TASMANIA
LAW REFORM
INSTITUTE

Submission Template

Review of the Defence of Insanity in s 16 of the *Criminal Code* and Fitness to Plead

This Issues Paper evaluates Tasmania's current laws relating to the defence of insanity and fitness to stand trial.

The *Criminal Justice (Mental Impairment) Act 1999* has not been reviewed since it commenced 20 years ago, and it is timely to examine whether the Act is operating effectively and consistently with its underlying principles.

There are concerns that the Act, and relevant provisions of the *Criminal Code*, do not reflect contemporary understandings of mental health. Principles of fairness and justice dictate that, wherever possible, defendants with cognitive or mental health impairments should be supported to undergo a normal trial.

The Institute's review provides an opportunity to modernise these laws, consider initiatives to promote due process rights for vulnerable defendants in the criminal justice system, and examine whether courts should be given greater supervisory powers and therapeutic sentencing options to better serve the community.

The Issues Paper addresses a wide range of issues, including the interaction of the insanity defence with other defences under the *Criminal Code*, criteria for establishing insanity and fitness to plead, standardisation of expert assessment requirements, the operation of special hearings, the indefinite nature of forensic orders and expanding options to 'scale up' or 'scale down' supervision orders depending on the patient's circumstances.

The Institute invites responses to any or all of the questions asked in the Issues Paper, and on any other matter considered relevant but not raised in the paper. The deadline for feedback to the TLRI is 24 May 2019.

You can answer any or all of the questions and provide as little or as much information as you wish.

The Template can be filled in electronically and sent by email or printed out and filled in manually and posted.

- The form is designed to be completed electronically by entering responses. The space provided for your answer will expand (if necessary) as you type. You are invited to include as much or as little information as you choose.

- Alternatively, you may print out the form and either fill it in manually or use a separate answer sheet (if you use a separate answer sheet, please ensure that you clearly number your answers to correspond with the questions in the Issues Paper). Again, you are invited to include as much or as little information as you choose.

After you have completed your submission please either email or post the document to the Institute:

Email: law.reform@utas.edu.au

Post: Tasmania Law Reform Institute

Private Bag 89
Hobart TAS 7001

This study has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on +61 3 6226 6254 or email human.ethics@utas.edu.au. The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number [H0016752].

Personal Information

Name

Organisation (if any)

Address

Email

Phone number

Publication of Submissions

The Institute uses any submissions received to inform its research. Submissions may be referred to or quoted from in a final report which will be published on the Institute's website. Extracts may also be used in published scholarly articles and/or public media releases. However, if you do not wish your response to be referred to or identified, the Institute will respect that wish.

Therefore, when making a submission to the Institute, please tick the applicable box to identify how you would like it to be treated based on the following categories:

Public submission – the Institute may refer to or quote directly from my submission and name me as the source of the submission in relevant publications.

Anonymous submission – the Institute may refer to or quote directly from my submission in relevant publications but will not identify me as the source of the submission.

Confidential submission – the Institute will not refer to or quote directly from the submission but may aggregate information in your submission with other submissions for inclusion in any report or publication.

Confidential submissions will only be used to inform the Institute generally in its deliberations of the particular issue under investigation, and/or provide publishable aggregated statistical data.

Providing a submission is completely voluntary. You are free to withdraw your participation at any time, by contacting Kira White on (03) 6226 2069 or email Law.Reform@utas.edu.au. You can withdraw without providing an explanation. However, once the report has been sent for publication, it will not be possible to remove your comments.

All responses will be held by the Tasmania Law Reform Institute for a period of five (5) years from the date of the first publication and then destroyed. Electronic submissions will be stored on a secure, regularly backed-up University network drive. Hard copy submissions will be stored in a locked filing cabinet. At the expiry of five years, submissions be deleted from the server, in the case of electronic submissions, or shredded and securely disposed of in the case of paper submissions.

QUESTIONS

Part 3 – Mental health and cognitive impairments and the criminal justice system

1. Should there be an amendment to the dangerous criminal provisions contained in the *Sentencing Act 1997* (Tas) to provide a statutory trigger for judicial consideration of the appropriateness of a making an order under the *Sentencing Act 1997* (Tas) Part 10 instead of a dangerous criminal declaration?

