Submission to the Legislative Council of Tasmania Inquiry into Tasmanian Adult Imprisonment and Youth Detention Matters

My submission is directed to the following terms of reference of the Committee:

1. Factors influencing increases in Tasmania's prisoner population and associated costs

2. The use of evidence-based strategies to reduce contact with the justice system and recidivism

I was educated at the University of Tasmania and admitted to the Bar of the Supreme Court in February 1972. I spent 13 years as a defence lawyer and 30 years as a Magistrate (including twelve as Deputy Chief Magistrate and six as Chief Magistrate), and over those years have reached some conclusions about changes that I submit should be considered in the criminal justice system, both in the youth and the adult jurisdictions.

By way of background, I was instrumental in the introduction of the Contest Mention system of Criminal Case Management in 1996, the introduction of the Forensic Mental Health list and Drug Court procedure in 2007 and the Specialised Youth Justice lists in 2011. I retired in 2015 and since then I have held a number of honorary positions. I am Chair of the Drug Court Support Group 'Just Desserts', I am a patron of the Justice Reform Initiative and an Adjunct Professor of the University of Tasmania Law School. I am an Associate member of the Institute of Judicial Speakers based in the United States.

I have for many years been an advocate for change in the Criminal Justice system in Tasmania, and in 2006 I presented a paper at the International Therapeutic Jurisprudence Conference held in Perth. The title of that paper was 'Therapeutic Jurisprudence - does it have a place in Tasmania?' I have spoken at the University of Tasmania and in the

Tasmanian general community on countless occasions over nearly 30 years on Sentencing. In 2010 I was invited by the Australian Institute of Judicial Administration to speak on the operation of the Tasmanian Mental Health Diversion list at a conference in Auckland. That presentation can be seen on the AIJA website.

The Problem-Solving approach

Well known Tasmanian Scholar Hannah Graham reviewed the operation of the Mental Health list in a work 'A foot in the revolving door' which can also be accessed on the internet.

Obviously, the court and its powers are the last step in a person's journey in the Criminal Justice system. Hopefully, initiatives which deal with the causes of crime can be effective so that people don't end up the court system in the first place. However, when they do, the current court structures, in my view, do not really fulfill the objectives of protecting the community the way a modern community would expect. The courts' structures and powers have really remained relatively unchanged for a long time apart from the initiatives to which I have referred.

I saw in the 1990s the increasing number of persons coming to court after the policies of deinstitutionalisation were put into effect. Alcohol was of course a constant offence-related factor, and still is. People were being imprisoned for nuisance type offences which really stemmed from their mental health issues. The sentencing policy structure ultimately legislated in the *Sentencing Act* was really the traditional approach of denunciation, general and personal deterrence and rehabilitation, very much in the common law tradition. Protection of the community of course was elevated in a sense. People with mental health issues could not pay fines or do community work and often went to prison. People with drug addictions (usually property offenders) were often in the same boat. The revolving door of sentencing was obvious.

The problem-solving approach introduced in the United States in the 1980s based on the principles of Therapeutic Jurisprudence underpinned the set-up of drug treatment courts. There are now over 4000 of them and the results are impressive. These courts now cover areas such as recidivist drink drivers, mental health issues, family violence and re-entry courts and others.

Tasmania has two of what could be called 'problem solving' lists or Courts. One is the Diversion List which deals with people whose offending is linked to their mental illness and the other is the Drug Court (strangely called Court Mandated Drug Diversion) which deals with people whose offending is linked to their illicit substance addiction. Neither 'court' has a statutory base. Without such a base of course, the Courts could be put to one side as being too personality based despite the excellent work which has been done in both courts.

The Diversion List was established in 2007 and is governed by a procedural manual which can be accessed on the Court website. Persons charged with offences who are subsequently 'diverted' into the Diversion List have their matters listed in the Criminal Division of the Court.

