to include a defence of publication in the public interest. The media opposed this element, and the Bill lapsed.

the queensland proposals. But the obvious advantage and desirability of a uniform defamation law has kept the issue on the boil. The latest to give the pot a stir is Queensland Attorney-General Mr Deane Wells. He has placed the issue on the agenda for the June meeting of the Standing Committee of Commonwealth and State Attorneys-General. Mr Wells told *Reform* that the Queensland Government would be reviewing the Criminal Code, including criminal libel. 'We're going to be reviewing and re-drafting libel laws anyway and we would hope that this could co-incide with a national approach.' . Because the media had refused to accept court imposed corrections contained in the draft Defamation Bill, Mr Wells is seeking from media outlets in Queensland an indication of what sanctions they would regard as acceptable. 'It's crucial that we have uniform defamation laws,' Mr Wells told *Reform.* 'Freedom of speech is an absolute cornerstone of our democratic system. If you don't have precision in what can be said, you don't have democracy.'

* * *

mental health law

> Is this a dagger which I see before me,
> The handle toward my hand? Come, let me clutch thee:
> I have thee not, and yet I see thee still.
> Art thou not, fatal vision, sensible
> To feeling as to sight? or art thou but
> A dagger of the mind, a false creation,
> Proceeding from the heat-oppressed brain?
>
> Macbeth, II, I, 33.

Mental health legislation in New South Wales has had a troubled history. After several committees considered the question of how to reform the 1958 Mental Health Act, the Labor government passed the Mental Health Act 1983, but several crucial parts of the Act remain unproclaimed. They included the definition of 'mentally ill person' in section5.

The NSW Minister for Health, Mr Peter Collins MP, released an exposure draft Mental Health Bill in December 1989. The Bill has now passed the Legislative Council but has not yet received assent. There are two cognate bills, the Criminal Procedure (Mental Health) Amendment Bill 1989 and the Miscellaneous Acts (Mental Health) Repeal and Amendment Bill 1989.

definition of mental illness. The most controversial aspect of mental health laws is the definition of mental illness. The 1983 Act defines a mentally ill person (eg in the context of involuntary admission to a hospital or detention in a hospital, prison or other place) as a person who requires care, treatment or control for the person's own protection, or for the protection of others, because of the risk of serious bodily harm to himself or herself or to others. The Act specifies a number of factors which are not relevant to the issue of whether or not the person is mentally ill. These are expression of a particular political opinion, religious opinion, sexual preference or sexual orientation or the fact that the person is or has been sexually promiscuous, the fact that the person engages in or has engaged in immoral conduct or illegal conduct, that the person has a developmental disability of mind, or that the person takes or has taken drugs, including alcohol. However the Act provides that serious and permanent physiological, biochemical or psychological effects of drug taking can be regarded as an indication that the person is mentally ill.

a dishonourable tradition? This definition continued a tradition of defining mental illness in circular terms, or not defining it at all. Outlining the arguments against a definition, the Steering Committee on Mental Health (the Deveson Committee) noted in its 1983 report on the Mental Health Act 1983 to the Health Minister that

> The prime argument advanced against any attempt to define mental illness in legislation is that "it can't be defined", or at least can't be defined adequately for the purpose intended. Any attempted definition can be argued to be too broad, thus potentially open for abuse, or too narrow, potentially leading to injustice and unnecessary suffering. A further argument is that any definition will be subject to the changes and whims of psychiatric thinking, or that such changes may leave the legislation behind. Lastly, it has been argued that, as a matter of law, it is preferable to omit a definition of mental illness from the legislation and to leave the process of definition to the courts, as has happened in New South Wales under the 1958 Mental Health Act.

Until the present Bill the only Australian jurisdiction to have offered a substantive, non-circular definition of mental illness was the ACT. The Mental Health Ordinance 1983 defined 'mental dysfunction' as:

> ... a disturbance or defect, to a severely disabling degree, of perceptual interpretation, comprehension, reasoning, learning, judgment, memory, motivation or emotion.

Apart from the NSW Bill, this definition remains alone of all the Australian definitions in attempting to describe the features of mental illness. The remaining States and the Northern Territory use circular definitions of which the South Australian, while the briefest, is perhaps typical:

> 'Mental illness' means any illness or disorder of the mind.