Part 4 Unfitness to stand trial: The test

2. Should the doctrine of fitness to stand trial be abolished in Tasmania?
3. If so, how should the law be changed to ensure that individuals who are not able to participate in the trial process (even with the provision of supports) receive a fair trial?
4. Does the current test for unfitness to stand trial contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8 continue to be a suitable basis for determining unfitness to stand trial?
5. Are there any difficulties that arise from the current application of the criteria contained in the *Criminal Justice* (*Mental Impairment*) *Act 1999* (Tas) s 8? For example, are there difficulties with the test that give rise to a subjective interpretation of the criteria by medical experts?
6. Is the current test under-inclusive and not able to appropriately reflect the issues that arise for individuals with mental illness?
7. Should the test of unfitness to stand trial contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8 include consideration of an accused person's decision-making capacity and/or ability for effective participation?
8. Should the test of unfitness to stand trial contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8 include an overarching requirement of a fair trial in the application of the criteria?
9. Should the test of unfitness to stand trial contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8 include a requirement that the accused person is able to exercise the criteria rationally?
10. Are changes required to the criteria contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8 to allow for an accused to participate meaningfully in the trial process?
11. What changes to the criteria contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) can be made, if any, to enhance the ability of experts to assess an accused person's fitness to stand trial?

12. Should the availability of accommodations and support measures, including the potential use of an intermediary/communication assistant (if the scheme is adopted) be specified in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) as a factor that needs to be taken into account when determining unfitness to stand trial?
13. Should there be a separate test in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) to determine whether a person is fit to enter a plea?
14. If so, what should be the requirements of the test?

Part 5 Unfitness to stand trial: Procedure to determine unfitness to stand trial

15. Are there any issues that arise in relation to the role of experts and expert reports in the process of determining unfitness to stand trial?
16. If so, how do you think these problems might be resolved?
17. Should the *Criminal Justice (Mental Impairment) Act 1999* (Tas) be amended to provide that unfitness to stand trial is determined by a judge in the Supreme Court instead of a jury in all cases?
18. Should the *Criminal Justice (Mental Impairment) Act 1999* (Tas) be amended to allow a magistrate to discharge an individual without making a determination of their fitness to stand trial or criminal responsibility?
19. What (if any) limitations should be set out in relation to the exercise of the power of discharge?

Part 6 Unfitness to stand trial: Procedure following a determination of unfitness to stand trial

20. Do you consider that the conduct of a special hearing differs from an ordinary trial in terms of the

evidence adduced or the conduct of the hearing? If so, in what ways?

21. Do you consider that the conduct of the special hearing is consistent with the presumption of innocence?
22. Do issues arise in relation to the conduct of legal practitioners in acting in the 'best interests' of a person rather than based on that person's 'rights, wishes and preferences'?
23. Should any changes be made to the procedure for a special hearing?
24. Should there be a judge-alone process available instead of a special hearing? If so, should this be available in circumstances where the prosecution and defence agree that the evidence establishes the defence of insanity at a special hearing? Or should there be a judge-alone process available instead of a special hearing in all cases?

Part 7 Insanity

25. Should the defence of insanity in s 16 of the *Criminal Code* (Tas) be abolished?
26. If you consider that the insanity defence should be abolished, do you think that a new defence should be created, or should general principles of criminal responsibility apply?
27. If the defence of insanity is abolished, do you consider that the powers under the *Mental Health Act 2013* (Tas) are sufficient to address community protection concerns following the acquittal of an individual with mental health impairments? If not, what changes would be necessary?
28. Should a new defence be introduced to replace the insanity defence that provides for a verdict of not guilty on the grounds of a recognised medical condition (as proposed in England and Wales)?
29. If so, should there be any non-qualifying conditions?
30. Do you consider that the name of the defence of insanity in s 16 of the *Criminal Code* (Tas) should be changed? If so, what should the defence be called?
31. Does the definition of 'mental disease' cause problems in practice?
32. Should the terminology in s 16 of the *Criminal Code* (Tas) be changed to replace the terms 'mental disease' and 'natural imbecility'? If so, what terminology should be used? Should s 16 refer to mental health and cognitive impairments (as recommended in NSW)? Or mental impairment (as used in a majority of other jurisdictions)? Or what other terminology would you recommend be used?
33. Should there be a statutory definition of the terms used?
34. If so, should this be a definition that defines mental impairment to include all or any of the following: mental illness, intellectual disability, cognitive impairment, senility, dementia?
35. Should the definition of mental impairment include some or all personality disorders or expressly exclude some or all personality disorders, or should the definition not specifically refer to

personality disorders? If the definition of mental impairment is to distinguish between personality disorders, which should be included or excluded from the scope of s 16?

