**A submission to the Tasmanian Department of Justice regarding the *Justice Legislation Amendments (Criminal Responsibility) Bill 2019***

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This submission on the *Justice Legislation Amendments (Criminal Responsibility) Bill 2019* (‘the Bill’) contains the opinions of the authors as legal academics and not a formal perspective of the University of Tasmania.

1. Chance event: inconsistencies between the Bill and *Van Den Bemd* [1994] 70 A Crim R 489, (1994) 68ALR 199 and *Kaporonowski* (1973) 133 CLR 209

In *Van Den Bemd* the High Court affirmed the approach of the Queensland Court of Criminal Appeal to

1. reject the ‘supervening event’ interpretation of ‘chance event’. Among other things, this approach would not exculpate a person for a death that resulted from their violent act even where death would not have occurred but for a particular weakness or abnormality in the victim (eg *Mamote-Kulang v R* [1964] HCA 21; *TimbuKolian v R* [1968] HCA 66); and
2. adopt the meaning of chance event defined by the High Court in *Kaporonowski*, namely an event that was unintended and unforeseen by the accused, and unforeseeable by an ordinary person in the position of the accused.

To our knowledge the Tasmanian Supreme Court has not considered s13(1) in light of *Van Den Bemd*. However, for reasons explained by Blackwood (1996; see attached) the authority is likely to be highly persuasive in this jurisdiction, particularly given the close association between the criminal codes in Tasmania and Queensland. It is also worth noting that *Van Den Bemd* has been applied in interpreting the Western Australian Code (eg *The State of Western Australia v Carkeek* [2016] WASC 201).

The Bill contains two clauses that are inconsistent with *Van Den Bemd.*

1. Clause 4(b)(b) probably applies a stricter test because it excludes what an ordinary person would foresee *in the position of the accused*. This is analogous to the old operation of self-defence in Tasmania which, in the second limb, applied a straight reasonableness test to the level of force used. The amendment (the current s 46) introduced a more lifelike and practical second limb: whether the use of force was reasonable in the circumstances as the accused believed them to be.
2. By stipulating that chance event does not exculpate an accused where “death, or grievous bodily harm” “results to a victim because of a defect, weakness, or abnormality, of the victim”, cl 4(c) specifically rejects the approach taken in *Van Den Bemd* in preference for the ‘supervening event’ interpretation of chance event (*Mamote-Kulang v R* [1964] HCA 21).

Our main concern with this stricter construct of chance event is the risk of an unjustly severe outcome. For example, an accused could be found criminally responsible of manslaughter contrary to s 156(2)(a) because they committed a minor assault, such as a push, that only resulted in death because the victim had a rare congenital condition that was unknown to anyone. (The push could satisfy the element that it be commonly known to be likely to cause bodily harm.)

In our view the *Van Den Bemd* approach does not present a risk of unjustly lenient outcomes because (a) community standards are incorporated into the meaning of ‘unforeseeable’ and (b) an accused exculpated of manslaughter may still be culpable of GBH, wounding or assault.

We also submit that the proposed amendments in cl 4 might be successfully appealed on the basis of their disjuncture from the principles adopted by the High Court and appeal courts of Queensland and Western Australia.

2. Chance event: inconsistency with the mental element for grievous bodily harm

The Bill introduces the ‘supervening event’ test for chance event not only in respect of manslaughter but also, in cl 4(c), for the crime of grievous bodily harm. This imposes an objective test of culpability for an offence which the courts have consistently interpreted as requiring proof of subjective culpability. The mental element for the crime of grievous bodily harm in s 172 of the Code is subjective recklessness. This is established by the authority of *Vallance v The Queen* (1961)108 CLR 56 and confirmed in a long line of subsequent cases such as *Arnol* [1981] Tas SR 157, *Hodgson* [1985] Tas R 75 and *Bennett* 1990] Tas R 72. Accordingly, there is no recourse to the second limb of s 13(1) in prosecutions under s 172.

The proposed amendment to s 13(1) would effect a significant change in the principles of criminal responsibility that apply to grievous bodily harm and target those who *could not* have been aware of the potential serious consequences of their conduct nor of the need to adjust their behaviour to avoid those consequences. As in the example above, an individual cold face conviction for one of the most serious violence offences if they committed a minor assault, such as a push, that only resulted in serious harm because the victim had a rare congenital condition that was unknown to anyone. Those who engage in acts of violence where the risk of really serious harm to others in fact eventuates are already held accountable by the current formulation of the mental element. In relation to such acts, it is for the jury to decide whether they are satisfied that the accused foresaw the likelihood of causing serious harm. This determination is informed by jurors’ own understanding and experience of the risks of violence. The more objectively foreseeable harm is, the less likely the jury will accept any claim by an accused that they did not foresee the harm. However, where the risk of serious harm is unforeseeable an accused may face prosecution for one of the most serious offences in the criminal calendar even where their culpability is very minor.

3. Chance event: inconsistency with the test for criminal negligence

An individual may be held criminally responsible for an act which causes grievous bodily harm to another where they have charge of a dangerous thing (for example a firearm) and fail to take reasonable precautions to avoid endangering human life (ss 150 and 152 of the Code). These provisions impose an objective test of liability for the offence of causing grievous bodily harm. However, the test is not as strict as the test proposed in the amendments to s 13(1). The test relies on an assessment of whether reasonable care was taken. In turn, that connotes an assessment of what consequences might reasonably be foreseeable as a result of the lack of care. Liability is only imposed in the event that harm which was reasonably foreseeable in fact eventuates.