

COMMUNITY LEGAL CENTRES TASMANIA

5 November 2019

Department of Justice
GPO Box 308
Hobart TAS 7001
attn: Office of the Secretary

via email: haveyoursay@justice.tas.gov.au

To the Office of the Secretary,

Re: Justice Legislation Amendments (Criminal Responsibility) Bill 2019

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the *Justice Legislation Amendments (Criminal Responsibility) Bill 2019*.

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 support the three proposed amendments contained in the *Justice Legislation Amendments (Criminal Responsibility) Bill 2019* ('the Bill') which will enshrine common law principles in the *Criminal Code Act 1924* (Tas) and the *Sentencing Act 1997* (Tas). In our opinion, the passing of the Bill into law will assist in ensuring that our laws are more accessible, certain and predictable.

Criminal Code Amendments

The test for criminal responsibility will be clarified as a result of the proposed amendment to the *Criminal Code Act 1924* (Tas). Clause 4 of the Bill will result in the codification of the common law reasonable foreseeability test, as set down by Gibbs J in *Kapronovski v R*:¹

It must now be regarded as settled that an event occurs by [chance]... if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person.

¹ (1973) 133 CLR 209 at 231. Also see *R v Van den Bemd* [1995] 1 Qd R 401; *Vallance v R* (1961) 108 CLR 56.

The amendment is likely to be welcomed by some academics who have observed that “numerous Australian cases have considered the meaning of the words ‘by chance’ and ‘accident’ but not in an entirely consistent way”² and that some decisions have been “unwarranted, unnecessary and wrong in principle”.³

Clause 4 of the Bill will also enshrine the common law ‘eggshell skull’ test to prevent an accused avoiding criminal responsibility on the basis that the victim had a ‘defect, weakness or abnormality’. As Taylor and Owen JJ noted in *R v Mamote-Kulang of Tamagot*:⁴

If... death is the immediate and direct result of an intentional blow, the fact that the person struck has some constitutional defect, be it an enlarged spleen or an egg-shell skull, unknown to the person striking the blow and which makes the recipient of the blow more susceptible to death than would be a person in normal health does not enable the accused to assert that he is being sought to be made criminally liable for an ‘event’ occurring by accident.

Although it may seem unfair that an accused person is found guilty of an offence for an unforeseeable outcome, there is an important policy considerations warranting the enshrining of the test, namely the role of the law in setting boundaries about acceptable forms of behaviour.⁵

Sentencing Act Amendment

The proposed amendment to the *Sentencing Act 1997* (Tas) will make clear that “the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor”.⁶ As a general rule, this is already the position at common law with the textbook *Sentencing in Tasmania* observing that “the degree of intoxication is aggravating” and “the assertion that an offender is addicted to drugs is not regarded with much sympathy”.⁷

Whilst it is acknowledged that one of the aims of the criminal justice system is to punish those who have committed criminal offences, it is equally as important –if not more important– to provide rehabilitation and treatment services so that the cause of the offending is addressed. Whilst the government has taken steps to improve treatment services for offenders who abuse alcohol and other drugs, more needs to be done, particularly when it is recognised that of offenders sentenced to a

² John Blackwood, *Humpty Dumpty Was Pushed Off the Wall Humpty Dumpty Died From the Fall – An Accidental Death or Manslaughter in Tasmania?* (1996) 15 *University of Tasmania Law Review* 306 at 307.

³ *Ibid.* at 323.

⁴ (1964) 111 CLR 62 at 70.

⁵ See, for example, Jennifer Porter, *The Implications of Uncertainty in the Law of Criminal causation for the One-Punch Homicide Offence in Western Australia* (2015) 27(1) *Bond law Review* 5 at 21.

⁶ Clause 6 of the *Justice Legislation Amendments (Criminal Responsibility) Bill 2019*.


⁷ Kate Warner, *Sentencing in Tasmania* (2nd Edition, Federation Press: 2002) at 101-103.

custodial sentence in Tasmania 85 per cent had a history of alcohol abuse and almost 75 per cent had a history of problematic drug use.⁸

In summary, we support the three proposed amendments contained in the Bill which will enshrine common law principles in Statute and assist in ensuring that our laws are more accessible, certain and predictable.

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

Yours faithfully,



Benedict Bartl
Policy Officer

Community Legal Centres Tasmania

⁸ As found in Tasmanian Law Reform Institute, *Responding to the Problem of Recidivist Drink Drivers* (Issues Paper No 23) at 12.