



“

**Injustice anywhere
is a threat to justice
everywhere.**

MARTIN LUTHER KING JR

Collein and John Avery (Source: TASC)

TEN YEARS ON, TASC CELEBRATES A LANDMARK LEGAL DECISION

Ten years ago, TASC was involved in a landmark legal decision, still widely known as the “Avery Case”.

A decade later, we’re celebrating this important ruling, which led to people with disability getting a fairer deal in Queensland’s justice system.

On 5 November 2010, the Queensland Court of Appeal overturned the criminal record of Melisa Avery on the grounds that she had not been fit to plead guilty. Melisa is a Toowoomba woman who lives with a significant intellectual

disability and complex mental health diagnoses, including anxiety.

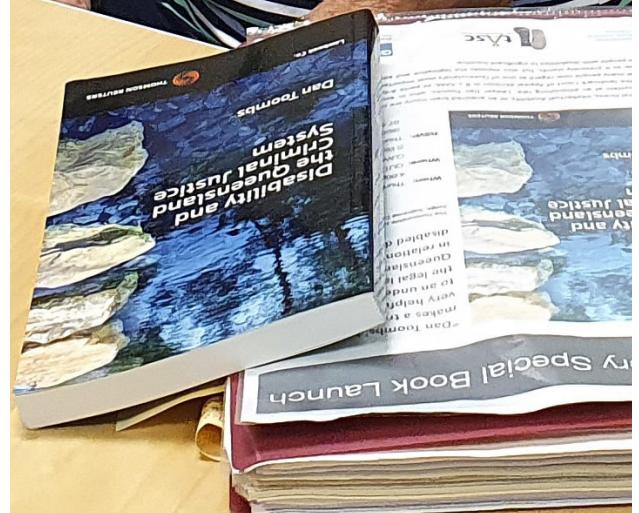
The ruling wasn’t just notable for Melisa and her parents, Collein and John Avery. Now retired schoolteachers living in Redcliffe, the Averys had already spent many years pursuing justice for their daughter.

The ruling was also important because in handing it down, the Court made a strong case for changes to the Queensland Mental Health Act.



Calling Melisa's situation a "miscarriage of justice", the Court made recommendations for new measures that would safeguard the legal and human rights of people with disability and mental illness.

Collein and John Avery took up the cause and spent years campaigning for law reform. And in 2015 the Queensland Government introduced major changes to the Mental Health Act.

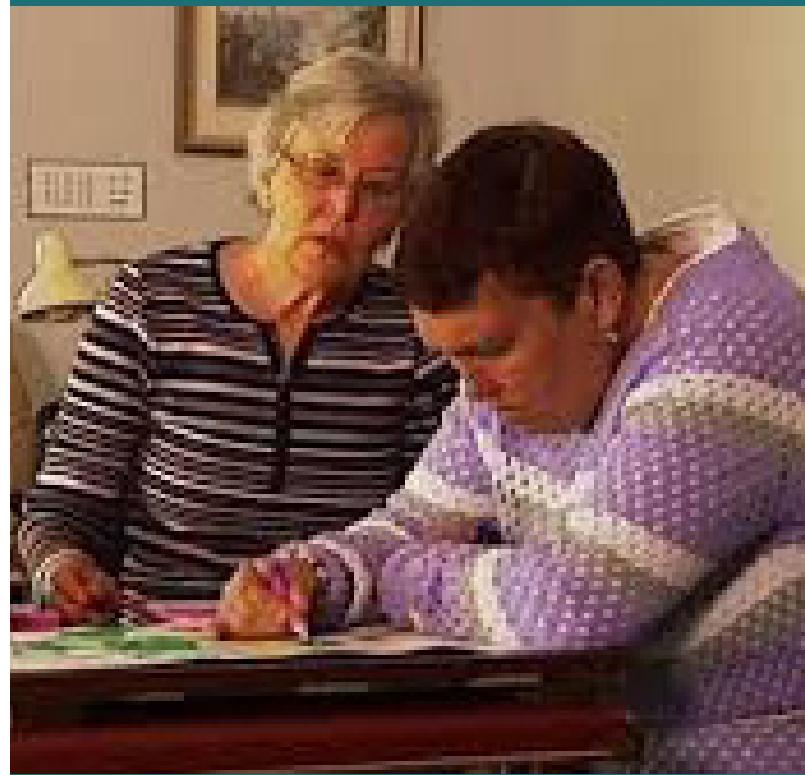


Ten years on, why is the Avery case so significant?

