Book Launch

Manifest Madness: Mental Incapacity in Criminal Law, **Arlie Loughnan, Oxford Monographs on Criminal Law and Justice, Oxford, 2012, 312 pages (ISBN 978-0-19-969859-2)**

I am truly honoured to launch Arlie Loughnan's book, *Manifest Madness: Mental Incapacity in Criminal Law*. Having known Arlie for many years now, and having seen her stellar career develop on three continents, it is a very great pleasure to hold her first book in my hand.

As the general editor of the Oxford Monographs on Criminal Law and Justice, Andrew Ashworth, pointed out in the preface to Arlie's book, and as Arlie herself says, this volume appears at a time when law reform agencies in this country and elsewhere are turning their attention to this part of the criminal law. The NSW Law Reform Commission, of which I am the Full-Time Commissioner, is one such agency.

The Commission presently has a reference on the topic of 'people with cognitive and mental health impairment in the criminal justice system.' Lawyers and behavioural scientists who know or practice in this area have remarked on the great breadth of this reference. It is indeed a significant undertaking. We are very grateful to academics whose work informs our law reform efforts, especially those like Arlie whose work covers such a broad terrain and has so many original insights.

Our reference covers not only people with mental health impairments, but also that often forgotten group, people with cognitive impairment. Should Arlie be casting around for a fresh topic, I cannot say how grateful law reformers, and those who work in that sector, would be if she were to bring the depth of analysis, interdisciplinary insights and theoretical perspective displayed in this book to the criminal law's treatment of cognitive impairment. One of the strands that is so illuminating in Arlie's book — the way in which doctrinal and procedural issues are imbricated — would, I suggest, be a particularly fruitful approach to apply to cognitive impairment.

But this is an opportunity to look not at what remains to be done, but at the significant achievement represented by this thoughtful, fresh and insightful work on an important and contemporary topic.

However, I cannot avoid interweaving my thoughts about Arlie's book with reflections on the challenges of law reform in this area because they are so fresh in my mind. I am reassured in this approach in that engagement with law reform is part of Arlie's intention in her analysis. The Commission has already called on her assistance as an expert adviser in relation to our report on complicity (NSW Law Reform Commission (2009) *Complicity*, Report 129, December 2010) and we now have her assistance on mental health issues.

As I have mentioned, one of the great strengths of Arlie's book is that it illuminates the ways in which doctrinal and procedural issues are interwoven in the development of criminal law relating to people with mental impairments. It is important to acknowledge and examine these intersections, amongst other things, because they present modern lawyers with practical dilemmas.

Imagine for a moment that you are a Legal Aid lawyer whose client is charged with a serious offence, but your client has a mental illness and there is a real question as to whether your client is capable of forming the requisite mental element of that offence. Your first task is to consider whether or not the tenacious and long standing M'Naghten rules apply to your client. To do so, you need to review a considerable amount of case law developed on several continents. Having done that, your advice may be to plead not guilty. However, were you to embark in this direction, your client, who is almost certainly very ill, will have to be able to deal with a trial.

There may also be a real question in your mind as to whether or not he or she has the capacity to do what that trial requires of them — to give you instructions, and to follow what is happening in court and respond to it. A further option, therefore, would be to raise the question of your client's fitness to plead.

However, the consequences of taking either of these routes are likely to be unpalatable for your client, because the procedural requirements attendant on these courses of action may result in your client being incarcerated in a forensic mental health facility, with no definable end point for release. Few clients embark on this route unless their crime is of the most serious sort and their illness is similarly grave.

But should your client even be in the criminal justice system? A further option would be to apply for her, or him, to be diverted from the criminal justice system into treatment. The likelihood of such an application succeeding depends on the seriousness of the offence, amongst other things. It also requires that you have the capacity to navigate the service sector sufficiently well to put together a program of treatment that will convince the court that diversion is appropriate in the interests of your client and the broader public. This requires knowledge that you certainly did not glean at law school, because it lies in behavioural science and delivery of government services by multiple departments.

Your decisions as a contemporary lawyer therefore inevitably involve complex assessments of both doctrinal and procedural issues and the two are irretrievably linked. Arlie's book demonstrates the ways in which these doctrinal and procedural issues have always been interwoven and shows that this interweaving has influenced the way in which the criminal law relating to mental impairment has developed. Indeed it shows that what I had hitherto assumed to be a 21st century problem is a current that flows though this area of law from its inception.

The detailed historical analysis in Arlie's book is enormously illuminating of this issue, and many other aspects of this area of law. Her theoretical and doctrinal insights are brought alive by narratives from case law and by the analysis of the ideas of 'madness' deployed in Old Bailey proceedings. The very considerable original research effort involved in developing these understandings is almost concealed by the artful way they are interwoven into the analysis to illustrate and reinforce her arguments.

As well as its illuminating historical analysis, *Manifest Madness* challenges us to think about the appropriate scope of the terrain of mental incapacity in law. I was partly reassured that the landscape envisaged by Arlie in her book was, for the most part, the terrain that we have mapped for our reference. In the United Kingdom context in which this book is written these would be insanity, automatism, unfitness to plead, infanticide and diminished responsibility. But Arlie has challenged us to think beyond this, and to consider how the law deals with infancy and intoxication in the same context.

As a Law Reform Commission, we have a neat and practical escape route to excuse ourselves from venturing into new territory, which is that the Attorney General gives us

'Terms of Reference' beyond which we must not stray. But to seek to exculpate ourselves in this way would be to ignore the intent and power of the argument in this book. It demonstrates that, however we may carve up the territory, these areas of law are interrelated at a deep level through their historical roots in ideas of incapacity and its consequences. Arlie's analysis therefore challenges us to re-think what we include and exclude when we have a contemporary opportunity to reform the law in this area.

This book also challenges us to consider how we conceive of 'madness' in the criminal law, and it supports that challenge by exposing the deep structures of the law. Her analysis of the ways that madness is regarded as both dispositional and 'readable' from conduct is particularly incisive. Amongst other things, it sheds a historical light on the tensions between the way in which actors in the criminal justice system read madness and the way in which psychiatrists read it.

Again, this is a contemporary tension, and one that is enacted daily in the criminal justice system. Police present people who appear to them to be manifestly mentally unwell to mental health institutions, only to have those people refused admission by psychiatrists on the basis that they do not comply with the definitions of 'madness' in the *Mental Health Act*. It is enacted when magistrates send defendants who appear to them to be a severe risk of harming themselves or others, to a mental health facility, only to have them returned to court because what the magistrate reads and what the psychiatrist reads are two different things. I have also seen it enacted when lawyers read some of the definitions of personality disorder in DSM IV (Diagnostic and Statistical Manual of Mental Disorders, 4th ed) and exclaim — "But that isn't mental illness — that is simply a description of criminal behaviour!"

I have touched on only a few of the issues dealt with in this book. It contains much more than this brief review can encompass. I recommend it to those who seek a challenging and satisfyingly complex review of this area of the law.

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