Contemporary Comment

Reforming the Criminal Law on Mental Incapacity

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Introduction

The New South Wales Law Reform Commission's ('NSWLRC') Report No 138 (2013), *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences* ('2013 Report'), represents a comprehensive and generally progressive set of reforms of the principles and practices relating to mental incapacity in criminal law. The systematic and reflective approach to mental incapacity the 2013 Report adopts provides a valuable opportunity for reform to this area of the criminal law and process. At this crucial juncture — when law reform references such as this one coincide with the now well-documented over-representation of individuals in the criminal justice system (NSWLRC 2012b) — we have the chance to propose amendments that, if implemented, will generate meaningful and positive change for the individuals involved in, and affected by, this part of the criminal law and legal process.

In its reference, *People with Cognitive and Mental Health Impairments in the Criminal Justice System*, the NSWLRC's task was to 'examine the law and practice regulating what happens to people with a mental illness or a cognitive impairment, or both, who commit crimes' (NSWLRC 2010:CP 5 [0.2]). This was a wide brief — covering legal provisions, prosecutorial and judicial decision-making, criminal procedure and sentencing — and the Commission itself acknowledged that its task was 'daunting and multi-faceted' (NSWLRC 2012a:CP 5 [0.9]).

In relation to substantive law alone, the scope of the Commission's reference encompasses 'fitness for trial', the mental illness defence, the partial defence of substantial impairment, and the offence/defence of infanticide (NSWLRC 2010:CP 5 [0.10]). In the 2013 Report, 'fitness to be tried' and the defence of mental illness are dealt with in chs 2 and 3, and the proposed extension of these laws to local and children's courts is covered in ch 12. To complete its coverage of the substantive law on mental incapacity, the Commission assesses substantial impairment in ch 4, and infanticide is discussed in ch 5.

In addition to the substantive law, the 2013 Report also deals with procedural matters relating to the process following a finding of unfitness (ch 6); the powers of the court and the Mental Health Review Tribunal ('MHRT'), and the factors that guide their decision-making; following a special hearing and a successful mental illness defence (chs 7 and 8); management of forensic patients (chs 9 and 10); the specific case of those patients who

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present a risk of harm at the end of their limiting term (ch 11); apprehended violence orders ('AVOs') as they apply to people with cognitive and mental health impairments (ch 13); and the retention of forensic materials (ch 14). These chapters contain numerous recommendations, which, taken together, indicate the exhaustive nature of the Commission's report.

Based on a close examination of the 2013 Report and associated Consultation Papers (NSWLRC 2010) and Question and Discussion Papers (QP1, DP1 2012), this comment critically assesses the Commission's proposals for reform of the law on 'fitness to be tried' (the procedural provision relating to incapacity that affects an accused at the time of his or her trial), and the insanity/mental illness defence (the defence relating to the kind of mental incapacity that affects an accused at the time of the alleged offence). This comment focuses on these areas of law (while providing an overview of proposals related to other areas of substantive law) because, together, these two legal provisions represent cardinal, double-sided safeguards — for vulnerable individuals charged with criminal offences, on the one hand, and against an abuse of court process that may follow if such individuals are tried and convicted, on the other. This comment assesses the proposals for reform in light of the purpose of the provisions and their current construction, concluding that, in general, the proposed reforms are largely positive in that, evidently mindful of the competing interests inevitably entailed in any law reform project, the Commission strikes an appropriate balance between the specific interests of defendants, victims, and legal and medical professionals and the general social and legal interests of liberty and security.

