Mental Health Council OF TASMANIA

www.mhct.org

Contemporary Understandings of Mental Health

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

24/05/2019

AUTHORISED BY:

Connie Digolis
Chief Executive Officer

cdigolis@mhct.org
03 6224 9222
0418 431 995

Level 1, 131A Collins Street
Hobart TAS 7000

1. Introduction

The Mental Health Council of Tasmania (MHCT) is the peak body for community-managed mental health services in Tasmania. We represent and promote the interests of our members and work closely with Tasmanian Government agencies and Primary Health Tasmania to ensure sectoral input into public policies and programs. We are strongly committed to enabling better mental health care access and outcomes for every Tasmanian. Our purpose is to improve mental health for all Tasmanians, and our vision is for all Tasmanians to have awareness of, and value, their mental health and wellbeing.

MHCT recognises the laws relating to the defence of insanity and fitness to plead are highly complex. As the peak body for the community-managed mental health sector in Tasmania, the purpose of MHCT's submission is not to provide a legal perspective, rather a perspective that supports and advocates for the rights of people experiencing mental illness and for the systemic reduction of stigma associated with mental illness in our communities.

As a leading voice in mental health, MHCT supports the use of contemporary language as a way of upholding the dignity and respect of people living with mental illness and reducing negative community attitudes towards mental illness, in particular community attitudes linking mental illness to violence.

MHCT attempted to gain a lived experience perspective for our response via a public survey, however a low response rate meant this aspect was not included in our response. As such, MHCT's focus is on supporting a human rights perspective based on a contemporary understanding of mental health, mental ill-health and mental illness.

2. Contemporary Understandings of Mental Health, Mental ill-health and Mental Illness

2.1. A human rights perspective

As discussed in the issues paper, the law of insanity, 'pre-dates the inception of modern psychiatry and psychology as professional disciplines.' [1]

Maintaining the dignity of people with mental illness is observed in both the Convention on the Rights of People with Disability (CRPD)[2] and the current Mental Health Act, Tasmania (2013)[3].The Mental Health Act stipulates a schedule of mental health service delivery principles which provide a basis of treatment for people with mental illness. The first principle being, 'to respect, observe and promote the inherent rights, liberty, dignity, autonomy and self-respect of persons with mental illnesses.

This is equally conveyed within the CRPD of which Australia is a signatory. The CRPD fundamentally promotes and protects the human rights of all persons with a disability, including individuals with a mental illness. As such, MHCT encourages reforms to the Defence of Insanity and Fitness to Plead to be developed under the lens of the guiding principles of the CRPD.

- *Question 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?*

Terminology such as 'insanity' exacerbates a historical concept of institutionalisation, community fear and misunderstanding of mental ill-health. As recognised in the discussion paper, The Law Commission of England and Wales states that terms such as 'insanity', 'mental disease' and 'natural imbecility are, 'not medical terms but outdated legal terms'. These terms can perpetuate damaging myths and historical stigma relating to mental illness and violence thereby cementing negative community attitudes towards mental illness more broadly within the community.

The name of the defence should be more closely aligned toward language relating to an individual's level of awareness and understanding. The Scottish Law Commissions recommendation, along with the New South Wales Law Reform Commission (NSWLRC), both recommend renaming the defence to the, 'defence of mental health and cognitive impairment'. From the perspective of upholding dignity of the individual, the name provides a respectful description of the condition or conditions. As stated in TLRI's issue paper, there is a, 'disconnect between the legal concept of insanity and contemporary psychological underpinning'. Updating the name of the defence should align to contemporary understandings of mental illness.

2.2. Terminology and language

Reforming the language within the defence of insanity will achieve significantly more than just modernising the 'look and feel' of the law. An updated use of language will provide a legal basis for the systemic reduction of stigma within our communities and support upholding the dignity and self-respect of people with a mental illness through the use of appropriate and respectful language.

In the past, negative community attitudes towards people experiencing mental ill-health have been perpetuated through the association of mental illness with violence. As stated in the issues paper, terms such as, 'criminal insanity' reinforce damaging and incorrect perceptions that people with mental illness are dangerous.

Media plays a significant role in perpetuating the association between mental illness and violence. However, it is not just sensationalising stories that contribute to, and perpetuate stigma around mental illness. A report by the Media Monitoring Project explains that much of the information gained by journalists is derived through court documents. The report states how, 'language use in news stories derived from court proceedings and police reports are of particular concern in perpetuating community fear.'[4] Additionally, the report states that the use of 'negative, colloquial or outdated language should be avoided. Words such as *insane, lunatic, mad* and *mental patient* can perpetuate fear and discrimination when associated to people with mental illnesses.'

As the Tasmanian Law Reform Institute has suggested in their issues paper, such terms are inappropriately stigmatising. At a systemic level, these terms can appear in court documents which are sourced by journalists and then communicated out to the greater community. For stigma towards people with mental illness to be reduced, it is imperative that collectively, we 'communicate in ways that principally do no harm.'[5] The Tasmanian Communications Charter has been developed as an overarching guide to communicating in ways that do no harm. The document has been developed as a key priority under the Tasmanian Government's mental health reforms. The document is a resource for

all sectors including government, business and community organisations. The resource provides information on the use of language which is consistent, respectful and person centred. MHCT recommends the resource is used as a guide in developing policy and law reforms that affect people with mental ill-health. A link to the guide is provided in the resource list below.

- *Question 31: Does the definition of 'mental disease' cause problems in practice?*

As stated in the TLRI issues paper 7.5.19, 'concepts of mental disease and disease of the mind are regarded as limited, outdated and offensive'. From the perspective of supporting a reduction in stigma, 'mental disease' is not a term commonly used within the community-managed mental health sector, or across the system in a contemporary setting. Language that refers to medical terminology should be contemporary and used to describe an individual's condition or diagnosis. Additionally, utilising terms that are more reflective of current and appropriate medical terminology enables a better understanding across all elements of society. The Tasmanian Communications Charter is one example that aims to bring a common and cohesive language of mental health and mental-ill health throughout Tasmania. MHCT recommends utilising the Tasmanian Communications Charter as a reference point for contemporary use of language within the defence of insanity law reforms.

- *Question 32: Should the terminology in s 16 of the Criminal Code (Tas) be changed to replace the terms 'mental disease' and 'natural imbecility'?*

Outdated and offensive terms such as 'mental disease' and 'natural imbecility' significantly contribute to the systemic stigmatisation of people with mental illness and intellectual disability in our communities. These outdated terms do not communicate dignity and self-respect for individuals experiencing mental ill health or cognitive impairment.

The Mental Health Commission of Canada's report into structural stigma explains that, 'Stigma cannot be eradicated without attending to structural stigma; that is, the inequities and injustices that are woven into the policies and practices of our institutional system'. To reduce stigma associated with mental illness, it important to ensure our polices and documents uphold terminology that is respectful, accurate and contemporary.[6]

MHCT recommends an update of this language to reflect contemporary terminology such as the NSWLRC recommendation of mental health and cognitive impairment. Such terminology is respectful to the individual and family and additionally is more reflective of current medical terminology.

- *Question 35: Should the definition of mental impairment include all or some of the personality disorders or expressly exclude some or all of the personality disorders, or should the definition not specifically refer to personality disorders?*

There is a high rate of diagnosed personality disorders among Australian forensic populations, with an estimated 40–43% of prisoners meeting the diagnostic criteria for a personality disorder.[7]

Personality disorders are often related to complex trauma and as such there is a high prevalence of co-morbidity. In an Australian study of women with a diagnosed personality disorder, 63% of the women were also diagnosed with a mood disorder, whilst 45% were diagnosed with an anxiety disorder.[8] These results illustrate how personality disorders are complex mental illnesses. Due to the complexity of the illness, it may be difficult to expressly exclude personality disorders from the mental impairment category.

As suggested in TLRI's issues paper 7.5.30, expressly excluding personality disorders may not be necessary as, 'the person must pass through the second, narrower, gate and show that the personality disorder had the effect that he or she did not know what they were doing, or not knowing that it was wrong, or that he or she was unable to control their actions'. Due to the complexity of personality disorders and that the condition is a diagnosed mental illness, MHCT recommends that all personality disorders are not expressly excluded in the definition of mental health impairment.

- *Question 36: Should there be a definition, such as recommended in NSW, that separates mental health impairment and cognitive impairment?*

MHCT agrees with the NSWLRC's recommendation of separating the definitions of mental health and cognitive impairment.

The NSW recommendation shown within the issues paper 7.5.25, provides a detailed outline of mental health impairment and cognitive impairment. The descriptions are aligned with contemporary understandings and provide a more updated and respectful use of terminology. Utilising such terminology within court proceedings would support more respectful language within court documents, media reporting and subsequently within the community.

- *Question 37: Should mental illness be defined? If so how?*

The Commonwealth and State governments have set out measures to provide a contemporary understanding of mental health and mental ill-health (including mental illness). These definitions aim to support the reduction of stigma nationally and to also a promote a common language across sectors.

Within the Tasmanian Communications Charter, mental illness is defined as: *"A mental illness is a disorder diagnosed by a medical professional that significantly interferes with a person's cognitive, emotional or social abilities, Examples include depression, anxiety, schizophrenia and eating disorders. These can all occur with varying degrees of severity."*

Resources

Tasmanian Communications Charter: A state based approach to Mental Health and Suicide Prevention
An overarching guide to communicating consistently about mental health, mental ill-health and mental illness.

Language Guide: Mental Illness
Best practice in language relating to mental illness

[1] Tasmania Law Reform Institute, *Review of the Defence of Insanity in s 16 of the Criminal Code and Fitness to Plead*, http://www.utas.edu.au/__data/assets/pdf_file/0016/1201093/Insanity_IP_A4_03_print.pdf accessed 23/05/2019.

[2] United Nations, *Convention on the Rights of People with Disabilities*, https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/the-convention-in-brief.html accessed 23/05/2019.

[3] Tasmanian Government, *Mental Health Act, 2013* https://www.legislation.tas.gov.au/view/html/inforce/current/act-2013-002 accessed 23/05/2019.

[4] Prikis, J. et al. 2001 *Media monitoring project: a baseline description of how the Australian media report and portray suicide and mental health and mental illness* University of Melbourne and University of Canberra, p 143.

[5] Tasmanian Communications Charter: A state based approach to mental health and suicide prevention https://www.tascharter.org/wp-content/uploads/2018/11/TAS-Communications-Charter-Final.pdf accessed 23/05/209.

[6] Livingston, J. 2013. *Mental Illness-Related Structural Stigma: The Downward Spiral of Systemic Exclusion,* Mental Health Commission of Canada *https://www.mentalhealthcommission.ca/sites/default/files/MHCC_OpeningMinds_MentalIllness-RelatedSructuralStigmaReport_ENG_0_0.pdf* Accessed 23/05/2019

[7] Carrotte, E & Blanchard, M, 2018, *Understanding how best to respond to the needs of Australians living with personality disorder,* SANE Australia and The National Mental Health Commission (Australia). http://www.mentalhealthcommission.gov.au/media/251790/SANE%20spotlight%20report%20June%204%20FINAL%20Accessible.pdf accessed 23/05/2019

[8] Quirk, S et al. 2017, *The prevalence, age distribution and comorbidity of personality disorders in Australian women.* Australia and New Zealand Journal of Psychiatry *v. 51 (2) pp 141- 150* *https://journals.sagepub.com/doi/pdf/10.1177/0004867416649032* accessed 23/05/2019