

COMMUNITY LEGAL CENTRES TASMANIA

12 June 2019

Tasmania Law Reform Institute
Private Bag 89
HOBART TAS 7001
attn: Rebecca Bradfield

via email: law.reform@utas.edu.au

Dear Bec,

Re: Review of the Defence of Insanity in s 16 of the Criminal Code and Fitness to Plead Issues Paper

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on 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* ('the Issues Paper').¹

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

We strongly believe that Tasmania's criminal justice system is failing persons with cognitive and mental health impairments. The research clearly demonstrates that there are a disproportionately high number of persons with cognitive and mental health impairments caught up in the criminal justice system and in our prisons. We strongly believe that there should be an emphasis on diverting persons with cognitive and mental health impairments away from the criminal justice system and into treatment and our submission is therefore focused on reforms that should be introduced in the Magistrates Court where most criminal matters are heard.

Cognitive and Mental Health Impairments in Tasmania's Custodial System

Tasmania's prison population is rapidly increasing. Over the last five years our prison population has increased by 27 per cent from 451 prisoners in 2014 to 614

¹ CLC Tas would like to acknowledge Katherine Sproule and an anonymous referee who assisted in the preparation of this response.

prisoners in 2018.² At the same time, it is well recognised that there is a overrepresentation of persons in the criminal justice system with cognitive or mental health impairments when compared against the general population. A report from the Australian Institute of Criminology for example, found that the rates of major mental illness, such as schizophrenia and depression, are between three and five times higher in the offender population in Australia than society at large.³ As well, a report released in 2015 and entitled *The health of Australia's prisoners* found that 40 per cent of Tasmanian prison entrants are referred to prison mental health services; the second highest rate in Australia.⁴ These statistics demonstrate that a higher rate of persons with mental health impairments are being sentenced in Tasmania's courts than most Australian jurisdictions. Whilst we are unable to point to data on the number of Tasmanian prisoners with a cognitive impairment, Australia wide research has found that up to 12 per cent of the prison population has an intellectual disability and up to 30 per cent has a borderline intellectual disability.⁵

The large number of prisoners with cognitive or mental health impairments is not however reflected in the data made available from the Magistrates and Supreme Courts, with the Issues Paper reporting 21 persons having been found insane or unfit to stand trial in the Magistrates Court between 2013-14 and 2017-March 2018 and only 3.8 per cent of persons sentenced in the Supreme Court between 2004-05 to 2016-17 having been found insane or unfit to stand trial.⁶ 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".⁷

As a result, significant court resources are tied up in matters that could have been re-directed and persons are sentenced to custodial sentences rather than being diverted to treatment. Or, in the words of one commentator, persons with cognitive

² Australian Bureau of Statistics, 4517.0 - Prisoners in Australia, 2018, Table 15 'Prisoners, state/territory by selected characteristics, 2008-2018'.

³ James Ogloff, Michael Davis, George Rivers and Stuart Ross, *The Identification of Mental Disorders in the Criminal Justice System*, Australian Institute of Criminology (March 2007) at 1.

⁴ Table S55: Prison entrants, referrals to prison mental health service, states and territories 2015. As found at Australian Institute of Health and Welfare, *The health of Australia's prisoners 2015*. Cat. no. PHE 207. (Canberra: 2015). Worryingly, the same report notes that of those Tasmanian prisoners with a mental impairment, 54 per cent are discharged with either no improvement or with deteriorating mental health compared to when they were admitted. As found at Table S32: Prison discharges, change in mental health, and wellbeing while in prison, states and territories, 2015.

⁵ Eileen Baldry, Melissa Clarence, Leanne Dowse and Julian Trollor, Reducing vulnerability to harm in adults with cognitive disabilities in the Australian criminal justice system, (2013) 10(3) *Journal of Policy and Practice in Intellectual Disability* 222.

⁶ 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.