'Fitness to be tried': The significance of the accused in the criminal trial process

'Fitness to be tried' is the subject of the 2013 Report's first main chapter. 'Fitness to be tried' or unfitness to plead/stand trial is a procedural provision governing whether a normal trial can proceed when the accused has some kind of incapacity. Unfitness to plead is concerned with the accused's condition at the time of the trial — not at the time of the offence. Thus, unfitness is not a defence; being unfit to plead is not the same as being found not guilty, as it is not a judgment of either criminal responsibility or liability. Rather, a finding of unfitness means that no such determination can be made. Each accused coming before a criminal court is presumed to be fit to plead (*Eastman v The Queen*; *Kesavarajah*); that is, he or she is presumed to have standard cognitive, moral and volitional capacities. Where it is possible that a particular accused does not have the requisite capacities, a judge, sitting alone, conducts an inquiry into the accused's *un*fitness (the question for the court is whether he or she is *un*fit: taking the legal presumption seriously means that it is not strictly correct to refer to inquiries into fitness).

The LRC focused its attention on the test for a finding of unfitness. In New South Wales, inquiries into unfitness are formal processes, governed by the *Mental Health (Forensic Provisions) Act 1990* (NSW). But the test for unfitness is still covered by common law and, specifically, the *Presser* 'standards', which, broadly, provide that an accused should be able to understand the alleged offence, understand and follow the proceedings, and participate as required in the trial and in his or her defence (*R v Presser*). In its Consultation Paper 6, the NSWLRC canvassed reforms to reorientate unfitness around the absence of rational decision-making (2010:CP 6 [1.13]–[1.15]) or to subsume the *Presser* standards into a general principle of effective participation (2010:CP 6 [1.18]–[1.20]). But the LRC's

subsequent Discussion Paper, issued following consultations about potential reforms, tentatively concluded that the *Presser* standards are 'fundamentally sound' (NSWLRC 2012a:DP 1 [4]), and it proposed reforms to clarify the elements, and modernise and streamline the law (NSWLRC 2012a:DP 1 [4]).

In its proposed statutory test for fitness, the NSWLRC recommends that the *Presser* standards be updated and incorporated into statute (Recommendation 2.1) and that an overarching principle of a fair trial be incorporated into the test as a 'touchstone' for the determination of unfitness (NSWLRC 2013:[2.66]). This proposal maintains the common law approach of focusing on the individual capacities an accused requires to participate in a criminal trial, and is oriented around understanding and using information that is relevant to the decisions he or she will need to make. The NSWLRC had stated that such an option was not intended to raise or lower the standard for a finding of unfitness, but rather to tidy up the law (NSWLRC 2012a:DP 1 [5]).

The main advantage of the proposed statutory formulation of the test for unfitness is that it retains a focus on the essence of the law: participation in the trial process. It does this through the common law formulation, which is focused on particular capacities, rather than through a broad and singular test of 'effective participation', which had been discussed at the consultation stage (but which the Commission concluded, in such a format, might be over-inclusive or uncertain: NSWLRC 2013:[2.52]). The criminal trial is a process in which the accused is meant to participate in a meaningful way. As a process of argument and judgment, the trial is meant to be held *with* a person and his or her participation is 'central' to the meaning of the trial (Duff 1986:35).

This means that, as noted in the NSWLRC's Question Paper, it is (generally) in the best interests of the defendant to have a normal trial if possible (NSWLRC 2012a:QP 1 [5], [6]). Unfitness provisions do not just exempt an individual from trial and punishment; they also expose him or her to kinds of coercion to which others are not subject. Depending on the outcome of a 'special hearing' into the alleged offence, which may follow a finding of unfitness, an unfit accused may be detained. As the NSWLRC has noted, 'in practice, the only alternative in New South Wales is prison' (NSWLRC 2010:CP 5 [3.13]). This is a reason for keeping unfitness provisions narrow, and it is positive that the proposal for a statutory test also requires courts to consider utilising special provisions at trial if modifications to process will mean that a defendant could participate effectively in the trial process (Recommendation 2.2; see also Law Commission for England and Wales 2010).

The question then becomes what is gained by the addition of a 'touchstone' of the principle of a fair trial in the Commission's proposed statutory test of unfitness. The Commission itself points to an educational function, stating that it is 'desirable' that such a reference be included, 'especially so that expert witnesses who do not have legal expertise understand its significance' (NSWLRC 2013:[2.66]). Because the reference to whether a person can be afforded a fair trial is overlaid onto the updated test for unfitness, it might be thought to merely enhance the proposal, encapsulating the rationale of the law by expressly connecting the specific issue of unfitness with what is now an overarching guiding principle of trial process. But it is important to note that the law on unfitness has its own long history. As a procedural provision, unfitness has been analysed beneath broad rationales for criminal procedural rules such as threat to the integrity of the justice system, or unfairness to the accused (see, for instance, Campbell 1988; Chiswick 1992; Freckelton 1996). However, the functional significance of a plea in the medieval era, and the position of the accused as an informational resource for the court in the subsequent 'accused speaks' trial era, provides a more accurate explanation of the development of the law (*R v Mailes*; Loughnan 2012:

71–2). As this suggests, the law on unfitness predates any particular concern with due process.

More seriously, the reference to fair trial as a 'touchstone' for the test of unfitness runs the risk of diverting attention away from the concern that lies at the heart of the law. While one danger in trying an unfit individual is that a conviction may be unsafe, the true objection lies elsewhere: if an individual cannot understand what is being done to him or her, or why it is being done, or how it relates to the past offence, then punishment becomes a travesty. As Duff argues, if it is to be properly justified, punishment must aim to address the offender as a rational and responsible agent (Duff 1986:27). This is the corollary of the generally well-understood distinction between disposal, for the purposes of treatment (under mental health legislation), and punishment. As it stands, with an emphasis on capacity, the law on unfitness performs a communicative function (see generally Duff 2007), sending a message about the centrality of the role of the accused in the criminal trial. Unfitness to plead is a protection for the criminal defendant and, to be adequate, the test for unfitness must recognise and expressly take into account the multiple dimensions of participation in the trial process.

The defence of mental illness: Non-responsibility in criminal law

The defence of mental illness is currently a mix of statute and common law. As is well known, s 38(1) of the *Mental Health (Forensic Provisions) Act 1990* (NSW) provides that, if the person tried 'did the act or made the omission charged, but was mentally ill at the time', the jury should return a 'special verdict' — 'that the accused person is not guilty by reason of mental illness' ('NGMI'). The scope of the defence — which is determined by its three limbs — continues to be governed by the common law and, specifically, by the *M'Naghten Rules* (*M'Naghten's Case*). The defence is available across the board of criminal offences, although, in practice, it is usually raised in relation to the most serious crimes, like murder (NSWLRC 2010:CP 6 [3.6]). The defence bears the burden of proving insanity on the balance of probabilities (*Porter*). If an accused succeeds in raising the mental illness defence, he or she is liable to an alternative set of disposal measures that include detention. The availability of these measures reflects an enduring concern with dangerousness that has long driven this area of the criminal law and process (see generally Loughnan 2012). As the NSWLRC recognised, 'the modern defence of mental illness' is grounded in 'recognition of impaired mental functioning as an excuse from criminal responsibility' and 'protection of the community through detention of those, who, because of their mental illness, pose a threat to themselves or others' (NSWLRC 2010:CP 6 [3.5]).

In a step that represents further formalisation of the criminal law on mental incapacity, the 2013 Report includes a recommendation that a revised and updated version of the *M'Naghten* insanity defence be incorporated into the *Mental Health (Forensic Provisions) Act 1990* (Recommendation 3.1). The NSWLRC had considered replacing the *M'Naghten Rules* with a wholly new approach (2010:CP 6 [3.64]–[3.88]), but its decision to opt for expanding and clarifying the *M'Naghten Rules* (NSWLRC 2010:CP 6 [3.51]–[3.63]) is preferable. The proposal put forward in the 2013 Report for a revised mental illness defence is based on the Commonwealth *Criminal Code* provision on mental impairment (s 7.3). As such, the proposed version of the defence includes volitional incapacity within its scope ('the person was unable to control the conduct') (Recommendation 3.2). This inclusion would take into account the global way in which some mental disorders may affect individuals (see Yannoulidis 2012 for discussion). It would also go some way to

ameliorating the well-recognised narrowness of *M'Naghten* insanity (see NSWLRC 2010:CP 6 [3.22]–[3.48] for discussion; see also Mackay 1995). While it might cause some 'challenges' (as the Commission acknowledges: NSWLRC 2013:[3.119]), the inclusion of volitional incapacity is a progressive development and would bring the law into line with some of the Australian Code jurisdictions (see further Yannoulidis 2012).

