Law Reform Submission

Mental Health Diversion Application Additions to the Queensland Jurisdiction
By Scott J. Sier Principal Lawyer
16.4.25

1. In Queensland many people suffer from mental conditions at the time of their offending, and they are criminalised for it. According to the ABS 42% of people will suffer from a mental condition during their age of criminal responsibility. https://www.abs.gov.au/statistics/health/mental-health/national-study-mental-health-and-wellbeing/2020-2022

2. In Queenlsand securing a mental health diversion is archaic and derived from the M'Naghten rule(s) House of Lords in 1843. These are codified extremely old principles that basically require the defendant to be suffering from temporary or permanent fitness deficiency. The test is archaic and leads to absurd outcomes including convictions for fairly regular people that can suffer with mental impairments and conditions at the time of their offending. Any person can suffer with a mental condition as a result of events that can induce such mental conditions, bereavement, socio economic factors, hormonal related events such as post-natal depression and polycystic ovaries, recurring bouts of anxiety and depression and other disorders categorised in the DSM-5.

3. Currently there is no legal release value in Queensland law to dismiss matters or order mental health treatment plans for everyday people suffering from temporary DSM-5 incidents. This is wholly inadequate in a modern Queensland. We are falling behind other states in this regard. In this state we basically rely on ancient laws to release offenders into the mental health court systems rather than modern progressive laws of treatment and management.

Extracted DSM-5:

4. The DSM-5 includes several disorders that may have underlying physiological components, but it primarily focuses on mental and behavioural disorders, rather than directly addressing physiological conditions themselves. Some conditions within the DSM-5, such as certain sleep-wake disorders, feeding and eating disorders, and those related to somatic symptoms, can have significant physiological consequences or be influenced by physiological factors.
5. Neurodevelopmental Disorders:

6. This category includes conditions like autism spectrum disorder and attention-deficit/hyperactivity disorder (ADHD), which are known to have neurobiological underpinnings.
7. Schizophrenia Spectrum and Other Psychotic Disorders:
8. These disorders are associated with changes in brain structure and function, and while the DSM-5 primarily focuses on the clinical presentation, it acknowledges the role of biological factors.
9. Bipolar and Related Disorders:
10. These disorders involve mood swings and are thought to be influenced by neurotransmitter imbalances and other biological factors.
11. Anxiety Disorders:
12. While primarily defined by behavioural and emotional symptoms, some anxiety disorders, like panic disorder, have physiological correlates like increased heart rate and breathing.
13. Feeding and Eating Disorders:
14. Conditions like anorexia nervosa and bulimia nervosa have significant physiological consequences, including malnutrition, electrolyte imbalances, and cardiovascular problems.
15. Sleep-Wake Disorders:
16. Conditions like insomnia and narcolepsy are directly related to sleep-wake cycles and have measurable physiological effects.
17. Somatic Symptom and Related Disorders:
18. This category includes conditions like illness anxiety disorder and factitious disorder, which are characterized by physical complaints and distress, and while the focus is on psychological factors, physiological factors can also play a role.
19. Important Note: The DSM-5 is not a tool for diagnosing medical conditions or disorders. It's a manual for mental and behavioural disorders, and while it acknowledges the importance of physiological factors, it primarily focuses on the psychological and behavioural aspects of these disorders.

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20. The range of sentencing options including community service, probation and parole are quite often illusory non-existent penalty systems that have no meaning in the context of sentencing a person with a mental health condition. Specific deterrence has no effect, general deterrence has no effect.

21. These sentencing outcomes do not treat the condition. They do not usually incur breach for non-compliance. Where non-compliance is called upon with breaches of these orders are often the catalyst for unreasonable incarceration.

22. This can occur with very low level minor offending that starts compounding into terms of imprisonment for a set of very minor things. This frequently affects vulnerable people who are deemed fit to be sentenced including homeless, vulnerable persons, indigenous people suffering from trauma, DV victims that suffer from DSM-5 mental conditions as a result of factors that are not their own fault. Even overworked and stressed citizens in a modern heavily debt burdened society that are quite literally driven into a mental condition by circumstance.

23. The complete dismissal of matters upon the declaration of a mental health condition is an option under federal law under s20BQ of the Cth Code in Queensland Courts and it is applied where advocates are aware of its existence.

24. There is the ability to order ongoing mental health treatment with a treating psychologist and psychiatrist that see an offender actually involved in paying for their ongoing treatment. Usually this involves compliance and it is intensive and requires mental health treatment plans of a minimum of 6 months + This is self maintained however the treating psychologist or psychiatrist can be ordered to inform the court of non-compliance. Also adjournments can take place where the magistrate insists on seeing proof the order was completed successfully and to encourage ongoing compliance to reduce recidivism and manage that illness.

