.

Lawyers told the CIJ, therefore, that they needed assistance about how to ask about gambling issues in a sensitive way — including whether they suspected that gambling was a backdrop to the matter at hand, but perhaps not a direct cause.

Obviously, certain groups of lawyers were more likely to see certain pathways between gambling and offending than others. VLA lawyers, whose clients must be eligible for public legal assistance, were more likely to see clients for whom gambling was a secondary issue to other forms of offending; or who had alternatively drained all their resources on a gambling addiction.

Many lawyers indicated that they were often unsure about where to refer clients if they did disclose or when they presented with gambling as a direct cause of offending. Knowledge of Gambler's Help and other services varied quite widely, with this project offering the opportunity to increase legal practitioners' awareness about what might be available.

Of those lawyers who were aware of services, many indicated that getting a client into counselling or treatment prior to an appearance in court was often helpful to their case.

...the prosecution were gunning for [the client] but we got her into treatment and the court saw the potential for rehabilitation. She might have gone to prison but she got a CCO.<sup>269</sup>

One client had a relative who had accumulated a huge gambling debt. Out of desperation to help, this client had the bright idea that **she** would try her luck gambling to see if a big win could solve all their problems. When she lost instead, she tried to make off with someone else's winnings and got caught! She didn't have a gambling problem, but acting for her was a chance to refer her relative into treatment as well. The court was sympathetic and she got a [good behaviour] bond.<sup>270</sup>

Further, the CIJ's consultation with Wesley Mission Legal Service — a publicly funded service dedicated to providing legal assistance with gambling-related matters in NSW — confirmed the value of connecting clients with treatment and 'wrap-around' service provision. Co-located with financial counselling and gambling counselling services, the director of the organisation indicated that their lawyers prefer to see clients who are already connected with these other services.

Clients with severe gambling problems often just want to fix their legal problem. They've been gambling for years and have tipped over onto the wrong side of the law. Unless they get their gambling and other issues sorted out, such as childhood trauma, they will just come back through the door later on.<sup>271</sup>

<sup>269</sup> Focus group participant, Victoria Legal Aid, Geelong, October 2016.

<sup>270</sup> Focus group participant, Law Institute of Victoria, October 2016.

<sup>271</sup> Consultation with Wesley Mission Legal Service, September 2016.

Accordingly, the CIJ sees contact with legal practitioners as a relatively early opportunity for intervention with clients who have gambling problems, or for whom gambling may increase risk of recidivism post-release. This means that, just as lawyers should be alive to the opportunity to identify and make informed referrals in relation to family violence, lawyers can also be alive to the chance to refer their clients to other forms of support which may prevent further offending or other problems down the track.

Equally, lawyers can be alive to some of the more practical measures which might assist their clients — such as helping them to 'self-exclude' from gaming venues, or disposing of their smart phone in favour of a less 'app-friendly' model. That said, the CIJ heard that practical measures such as self-exclusion are not always successful, particularly in relation to local gaming venues.

We've had two clients in the last month who have lost over \$10,000 at venues from which they had self-excluded. It's amazing how when you self-exclude you can no longer claim any winnings, but you can certainly be liable for your losses.<sup>272</sup>

To assist lawyers and others in the legal profession in New South Wales, the Office of Liquor & Gaming in NSW has produced an information kit specifically for professionals in the criminal justice sector. Providing information about risk factors and consequences of problem gambling; as well as referral links and potential opportunities for intervention, the CIJ heard that the legal profession in NSW has been very receptive to the provision of this targeted and valuable information.

Given the door which has been opened to engagement by the ClJ's project, the ClJ strongly recommends that, perhaps in consultation with the Office of Liquor & Gaming in NSW, the VRGF support the development of equivalent material in Victoria. Lawyers may use this information to assist in the earlier provision of support services. As noted, social and community services are not consistently asking about these behaviours, and some gamblers are grateful when a professional 'finally' asks them about their gambling behaviour. As noted by Judge Cheryl Moss, 'a family lawyer does not need to be an expert when he or she encounters a problem gambling issue. The lawyer just needs to know where to go for information'.<sup>274</sup>

At the very least, the VLA results referred to in Part Two suggest that lawyers are in a position to generate a larger data set concerning the intersection of gambling harm and crime. Perhaps more importantly, these results indicate that including questions about gambling problems and harms related to this behaviour in a client's initial assessment is an opportunity that is currently being missed.<sup>275</sup>

...it's the lawyers who have to ask, that's where we can make a difference...<sup>276</sup>

<sup>272</sup> Focus group participant, Community Legal Centres, September 2016.

<sup>273</sup> Office of Liquor & Gaming NSW, Gambling Help — Justice & Corrections Project, October 2016. Provided to the CIJ by the Office of Liquor & Gaming.

<sup>274</sup> Moss, C., "Symposium: Problem Gambling & The Law, Part II: Shuffling the Deck: The Role of the Courts in Problem Gambling Cases," UNLV Gaming Law Journal 6 (2016).

<sup>275</sup> Ibid. See also National Centre for Responsible Gambling, "Gambling and Health in the Justice System: A Research-based Guide about Gambling Disorders for Judges, Parole Officers, Attorneys and Other Professionals Involved in the Justice System," (2015). http://ncrg.org/sites/default/files/uploads/docs/ncrgguide\_judicial2015final.pdf

<sup>276</sup> Consultation, Magistrates' Court of Victoria, Melbourne, October 2016.