Persons who are sentenced to a Drug Treatment Order under Part 3A of the *Sentencing Act* have their matters transferred for management and supervision to the 'Drug Court' or (CMD list). Their matters are listed in the Criminal Division. The relevant statutory provisions were enacted in 2007. The relevant Tasmanian legislation mirrors the Victorian Drug Court legislation but our set up is nowhere near the Victorian one. Each Court has specific Magistrates presiding at the direction of the Chief Magistrate. To emphasise the therapeutic direction of these (and similar courts), consideration could be given to the establishment of an appropriately named Division of the Court into which these matters are placed.

In the Victorian Magistrates Court, for example, there are the following

Divisions:

- The Drug Court Division
- The Koori Court Division
- The Specialist Family Violence Court Division
- The Neighbourhood Justice Division
- The Assessment and Referral Court List.

Establishment of specifically entitled lists would be a public acknowledgement of their purpose and commitment to rehabilitation. An option may be just one new Division named for example 'The Treatment Court Division'. The Chief Magistrate would be able to transfer suitably qualified Magistrates to sit in the new Division(s). There may subsequently be a need to re-examine the protocols for Judicial Appointment to make provision for suitable experience and knowledge in the problem solving or therapeutic jurisprudence area to be considered when appointing Magistrates. Current serving Magistrates ought to be given the opportunity and resources for further training in these areas.

Obviously, the causes of crime are numerous, and it is arguable that whatever additional powers and resources the Justice system is given, it may in some ways be considered too late in the day. Improvements in education, family supports, mental health services, housing and the like are all required to bring about better outcomes and ultimately reduce the likely entry of some into the Justice system.

However, the Criminal Justice system, in addition to its traditional dispute resolving role, needs the powers and resources to deliver effective responses in a sentencing context to offenders whose offending stems from co-occurring disorders, addictions, alcoholism, and mental illness. It could be argued that the prison numbers and unacceptable recidivism rate in the Tasmanian context suggest (among other things) that the application of the current sentencing options is not delivering sustained decreases in criminal activity and therefore is not protecting the Community, as is required by the *Sentencing Act*.

It suggested that the time is appropriate for consideration and discussion of the following matters.

The *Sentencing Act* S3 provides as follows

S 3. Purpose of Act

The purpose of this Act is to –

(a) amend and consolidate the State's sentencing law; and

*(b) promote the **protection of the community** as a primary consideration in sentencing offenders; and*

(c) promote consistency in the sentencing of offenders; and

(d) establish fair procedures for –

(i) imposing sentences on offenders generally; and

(ii) imposing sentences on offenders in special cases; and

(iii) dealing with offenders who breach the conditions of sentences; and

(e) help prevent crime and promote respect for the law by allowing courts to –

(i) impose sentences aimed at deterring offenders and other persons from committing offences; and

*(ii) **impose sentences aimed at the rehabilitation of offenders**; and*

(iii) impose sentences that denounce the conduct of offenders; and

(f) promote public understanding of sentencing practices and procedures; and

(g) set out the objectives of sentencing and related orders; and

(h) recognise the interests of victims of offences.

Now these concepts are not new of course and, there is little reason to quarrel with them, but it is suggested that they do not in a demonstrative way show the acceptance of the effective work done by the traditional problem-solving courts such as Drug Courts, Mental Health Courts and others that are specifically dealing with the problems that lead to the offending (the problem-solving approach). It is suggested that perhaps a provision could be inserted into S3 (e) along the following lines, to allow courts:

"To impose sentences directed at the issues that the court is satisfied are linked to an offender's offending".

Protocols for Judicial Appointment

The following is the Tasmanian Government's current Selection Criteria for Judicial Appointments.

Suitable candidates should be:

- *an experienced legal practitioner with a high record of professional achievement coupled with a knowledge and understanding of the law consistent with judicial office.*
- *an excellent conceptual and analytical thinker, displaying independence and clarity of thought.*
- *an effective oral and verbal communicator in dealing with legal professionals, litigants and witnesses and able to explain technical issues to non-specialists*
- *highly organised, able to demonstrate or develop sound court management skills and work well under pressure.*
- *capable of making fair, balanced and consistent decisions according to law without undue delay.*
- *a person of maturity, discretion, patience and integrity who inspires respect and confidence.*

- *committed to the proper administration of justice and continuous improvement in court practice, working collegiately with judicial colleagues and effectively with court officers to those ends.*