25. New South Wales has Section 14 of the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW) (formerly s32) it is analogous in many respects to s20BQ of the commonwealth criminal code.

26. If the order is breached the defendant can be sentenced through the law. The good thing about this law is that there is no finding of guilt. In Queensland we find people guilty when they are suffering from a mental condition at the time of an offence and then our lawyers attempt to proceed in such a way that sees them being placed on probation with a conviction not recorded. This still enters a conviction without a conviction being recorded. This means that a person cannot travel to some countries or be involved in some types of work because a finding of guilt has been recorded. They may lose their blue card.

27. The application process for a s14 can occur at first mention, pre trial, mid-trial when factors are established or after trial and abstains from the entering of guilt onto the record. It can cut down the need for defended hearings and reduce pressure on the course. It can reduce compounding sentences for minor matters with people who have rightly suffered from mental conditions. If someone with a broken leg were to use lawful violence in self defence to protect themselves for example this would be a proportionality factor.

Currently we cannot use the defence of a temporarily unsettled mind on a clinically proven basis like other states to avoid the entering of a plea and guilt.

28. These amendments and inclusions are a critical safeguard that could be available for up to 42% of the population who may at one time suffer from a mental health impairment at the time of their offending. One in 2.38 people reading this submission may very well need to use these provisions to escape the throes of unreasonable penalties. Especially where Queensland insists on applying mandatory minimum sentences. They might be operationally effective but without a release valve in circumstances of genuine need we can create a web of laws that hurts society and citizens.

Some Examples:

You are bereaved from the death of your mother and suffer temporarily from depression and anxiety. You attend the funeral and an aunty says "I am glad the bitch is dead" you break her sunglasses. In Queensland we criminalise this with a wilful damage charge. We enter a plea of guilty. A conviction flows and it is not recorded. This sits on your history as a finding of guilt on your history. In New South Wales It could be diverted.

Order
You are diverted to engage in 6 monthly sessions with a psychologist. No finding of guilt no sentence and no conviction.

Another Example:

You are bereaved from the death of your mother and suffer temporarily from depression an anxiety. Not quite thinking straight , you take a pen at the desk of a store next to the wake. You are charged with stealing. This might affect your history or ability to obtain employment.

Order
You are diverted to engage in 6 monthly sessions with a psychologist. No finding of guilt no sentence and no conviction.

Another example:

You are suffering from anxiety and depression as a result of domestic violence. You have 2 glasses of wine and decide to drive to your fathers house to get away from the abuse.

You drive 500 meters and blow 0.05. You are unable to escape the mandatory minimum penalty and are now at risk of violence and are unable to drive away from it in the future.

Order
You are diverted to engage in 6 monthly sessions with a psychologist. No finding of guilt no sentence and no conviction.

All these scenarios could benefit from mental health diversion and treatment.

Section 14 of the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW) Fact Sheet

This section allows a Local Court to make orders for defendants with mental health or cognitive impairments, even if they are pleading not guilty to the offense.

Diversion from Criminal Justice:

A successful s14 application results in the charges being dismissed, and the defendant being discharged, potentially with conditions like attending treatment.

No Criminal Conviction:

No criminal conviction is recorded against the defendant, and they are not considered guilty of the offense.

Focus on Mental Health:

The court considers whether the defendant has a mental health or cognitive impairment, and whether dealing with them through the mental health system is more appropriate than criminal justice.

When is it used?

Summary Offenses:

Section 14 applications are primarily used in summary criminal proceedings or indictable offenses triable summarily.

Mental Health or Cognitive Impairment:

A magistrate can make a s14 order if they believe the defendant has, or had at the time of the offense, a mental health or cognitive impairment.

Appropriateness:

The court also considers whether it's more appropriate to deal with the defendant through the mental health system than through the criminal justice system.

What happens if it's successful?

Dismissal of Charges: The criminal charges against the defendant are dismissed.

Discharge: The defendant is discharged, potentially into the care of a responsible person or on the condition that they attend a specific place or person for assessment, treatment, or support.

No Criminal Conviction: No criminal conviction is recorded.

Potential Treatment Plan: The court may order the defendant to comply with a mental health treatment or support plan, which may include taking medication, attending therapy, or following other medical instructions.

In essence, a s14 application is a way to address mental health issues within the criminal justice system, providing an alternative to a criminal conviction and allowing for a more appropriate and potentially beneficial path for the defendant.

"Use of Force Law Reform in Northern Australia"

By Scott J. Sier Lawyer – [redacted]

Use of force laws affect millions of people that have in the past been arrested and the millions yet to be arrested in the criminal justice system. The limitation to using force upholds the presumption of innocence to treat accused persons as if they have not yet been convicted.