To understand the full impact, it's important to remember that at the time of the successful appeal, magistrates had fewer powers to support people with disability and mental illness.

They could not dismiss a summary (minor) offence on the grounds that a person was not fit to plead guilty. They had limited ability to refer people to more appropriate supports that might divert them from the criminal justice system.

Attitudes were different, too. Barrister Dan Toombs, TASC's former CEO, played an important role in the Avery case.



Collein and Melisa Avery (Source: ABC News)

“

**Our love
for Melisa is
unconditional**

“

Do the crime, do the time

Dan explains that in the early 2000s, there was a less sophisticated understanding of the link between offending behaviour and disability or mental health diagnoses.

In Melisa’s case, she has intellectual disability that (as psychologists’ reports to court described it) places her “in the bottom one per cent of the population”.

While Melisa has high level social skills, her cognitive ability is more like that of a 7 or 8 year child.

Despite this and her diagnoses of anxiety and borderline personality disorder, Melisa was treated by the courts like any other offender. As John Avery puts it now, the prevailing attitude was very much “**you do the crime, you do the time**”.

As devoted parents, the Averys wanted to do the right thing. Collein says “our love for Melisa is unconditional. But of course we did not condone her behaviour”.

John and Collein could see that Melisa’s offences, which were minor, were directly related to her diagnoses.

For example, Melisa went through a stage of taking her neighbour’s mail. This was because the way the letters stuck out of the mailbox triggered anxiety. As her legal guardians, however, Collein and John were encouraged by a series of duty lawyers to plead guilty. Luckily, meeting Dan – who was then working with TASC on a specialist Disability Law Project – helped them turn the corner.

"

Dan tapped us on the shoulder and asked did we mind if he sat in on the case. We didn't know him from Adam, but we said yes. And he said, 'This is not going the way it should be going. Melisa should not be pleading guilty'. From that day, he took over the case.

JOHN AVERY, 2020



LEADING UP TO THE APPEAL

Leading up to the 2010 appeal, Melisa had appeared in Toowoomba Magistrates Court numerous times between 2001 and 2006. She had pleaded guilty to and was convicted of a string of minor offences. John and Collein had supported her at every court hearing, travelling from Redcliffe on their own time and at their own expense.

At that time, when it came to summary offences, magistrates could not assess people's fitness to stand trial. However, the Mental Health Court had the power to assess people's capacity. When the Averys and TASC joined forces, they succeeded in getting Melisa's cases heard by the Mental Health Court. The Court found her "**permanently unfit for trial**" on the grounds of her disability and mental illness.

For an insight into how the Averys and TASC came to cross paths, we recommend Dan Toombs' book, **Disability and the Queensland Criminal Justice System** (available at Booktopia). It includes a beautifully written introduction by Collein that sheds light on the events leading up to Melisa appearing in Toowoomba Magistrates Court, and the Averys being represented by Dan.

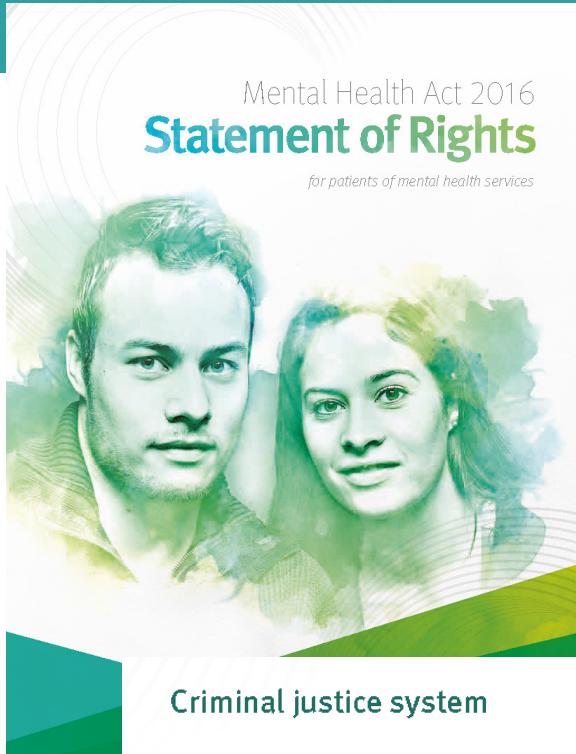
This exposed a clear gap in the law. If Melisa, whose disability was permanent and diagnosed at a young age, was found unfit to stand trial in one court ... why had she been found guilty so many times in another court?