Again, there is no reference to the principles of Restorative Justice (the policy behind the *Youth Justice Act*) or Therapeutic Jurisprudence (the evidence-based approach behind the Drug Court and the Mental Health Diversion List). It is suggested such an omission is quite critical, and that including such a provision would go some way to ensuring the appointment of suitably qualified persons who have at least some familiarities with these principles. It is suggested perhaps the addition of the following (or similar) should be considered:

'a person who has an appreciation of the principles of Restorative Justice and Therapeutic Jurisprudence and the application of those principles

The Structure of the Magistrates Court

Submissions have already been made suggesting some changes to the structure of the Court and the creation of a division directed at a Therapeutic or Treatment-based disposition. It is further suggested additional problem-solving courts could be established.

There has been much discussion about 'crossover kids', those young people who seem to inevitably 'graduate' from the Care and Protection Jurisdiction to the Youth Justice area and then to the Adult Criminal Jurisdiction. In Victoria there has been established a Family Drug Court that supervises program rehabilitation for those parents whose children have been removed into the Care Jurisdiction. The Court looks at treatment programs for the issues behind that removal, such as addictions to drugs and alcohol, with a view to ultimate reunification of the family. The following is a brief extract from the Website of the Magistrates Court of Victoria:

'It is a judicially monitored, therapeutic 12-month program conducted in a highly supportive non-adversarial environment. The

program seeks to engage parents whose children have been removed from their care due to parental substance misuse or dependence and uses intensive case coordination and holistic therapeutic intervention to address issues of substance misuse with the aim of achieving safe and sustainable family reunification of parents and their children.'

Once again, steps this early by way of appropriate interventions may have positive effects which ultimately address the Tasmanian recidivism rate.

A Drink Driver Court, as recommended by the Tasmanian Law Reform Institute, could be established to deal with the large number of recidivist offenders who are sent to prison for offending against the *Road Safety (Alcohol and Drugs) Act*. There is a significant body of research and experience from the United States that supports the 'Drug Court' approach has significant positive effects with this cohort of offenders. The *Sentencing Act* provisions which establish the Drug Court deal only with offenders who are addicted to illicit substances, and, as the Law Reform Institute noted, the deletion of the word 'illicit' would enable those court processes to include drink driving offenders.

Much discussion occurs over the difficulty prisoners have with housing upon leaving prison after the completion of their sentence. Again, experience in the United States shows that the establishment of re-entry courts has had positive effects in this area, which of course could assist in dealing with the unacceptable recidivism rate in Tasmania. The following is a summary of those courts:

'A re-entry court is a court that manages the return to the community of individuals being released from prison, using the authority of the court to apply graduated sanctions and positive reinforcement and to marshal resources to support the prisoner's reintegration, much as drug courts do, to promote positive behaviour. Built on specialty courts research and experience, a re-entry court is a specialised court for offenders who leave prison early and 're-enter' society. Its purpose

is to make the transition from incarceration to tax-paying citizen more likely.

It is important that these problem-solving courts have a statutory base for several reasons. That recognition sends a strong message of the Courts' objectives, and, of course, recognition by way of funding is enhanced. I note the Diversion List, which won an award in 2010 for Community Achievement, is not statutorily based.

Provision of support for the Court

Judicial Officers and relevant staff should be given opportunities to keep up with developments in the problem-solving area. Many studies and evaluations are being carried out which could affect approaches being taken in Tasmania. Obviously in a treatment program based sentencing option, suitably staffed and resourced programs need to be available for referral by the courts. It goes without saying if the Court does not have the confidence that the programs are appropriately resourced, they will be reluctant to use them, and the approaches can be frustrated.

The Youth Jurisdiction

Other issues include a separate Youth Court and possibly a separate Youth Drug Court as exists in other States. It is suggested that specialisation of Judicial Officers in these areas leads to consistency of approach and better outcomes for the Youths and their communities

Former New Zealand Youth Court Chief Judge Andrew Beecroft said in 2014 when giving a paper to the Pacific Justices Conference:

A 'good' youth justice system is a specialised system, created with the understanding that young people are not just 'junior adults' but developmentally, almost a 'different species of human being' with markedly different characteristics and responses than adults. A good

system recognises their vulnerability and includes protections that enable them to desist from offending in the future.