The Police Powers Responsibilities Act 2000 Qld allows a police officer to use force deemed reasonable in the circumstances, however there are limited to no prescriptive definitions of what reasonable is. This is similar in other states such as Western Australia Section 609 of the Police Force Regulations 1979 which again provides limited prescriptive factors as to how reasonable use of force operates.

Section 27 and 28 of The Northern Territory Criminal Code attempts to address use of force in a different way with "justification for the use of force" it provides "adequate time to comply" before certain force can be justified. Prescriptive factors like this need to be included in a uniform way to the use of force laws generally. However, they are especially required in the Northen States of Australia where more vulnerable indigenous persons live and where relations with police are limited and accidents keep occurring.

In the North of Australia force is used disproportionately against indigenous persons. The Queensland Operating Procedure Manual provides more prescriptive factors such as using the "minimum force required" for a lawful purpose. This is an ideal standard but it is unrealistic and unenforceable for lawyers and decisions makers as they are internal rules.

The lack of detail in the use of force laws frequently lead to miscarriages of justice whereby public lawyers advise defendants to plead guilty in cases where the matter should be dismissed. There are a range of reasons for this.

1. Dismissal requires complex litigation with a summary trial lawyer, which is often not accessible to the defendant in communities where the lawyers are often circuiting.
2. Being inferior jurisdiction indictable matters they are heard in Magistrates Courts usually with inexperienced counsel that are not willing or able to run a summary trial.
3. Public funding models are aimed at "preventing unnecessary litigation", it is common for Publicly funded Solicitors to never run a summary trial, often times due to a lack of merit assessment to do so internally within their own organisation. Merit cannot be granted fairly without more prescriptive use of force law

There are limited or no guiding principles in the legislative instruments that regulate use of force. Lawyers rely on complex case law and the opinions of all parties reviewing the material. The accessibility of the right to dismiss a case for unlawful use of force is largely inaccessible yet it is critical to regulate use of force accidents. Often times convictions are sought against a defendant where unreasonable force is used to prevent the defendant from suing the police force for assault.

Case Studies:

In Queensland Peter O'Keefe was walking across a hot bitumen road in Doomadgee when he was detained without charge. He simply tried to get his thongs. The police officer pushed Mr Okeefe in the chest leading into a cascading escalation of force that resulted in his tibial head and fibular being broken, his ACL and MCL ligaments being torn, the injuries led to permanent disfigurement. Mr O'Keefe's case was ultimately dismissed for unlawful use of force at summary

The Human Rights Act 2019 section 30(3) Qld ensures that those not yet convicted of an offence must be treated in a way that is appropriate for a person that has not been convicted of an offence. There is also a presumption of innocence until a person is found guilty.

trial but not without significant litigation stress to him and over 10 in person court appearances. The extent of the litigation required to have these cases dismissed prevents the law from functioning properly with defendants often pleading guilty prior to summary trial or breaching bail and pleading guilty to all matters to be released. Such matters would be best dealt with as an early pre-trial motion / hearing to dismiss without the defendant's presence required.

Around 2018 a similar failed use of force by a young officer with no cultural training resulted in the death of Neil Banjo in Normanton Queensland. Both of these tragedies were completely preventable with better training and laws.

In the **Northern Territory** Officer Zachary Rolfe shot 19 year old Kumanjai Walker 3 times and a prosecution against the officer failed.

In **Western Australia** there have been commissions into the unlawful use of force.

Legislative amendments proper consideration is given to the overall circumstances by the officer before applying force, including but not limited to the **persons culture, age, health, disability or any other needs.**

Our laws should permit **force that is proportionate to the risk faced by any police officer in any given situation.** Proportionate force is the standard available to a private citizen for the purposes of self-defence and is a standard that most people expect police are already held to.

Subjective views on what is reasonable force should be rescinded for objective standards.

DRAFT AMENDMENTS UNDERLINED BELOW

Police Powers and Responsibilities Act 2000 QLD

615 Power to use force against individuals

(1) It is lawful for a police officer exercising or attempting to exercise a power under this or any other Act against an individual, and anyone helping the police officer, to use reasonably necessary force to exercise the power.

Example— A police officer may use reasonable force to prevent a person evading arrest.

(2) Also, it is lawful for a police officer to use reasonably necessary force to prevent a person from escaping from lawful custody.

(3) The force a police officer may use under this section does not include force likely to cause grievous bodily harm to a person or the person's death.

Additional Amendments Sought

(4) Any force applied should be proportionate to the risk faced by a police officer in any given situation.