# Magistrates' Court

Where a matter reaches the Magistrates' Court, there are also positive interventions available in this context. A substantial body of evidence demonstrates the value of therapeutic jurisprudence — using a person's contact with a court as a positive intervention, harnessing the authority of that court to encourage an offender to take responsibility for their offending and to participate in relevant rehabilitation.<sup>277</sup>

While this is commonly understood in the context of specific 'problem-solving' or 'solution-focused' courts, a therapeutic jurisprudential approach can also involve creative deployment of options already available to a court. The CIJ heard that these include:

- Options pre-trial, including a more effective use of bail provisions, such as contact with a Gambler's Help or other appropriate service as a condition of bail;
- Options post-trial and pre-sentence, such as a more effective use of the power for deferral of sentence. The CIJ heard that this included Magistrates requesting that VLA seek a psychologist's report for their client, overcoming the challenge that many lawyers reported in terms of resourcing psychologist's reports at an early stage in proceedings;
- Options at sentence, such as the inclusion of a relevant referral for eligibility assessment in a Community Corrections Order.

Most Magistrates participating indicated that they had imposed CCOs with conditions of this kind on occasion. While Community Corrections officers conduct the relevant assessment for referral, Magistrates indicated that they need to be confident that this referral is to a rigorous and evidence-based service. Like awareness amongst lawyers, awareness of relevant services amongst the judiciary varied significantly. The CIJ was consequently pleased that, as this report went to publication, the Magistrates' Court had included a briefing on Gambler's Help services and clinical approaches on the program of an upcoming professional development day.

Beyond better use of existing options, however, are more proactive approaches from the courts — ones which formally allow gambling to be the trigger for connection with a therapeutic response. For example, the Magistrates' Court of South Australia recently introduced a Problem Gambling stream into its Treatment Intervention Program. Rather than distinct specialist lists, the South Australian court currently has one specialist list through which court users with a range of issues (apart from family violence, which does have a dedicated court) are referred for treatment and ongoing monitoring by the court. While the majority of these matters involve drug addiction and offending, the court has also created a pathway by which individuals can be referred for eligibility assessment and then proceed to treatment through a specialist clinic, the Statewide Therapy Clinic described in Part One of this Report.

As this earlier description reveals, this particular treatment service is relatively intensive when compared with other less formal approaches, and was chosen as the appropriate referral pathway by the court and the Office for Problem Gambling, South Australia, which funded the necessary infrastructure. As was suggested earlier, the apparently rigorous nature of this program — including a biofeedback monitor which measures heart-rate — may have made it more likely to attract government-funded support.

The promise of this model, however, does not only rely on the form of treatment to which offenders are referred. Rather, it also relies on the established value of solution-focused approaches, leveraging an offender's participation through a guilty plea while the person is on supervised bail under the *Bail Act*. The promise also stems from the fact that offenders are brought back before the court on a regular basis to report on their progress, and this progress and completion informs their ultimate sentence. To this extent it is a straightforward, solution-focused approach with, in the CIJ's view, substantial potential.

In consultations in South Australia, however, the CIJ heard of various challenges which the introduction of this program had encountered. The first was that sentencing options in South Australia still only allowed sentences to be deferred for a maximum of 12 months, meaning that treatment and judicial monitoring were confined to that period.

<sup>277</sup> Richardson E, Spencer P and Wexler D, 'The International Framework for Court Excellence and therapeutic jurisprudence: creating excellent court and enhancing wellbeing'. Journal of Judicial Administration 25 (2016) 68.

Perhaps more importantly, CIJ also heard that, on the whole, referrals to the list were still low — meaning that defendants were not raising the issue; lawyers were not asking about it; and other Magistrates across the jurisdiction were not necessarily making referrals. Those involved in the intervention stream suggested that this may be in equal parts due to hesitance about the value of therapeutic approaches; and a level of skepticism about the status of gambling as a 'proper' disorder or addiction.

Certainly, this skepticism was not limited to one jurisdiction. Judge Mark Farrell — who established the world's first problem gambling court, the Amherst Gambling Treatment Court, in New York state in 2000 — reported that, fifteen years on, he still encountered reluctance in some quarters to treat gambling problems as little more than an offender's moral failing.

Though a handful of problem-gambling referral pathways now exist in US criminal justice systems<sup>278</sup> — thanks in no small part to Judge Farrell's nationwide advocacy for the issue — they remain the exception, with interest from the profession not necessarily translating into implementation, and 'prosecutors all over the world continuing to see gambling as a character flaw'.<sup>279</sup>

<sup>278</sup> Nevada Voluntary Treatment program is run through drug court caseload, but without a special court structure. Offenders must agree to pay for treatment or be assigned to a state or federally funded program. The Stateside Gambling Treatment Program in Louisiana diverts first or second time offenders into diversion and treatment. Meanwhile, there have recently been calls for a dedicated gambling court to be added to new drug court in Auckland and Waitakere. http://www.radionz.co.nz/news/national/296343/calls-to-use-casino-money-to-fund-gambling-addicts'-court

<sup>279</sup> Consultation with Judge Mark Farrell (retired), November 2016.

The Amherst Gambling Treatment Court was created in 2000 when Judge Farrell encountered a spate of gambling addicts in an already established drug court jurisdiction and decided to investigate further. The court was established by identifying potential outpatient facilities and referral pathways, and building up specialist knowledge to support clients and providers and court staff through cross-sectoral training.

Running successfully since that time, the court's operation is non-adversarial and contract based — in that the offender agrees to a set of sanctions and rewards under the strict oversight of a judicial officer whose aim is to bring 'toughness, compassion and open-mindedness' to the proceedings. Judge Farrell explains that the application of a therapeutic approach to a gambling context requires understanding the unique and comparable aspects of the addiction — including understanding the 'carnage' that gambling can cause.