A MISCARRIAGE OF JUSTICE

Seeking answers – and justice – Collein and John lodged an appeal against Melisa’s previous convictions, with support from Dan and TASC.

And the Court of Appeals listened. Not only did it expunge (set aside) all of Melisa’s previous convictions, it declared that these were a “**miscarriage of justice**”.

In handing down the decision, the Court made a strong case for reforms to how people with disability and mental illness were treated in the Queensland legal system. This set the foundation for the Avery’s campaign to change the Mental Health Act.



Criminal justice system

What rights do I have in the criminal justice system?

A relatively small number of persons with a mental illness, intellectual disability or other mental condition come into contact with the criminal justice system. In this situation, you would have the right to:

- request a magistrate consider your mental state at the time of the alleged offence or at the time of the hearing before the magistrate
- for a serious offence, request a psychiatrist report be prepared at no cost to provide an opinion on your mental state at the time of the alleged offence, or at the time of the hearing before the court
- for a serious offence, request the Mental Health Court to consider your mental state at the time of the alleged offence or at the time of the court hearing.

After considering you or at the time of the may dismiss the ch made this decision treatment support.

You have the right t months. You or som the Tribunal for a re

Further information and supp

How can I get further information on my rights?

For a copy of th including guide Mental Health A www.health.qld.gov.au

AFTER THE APPEAL

The Avery case is historic because the legal reforms it inspired have had far-reaching consequences for people with disability, mental illness, acquired brain injury and other vulnerabilities. As Dan Toombs explains:

“People with disability do not fare well in prison. They tend to serve longer sentences, they may have difficulty following rules so they end up on breaches. They are often treated badly while in gaol”.

The changes to the Mental Health Act had a preventative or diversionary focus. They allowed magistrates to refer people to government agencies or disability service

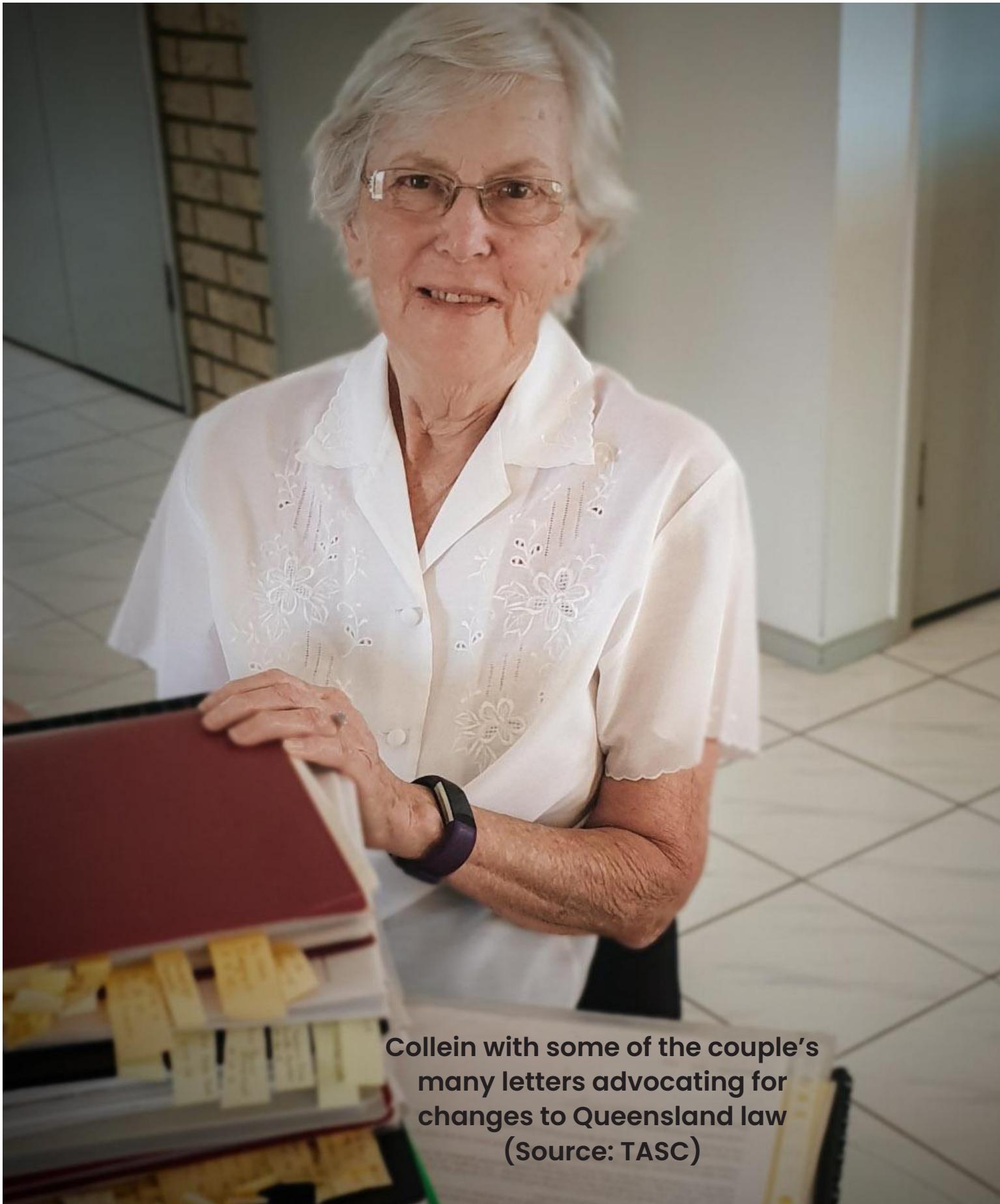
When Cameron Dick, Minister for Health at the time, introduced changes to the Mental Health Act, he paid tribute to Collein and John.

He said it was through the Avery’s “strong, consistent and persistent advocacy” that people with a mental illness or an intellectual disability “would now be treated fairly in hearings before magistrates”.

<https://statements.qld.gov.au>.

providers who could provide the expert, structured behaviour support and psychological care needed to prevent reoffending.

They also allowed magistrates to dismiss cases on the grounds of impaired capacity or a person’s mental state at the time of offending.



**Collein with some of the couple's
many letters advocating for
changes to Queensland law**
(Source: TASC)

IMPACT OF THE AVERY CASE

“

**HE CALLED US UP TO THE BENCH
AND TOLD US TO ‘CONTROL’ MELISA
OR SHE WOULD FACE PRISON TIME**

In the early 2000s when Melisa was attending court, magistrates had limited power to set appropriate consequences for her. So she was fined. Put on community service orders. On bail. On probation.

To her parents' distress, on two separate occasions Melisa was put in the watchhouse for four hours: to "teach her a lesson" as Collein and John were told.

Years later, John and Collein still remember how humiliating it was to be berated by a Toowoomba magistrate who thought they should be able to "control" Melisa's behaviour.

“He called us up to the bench,” says Collein, “and told us, in no uncertain terms, that if he saw Melisa again, he would have no choice but to recommend prison time”.

THE AVERY'S LEGACY

In 2021, the system has improved. People with disability are still over-represented in the justice system. But now there are court supports and diversionary programs in place. TASC continues to run our Disability Law Project, which provides legal representation for people with disability facing criminal charges.

Attitudes have shifted. There is greater understanding that people with mental illness and cognitive impairment benefit from supportive early intervention, rather than harsh consequences or punishments that don't fit the bill.

Critically, the Avery's lasting legacy is that magistrates in Queensland now have more options to keep vulnerable people out of a prison system where they don't belong.

It took five years of advocacy and campaigning for John and Collein to see legislative changes through Parliament. (That journey is one that TASC will share another day). Because of the Avery's tenacity and "absolute passion about outcomes for people who are disadvantaged," as Dan Toombs describes it, other families don't have to go through what they and Melisa endured.

Ten years after that landmark court ruling, TASC thanks John and Collein for making a difference.