⁷ Esther Newitt and Victor Stojcevski, *Mental Health Diversion List*, Evaluation Report (Magistrates Court of Tasmania: May 2009) at 15.

and mental health impairments are being “funneled into agencies of control rather than services of support”.⁸

Unfit to stand trial/Insanity

As the law currently stands in Tasmania, a person is presumed fit to stand trial unless it is established on the balance of probabilities that they are unfit to stand trial.⁹ The onus on persons to prove their unfitness often operates as a major barrier to justice with many unable to afford a report from a psychiatrist or other appropriate expert. With financial assistance from the Legal Aid Commission of Tasmania restricted to persons at risk of a custodial sentence, there are a large number of persons appearing before the Magistrates Court who have a cognitive or mental health impairment, have been charged with offences unlikely to result in a custodial sentence but who lack the finances to prove their incapacity to stand trial. At the same time, there is no provision in the Magistrates Court for a magistrate to dismiss a charge without conducting a special hearing, a process that is both complex and time-consuming.¹⁰

Simpler and more flexible approaches are found in New South Wales, Queensland and the Australian Capital Territory where a magistrate is able to dismiss a summary offence if ‘it appears to the magistrate’ (NSW),¹¹ ‘there is a real and substantial question’ (ACT)¹² or ‘satisfied on the balance of probabilities’ (Qld)¹³ that the person has a cognitive or mental health impairment. Rather than the onerous procedures adopted in Tasmania, the Queensland model allows Court Liaison Officers to make an assessment of the person’s state of mind at the time of the alleged offence and their fitness to stand trial with a report provided to the court, the prosecutor and the defence lawyer.¹⁴ Whilst we do not have a view on which of the three threshold’s noted above should be adopted, we strongly believe that magistrates must be provided with the discretion, available in all three jurisdictions mentioned above, to dismiss the offence and/or divert the person to treatment,¹⁵ a reform that will reduce the court backlog, improve access to services and support recovery.

Investigation by Supreme Court into fitness to stand trial

Pursuant to section 12(1) of the *Criminal Justice (Mental Impairment) Act 1999* (Tas) a jury must determine the question of whether a defendant is fit to stand trial in the

⁸ Eileen Baldry, Melissa Clarence, Leanne Dowse & Julian Trollor, Reducing vulnerability to harm in adults with cognitive disabilities in the Australian criminal justice system (2013) 10(3) *Journal of Policy and Practice in Intellectual Disability* 222 at 228.

⁹ Sections 9, 11 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas).

¹⁰ Section 15 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas).

¹¹ Section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

¹² Section 314 of the *Crimes Act 1900* (ACT).

¹³ Section 22(1) of the *Mental Health Act 2016* (Qld).

¹⁴ Queensland Health, *Role of the Court Liaison Service in the Magistrates Court*. As found at https://www.health.qld.gov.au/_data/assets/pdf_file/0021/640335/FAQ_Court_Liaison_Service.pdf (Accessed 8 June 2019).

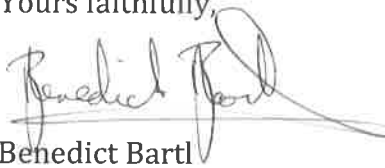
¹⁵ See for example section 32(3)(b) of the *Mental Health (Forensic Provisions) Act 1990* (NSW); section 315(2)(e) of the *Crimes Act 1900* (ACT); section 22(2) of the *Mental Health Act 2016* (Qld).

Supreme Court. Anecdotally, lawyers who appear as counsel in these applications observe that the jury is reliant on expert reports provided by psychiatrists and other medical experts. We believe it should be sufficient for a judge alone, after analyzing the expert medical evidence, to determine the question of fitness to stand trial. In our opinion legislative reform allowing the judge to determine fitness to stand trial is likely to result in less delays and finalization in a more timely matter, benefiting the criminal justice system as a whole.

In summary, we strongly believe that legislative reform is required, particularly in the Magistrates Court to ensure that persons with cognitive and mental health impairments are able to have charges dismissed and/or be referred to treatment. In our opinion, this can be achieved through the adoption of a model such as that currently in place in New South Wales, Queensland or the Australian Capital Territory and the proper resourcing of Mental Health Court Liaison Officers.

If we can be of any further assistance, please do not hesitate to contact us.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Benedict Bartl', with a long horizontal flourish extending to the right.

Benedict Bartl
Policy Officer

Community Legal Centres Tasmania
