



Tasmanian Council of Social Service Inc.

Submission to the Tasmania Law Reform
Institute's *Review of the Defence of
Insanity in s 16 of the Criminal Code and
Fitness to Plead*, Issues Paper No 27.

July 2019



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About TasCOSS

TasCOSS is the peak body for the community services sector in Tasmania. Our membership includes individuals and organisations active in the provision of community services to Tasmanians on low incomes and who often experience vulnerability and disadvantage. TasCOSS represents the interests of its members and their clients to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

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Introduction

TasCOSS welcomes the opportunity to provide input into the Tasmania Law Reform Institute's (TLRI) *Review of the Defence of Insanity in s 16 of the Criminal Code and Fitness to Plead Issues Paper* ('the Issues Paper').

TasCOSS advocates on behalf of low-income Tasmanians who often live in vulnerable and disadvantaged circumstances. Our vision is for one Tasmania, free of poverty and inequality, where everyone has the same opportunity. We advocate for public policy that values and respects the diversity of Tasmanians and makes a real difference to the lives of people who are experiencing vulnerability. We work to ensure that the human rights of all Tasmanians are integrated into government consultation processes, policy approaches and budget allocations.

Our goal

Equality of opportunity and full and effective participation and inclusion in society of people with disability, whether physical, intellectual, sensory or psychosocial.

Background

The Issues Paper reviews the law in Tasmania regarding the defence of insanity under s 16(3) of the *Criminal Code* and provisions in the *Criminal Justice (Mental Impairment) Act 1999* that affect people who are not criminally responsible due to their unfitness to stand trial or because they have been found not guilty by reason of insanity. The *Criminal Justice (Mental Impairment) Act 1999* has not been reviewed since its commencement in 1999 and the Issues Paper examines whether it is operating effectively and consistently with its underlying principles. Further, the Issues Paper responds to and addresses concerns expressed by government and the public about the extent to which the criminal law reflects contemporary medical knowledge about mental illness.

The Issues Paper's research also forms part of the Tasmanian Government's Disability Justice Plan for Tasmania 2017-2020, which commits to safeguarding the rights of forensic mental health patients.¹

TasCOSS' response to the Issues Paper focuses on the rights of people with disability and ensuring that Tasmania's legislation, policy and practice is consistent with Australia's obligations under international legal instruments to which Australia is a signatory, including the *International Covenant on Civil and Political Rights* ('ICCPR'), and the *Convention on the Rights of Persons with Disabilities* ('CRP'). We support modernising of the laws to reflect best practice established in other jurisdictions and for reforms that promote access to justice for all. TasCOSS recognises that the laws relating to mental impairment and disability are highly legally technical and as such, we will not address the complex legal questions raised.

¹ Department of Justice, Disability Justice Plan for Tasmania 2017-2020 (2017) 19

Issues of concern

1. Terminology

The language of Tasmania's *Criminal Code* needs to be modernised. The current *Criminal Code* at section 16 uses inappropriate and outdated terminology (insanity) which is stigmatising and reinforces damaging and incorrect perceptions that people with mental illness are dangerous. In this regard, we support the Mental Health Council Tasmania ('MHCT') position which advocates for the adoption of the New South Wales Law Reform Commission ('NSWLRC') recommendation to rename the defence of insanity to 'defence of mental health and cognitive impairment'.

This change in language would achieve 3 things. First, it will better reflect contemporary understandings of mental illness. Second, it contributes to the reduction of stigma and third, through the use of appropriate and respectful language, it upholds the dignity of people with disability.

2. The over-representation of people experiencing mental ill health or cognitive disability in findings of guilt in the criminal justice system

People experiencing mental ill health or who have a cognitive disability are disproportionately represented in findings of guilt in Tasmania's criminal justice and corrections system.

- The Australian Institute of Health and Welfare (AIHW) 2018 report, *The Health of Australia's Prisons 2018* found that, nationally, mental health conditions among people in prison were common, with 40% of prison entrants and 37% of those leaving prison reporting a previous diagnosis of a mental health condition, including alcohol and other drug use disorders. In Tasmania, 67% of prison entrants reported a previous diagnosis of a mental health condition, the highest of any Australian state or territory.²
- While there is no recent data in Tasmania that accurately records the number of prisoners with cognitive disability, looking to another Australian jurisdiction's data 33% of women and 42% of men in Victorian prisons have been found to have an Acquired Brain Injury (ABI), compared with 2% in the general Australian community.³

The large number of prisoners with cognitive or mental health impairments is not however mirrored in the data on people having been found insane or unable to stand trial made available from the Magistrates and Supreme Courts, with the Issues Paper reporting only 21 persons falling into these categories in the Magistrates Court between 2013-14 and 2017-March 2018. Only 3.8 per cent of persons sentenced in the Supreme Court between 2004-05 and 2016-17 have been found insane or unfit to stand trial.⁴

This disproportion speaks to the fact that at the moment it is costly in court fees and time, and medically and legally complex to raise the defence of insanity or to go down the unfitness path. Most

² *The Health of Australia's prisons 2018*, The Australian Institute of Health and Welfare (AIHW)

³ Recognition Respect and Support, Enabling Justice for People with and Acquired Brain Injury, Centre for Innovative Justice and Jesuit Social Services, 2018, Final Report 2018.

⁴ Tasmania Law Reform Institute, *Review of the Defence of Insanity in s 16 of the Criminal Code and Fitness to Plead* Issues Paper No. 27 (February 2019) at 22.

defendants, therefore, remain in the regular criminal justice system. The Issues Paper notes, however, that “anecdotally, it is reported that there are a significant number of defendants in the Magistrates’ Court who have mental health or cognitive impairment. Some of these individuals may participate in the Diversion List, and many others proceed through the ordinary criminal process.”⁵

3. The Mental Health Diversion List

The Diversion List was established in 2007 to:

*divert eligible mentally ill defendants and/or defendants with impaired intellectual functioning away from the regular criminal justice system and into appropriate treatment in order to reduce their likelihood of reoffending. These defendants offend usually in a nuisance type way i.e. shoplifting, disorderly conduct and the like and they have traditionally been dealt with in the general lists where there is little time to consider the underlying reasons for their offending. They are usually repeat offenders. They present complex sentencing problems in the traditional court as they have no money and their offences are not serious enough for gaol or community service.*⁶

The Diversion List has the potential to better address the needs of people with poor mental health or cognitive disability, but there are constraints on its functions that limit its effectiveness and the number of people it can assist.

The first constraint is that there is no legislative basis for the Diversion List in the Magistrates’ Court.

Unlike other comparable mental health courts and court diversion programs in Tasmania and interstate, the Diversion list in Tasmania has no legislative basis. The Diversion List was set up in 2007 as a pilot program in response to the large number of people with mental ill-health and cognitive disability entering the criminal justice system and being unsuitable to be dealt with in the regular lists. Whilst specific data is not collected, anecdotal evidence from legal experts is that many defendants who are technically unfit or marginally unfit pass through this list. This raises a fundamental issue of justice, where people on lower level charges who may have a defence of mental impairment or unfitness nevertheless plead guilty.

Tasmania’s Disability Justice Plan 2017-2020 recognises the value of diversionary courts for people with disability. Acknowledging that people with a disability continue to face barriers in accessing an efficient and effective justice system, the Disability Justice Plan emphasises the importance of therapeutic courts:

*The availability of therapeutic jurisprudence approaches, such as the Diversion List, is critical to addressing the particular needs of offenders with disability. It provides opportunities to break the cycle of offending and prevent to the escalation of criminal behaviours.*⁷

In other jurisdictions, such as Victoria, diversionary courts are constituted under specific legislation that provide specific sentencing dispositions that do not criminalise defendants with mental ill health or cognitive/intellectual disability. For example Victoria’s Assessment and Referral Court has specific powers, if an accused completes, or participates in, an individual support plan to the satisfaction of the

⁵ Tasmania Law Reform Institute, *Review of the Defence of Insanity in s 16 of the Criminal Code and Fitness to Plead* Issues Paper No. 27 (February 2019) at 22

⁶ Magistrates Court Diversion List Procedural, Magistrates’ Court of Tasmania, October 2014, Version 1.4

⁷ Department of Justice, Disability Justice Plan for Tasmania 2017-2020, p.15

Court, to discharge the accused without any finding of guilt.⁸ Without a legislative basis for the Diversion list in Tasmania, the sentencing options remain within the restrictions of the *Sentencing Act*. Whilst participants may successfully meet their therapeutic goals in the Diversion List there is no power for the Magistrate to discharge a defendant, so the defendant will receive a criminal conviction.

We therefore advocate for legislative change that enables Magistrates to exercise discretion to discharge an accused without conviction through the Diversion List. This reform would reduce court backlog, improve access to therapeutic services and support recovery.

Such a change would, however, require more resources be dedicated to the Diversion List in the Magistrates' Court.

The second constraint on the Diversionary List, then, is its lack of resources.

A 2009 Evaluation Report of the Diversion List found:

Whilst the Mental Health Diversion List is able to divert some people away from the criminal justice system, the research clearly demonstrates that Tasmania's criminal justice system is not appropriately resourced to assess cognitive and mental health impairments with two Mental Health Court Liaison Officers for the whole of Tasmania and the Mental Health Diversion List continuing to "operate without a distinct budget allocation and with no distinct human resources or extra resources".⁹

There has not been an increase in funding to the Mental Health Court Liaison service since the Diversion List began in 2007. The Diversion List is a now state wide service, but its funding has not increased despite its expansion and the increased need. The Department of Health is funded for one Court Liaison Officer in the South and one in the North. There is also a Court Liaison Officer working in the North West but this position has no dedicated funding.¹⁰

Recommendations

1. Rename the defence of insanity to 'defence of mental health and cognitive impairment'.
2. Establish a legislative basis for the Diversion List in the Magistrates' Court.
3. Increase funding for the Diversion List in the Magistrates' Court and for mental health court liaison officers.

⁸ *Magistrates' Court Act, Victoria, 1989*. Section 4U.

⁹ Esther Newitt and Victor Stojcevski, *Mental Health Diversion List, Evaluation Report (Magistrates Court of Tasmania: May 2009)*, p.15.

¹⁰ Peter Timson, Manager, Community Forensic Health, Personal Communication, 18 July 2019