The effect of the circular definitions has been to leave the question of determining who is mentally ill for the purpose of compulsory admission to hospital, release from hospital, or appointment of a guardian or other trustee, to the medical profession, or to leave the courts to try to create a definition. Leaving the decision to the psychiatrists does not sit well with the thrust of the remainder of the 1983 Act. The Act creates a rather elaborate system of controls over the power of the medical profession to admit and treat involuntary patients on an indefinite basis. It also states who is not mentally ill for the purpose of compulsory admission. The vacuum left by the failure to provide a substantive definition imposes on doctors a burden they may not want to carry, and arguably should not carry. A statutory definition which gives real guidance to practising psychiatrists as to whom the legislature intends to be regarded as mentally ill for the purposes of the law will largely remove that burden.

problems caused by failure to proclaim the 1983 act. Apart from the problem of circularity and avoidance of a definition of mental illness itself, rather than its consequences, the major problem in New South Wales is that the section which contains the definition has not been proclaimed.

judicial attempts to fill the gap. Justice Powell attempted to fill the gap in a series of decisions made after taking charge of the Protective Division of the New South Wales Supreme Court. He attempted to determine the boundary between those who are and those who are not mentally ill, and between those who, while mentally ill to some degree, should not be involuntarily admitted to or retained in a hospital for treatment, or who did not require a guardian or custodian over their affairs. In pursuing this goal, he drew a distinction between mental illness as a 'disease of the mind' and other mental infirmities arising from disease or age – the organically caused forms of mental impairment such as those caused by arteriosclerosis and epilepsy. Senile dementia caused by arteriosclerotic degeneration, he held, was not a mental illness (in *RAP v AEP* [1982] 2 NSWLR 508).

He continued this distinction between the so-called organic causes of mental impairment and the so-called functional causes (for which one can read, cause unknown) in findings that 'mental illness' includes schizophrenia but not Down's Syndrome leading to mental retardation, anorexia nervosa, or alcohol dependence (alcoholism) or abuse.

In another case which raised the problem of the boundary between those who are and those who are not mentally ill Justice Powell ordered the release of a patient suffering from senile dementia (Alzheimer's type) on the grounds that, although mentally ill in medical terms, he did not come within the definition of 'a mentally ill person' for the purposes of Mental Health Act 1958 which he held to be the relevant statutory test. He held the applicant to come within the organically caused category of mental infirmity, and thus not to be mentally ill for the purposes of the 1958 Act (*CCR v PS and another (No2)* [1986] 6 NSWLR 622).

an invalid distinction? Nonetheless, Justice Powell apologised for the need created by the distinction in the 1958 Act between a person of unsound mind and one who is mentally infirm because of disease or age to rely upon this functional/organic distinction in default of application of the unproclaimed 1983 Act. Over the last 15 to 20 years or so, psychiatrists have come to regard the functional/organic distinction as invalid, and to see all mental illnesses or impairments as having physical or organic causes (though not always discovered or discoverable). The cut-off point between those who are 'mentally ill' for the purposes of the 1958 Act and those who are not, he held, is the presence of 'hallucinations, delusions or other forms of psychotic symptomatology'. Since such symptoms were absent in that case, the applicant was not mentally ill and should not be compulsorily detained in a hospital (in *CCR v PS* at 639).

powell attempt defeated. But the vacuum was not to be filled by judicial attempts to create a definition. Justice Powell's creation of a definition of mental illness on the basis of the 1958 Act was held in 1987 to be invalid in the New South Wales Court of Appeal. That meant that the phrase 'mental illness' must be construed according to its ordinary meaning.

Thus the present situation in New South Wales is that there is no statutory definition of mental illness. Courts seeking a limit on the meaning of mental illness can only look to the ordinary meaning of the words.

a fresh start. The production of a new Mental Health Bill, complete with a new definition of mental health illness, offers hope that the lack of a statutory definition of mental illness will be remedied. The content of the proposed definition, like any definition of mental illness, is controversial. It accords with the recommendation of the Deveson Committee Report that

> ... the definition be based on symptoms and signs of major psychiatric disorders which will be recognised by virtually all psychiatrists as indicative of illnesses for which compulsory admission and/or treatment may be indicated. [The definition should be] ... sufficiently broad to encompass all serious concerns but limited primarily to disorders which have psychotic and/or major affective syndromes.

mental illness defined. The proposed new definition is as follows:

> Mental illness means a condition which seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:
> (a) delusions;
> (b) hallucinations;
> (c) serious disorder of thought form;
> (d) a severe disturbance of mood;
> (e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)–(d) ...