It also includes a level of flexibility in order to cope with the challenge of identification. After all, given that there is no blood or urine test available for gambling addiction, the court must rely on defendant admissions and collateral information The Judge also notes that co-occurring issues, such as drug and alcohol addiction (which he reported occurred in 80–90% of cases) can mask or complicate diagnosis, while other issues such as mental illness (equally prevalent); trauma (including in veterans — of note, Amherst New York also has a Veterans Treatment Court); domestic violence and, in a particular cohort of cases, young defendants, pose additional challenges.<sup>281</sup> This is familiar to the problem gambling and offending context in Australia, as are the kinds of offences which Judge Farrell reports appear before him.<sup>282</sup>

Judge Farrell also reported that, crucial to the effectiveness of the court, was the swiftness with which offenders were arraigned, initially assessed and returned before the court (within 48 hours to one week) and the comprehensive process of ongoing assessment, treatment and monitoring.

Similarly, the treatment program was comparably comprehensive — with an initial prevention/ education program concerning family abuse over four weeks to three months; followed by a variable term of treatment from a minimum of one year up to three years for problem or pathological gamblers, which included an intensive group component. Also of note, participants are re-assessed every three months, and mandatory screening includes for drug and alcohol use; domestic violence; mental health as well as gambling. There have been no reports of gambling relapse or new arrests among the program's 24 graduates.

<sup>280</sup> Judge Farrell, M 'A "Struggle" for Progress & Therapeutic Innovation in the Criminal Justice System: Origins, Implementation & Challenges' (2016)

Massachusetts Conference on Gambling Problems (Norwood, MA). At http://www.masscompulsivegambling.org/mcg16presentations

<sup>281</sup> Ibid and Consultation with Judge Mark Farrell (retired), November 2016.

<sup>282</sup> These include, amongst other things, a range of property theft, embezzlement, theft from family, child neglect and drug and alcohol offences.

<sup>283</sup> These options obviously stand in contrast with the options available in the South Australian Problem Gambling Treatment List.

<sup>284</sup> Moss, above note 273, 152.

Although this Amherst Gambling Treatment Court represents the 'gold standard' in solution-focused approaches — one that, the CIJ heard, nevertheless requires constant advocacy, future legislative support and greater judicial uptake — it is also one that obviously requires substantial investment.

The CIJ nevertheless suggests that, until prevalence rates are more effectively established in Victoria (and indeed Australia) through adequate data collection, there may be opportunities to introduce a dedicated stream, rather than a fully blown court, related to problem gambling — potentially in the existing Drug Court jurisdiction. Given the frequent co-existence of drug abuse and gambling harm, this potentially offers a path to trial a therapeutic gambling intervention by virtue of the existing infrastructure.

More broadly, there are other ways in which contact with the Magistrates' Court can function as a positive intervention before an individual even gets into the courtroom. This includes through the various opportunities for contact with trained personnel who can identify gambling problems and make appropriate referrals.

Obviously, this includes where Gambler's Help counsellors are available on site. This is the case at the Neighbourhood Justice Centre in Collingwood, for example, and the CIJ understands that as this report went to publication the NJC and VRGF were in discussions about how to support a more integrated service provision response on site. It also occurs once a month at the County Court circuit in Bendigo; while the CIJ similarly heard that Gamblers' Help East co-located a worker one day a week at Ringwood Magistrates' Court, with individuals able to be referred regardless of the matters which had brought them to court.<sup>285</sup>

In particular, even where offenders were not specifically asked by other services about their gambling, visible signage and the moment of crisis brought about by attendance at court meant that offenders often disclosed of their own volition anyway. Where individuals were referred, this worker would stay with them for as long as they were at court. Having experienced non-judgmental support, offenders were then more likely to seek ongoing help. Of note, the CIJ also heard that offenders may still be unlikely to disclose to services who were offering a form of financial support, such as food vouchers, as they did not think they were like to receive food vouchers if they revealed that they had a gambling problem.<sup>286</sup>

All other service providers present at court have an opportunity to screen and refer for problem gambling. This obviously includes those services more commonly present at court, such as drug and alcohol (as referred to above); mental health; specialist family violence; as well as, of course — and as demonstrated by the VLA survey referred to above — legal practitioners.

It also includes Court Network — a service providing support to court users from trained volunteers who help them navigate the court process. The CIJ was told that Court Network volunteers do not currently hear about gambling problems with any frequency, as they do not conduct any form of in depth intake. That said, training which Court Network volunteers have recently received regarding family violence indicates a willingness to provide more nuanced support and intervention — including to avoid collusion in the abuse — which could be extended to facilitating identification of and referrals for gambling issues.

<sup>285</sup> Interview with Gambler's Help East, November 2016.

<sup>286</sup> Interview with Gambler's Help East, November 2016.

<sup>287</sup> Interview with Court Network, October 2016.

In other jurisdictions, a range of other options exist. This includes through the Defendant Health Liaison Service in the Tasmanian Magistrates' Court, to which family violence defendants are bailed to address any factors contributing to the violence such as mental health, substance abuse and homelessness. Unlike many equivalent services, intake for this service also includes questions about gambling.

Interestingly, the DHLS reported that, although offenders in this cohort regularly report gambling, it rarely appears to be a problem for them. Rather, most offenders indicated that they only a gamble a set amount every fortnight when they receive their pay or Centrelink benefits.<sup>288</sup> More broadly, the DHLS reports that connection with this service is often the first time that offenders have been asked — not only about their offending behaviour — but about their life circumstances overall, circumstances which often include early childhood trauma or exposure to family violence.<sup>289</sup>

Outside the criminal justice system — but arguably close to it, given the consequence of breaches — is more effective use of Intervention Order conditions. Notably, in South Australia the imposition of conditions relating to treatment for problem gambling; self-exclusion from gambling venues; or prohibitions on contacting family members for the purpose of demanding money for gambling activities are possible through legislative provision. In practice, however, this is reported as not occurring very frequently.<sup>290</sup>

Similarly, Magistrates in Victoria noted that they were hesitant to impose conditions on a civil order which could not necessarily be enforced. Some Magistrates suggested that, in the interim, the imposition of a condition relating to self-exclusion from a gaming venue was a more useful tool. In this scenario, a victim of violence could report a breach of the self-exclusion condition (i.e. that he had attended a venue) rather than wait until the point of any future physical violence. To this end, however, it is worth remembering the reservations about the effectiveness of self-exclusion measures expressed by lawyers, referred to above.

Overall, however, appearance in the Magistrates' Court jurisdiction should be about harnessing that moment of crisis that someone is experiencing upon their attendance at court. Where it their first time and they are ashamed and embarrassed, potentially plummeting in terms of mental health, that is the time to scoop them up — to prevent self-harm; to start to address mental health; to start to address drug and alcohol issues; and of course to address gambling. This is valuable even where gambling is not the main causal factor — an opportunity to prevent it becoming the cause of their *recidivism* down the track.

Where an offender is a regular attendee at court, meanwhile, it is an opportunity which is just as crucial to break the cycle of offending in which they may be caught — to connect them with services that they may never have previously encountered and to help them to imagine a life, not only beyond crime, but all the factors which contribute to it.

<sup>288</sup> Phone interview with Defendant Health Liaison Service, Tasmanian Magistrates' Court, October 2016.

<sup>289</sup> Centre for Innovative Justice, Opportunities for early intervention: bringing perpetrators of family violence into view, (2015), RMIT University.

<sup>290</sup> Problem-Gambling Family Violence Protection Orders Act (2004), SA, discussed in Australian Law Reform Commission 'Protection Orders and the Criminal Law; Family Violence: A National Law Response (2010, 464).

## **County and Supreme Courts**

Clearly, the *Grossi* decision has had a big impact. Its influence was acknowledged by service providers, members of the judiciary and the legal profession alike — many of them noting that the less frequent appearance of gambling-related offending in the clients who sought their help or appeared before them dated back to shortly after the decision was handed down.

While the *Grossi* decision is certainly authoritative statement, it is by no means applicable without exception. In fact, the qualifying language highlighted by the CIJ in the statement of reasons above indicates that Justice Redlich himself did not seek to 'close the door' on the possibility of mitigation all together. It may be, therefore, that more work needs to be done in terms of the law's understanding of this complex issue.

To this end, the CIJ decided to go straight to the source. In consultation in 2016, His Honour Justice Redlich agreed that the door was not completely closed — that the weight which should be attached to a gambling addiction will ultimately vary according to the circumstances. That said, no firm or detailed evidence about the effects of a gambling addiction on an offenders' mental state had been led to date in his court, with the current 'science remain[ing] unconvincing from a sentencing perspective'.<sup>291</sup>

His Honour was open, however, to broader evidence about emerging neuroscience, and eager to see how an argument might be mounted — potentially in a test case — about the effects of a gambling addiction on an offender's behaviour in the context of the clinical evidence. In fact, the CIJ was encouraged by His Honour's interest in facilitating future opportunities for engagement between the clinical and legal spheres and recommends that the VRGF support this possibility as soon as is achievable.

In particular, given that the latest DSM 5 classification, released in 2013 — as well as the bulk of the neuroscience described so far in this Report — has emerged since the *Grossi* decision was handed down in 2008, the CIJ suggests that the issue is well due for another examination. That said, the CIJ would caution that courts will still be keen, as His Honour confirmed, to guard against any claims about addiction and disorder, when behaviour may actually be motivated by greed. Similarly, as almost all stakeholders observed, reform or reconsideration in this area would only go so far 'while gambling is so heavily promoted'.

Like Justice Redlich, members of the County Court participating in the project expressed significant interest in hearing more about emerging neuroscience, similarly curious about hearing how this might play out in a suitable 'test case'. Given that psychologists' reports have already been presented which argue that the relevant offender has a clear addiction which creates a nexus with the offending, the CIJ wonders whether it might take a test case in the Supreme Court instead to interrogate the intersection of current clinical and legal considerations.

What increased engagement between the legal and clinical spheres may create in the meantime, however, are more opportunities for the County Court to be 'alive to the potential of a therapeutic option'.<sup>292</sup>

<sup>291</sup> Consultation with Justice Robert Redlich, September 2016.

<sup>292</sup> Focus group participant, County Court of Victoria, October 2016.

# **Police**

Beyond the legal profession and the courts as the main focus of this project, other parts of the criminal justice system also present opportunities for better identification and positive intervention. For example, Australian and international police currently lack adequate data collection systems to respond to or inquire about the gambling behaviours of people they have arrested. In fact, police are not required to question an arrestee about their motivation for crime, which means that the information which is available — let alone acted upon — about problem gambling is only available on a piecemeal basis.<sup>293</sup> Likewise, a person's gambling problem may or may not be revealed and documented as part of a police interview, with police only likely to ask if they have a particular suspicion.

Despite these limitations, the CIJ reiterates the potential usefulness of Victoria Police as both a source of gambling-related data, as well as an early detection and referral point, though publicly available data since the VRGF 2013 report's publication suggests that, between October 2014 — June 2015, of 14, 215 referrals across 12 referral streams, Victoria Police referred 58 people to gambling services. A further opportunity may exist through the Criminal Justice Diversion program where the offence is sufficiently low level.

