

**ROYAL AUSTRALIAN AND NEW ZEALAND COLLEGE OF PSYCHIATRISTS  
CONGRESS 2021 OPENING SPEECH BY  
HER EXCELLENCY PROFESSOR THE HONOURABLE KATE WARNER AC  
GOVERNOR OF TASMANIA  
HOTEL GRAND CHANCELLOR MONDAY 17 MAY 2021**

Good morning and thank you for inviting me to open your 2021 Congress with the theme 'Influencing and being influenced by the world around us'.

I begin by paying my respects to the traditional and original owners of this land— the palawa people. I acknowledge the contemporary Tasmanian Aboriginal community, who have survived invasion and dispossession, and continue to maintain their identity, culture and Indigenous rights.

Our First Nations people have survived invasion and dispossession. However, colonisation has come at great cost to them. Data on self-assessed psychological distress among Indigenous Australians indicates that in 2019 31% reported 'high or very high' levels of psychological distress; 2.3 times the rate for non-Indigenous Australians.<sup>1</sup> Moreover, the rate of suicide for Aboriginal and Torres Strait Islander people is double that of non-Indigenous Australians<sup>2</sup> and the rate of hospitalisation for self-harm is three times the non-Indigenous rate.<sup>3</sup> I note that there will be clinical updates at this Congress on Indigenous mental health.

I also note that you have a session on forensic psychiatry, perhaps the only relevant topic which I am able to speak to you about with at least a little knowledge. But first, as you are here in Tasmania, it is worth mentioning that some 40 kilometres to the North West of Hobart is the historic New Norfolk Asylum (now called Willow Court) which opened in 1827 for invalid convicts and those transported to Van Diemen's Land who had a psychiatric illness.

---

<sup>1</sup> Australian Bureau of Statistics, 2019. [National Aboriginal and Torres Strait Islander Health Survey, 2018–19](#). ABS cat. no. 4715.0. Canberra: ABS.

<sup>2</sup> <https://www.aihw.gov.au/suicide-self-harm-monitoring/data/populations-age-groups/suicide-indigenous-australians>

<sup>3</sup> <https://www.aihw.gov.au/suicide-self-harm-monitoring/data/populations-age-groups/intentional-self-harm-hospitalisations-indigenous>

From 1830 the site was developed into a large complex of hospital buildings for the mentally ill and intellectually disabled and functioned as such until its closure in November 2000.

The Willow Court complex, a three-sided sandstone courtyard with its two-storey Georgian façade designed by colonial architect John Lee Archer, can be visited at weekends if you go to the adjacent Agrarian Kitchen Eatery for lunch in a renovated ward building constructed in the 1920s.

Forensic psychiatry in the twenty-first century has advanced considerably since the colonial days when convicts diagnosed as lunatics, imbeciles or idiots were housed at the New Norfolk Asylum. And yet, the legal defence of insanity based on the M’Naghten Rules of 1843, formulated when Daniel M’Naghten shot and killed Edward Drummond, thinking he was the Prime Minister Sir Robert Peel, still exist in many common law jurisdictions more than 170 years later.

The M’Naghten rules state:

That everyone be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

A variation of that rule remains the law in the Tasmanian Criminal Code – defect of reason from disease of the mind has been replaced by the term ‘mental disease’ but the two limbs of the rule remain with an addition in relation to irresistible impulse.

This law, together with the law in relation to fitness to plead, was recently reviewed by the Tasmania Law Reform Institute.<sup>4</sup> The Institute recommended against abolishing a separate defence of insanity which would mean a mental disorder or disability could only be used to deny the mental element of an offence. While it recommended renaming the defence and changing the qualifying condition from a 'mental disease' to mental or cognitive impairment with a detailed definition of each of these terms, it retained the two limbs of the M'Naghten Rules referring to an incapacity to understand the nature and quality of the act or know that the act of or omission was one which he or she ought not to do or make. The recommended name change is from the defence of insanity to 'defence of mental or cognitive impairment'.

The Report also recommended that the test of fitness to plead should shift from a cognitive approach to a more supportive decision-making approach with a focus on assisting the accused to participate meaningfully in the trial.

The recommendations have yet to be implemented and so we still have the 'defence of insanity' in the Tasmanian Criminal Code.

Fitness to plead and defence of insanity arise rarely in criminal trials despite the prevalence of mental disorder in offenders caught up in the criminal justice system. In most cases, those with a mental disorder will stand trial or plead guilty in the usual way and if convicted face the normal sentencing process. The question then arises as to the relevance of mental impairment to the sentencing outcome. Whilst it is mostly mitigating, operating to reduce the severity of the sentence, if it suggests that the offender may be a risk to society because of the condition, it may operate as an aggravating factor.<sup>5</sup>

---

<sup>4</sup> Tasmania Law Reform Institute, *Review of the Defence of Insanity in s 16 of the Criminal Code and Fitness to Plead*, Final Report No 28, December 2019.

<sup>5</sup> *Veen v The Queen* [No 2] (1988) 164 CLR 465.