I think that statement itself lends weight to the argument for a separate Youth Justice Court in Tasmania.

We have come a long way here in Tasmania. We now have Magistrates assigned to sit in the Youth Court as part of their overall duties. The Court now operates on a Therapeutic Jurisprudential model for some youths who need special treatment. In the most recent Magistrates Court Annual report the Court noted the assistance it gets from the following:

Assisting in the Youth Court

> *Save the Children (STC) continues to support and assist state-wide some of the young people who are subject to bail and young people who have transitioned from Ashley Youth Detention Centre. A STC youth worker interviews the young person and helps them to identify pro-social goals and develop a plan as to how to achieve the identified goals. The STC youth workers will also support the young person to seek legal advice, attend appointments and attend court. A report is prepared to update the Court on the progress being made by the young person. STC will also support the young person to engage in some pro-social recreational activities which provide other options to offending behaviour.*
>
> *The partnership between STC and the youth court is an invaluable resource, as by collaborating it is possible to achieve better outcomes for some of our very disadvantaged young people who are offending and appearing in court.*
>
> *As the Youth Justice Division was a priority area that the Court continued to deal with during the Covid-19 peak, STC maintained its involvement with the Court throughout that time.*

Other support services

Other services that actively engage with the Youth Justice Court are Mission Australia, Life without Barriers, the Department of Education and Baptcare. Each offers assistance and support to young people with a range of needs, such as homelessness, alcohol and drug problems, education and training, family breakdown, and mental illness.

Historically every Magistrate took turns in sitting in the Youth Justice Court. Imagine the variety of approaches across the state with about 14 or so different Judicial Officers dealing with those who were appearing. The differences in approaches outcomes and manner were a recipe for disaster in my view. There is strong support for the proposition that specialised magistrates should be sitting in certain areas, and youth courts are one of them. I also think there is an argument for quite distinctly separate accommodation away from the adult courts.

I was appointed to the bench in the 1980s. The basic principle in those days was that in the Youth Justice Court, which had large numbers then (pre police diversion and cautions and family group conferences), was to process the list with as much speed as one could. Of course in sentencing the provisions of the then *Child Welfare Act* applied, but rehabilitation was still the main aim. The *Youth Justice Act* based on the New Zealand Act was passed I think in 2000. In the intervening period and subsequently there has been much material produced about the effect of various circumstances on young person's lives and why that may lead to offending. We now know that the cross over kids who have spent time in CP have a strong chance of moving to the YJ and ultimately the adult criminal jurisdiction.

There has also been much research carried out particularly in the area of the impact of mental health on the offending behaviour of young people (our Mental Health Court, which has no statutory base, does not deal with Youths as the *Sentencing Act* doesn't apply to them). As

our Commissioner for Children, Leanne McLean, recently said in the context of the debate about the age of criminal responsibility:

'*Simply raising the age of criminal responsibility to 12 won't achieve the changes needed either for childrens' best interests or for community safety. Community safety is best achieved when we support families and their children to thrive through evidence-based therapeutic interventions that are integrated into a holistic system of supports. These could include family supports, free activities, mentoring, preventative health programs, health services, mental health supports and services, drug and alcohol programs, innovative educational programs and opportunities to build skills for future employment.'*

These are the things that will promote community safety and reduce crime. These comments, in my view, strengthen the argument for a specialised approach to youthful offenders in a specialised court system.

I noted in a paper entitled '*Time to get it right: enhancing problem solving justice in the youth court*' written for the Centre for Justice Innovation by Tim Bateman, a reader in Youth Justice at the University of Bedfordshire, some comments which I think could be considered for the Tasmanian situation.

> *The Carlile Inquiry (2014) recommends piloting problem-solving judicial monitoring in the youth court as a way to coordinate and review interventions and the support provided to address the welfare needs of young people following orders of the court. It urged 'piloting of a problem-solving approach in court for children, which would include judicial monitoring and continuity in cases, and powers to ensure children's underlying needs are met.'*

His report made several recommendations including specially designed court rooms, training for Magistrates and practitioners especially how to communicate with young people. He noted the following:

'Rates of mental illness among youth offenders far exceed those of children and adolescents in the general population.

Youth in the justice system experience high levels of co-morbidity, with around 50% of confined youth meeting diagnostic criteria for at least two disorders.

Youth offenders are more than three times more likely to have experienced a traumatic brain injury (prevalence rates around 30%).

Individuals who have experienced abuse and trauma earlier in their lives have neurophysiological differences and are less able to regulate their emotions, as well as tending to act more aggressively; anger and aggression are highly correlated with violent crime.

Relative to other adolescents, life-course- persistent offending youth are distinguished by neurological abnormalities, volatile temperament, low intellectual ability, reading difficulties and poor performance on neuropsychological testing.

Now to properly assess and judge the effect of any of this needs specialised attention, time, and expert assistance if the court is going to do the youth justice and consider all the factors relevant to his or her offending'.

I haven't mentioned literacy family violence, drugs alcohol poverty, peer pressure, family culture and the like. The psychiatrists now tell us that brain development in some young people, males particularly, may not be fully achieved until they reach 30 years of age. These factors are now assuming greater significance in the way Courts deal with young people.

The Care and Protection system needs to be housed with the Youth Court allowing ease of access to the court and the use of relevant information across all matters. Often what is happening in the welfare jurisdiction is extremely relevant to what is happening in the criminal jurisdiction. We could have a Youth Drug and Mental Health Court

dealing with those youths who are struggling with those issues. We could have a family drug court aimed at reunification of families where children are in care due to parental drug use and subsequent maltreatment and neglect. It is well knows that risk factors for the severely challenging behaviour that can develop into lifelong offending are established earlier in life.

As the late American Judge and Drug Court expert, Peggy Hora, says, *'the outcomes for children and their families could be improved if the courts became more actively involved in healing families'.*

Now that may seem like a complete wish list but, as I have said over the years, in Tasmania we are small, we are boutique and we should be aiming at excellence in our Justice system - and where else to start but in the youth court? If we get it right there, the appalling recidivism rate in our adult criminal jurisdiction of over 50% might well be reduced. Of course, getting the court structure right is just part of the problem. We need to look at what services we have and what services we need.
A paper published in September 2020 by the RMIT in Victoria entitled "*Specialist Children's Court Approaches* "suggests the following:

"What programs we need

Overarching characteristics of evidence-based, effective, youth-offending therapeutic interventions include the following:

- *Therapeutic intervention philosophy, targeting high-risk offenders and programme integrity (quality)*
- *Comprehensive, systemic, social- ecological approach (involve the youth, their family/caregivers, and/or other social system, e.g. church, school etc.)*
- *Well-structured (e.g. one or more weekly sessions), well-planned, well- implemented and evaluated*
- *All aspects of a youth's functioning are addressed (physical, mental, school, peer relationships, etc.) and the interventions*

strive to enact change among key members of a youth's ecology, rather than purely change in the youth themselves. "

As Andrew Beecroft said of the NZ system:

'*As mentioned before, a strength of the New Zealand system is the availability of professionals who specialise in working with young people. Youth advocates (lawyers for young people) are universally available to all young people charged in the Youth Court, free of charge and irrespective of the means of the young person and his or her family. The legislation also prescribes those judges should possess special skills for working with young people. There are also specialist Family Group Conference Coordinators who specialise in youth justice, specialist youth justice social workers and a specialist division of the New Zealand Police.*

What is the benefit of this? It means that people working in the Youth Courts bring a 'youth-centric' approach with them. Without a small amount of knowledge about the characteristics of young people, and of youth offenders, it is all too easy to treat young people simply as 'junior adults'. First, this can result in responses which may not be fair: as brain science indicates, young people are often not as responsible for their actions as an adult might be. Second, if professionals have some knowledge of young people and how to work with them, they can make the process more accessible to young people. It is impossible for young people to engage with the criminal justice system, and make it a meaningful process, if they do not understand it.'

I am happy to discuss these matters in person if the Committee sees that as helpful.

Michael Hill

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