In the context of discussing gamblers' contact with the police, of course, it is vital to keep in mind that gambling-related arrest is associated with suicidal ideation and attempted suicide. Coronial statistics in the VRGF's 2013 report suggest that suicide may be 'an act of impulsive desperation, instigated by the deceased's exposure for gambling-related crime, or their awareness that such exposure was imminent.<sup>295</sup> Although not the subject of specific recommendations in this Report, for the reason above the CIJ cautions that questions related to gambling upon arrest be approached with care and supported with appropriate referrals.

<sup>293</sup> Victorian Responsible Gambling Foundation, above note 26, p 39.

<sup>294</sup> http://www.aic.gov.au/media\_library/conferences/201-wsw/wsw\_2015\_presentations/Demarte.pdf

<sup>295</sup> Victorian Responsible Gambling Foundation, above note 26, 55.

# **Corrections and Adult Parole Board**

Since the VRGF published its report in 2013, the Victorian correctional system has undergone a suite of changes that potentially expand the number of opportunities for screening and addressing problem gambling needs pre-release. There is little information, however, either in the academic or grey literature, to evaluate the impacts of that change.

To this end, the CIJ heard from participants that, while imposing a relevant condition on CCOs may be relatively straightforward, this system relied on the assessment and oversight of Corrections Victoria staff who were not necessarily fully trained in this regard and may prioritise other referrals — such as to drug and alcohol services — instead. The CIJ therefore welcomes the fact that the VRGF is in discussions with Corrections Victoria about how to improve assessment and referral pathways.

How gambling activities are regulated within custodial environments, however, is a further relevant matter. Certainly, while prison gambling regulations are explored and debated in the international literature, they are surprisingly under-discussed in Australia.

In this context the question, put simply, is whether gambling should be allowed as a leisure activity within prison, or whether it should continue to be regulated and possibly subject to discipline within prison walls. Certainly, different commentators present compelling arguments for and against gambling regulation in American prisons. On one hand, some argue that gambling is seen as a valued pastime for prisoners and that permitting casual gambling may emphasise prisoners' feelings of fairness, and their successful management in prison environments.<sup>296</sup>

On the other hand, given the demonstrated high prevalence of that country's problem gambling in prisoner populations, others argue that prisoners who may be 'in remission' from gambling, or not experiencing the symptoms at the time of their incarceration, may be vulnerable to 'relapse' when exposed to that activity in prison.<sup>297</sup> In fact, incarceration itself may exacerbate gambling disorders.<sup>298</sup>

At the time of its publication in 2013, the VRGF reported an absence of gambling-specific programs in prison and a range of barriers to identifying the gambling problems (and harms) in the Victorian prisoner population. In addition, it reported that a majority of prisoners who *had* accessed some form of gambling treatment in prison did not consider it useful for addressing their gambling issues.

It's always to do with drugs and alcohol — that's all they're really interested in. They're saying, [the prison] "We're doing that" [in relation to problem gambling]. There's things up there [pamphlets on notice board] for programs that haven't been run for 10 years, but it looks good for the visitors.<sup>299</sup>

Some years on from the VRGF report, the CIJ heard that eligible offenders were still not always being referred for gambling treatment.<sup>300</sup> Nevertheless, the CIJ also heard of further specialist service developments, including a twelve-session psycho-educational and therapeutic program provided in gamblers' help service delivery in the context of Tarrengower Prison.<sup>301</sup>

The CIJ also heard of a training session now available to court and prison personnel, as well as to police, which specifically concerns the intersection of gambling and the criminal justice system. This session, currently delivered by Anglicare, touches on the public health approach to problem gambling; any likely comorbidities; the DSM-V criteria; and the prevalence of problematic gambling in particular communities.

More broadly, the CIJ heard that sentencing planning needs to factor in referrals to relevant services from the point of remand, as well as the point of entry into custody. Again, although not the subject of specific recommendations, the CIJ encourages the ongoing development of these approaches and the provision of more flexible support to prison populations.

<sup>296</sup> Williams, D 'Response to the commentaries by Marotta, Plecas and Turner', Journal of Gambling Issues 28 (2013).

<sup>297</sup> Riley, B and Oakes, D 'Problem gambling among a group of male prisoners: Lifetime prevalence and association with incarceration', Australian & New Zealand Journal of Criminology 48, no 1 (2014), 78.

<sup>298</sup> Ibid, p 79

<sup>299</sup> Victorian Responsible Gambling Foundation, above note 26, p 106.

<sup>300</sup> Focus group participant, Community Support Organisations, September 2016.

<sup>301</sup> Halloran, M, 'Final evaluation report: the making meaning psychoeducation and therapeutic program at Tarrengower prison, provided to the ClJ by Anglicare, 3 November 2016.

# Post-release and community-based support

Gambler's Help service providers interviewed for the 2013 VRGF report identified community based offender support programs as an effective avenue for supporting a person to desist from further gambling behaviour.

If we have clients who are post-release and...have other referral needs, we really just respond to that in terms of scoping out what services are available, as you would with any other client, and sometimes that needs to be tailored to the fact that they are a post-release person. VACRO [Victorian Association for the Care and Resettlement of Offenders] is a good organisation to be linked with for that...<sup>302</sup>

Some years on, the potential for more effective support for a 'post release person' remains untapped, while the value of linking an offender to a community-based support organisation remains very much alive. To this end, lawyers suggested that it was to this case management support that offenders often turned:

...people might not go to treatment, but they always go to the ACSO [offender support] appointment.303

Certainly, one of the strengths of the problem-solving model in South Australia is the ongoing case management by the Offenders Aid and Rehabilitation Service (OARS). The CIJ heard that OARS walk 'side by side' with clients from the moment of referral to their dedicated Gambling Support Service, with case management support often involving the service working with the entire family.

Annie was a woman in her 30s with an Intellectual Disability. Her brother is her primary carer, as well as the carer for their mother, who has terminal cancer. Annie was referred to OARS Gambling Support Services because OARS are case managing her brother while he is on Home Detention.

Annie began playing pokies at age 20 with her mother (who also has history of problem gambling) and was losing around \$200 per fortnight. Annie had displayed anger when told that she could not go to a gaming venue and often just wandered into venues alone...to stare at the machines. Primarily motivated by excitement, Annie also wanted to find a way of contributing to the family. Annie was experiencing grief due to the death of her father who was previously her primary carer; anxiety, depression and hoarding behaviours; boredom through lack of meaningful activity; lack of structure and consistency in the family home.

OARS has therefore been working with her whole family — hooking Annie into Disability SA (DSA), referring her brother to respite and liaising with Annie's day centre provider. This has included giving her jobs around the house so that she feels she is contributing; as well as structure around meal time and bed time, including playing board games. OARS also worked with the family to limit Annie's gambling to \$20 per fortnight and help her with her hoarding issues. Although Annie is the primary client, this work with her family has been key to addressing her problems.<sup>304</sup>

<sup>302</sup> Victorian Responsible Gambling Foundation, above note 28, p 131.

<sup>303</sup> Focus group participant, Law Institute of Victoria, October 2016.

<sup>304</sup> Case study provided to the CIJ by Offenders' Aid and Rehabilitation Service, September 2016.

Of further interest to the CIJ was the option for victim-offender mediation also offered to clients who are case managed by OARS. Given the 'breach of trust' and harm caused to victims exposed to the consequences of gambling problems — whether employers or family — the CIJ suggests that this is certainly a context ripe for exploration and development of restorative justice options.

This is because restorative justice approaches are about repairing the harm of an offence by providing a setting in which this harm can be discussed and acknowledged, as well as involving those most directly impacted by the commission of the offence in the development of solutions. Given the shame and stigma associated with gambling-related offending discussed throughout this Report — including the shame of employers concerned with reputational damage — as well as the increased risk of suicidal tendencies from offenders upon arrest, the opportunity to deliver an apology and develop an appropriate restitution plan in a facilitated environment is certainly something worth exploring.

The CIJ is currently supporting the development of restorative justice options in a range of other contexts. It is therefore well placed to assist with any restorative justice developments in relation to gambling and crime.

# Conclusion – counting the cost

Given that the limited research available suggests that contact with the criminal justice system can compound the vulnerability already experienced by problem gamblers, we need to do everything possible to turn this around — using contact with the criminal justice system, whether formal or informal, as a positive intervention which mitigates this harm. Unless we start to find more constructive options — unless we properly acknowledge the extent of gambling harm — it will continue to impact future generations.

To return to the cost-benefit analysis discussed at the outset of this Report, the Victorian Competition and Efficiency Commission estimated that the cost of problem gambling on the Victorian justice system was about \$26 million in 2010–11.305 These costs were distributed across the justice system at the time as follows:

- \$1.7 million on the police
- \$1.5 million on the courts
- \$23.1 million on corrections

Given that opportunities to gamble are growing — including by exposing the next generation through increased advertising and online opportunities — we must start to find ways for this cost to be stemmed. As the VRGF 2013 report suggests:

...without an effective process for early identification and treatment, a proportion of offenders whose gambling is directly related to their offending, will go on to commit a substantial level of preventable, gambling-related crime.<sup>306</sup>

More recently, a US academic noted that:

If you can lower costs by getting people out of jail and into treatment, and if you can get rid of or treat the underlying mental health problem, you are getting both clinical and...economic benefits.<sup>307</sup>

To be effective, this early intervention and treatment which seems so essential *must* bring existing spheres of knowledge together. This means, in particular, bringing legal understanding and clinical understandings together — including judicial officers; counsellors; lawyers; and service providers of all kinds sharing their different perspectives.

Just as importantly, it means understanding how clinical, legal and social determinants are brought together in the stories of individual gamblers. For, as this Report has attempted to suggest — and despite the excitement associated with emerging neuroscience — the pathways between gambling and offending cannot just be explained through a single model.

Rather, a more sensible conclusion is that social determinants and neurological changes *converge* — indirectly or directly; either detrimentally or protectively; and either acutely or progressively — over the course of a gambler's life to determine contact with the criminal justice system.<sup>308</sup>

<sup>305</sup> Victorian Competition & Efficiency Commission, "Counting the Cost: Inquiry into the Costs of Problem Gambling," (2012). 71.

<sup>306</sup> Victorian Responsible Gambling Foundation, above note 26.

<sup>307</sup> Professor Stacey Torvino, 'Calls to use casino money to fund gambling addicts' court'. At http://www.radionz.co.nz/news/national/296343/calls-to-use-casino-money-to-fund-gambling-addicts'-court

<sup>308</sup> Adapted from the definition of health's social determinants in Galea, S. and Vlahov, D., 'Social Determinants and the Health of Drug Users: Socioeconomic Status, Homelessness, and Incarceration,' *Public Health Reports* 117, no. 1 (2002): S136.

More broadly, what we know about the factors which bring people into contact with the criminal justice system more generally — including low educational attainment; trauma in childhood; mental illness and social isolation — are also some of the factors which make people more likely to develop a gambling problem and, ultimately, an addiction reinforced by neurological changes. Where these factors converge — in a potent cocktail of vulnerability and gambling — the resulting harm is likely to be all the more acute.

Bringing this understanding together is not about excusing all those with gambling problems from criminal behaviour, nor about suggesting that all those who offend in connection with gambling have an addiction. Certainly, it is unwise to categorise all forms of problem gambling as medical conditions and also unwise to discount greed as a primary motivation. Commentators rightly caution that 'judges need to understand the phenomenon and facilitate treatment without exempting responsibility in ambiguous cases'.<sup>309</sup>

As other legal scholars and criminal lawyers have urged, however, increased involvement of forensic care mental health professionals in the realm of legal decision-making is essential because 'gambling addicts gamble the way an alcoholic drinks or a heroin addict shoots up — not impulsively, but in an all-consuming, life-controlling and even life-threatening way. They are very ill, not impulsive'. 310

As a member of the *Three Sides of the Coin* performance group explained about the grip of their own addiction, the downwards spiral means that 'we build our own prison'. If this is the case — if a gambling addict has already sentenced themselves to perpetual isolation — then perhaps intersection with the criminal justice system should offer a more relevant, inclusive and constructive approach.

# Recommendations

## Data collection and identification

- 1. That the Law Institute of Victoria, Victoria Legal Aid, and Federation of Community Legal Centres collaborate to establish standardised data collection approaches in relation to prevalence of problem gambling and any offending related to that gambling. This data should ideally include demographic information as well as information about co-morbidities.
- **2.** That Courts Services Victoria establish standardised data collection approaches in relation to prevalence of problem gambling and any offending related to that gambling across all jurisdictions.
- 3. That the VRGF work with the family violence sector, including agencies providing existing expertise on the intersection of family violence and gambling, on developing appropriate questions in relation to family violence for Gambler's Help providers.
- **4.** That Government consider, in its development of the new family violence Risk Assessment and Management Framework, the inclusion of specific questions in relation to gambling.

# Training and information

- **5.** That the VRGF develop an information and training package specific to the justice sector, potentially in consultation with the Office of Liquor & Gaming in NSW, for delivery in a range of settings.
  - In particular, the VRGF should work in consultation with the Judicial College of Victoria as well as all relevant court jurisdictions; Corrections Victoria; Victoria Police; Victoria Legal Aid; Court Network; the Law Institute of Victoria and the Victorian Bar on developing this package.
  - This should also be developed in consultation with local RAJAC and other Indigenous bodies, as well as CALD specific organisations.
- **6.** That, in particular, the VRGF support and facilitate a series of initial seminars which give members of the judiciary and legal profession access to clinical and neuroscientific knowledge from the field.
- 7. That the VRGF support and facilitate the delivery of criminal justice sector and family violence training to Gambler's Help professionals, as well as in relevant LifeSkills training, within a period of 12 months.
- **8.** That the VRGF establish pathways so that Gambler's Help providers can have access to regular information about the emerging needs of their client base.
- **9.** That the VRGF support and facilitate the delivery of relevant training on gambling problems and harm to organisations providing post-release support for offenders in the community.

# **Extending definitions and current programs**

- **10.** That Government consider extending the definition of 'special circumstances' in the Fines and Infringements List to include gambling harm and gambling addiction.
- **11.** That Government consider extending the availability of diversion schemes for people with identifiable gambling harm or addiction.
- **12.** That the Magistrates' Court of Victoria issues a Practice Note which indicates that problem gambling or addiction can be a factor relevant to deferral of sentence.
- **13.** That, in any further expansion of the Courts Integrated Services Program (CISP), the Magistrates' Court of Victoria; Courts Services Victoria; and Government take into consideration potential need on the basis of levels of problem gambling and EGM numbers per capita.
- **14.** That the Magistrates' Court establish a working group to consider a pilot expansion of the Drug Court list to include a specific gambling intervention stream. This intervention stream should refer eligible participants to a specific treatment model.

#### Co-location

- 15. That the VRGF support and fund, where necessary, the co-location of Gambler's Help services at all headquarter Magistrates' Courts, concurrent with the expansion of Specialist Family Violence Courts in these locations. This co-location should involve the availability of a Gambler's Help counsellor at each court location on at least one day a week; visible signage about the service; and monthly meetings between service providers to encourage the exchange of developments in current practice.
- **16.** That the VRGF, in consultation with Victoria Legal Aid, facilitate the co-location of Gambler's Help counsellors in all VLA regional offices for at least one day a week.
- 17. That the VRGF, in consultation with the Federation of CLCs, facilitate the co-location of Gambler's Help counsellors in relevant Community Legal Centres which service cohorts of clients in particular need (including those in areas with over-representation of EGMs per capita of population).

# Treatment and increasingly diverse responses

- **18.** That the VRGF develop a considered model and referral pathway so that eligible participants may be referred from the criminal justice system. Information about the content of this program should be made available to all potential referring agencies.
- **19.** That the VRGF support the development and delivery of restorative justice approaches relevant to be used in contexts of gambling harm, such as but not limited to victim-offender mediation (with particular application to the employment context).

# Appendix A – Survey instruments administered by Victoria Legal Aid

## **Information Sheet**

## What is the project for?

The Centre for Innovative Justice at RMIT is collecting information about gambling and its contribution to criminal offending, so that it can understand how often problem gambling features in the criminal justice system of Victoria. The Centre has partnered with Victoria Legal Aid for this project to understand the connection better, in the hope of creating a better policy response towards problem gambling.

#### What does this research involve?

You are invited to take part in a short survey about your experiences with gambling. The survey consists of 6 questions about your gambling practices, followed by some small questions about you for statistical purposes. You will be asked for your consent to collect this information prior to beginning the survey. Your participation would be completely voluntary, and will not affect applications for legal assistance in any way.

#### What are the benefits and risks?

By participating in this project, you will help us increase our knowledge on how often gambling pushes people towards contact with the law. This data is intended to support a wider research project on the link between problem gambling and criminal offending. However, there is a risk of discomfort with these questions. If at any point you feel distressed or embarrassed by these questions, you can opt to not answer them or withdraw from the survey at any time.