(5) Any force used must be necessary to achieve a legitimate purpose and must be the minimum force required as perceived by the officer at the time.

(6) Proper consideration must be given to the overall circumstances before applying force which include but are not limited to the persons culture, age, health, disability or any other needs.

(7) Adequate time must be provided for a person to comply with directions.

(8) Police officers must attempt to comply strictly with sections 1-8.

The Human Rights Act 2019 section 30(3) Qld ensures that those not yet convicted of an offence must be treated in a way that is appropriate for a person that has not been convicted of an offence. There is also a presumption of innocence until a person is found guilty.

Recommended Discrete Indigenous Community Training Models

It is unfortunate that we have continued to relegate training programs to single day online courses or conferences in a capital city. This was the ineffective foundational training base for Constable James Limpus, the officer who broke 65 year old Peter O'Keefe's leg severely disabling him. The need for better police training was found by the coroner in the death of Neil Banjo in 2018. Still, no training program has been created or approved by any person related to the criminal justice system since these tragedies.

It is common that young police officers are sent into discrete indigenous communities to serve and to fast track their careers which is commendable. These communities have unique remote stressors of isolation as well as lack of cultural understanding, historical understanding and social opportunitie.. This can lead to lower moral and a scenario where the younger officer simply does not want to be in this environment, especially in the hotter months when it is nearly 40c and in this fatigued situation accidents happen. The appropriate support should be put in place to ensure that young officers are supported with the proper training and to ensure their needs are met. It must also be noted that a particular temperament should be selected in young officers intending to serve in indigenous communities.

Training for work in indigenous communities is not something that should only occur in the field. Discrete indigenous communities are complex places that require specific training. Officers that have spent longer periods of time in indigenous communities usually achieve better outcomes with respect to their general dealings and the use of force.

Younger officers are often paired with other young officers and are not in the field with older members of the police force with critical experience. If the police insist on the pairing of young partners, then adequate training should occur before young partners begin to operate together. Being allocated with an experienced partner would result in better arrest outcomes for young officers. Being allocated with indigenous partners would also be a most desirable outcome where possible.

Training should be based around the following structure and content.

1. Meeting with local lawyers with ATSILS and Community Justice Groups, their insight will provide a different perspective on how to interact with members of the community.

2. Meeting with criminal defendants in a non-suspect context to provide their insight as to how it feels to be governed by white laws and white people and why non-compliance with directions is often chosen over compliance.

3. The effects of alcohol on indigenous persons.

4. The history of displacement and removal in the particular indigenous community, the sordid history of missions, past racist legislation and lack of anti-discriminatory legislation.

5. Current laws with respect to the human rights act and the significant obligations of police officers with respect to s30 and s32 of the act.

6. The use of language, body language, eye contact and normative base levels of verbal interaction with regard to swearing in communities.

7. The history of high suicide and high death rates in the community.

8. Unique kinship roles specific to the indigenous community and individuals in the community to the extent that they can be explained at the time of the training.

9. Understanding the unique health and education outcomes of indigenous people and their shorter life cycles, including a focus on intergenerational trauma and transgenerational trauma.

10. Understanding the inextricable link that indigenous persons have to their traditional lands, the effect of losing their land and the frustration that comes with this. The resentment that often flows from the enforcement of laws on indigenous persons that are often not enforced on less vulnerable members of the community.

11. Understanding that these communities are culturally classified as indigenous traditional lands and that any other non-indigenous person is a visitor on these lands. This training will act as a formal invitation to police to serve the community to break down any risk of an us versus them relationship.

12. Importantly training is not seeking to undermine police to tell them how to do their job quite the contrary, the intention is to open lines of communication and have new police officer understand the unique features of the community.

13. Procedures that can assist in facilitating safe use of force and safe arrests.

    1. The age and health of the individual being arrested or detained should always be considered. This might has assisted in the case of Neil Banjo, Peter O'Keefe and the tasing of Garrick Yam a blind man with no violent history.

    2. Explanation of what the police require from the individual and why the individual has not yet complied. (eg in Peter's case it was the need for thongs)

    3. Informing the individual what type force is going to be used against them and why before the application of force allowing the individual time to respond and assist.

    4. Response and Understanding: the individual should be given adequate time to respond to directions and the police officer should ask the individual if they understand the direction before applying force.

The above procedures are modelled to the legislative amendments sought to s615.

Recommendation:
Training grants should be provided to independent bodies, police, community justice groups and legal organisations. The outcome of this training would be to certify each officer placed in discrete indigenous communities and designated high indigenous population communities. This will to serve as an invitation/welcome to country in a sense and provide a guide to enforcing the law in these communities. This approach will not only save lives but improve morale and general interactions with community and police.