The revised defence would rest on statutory definitions of 'mental health impairment' and 'cognitive impairment'. According to the LRC, 'mental health impairment' would be defined, broadly, as a 'temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgment or behaviour, so as to affect functioning in daily life to a material extent' (NSWLRC 2012b). This definition includes 'substance induced mental disorders' (such as drug-induced psychoses), but, unsurprisingly, does not include addiction and the temporary effects of the consumption of drugs (historically, intoxication has been contra-distinguished from insanity and is the subject of a distinct body of case law). The inclusion of cognitive impairment as a basis for the insanity defence, alongside mental health impairment, is a welcome clarification of the purpose and scope of the law. Historically, this basis for the insanity defence has been a less prominent feature of judicial and academic discussion than mental illness, which has obscured the specific issues (treatment, for instance) that are raised by cognitive impairment (see Attorney-General's Department, South Australia 2013 for discussion). Cognitive impairment would also be defined broadly as an 'ongoing impairment in comprehension, reason, adaptive functioning, judgement, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind' (NSWLRC 2012b).

The definitions of mental health and cognitive impairments exclude personality disorders, which, as the Commission notes, have long been the subject of significant community concern (NSWLRC 2013:[3.79]) and which, if included, would, in the Commission's view, 'throw the net too wide' (NSWLRC 2013:[3.78]). This view accords with the quite widely held view that personality disorders do not affect individuals in a way that properly goes to criminal responsibility. As the Law Reform Commission of Western Australia noted, 'it is inconsistent with fundamental notions of criminal responsibility to excuse a person's acts or omissions arising from a personality disorder evidenced merely by a lack of self-control or indifference to standards of morality' (1991:[2.13]). Although personality disorders are included within the scope of the Commonwealth *Criminal Code* defence, they have been excluded in a number of Australian jurisdictions on the basis of similar concerns (for example, in South Australia: see *Criminal Law Consolidation Act 1935* (SA) pt 8A, discussed in Attorney-General's Department, South Australia 2013).

The proposed statutory definitions of 'mental health impairment' and 'cognitive impairment' also form the basis of the revised defences of substantial impairment (a partial defence, available to murder only) and infanticide (a stand-alone offence, and a partial defence to murder). The Commission favoured retention of the defence of substantial impairment, in part because 'cognitive and mental health impairments are complex and varied in their nature and effects' and this complexity requires 'an appropriate range of legal responses' (NSWLRC 2013:[4.63]). The Commission recommends that the requirement that the defendant has 'abnormality of mind arising from an underlying condition' (*Crimes Act 1900* s 23A(1)(a)) be replaced by 'mental health or cognitive impairment' (Recommendation 4.1) — a change that, if enacted, would enhance coherence across the mental incapacity terrain. In relation to the offence/defence of infanticide (*Crimes Act 1900* s 22A(1) and (2)), the Commission also recommends retention (because the law provides 'appropriate and compassionate criminal law response to the complex and tragic set of

circumstances that may result in a mother killing her infant': NSWLRC 2013:[5.49]), but suggests minor changes to language to modernise the law: that the phrase 'wilful act or omission' be replaced with 'carries out conduct', and that the biological nexus between childbirth and mental illness, as well as the reference to lactation, be removed (Recommendation 5.1). These changes would remove some of the more antiquated aspects of the law and thus would seem to ensure that infanticide has a more sustainable footing in the criminal law corpus.

In relation to procedural practices regarding the mental illness defence, the NSWLRC recommends two modest changes. First, it proposes that it be open to the court, and the prosecution (with the leave of the court) to raise the defence at any time during the trial (Recommendation 3.3). This proposal substantially mirrors practice elsewhere (for instance, in England and Wales) and is positive in that it recognises the shared interests of all parties in ensuring that an insane individual is not dealt with via the usual trial process. The second proposed change to procedural practices that structure the defence relates to the conditions under which the court may accept a plea. According to Recommendation 3.4, if the prosecution and defence agree that the evidence establishes the defence, the judge may review the evidence and, if satisfied, he or she must enter a verdict that the defence has been successful. This means that the defence need not be left to the jury when it is not contested. As the Commission notes, this change may save resources, as uncontested cases will not proceed to trial (NSWLRC 2013:[3.159]). This modest change preserves the right of the jury to hear contested cases, which is a significant ingredient of the perceived legitimacy of the defence (see further Loughnan 2011).

Significantly, the NSWLRC also recommends that the wording of the mental illness defence — the 'special verdict' — be reformulated, with the reference to 'not guilty' replaced with a reference to 'not criminally responsible' (Recommendation 3.6). This is a laudatory reform proposal, as the reformulated defence more accurately conveys the distinctive nature of the plea of mental illness. The mental illness defence raises the issue of whether an individual can be held responsible, at law, for his or her actions. Criminal responsibility goes beyond the issue of liability for an offence and, thus, the mental illness defence is not the same as something like self-defence or duress — it is a denial of responsibility (Duff 2007; Tadros 2005). The question of criminal responsibility addresses whether the accused is someone to whom the criminal law speaks. The principle behind the law is to excuse those who are not properly thought of as subjects of the law, who cannot conform their conduct to the demands of the law, or for whom punishment is not a deterrent (as opposed to, say, those whose criminal behaviour is caused by their illness). It is for this reason that criminal responsibility is not a purely medical matter — judging an accused as non-responsible is an irreducibly moral-evaluative adjudication, albeit one in which the criminal law makes use of expert medical knowledge of illnesses and their effects.

To complete its coverage of the defence of mental illness, the NSWLRC recommends that, like 'fitness to stand trial', the defence be extended to the Local and Children's Courts. As it stands at present, in the summary jurisdiction, defendants with mental health and cognitive impairments may be diverted or discharged (*Mental Health (Forensic Provisions) Act 1990* ss 32, 33). The Commission recommends that, once the local or children's courts have considered whether an order under s 32 or s 33 should be made, those courts may then consider the defence of mental illness (and unfitness to plead) (Recommendations 12.3 and 12.6 (and 12.1 and 12.4)). The Commission appears to have been motivated to extend the defence of mental illness to the summary jurisdiction in order to extend the options of supervision and treatment that come along with the defence, in the interests of the safety of the public and the defendant (NSWLRC 2013:[12.77]). And, in recommending the

extension of the law relating to unfitness to the lower courts, the Commission seems to have had similar motivations (NSWLRC 2013:[12.20]). These are readily comprehensible motivations, but it remains to be seen whether, if enacted, the proposed extension of the mental illness defence and the law on unfitness to the summary jurisdiction has the practical effect of increasing formalised state interventions in response to minor offences.

Conclusion

The ways mental incapacity has come to impact on criminal law principles and practices over time is a story marked out by the high profile of related case law and judicial decision-making and, as such, this area of criminal law has grown up in a rather higgledy-piggledy manner. But the trend in the common law world is towards the formalisation of mental incapacity in criminal law (regarding England and Wales, see Loughnan 2012). With the concentration of law reform efforts in New South Wales and elsewhere we have a rare opportunity to critically assess the mental incapacity terrain as a whole and to improve the operation of this area of the criminal law and process. As this comment has suggested, there are significant issues of principle that are raised by the prospect of reforming the law on mental incapacity.

This area is a boundary area of the criminal law, marking the point at which its condemnatory and sanctioning power 'runs out' (Norrie 2001:176). It is also an area enlivened by human rights issues, including protection of some of the most vulnerable individuals in the criminal justice system. It is to be hoped that these issues will be firmly in the mind of the legislators charged with responding to law reform initiatives on mental incapacity in criminal law.

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