#### Will my personal details be confidential?

To ensure that your individual details remain anonymous, we will not be collecting any personal identifying information. The data collected will only indicate how many people responded yes or no to each question and some basic information (for example, age, cultural background, etc.) of people who accessed our services over the research period. All data will be stored securely on password-protected files.

#### Contacts

If you have any questions or concerns about the study, please feel free to contact the research managers.

#### **Rosy Jolic**

Victoria Legal Aid Telephone: 9269 0665 Email: research@vla.vic.gov.au

#### **Elena Campbell**

Centre for Innovative Justice Telephone: 9925 1181 Email: elenaeve.campbell@rmit.edu.au

If you would like help or have questions in regards to gambling problems, for you, a family member or a friend, please visit:

#### **Gambling Help Online**

http://www.gamblinghelponline.org.au/ 24/7 Telephone Support: 1800 858 858

# **Survey**

These questions will be asking about gambling practices and its contribution to criminal offending. Answer only the questions that you are comfortable with answering. This survey is anonymous, and will not affect applications for legal assistance in any way.

<b>1. Do you ever g</b> ☐ Yes		(move to Question 3	3)
2. If so, how often Occasionally  More than once	☐ One	ce a day ore than once a day	
3. Has gambling  ☐ Yes	g ever become a pro	oblem or an issue (move to Question 6	
<ul><li>☐ Meant you had</li><li>☐ Meant you wall</li></ul>	er: rom paying for food, k I to borrow money fro nted to hide your gam	om friends or family? abling from other ped	
<b>5. Have you sou</b> ☐ Yes	ght any help for it?		
<ul><li>☐ Fines/Infringer</li><li>☐ Traffic/Driving</li></ul>	nents offences ing threat to assault/\		e duty lawyer for today?  Theft/crimes of dishonesty/burglary  Drug offences  Family violence (including breaches of FVIOs
	answering. nder?	l purposes only. Ans t applicable	wer only the questions that you are
☐ Female		ner:	
Age 21 and under 22 to 34  Country of birth	55	to 44 [ to 64 [	☐ 45 to 54 ☐ 65 and over
Aug. 1101 - 5 Al-	ininal au Taura C	ik lalandarı dar	
No     Aboriginal		art islander descer res Strait Islander original and Torres S	

□ No	her than English at home?  — Yes Which language(s)?
<b>Do you have a disability (e.g.</b> ☐ No	physical, intellectual)?  Yes What kind?
What is your employment standard in Not employed  Full time Part time	atus?  Casual Self employed
What are your usual living an	rangements?
Living with parents	Couple with no children
<ul><li>☐ Living alone</li><li>☐ Sharing with others</li></ul>	☐ Couple with children at home ☐ Couple with children not at home
☐ Single parent	□ No fixed address
□ Not applicable	
Are you on a benefit?  No Newstart Age Pension	<ul><li>□ Disability Support</li><li>□ Parenting</li><li>□ Other:</li></ul>

# Appendix B – Participants from the following bodies or organisations were involved in this project:

# Judiciary — Victoria

- Supreme Court of Victoria
- County Court of Victoria
- Children's Court of Victoria
- Magistrates' Court of Victoria

# Judiciary — interstate and international

- Magistrates Court of South Australia
- Judge Mark Farrell, (Retired), Amherst Gambling Treatment Court, United States

## Statutory

- Sentencing Advisory Council
- Adult Parole Board, Victoria
- Office of Liquor and Gaming, New South Wales

#### **Court staff**

- CISP Clinicians
- Applicant and Respondent Practitioner Co-ordinator
- Court Intervention stream co-ordinator South Australian Magistrates' Court
- Co-ordinator, Defendant Health Liaison Service, Magistrates' Court of Tasmania
- Vietnamese interpreter, Sunshine Magistrates' Court
- Court Network

## Legal Profession (over 60 individuals)

- Law Institute of Victoria private practitioners
- Victoria Legal Aid: Sunshine

Ringwood

Morwell/Bairnsdale

Geelong

- Federation of Community Legal Centres
- Moonee Valley Community Legal Centre
- Women's Legal Service
- Mental Health Legal Centre
- Springvale/Monash Legal Service
- Wesley Mission Legal Service (NSW)
- Victorian Aboriginal Legal Service (VALS)
- Aboriginal Family Violence Prevention & Legal Service (AFVPLS)

# Service providers/community based organisations

- Australian Vietnamese Women's Association
- Financial Counselling Australia
- Australian Community Support Organisation (ACSO)
- Victorian Association for the Care & Resettlement of Offenders (VACRO)
- Offender's Aid and Rehabilitation Service (South Australia)
- First Step (Drug & Alcohol Service)
- Link Health (Drug & Alcohol Service)/Three Sides of the Coin Project
- Odyssey House, Richmond, (Drug & Alcohol/Financial Counselling)
- Kildonan UnitingCare
- Good Shepherd Australia & New Zealand
- Salvation Army
- Gambler's Help Eastern
- Gambler's Help Loddon Mallee
- Women's Health in the North (WHIN)
- Berry Street
- Safe Steps
- Relationships Australia
- Domestic Violence Victoria
- No to Violence/Men's Referral Service
- Neighbourhood Justice Centre, Financial Counselling service
- Victorian Arabic Social Services.

## Principal author:

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— Research, Advocacy and Policy

# Principal researcher:

Angela Vivian

## **Supporting researcher:**

Lisa Wulfsohn

The Centre for Innovative Justice researches, translates, advocates and applies innovative/alternative ways to improve the justice system, locally, nationally and internationally, with a particular focus on appropriate/non-adversarial dispute resolution, therapeutic jurisprudence and restorative justice.

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