The definition is almost identical with the definition proposed in the Report. Far from the circular definitions which define mental illness as mental disorder, impairment or other tautological term, this new definition goes to the heart of the practice of psychiatry, and in doing so creates new controversies. One of the main concerns underlying the definition was to remove any reliance on aeti-

ology or diagnostic categories. The distinction between organic and functional mental disorder has dominated the issue of aetiology, and because that distinction is no longer considered valid. The definition chosen uses symptoms and signs which can be relied on without regard to the cause of the illness.

signs and symptoms or diagnostic categories? Another reason the Deveson Committee preferred a definition based on symptoms and signs rather than upon diagnostic criteria or labels for mental disorder (such as schizophrenia, depression and mania) was that those criteria

> ... are constantly being refined and syndromes considered in different ways, so that a statutory definition based on diagnostic criteria may lag behind changing psychiatric thinking.

On the other hand, Dr Peter Shea, Lecturer in Forensic Psychiatry at Sydney University, has pointed out that

> ... the use of symptoms to define mental illness can lead to problems. In the case of delusions, for example, there is always the problem of defining them and of demonstrating that a belief is of delusional intensity. This is not always clear-cut. (Communication to ALRC, 21/2/90.)

In addition to the problems of definition of symptoms, Dr Shea also states that 'the list of symptoms [in the Bill] is too short and restrictive'.

Dr Shea concludes that

> ... categories of mental illness, not signs and symptoms, should be used if an attempt is going to be made to define mental illness in a positive manner. The fact is that they are used and have been used for both clinical and legal purposes all over the world for a long time and will undoubtedly go on being used for these purposes for a long time to come. Their use should be legitimated by their inclusion in the legislation (preferably in regulations under the Act).

He also criticises the list of symptoms as being too short and restrictive, and thus excluding certain conditions such as catatonia and some types of schizophrenia.

mentally disordered persons. A new category of 'mentally disordered persons' is introduced in the Bill. Clause10 provides that

> A person (whether or not the person is suffering from mental illness) is a mentally disordered person if the person's behaviour for the time being is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary:
>
> (a) for the person's own protection from serious physical harm or serious financial harm or serious damage to the person's reputation; or
>
> (b) for the protection of others from serious physical harm.

This new category was proposed by the Steering Committee on Mental Health in its Report. The Committee's view was that the disadvantage of its proposed new definition of mental illness was that it is

> ... relatively narrow and excludes an important group of persons who while not mentally ill in a formal medical sense, are temporarily irrational and endangering themselves or others. ... A common example would be the person who suffers a traumatic crisis in a close personal relationship and who, overwhelmed by emotional turmoil, becomes temporarily irrational and suicidal. ... These people are not mentally ill. They are, however, mentally seriously disturbed and may require intervention for their own protection.

Again, there may be problems of interpretation with this section. Dr Shea argues that it raises

> ... the vexed question of what is 'irrational behaviour', a matter that the courts may well end up having to decide. It should be noted that the term 'irrational behaviour' is also listed as one of the signs indicative of mental illness (although it is qualified by the statement 'indicating the presence

> of any one or more of the symptoms referred to in paragraphs (a)–(d)).

other problems with the proposed definition. Further criticisms of the definition of mental illness are that those whose delusions are caused by senile dementia will come within the definition of mental illness and thus become liable to involuntary detention in a mental hospital where available treatment may not be suitable. Similarly, hallucinations may accompany epilepsy yet it may not be appropriate to admit epileptics to mental hospitals for treatment.

personality disorders. Apart from the dementias, other psychiatric conditions which are on the borderline of mental illness are the personality disorders. Conflict has arisen over the decision whether the mental health system or the criminal justice system is appropriate to deal with those who suffer from such disorders and also have been convicted of crimes and/or are considered likely to do so.

vlrc report. The VLRC issued a Report in April this year addressing the question of whether or not those suffering from personality disorders are mentally ill (Report No31: The Concept of Mental Illness in the Mental Health Act 1986). The Report is concerned with the problems posed by a type of this disorder known as anitsocial personality disorder or psychopathy. Great controversy has been aroused by this issue because of a Victorian offender, Garry David, who has been described by ten psychiatrists as dangerous. The psychiatrists had agreed that 'David wanted to be remembered as the biggest mass murderer in Victoria and intended to commit mass murder' (The Age, 10 April 1990, 3).

the problem of garry david. David suffers from antisocial personality disorder, and has completed a 14 year sentence for the shooting of a woman at a pizza parlour. Since then he has been charged with making threats to kill. The Victorian government has put forward legislation designed solely to keep David locked up. This legislation, the Community Protection Bill, has been designed as a stop gap measure until dangerous offenders legislation is introduced.

responsibility for psychopaths. The VLRC argues that antisocial personality disorder is a type of mental illness and that those suffering from it should not be put in gaol. Psychiatrists are unwilling to have such people in mental hospitals because they are characterised ' . . . by disregard for social obligations, lack of feelings for others, and impetuous violence or callous unconcern. . . . Behaviour is not readily modifiable by experience, including punishment. People with this condition are often affectively cold, and may be abnormally aggressive or irresponsible.' (World Health Organisation, International Classification of Diseases, quoted in VLRC Report).