36. Should there be a definition, such as is recommended in New South Wales, that separates mental health impairment and cognitive impairment? If so, should the New South Wales definition be adopted?
37. Should mental illness be defined, and if so, how?
38. Should cognitive impairment be defined, and if so, how?
39. How should drug induced psychosis be treated within the insanity defence? Should a distinction be made between psychosis arising from the temporary effects of drug use and mental health impairments resulting from drug use (as recommended in NSW and Victoria)?
40. Does the narrow interpretation of the 'incapacity' and/or the physical character of the act contained in the *Criminal Code* (Tas) s 16(1)(a)(i) cause any problems in practice?
41. Does the requirement to establish that the person was incapable of knowing that the act was one which he or she ought not do or make contained in the *Criminal Code* (Tas) s 16(1)(a)(ii) cause any problems in practice?
42. Do you consider that there should be any change made to the qualifying conditions for the defence of insanity contained in the *Criminal Code* (Tas) s 16(1)(a)?
43. Do you consider that the volitional test for insanity contained in the *Criminal Code* (Tas) s 16(1)(b) should be retained?
44. Do you consider that any amendment should be made to the *Criminal Code* (Tas) s 16(1)(b)?
45. Do you have an explanation as to why successful reliance on the defence of insanity is so low?
46. Do you consider that there are practical difficulties with the current operation of the insanity defence contained in the *Criminal Code* (Tas) s 16?
47. Does the current test work well in practice or does it wrongly include or exclude defendants from the scope of the defence?
48. Do medical practitioners experience cases where a person's mental state at the time of the offence was such that their opinion was that he or she ought not to have been held criminally responsible, but the mental condition did not meet the tests contained in s 16 of the *Criminal Code* (Tas)?
49. Does the insanity test contained in s 16 of the *Criminal Code* (Tas) create difficulties for experts in writing reports and/or in giving evidence at trial?
50. Can you outline any circumstances where an accused would not be able to rely on insanity within s 16(1) but would be able to rely on insanity within s 16(3)?
51. Do you agree with the view of the TLRI that s 16(3) of the *Criminal Code* should be repealed and a provision inserted in the *Code* to provide that if a person does an act or makes an omission as a result of a delusion caused by a mental disease, the delusion can only be used as a defence under s 16 of the *Criminal Code* (Tas) and cannot be relied on to support a defence of self-defence under s 46 of the *Criminal Code* (Tas)? (A possible model would be the legislation in the ACT or the Commonwealth Act).
52. Alternatively, do you consider that s 16(3) of the *Criminal Code* should be retained, and an amendment made to the *Code* to provide that successful reliance on s 16(3) would result in a special verdict of not guilty by reason of insanity rather than a complete acquittal? (A possible model for the legislation would be the amendment proposed by the Western Australian Law Reform Commission).
53. Alternatively, do you consider that evidence of delusions arising from mental illness should be able to be relied on for the purposes of the self-defence in s 46 of the *Criminal Code* (Tas) with the result being that a successful argument of self-defence receives a complete acquittal? If so, what (if any) protections need to be put in place in the case of an accused who is acquitted on the basis of self-defence arising from a deluded belief attributable to a mental illness?

54. Should the *Criminal Code* (Tas) be amended to provide that the burden of proof for the insanity defence rests on the prosecution and that the defendant bears an evidential burden only in relation to this defence?
55. Should the prosecution have the power to raise the defence of insanity against the wishes of the defendant?
56. Should the leave of the court be required for the prosecution to do this?
57. Should there be legislative change to allow the prosecution and defence to agree that a defendant is not guilty by reason of insanity?
58. If so, are there any protections in the interests of the defendant that need to be put in place?

Part 8 Disposition: Forensic and treatment orders

59. Should the *Criminal Justice (Mental Impairment) Act 1999* (Tas) be amended to provide for a limiting term for restriction and supervision orders to replace the current indefinite nature of these orders?
60. Should the *Criminal Justice (Mental Impairment) Act 1999* (Tas) be amended to provide for a limiting term for a conditional release order to replace the current indefinite nature of these orders?
61. If the *Criminal Justice (Mental Impairment) Act 1999* (Tas) is amended to provide for a limiting term for restriction and supervision orders, is it necessary and appropriate to introduce a preventative detention scheme that would allow for an extension of the person's forensic patient status?
62. If a preventative detention scheme is introduced, what model should be used? What should the threshold test for an extension order be and how long should an extension order operate?
63. If there is a time limit for restriction and supervision orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas), on what basis should it be determined?
64. If there is a time limit for conditional release orders under the *Criminal Justice (Mental Impairment) Act* 1999 (Tas), should it be the same as the conditional undertaking under the *Sentencing Act 1997* (Tas) s 7(f) (five years)? If not, on what basis should it be determined?
65. Are there any difficulties that exist under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) in relation to the making, varying or discharging of orders for forensic patients?
66. Is the current approach to decision-making in relation to individuals subject to forensic orders overly cautious? For example, is too much emphasis placed on the risk to the community and too little emphasis placed on the interests of the person?
67. Do you think that the test contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35(1)(b) referring to 'likely to endanger' should be changed to refer to a 'significant risk of serious harm', an 'unacceptable risk of causing physical or psychological harm' or some other test?

Are there any of the other factors that should be included or removed from the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35?

68. If the current system of indefinite detention or supervision with reviews is retained in Tasmania, should the *Criminal Justice (Mental Impairment) Act 1999* (Tas) be amended to create a presumption in favour of a reduced level of supervision in circumstances where the Mental Health Tribunal has issued a certificate?

69. If a system of limiting terms is adopted in Tasmania, should a presumption against release or reduced supervision be created prior to the expiry of the limiting term and then a presumption in favour of release from detention/discharge from supervision after the expiry of the limiting term?

70. Should there be a change in the judicial model of decision-making to allow the Mental Health Tribunal to exercise powers of variation, discharge or revocation of forensic orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas)?

71. If there is a change to the decision-making model in Tasmania, is it necessary to make changes in relation to the composition of the panel that is constituted to make decisions to discharge, revoke or vary forensic orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas)?

72. Are there any difficulties with the operation of the leave provisions under the *Mental Health Act 2013* (Tas) that limit its utility in providing an appropriate pathway for the gradual reintegration of a forensic patient into the community?

73. Does *the Criminal Justice (Mental Impairment) Act 1999* (Tas) provide an appropriate pathway for gradual reintegration of a forensic patient into the community?

74. If not,

    (a) Are the provisions regarding the conditions that may attach to a supervision order adequate and appropriate? If not, what changes should be made? For example, would it be desirable for the provisions in relation to supervision orders in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) to be amended to allow the court to impose conditions that the person reside in an approved hospital if directed by the Chief Forensic Psychiatrist or the Mental Health Tribunal?

    (b) Would changes to the leave provisions, such as providing for extended leave, provide a more appropriate pathway for gradual reintegration of a patient into the community?

    (c) Is there a need for a medium secure environment to operate as a step-down/step-up facility for patients who are subject to a restriction order? If so, should the Chief Forensic Psychiatrist, the Mental Health Tribunal and/or the court have the ability to move a forensic patient between Wilfred Lopes and the medium secure facility? On what basis?

    (d) Is there a technological solution that may be used to monitor forensic patients to address concerns in relation to risk and community safety?

    (e) What is the cost implication of making these changes, including the costs of supervision and of treatment services?

75. Are the orders available following a finding of not guilty by reason of insanity or that a finding cannot be made that the defendant was not guilty of the offence charged under the current *Criminal Justice (Mental Impairment) Act 1999* (Tas) model appropriate for people with an intellectual disability or cognitive impairment?

76. Are changes needed to the *Criminal Justice (Mental Impairment) Act 1999* (Tas) in terms of the orders available and the process to vary or discharge an order to better meet the needs of people with an intellectual disability or cognitive impairment? What are the likely cost implications of making these changes?

77. Are changes needed to the services that support the *Criminal Justice (Mental Impairment) Act 1999* (Tas) model to ensure that it meets the needs of people with an intellectual disability or cognitive impairment? What are the likely cost implications of making these changes?