The leading Australian decision on the relevance of mental impairment as a mitigating factor is the Victorian Court of Appeal's decision in *R v Verdins*.<sup>6</sup> The Court explained that it may be relevant to sentence in six ways:

1. To reduce the moral culpability of the offending conduct which affects what is appropriate in terms of a just punishment and denunciation.
2. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
3. Whether general deterrence should be moderated or eliminated because a mentally impaired offender is an inappropriate vehicle for general deterrence.
4. Whether specific deterrence should be moderated or eliminated. As with principle 3, this depends on the nature and severity of the symptoms at the time of offending or at the time of sentence or of both.
5. The existence of the condition at the date of sentencing may mean that a given sentence will weigh more heavily on the offender than it would a person of normal health.
6. Where there is a serious risk of imprisonment having a significant effect on the offender's mental health this will be a factor tending to mitigate punishment.

This decision is frequently relied upon in sentencing submissions, and it has been cited more than two thousand times by Australian courts (as well as being cited in New Zealand).<sup>7</sup>

In two studies I have been working on with colleagues, we analysed the sentencing remarks in sentencing decisions for 140 offenders in Victoria and 167 sex and violent offenders nationally. In each study we found that mental impairment was raised as an issue for almost 30% of offenders and the *Verdins* Principles were referred to in most of the cases where it was found to be mitigating for 80% of offenders with a mental impairment in the Victorian study and 57% in the National Study. In both studies it was the fifth

---

<sup>6</sup> (2007) 16 VR 269.

<sup>7</sup> 2040 citations according to LawCite; 1013 according to CaseBase and 412 to FirstPoint.

principle that was relied on most often, namely cases where mental impairment made the sentence of imprisonment more onerous. The sixth principle was the next most commonly relied upon principle – where imprisonment would aggravate the offender’s mental condition.

It appeared that mental impairment was relied upon more frequently in Victoria than in other Australian jurisdictions. In one of the Victorian cases in the national study, the sentencing judge said:

I note that in recent times, King J in the Supreme Court has raised her concerns as to the way in which *Verdins* submissions have become commonplace in most pleas before that court, with very limited and often unsatisfactory materials placed before the courts. I agree with King J's remarks and add that there is scarcely a plea proceeding in this court without some claim made on *Verdins*. Generally unsatisfactory, sometimes even hopelessly flimsy reports are relied upon. I fear that that decision has spawned an industry.

In a more recent decision, *Brown v The Queen*, the Victorian Court of Appeal referred to the need for rigour in relation to commissioning and preparation of psychological and psychiatric reports for sentencing purposes and of the inadequacy of some of the reports presented to sentencing courts.<sup>8</sup> I should add that in *Brown’s case*, the Court made it clear that the psychiatric and psychological reports provided to the sentencing judge in that case were of the highest quality.

In *Brown v The Queen* the Court reversed a previous decision by holding that an offender diagnosed with a personality disorder should not be treated differently from any other offender who seeks to rely upon an impairment of mental functioning as mitigating a sentence in one or other of the ways identified in *Verdins*. The Court also made some interesting comments on the classification of personality disorders, contrasting the categorical approach of DSM 5 with the dimensional approach of ICD-II.<sup>9</sup>

---

<sup>8</sup> *Brown v The Queen* [2020] VSCA 212, [63]-[64].

<sup>9</sup> [41]-[58]. See discussion of this case in Danny Sullivan and Adam Deacon, ‘Personality Disorder and Moral Culpability: *Brown v The Queen*’ (2020) 28 JLM 45-53.

The Court also said:<sup>10</sup>

Evidence-based decision-making is, of course, precisely what *Verdins* both authorises and requires. What the sentencing judge needs is not a diagnostic label but a clear, well-founded expert opinion as to the nature and extent of the offender’s impairment of mental functioning and, so far as it can be assessed, of its likely impact on the offender at the time of the offending and/or in the foreseeable future.

Whether appeal courts in other jurisdictions will agree with the Victorian Court of Appeal that an anti-social personality disorder can engage the *Verdins* principles remains to be seen. The Court of Appeal of Western Australia has left it open and has pointed out that an anti-social personality disorder may act negatively as much as positively in the sentencing process by increasing the importance of personal deterrence and the need to protect the public.<sup>11</sup> The Court in *Brown* made the same point<sup>12</sup> but on the basis of the expert evidence in *Brown* they were satisfied that the offender’s personality disorder significantly diminished her moral culpability and the applicability of general deterrence (*Verdins* 1 and 3) as well as having a bearing on the kind of sentence that should be imposed (*Verdins* 2).

In Tasmania, in *Gordon v Tasmania*,<sup>13</sup> a decision delivered by the Court of Criminal Appeal last November, the Court accepted that personality disorder could engage the *Verdins* principles – in that case the offender had as well as a borderline personality disorder, post traumatic stress disorder and a history of substance abuse.

Clearly, from appellate decisions in other States, there is more to be said on the subject.

---

<sup>10</sup> [61]; see also *Thomas v The Queen* [2021] VSCA 97 at [32] noting the importance of rigorous scrutiny in cases where mental functioning is impaired by self-induced intoxication.

<sup>11</sup> *Bogers v the State of Western Australia* [2020] WASCA 174 (23 October 2020).

<sup>12</sup> [70]

<sup>13</sup> [2020] TASCRA 17.

Thank you for inviting me to open your Congress. I was delighted to accept the invitation – in part because I owe a debt of gratitude to the late well-known psychiatrist Dr Eric Cunningham Dax. In the 1970s he worked for the Mental Health Services Commission here in Tasmania and was an active member of the Australian Institute of Criminology. He encouraged me to select as a research topic, the use of psychiatric reports in sentencing at the beginning of my academic career. So, it was a pleasure to revisit that topic briefly for my opening address.

Thank you.