The VLRC points out that the difficulty or impossibility of treating antisocial personality disorder does not mean that it is not a mental illness. In its view

> . . . a person suffering only from that disorder who is systematically unable to function rationally, who is unable to copy with the ordinary pressures of life, who behaves in utterly bizarre ways, and who is grossly destructive of himself and others, is mentally ill. (Report, 9.)

When releasing the Report, the Chairman of the VLRC. David St L Kelly, said that

> The Commission is not suggesting that the Mental Health Act should be used to detain people who are dangerous but who are not mentally ill. That would obviously be inappropriate. But it is equally inappropriate to exclude people who are seriously mentally disordered from the operation or the Mental Health Act. The Act should apply to all people who are mentally ill.

conclusion. The tension between psychiatrists and lawyers will probably continue to exist over borderline mental illnesses such as personality disorders and conditions such as dementia. Lawyers are not concerned just with civil liberty issues, but also, like doctors, with the question of which set of social agencies is best suited to deal with those who suf-

fer from such conditions. Psychiatrists are concerned with providing therapy where resources are scarce. They do not wish to see mental hospitals become quasi-custodial institutions. These problems are some of the practical questions which arise out of the definition of mental illness. The new definition in the New South Wales Mental Health Bill does not resolve these problems, since reliance on symptoms need not make clear the dividing line between mental illness and 'normality' in cases such as antisocial personality disorder. The resolution of these issues will be the courts' responsibility after the Bill becomes law.

Despite these problems of whether borderline conditions come within the definition of 'mental illness', the difficulties caused by failure to proclaim the definition of 'mentally ill person' in the 1983 Act will be overcome when the Bill becomes law.

* * *

national committee on violence report: violence, directions for australia

> I think the family is the place where the most ridiculous and least respectable things in the world go on.
>
> Ugo Betti,
> *The Inquiry, 1945.*

The final report of the National Committee on Violence was released on 9 February 1990 and tabled in federal Parliament on 9 May. (For details of their earlier publications see Jan [1990] Reform 57.) The Committee has illustrated the report with Sydney Nolan's drawings based on Marcus Clark's novel *For the Term of His Natural Life,* which certainly give it a macabre edge, and leavened it with poetry.

a non-violent australia. Hailed as 'a blueprint for a non-violent Australia', the report is divided into three sections: the state of violence in Australia, the causes of violence, and the prevention and control of violence. Part I reveals that data on the incidence and prevalence of violence in Australia are far from adequate. However, the Committee was able to make the following observations based on the information available. By international standards, and compared to its own history, contemporary Australia is a relatively tranquil place. On the other hand, rates of assault in Australia are high by the standards of Western industrialised countries and the rate of reported assault and robbery is increasing. Contrary to popular mythology, homicide rarely results from random attacks by deranged individuals but is more commonly perpetrated by family members, friends, lovers or acquaintances of the victim. The risk of becoming a victim of violence is not evenly distributed across the population – those least at risk are the elderly, those most at risk are women and children (particularly infants) in the home, Aboriginal Australians and young men. Offenders are overwhelmingly adult men, violent offending by juveniles being relatively uncommon. Sexual violence, domestic violence and racist violence are particularly under-reported crimes making it difficult for the Committee to profile either offenders or victims. Without wishing to diminish the significance of interpersonal violence, the Committee points out in its report that for every homicide in Australia, there are seven suicides and nine road traffic fatalities. The number of injuries sustained in the workplace dwarfs those occasioned by assault.

explanations for violence. Part II of the report canvasses explanations for violence, reviewing the available literature on this issue. The Committee emphasises that there is no simplistic explanation for violent behaviour and discuss a variety of factors that may contribute to the propensity for violence. However, they are clearly persuaded that the dye is cast at a very early age and place child development and the influence of the family at the top of their list of explanatory factors: