A Review of the New South Wales Law Reform Commission's Report *People with an Intellectual Disability and the Criminal Justice System*

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The response to the report of the National Inquiry into Human Rights and Mental Illness[1] and the push toward having uniform criminal legislation[2] are two factors which have led to a reassessment of the law as it relates to those with an intellectual disability and/or mental illness. The New South Wales Law Reform Commission's Report entitled *People With An Intellectual Disability and the Criminal Justice System*[3] and its earlier issues and discussion papers and research reports[4] can be viewed as part of this general reassessment. What marks the NSWLRC Report as different to many others arising from governmental references is the comprehensive coverage of the issues raised by the topic and the extraordinary depth of research supporting the final recommendations.

This review cannot do justice to the breadth of matters covered by the NSWLRC Report, but will concentrate upon four main topics of proposed legislative reform: the definition of intellectual disability; fitness to stand trial; the defence of mental impairment and specific sexual assault provisions. Before turning to these topics, it is worthwhile outlining why the NSWLRC Report provides such a welcome analysis of a neglected area of the criminal law.

THE EXTENT OF THE PROBLEM

Individuals with an intellectual disability are vastly over-represented as offenders in the criminal justice system. Hayes and Craddock estimate that in New South Wales, those with an intellectual disability make up approximately 2 to 3% of the population[5] yet it has been estimated that they comprise at least 12 to 13% of

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1 Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness, Report of the National Inquiry Into the Human Rights of People with Mental Illness*, Volumes One and Two, (Canberra: AGPS, 1993) (The Burdekin Report).

2 In 1990, the Standing Committee of Attorneys-General placed on its agenda the question of the development of a uniform criminal code for Australian jurisdictions. The Standing Committee established the Model Criminal Code Officers Committee (MCCOC) to draft a Criminal Code that would codify the Commonwealth law and act as a model for adoption in the states and territories.

3 (Sydney: NSWLRC, December 1996). Hereinafter referred to as 'the NSWLRC Report'.

4 New South Wales Law Reform Commission, *People With An Intellectual Disability and the Criminal Justice System*, Issues Paper 8 (NSWLRC, 1992); New South Wales Law Reform Commission, *People With An Intellectual Disability and the Criminal Justice System: Consultations*, Research Report 3 (NSWLRC, 1993); New South Wales Law Reform Commission, *People With An Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts*, Research Report 4 (NSWLRC, 1993); New South Wales Law Reform Commission, *People With An Intellectual Disability and the Criminal Justice System: Two Rural Courts*, Research Report 5 (NSWLRC, 1996); New South Wales Law Reform Commission, *People With An Intellectual Disability and the Criminal Justice System: Policing Issues*, Discussion Paper 29, (NSWLRC, 1993); New South Wales Law Reform Commission, *People With An Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues*, Discussion Paper 35, (NSWLRC, 1994).

5 S C Hayes and G Craddock, *Simply Criminal* (1992, 2nd edition) 30.

the New South Wales prison population.[6] There are a range of possible explanations for this discrepancy. The early literature focused on a causal link between intellectual disability and criminal behaviour, but modern studies point to factors such as the vulnerability of those with an intellectual disability to being arrested and imprisoned because of a lack of services and facilities for them[7] and the psychological and socio-economic disadvantages faced by them.[8]

Similarly, there is an over-representation of individuals with an intellectual disability as victims of crime. A 1992 study of the incidence of criminal victimisation of individuals with an intellectual disability indicated significantly higher levels of victimisation with regard to offences against the person, when compared with the non-disabled population.[9] A New South Wales study found a high rate of sexual assault against both men and women with an intellectual disability.[10] One survey found that of 144 crimes against intellectually disabled clients reported to agencies, 130 involved sexual offences.[11] In an American study, 83% of women and 32% of men had been sexually assaulted in a group of 95 people with an intellectual disability[12] and a Canadian study has estimated that 39 to 68% of girls and 16 to 30% of boys with an intellectual disability will be sexually abused before they reach the age of 18.[13]

A number of factors may lead to such a high incidence of sexual assault and exploitation of individuals with mental impairment. These include the lack of power of such individuals over resources, relationships, decision-making and information and the fact that social attitudes may stigmatise them as deviant or of little value.[14]

6 S C Hayes and D McIlwain, *The Prevalence of Intellectual Disability in the New South Wales Prison Population: An Empirical Study* (Sydney, November 1988) 47.

7 K Deane and W Glaser, *The Characteristics and Prison Experiences of Offenders with an Intellectual Disability: An Australian Study* (University of Melbourne, 1994) 1; J Cockram, R Jackson and R Underwood, 'Attitudes towards people with an intellectual disability: Is there justice?', Paper presented at the *First International Congress on Mental Retardation: The Mentally Retarded in the 2000's Society* (Rome, March 1994); J Bright, 'Intellectual disability and the criminal justice system: New developments' (1989) 63 *Law Institute Journal* 933.

8 K Deane and W Glaser, *supra*, note 7; Inter-Departmental Committee on Intellectually Handicapped Adult Offenders in New South Wales, Australia, *The Missing Services* (Departments of Corrective Services and Youth and Community Services, Report, 1985); M Ierace, *Intellectual Disability: A Manual for Criminal Lawyers* (Sydney: Redfern Legal Centre Publishing, 1989) 5.

9 C Wilson and N Brewer, 'The Incidence of Criminal Victimisation of Individuals with an Intellectual Disability' *Australian Psychologist* (1992) 27(2), 114–17.

10 M Carmody, *Sexual Assault of People with an Intellectual Disability: Final Report* (Sydney: NSW Women's Coordination Unit, 1990). A South Australian study has also highlighted the high incidence of sexual assault and other crimes against those with an intellectual disability: C Wilson, *The Incidence of Crime Victimization among Intellectually Disabled Adults* (South Australia: National Police Research Unit, Final Report, 1990).

11 K Johnson, R Andrew and V Topp, Silent Victims: *A Study of People with Intellectual Disabilities as Victims of Crime* (Melbourne: Office of the Public Advocate, 1988), fn 70.

12 S Hard, *Sexual Abuse of the Developmentally Disabled: A Case Study*, Paper presented the National Conference of Executives of Associations for Retarded Citizens, Omaha, Nebraska, 1986.

13 The G Allan Roeher Institute, *Vulnerable: Sexual Abuse and People with an Intellectual Handicap* (Downsview, Ontario: Roeher Institute, 1988).

14 S C Hayes and G Craddock, *Simply Criminal* (1992) 75. See also C Wilson, T Nettelbeck, R Potter and C Perry, 'Intellectual Disability and Criminal Victimisation' (September 1996) *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, 1–6; K Rosser, 'A Particular Vulnerability' (1990) 15(1) *Legal Service Bulletin* 32–4; S Razack, 'From Consent to Responsibility, from Pity to Respect: Subtexts in Cases of Sexual Violence Involving Girls and Women with Developmental Disabilities' (1994) 19 *Law and Social Inquiry* 891–922.

It is obvious from social science research in this area that the criminal justice system is in urgent need of reform in relation to how both offenders and victims with an intellectual disability are treated. The NSWLRC Report recommends a package of reforms to combat the imbalance in offending and victimisation patterns. Chapters Three through Eight of the Report recommend legislative changes relating to such matters as the definition of intellectual disability, police powers, fitness to be tried, the defence of mental impairment, giving evidence and sexual offences against those with an intellectual disability. The NSWLRC Report stresses that legislative reform alone is not sufficient and has also recommended administrative changes in Chapters Nine through Eleven with a particular emphasis upon education for individuals with an intellectual disability as well as criminal justice personnel.

Many of the Australian criminal law jurisdictions have changed or are undergoing a process of changing laws which may have repercussions for those with an intellectual disability. The NSWLRC Report provides comprehensive research and recommendations in relation to how criminal laws should be reformed. The following provides an analysis of four areas: the definition of intellectual disability, fitness to stand trial, the defence of mental impairment and sexual assault provisions.

THE DEFINITION OF INTELLECTUAL DISABILITY

The NSWLRC Report recommends that a consistent definition of intellectual disability be inserted in the *Crimes Act* 1900 (NSW), the *Mental Health Act* 1990 (NSW), the *Mental Health (Criminal Procedure) Act* 1990 (NSW), the *Criminal Procedure Act* 1986 (NSW) and the *Evidence Act* 1986 (NSW).

While the NSWLRC Report is obviously only concerned with the law in that jurisdiction, the introduction of a standard definition of the term would be welcome throughout Australia. Having different definitions in similar legislation throughout Australia let alone different definitions in the criminal, health and social fields leads to confusion and conflict.[15]

The real problem of course lies in providing a definition which will have meaning for both the legal and medical professions. Ellard has argued that '[t]here are many useful words which simplify and abbreviate communication, but which will not stand up to critical examination. In psychiatry such words are often applied to processes and dimensions and mislead the unwary into believing that they refer to things or categories'.[16]

It is true that medical definitions of intellectual disability are designed with the aim of providing appropriate services and do not easily transfer to the legal setting. One medical definition of intellectual disability produced by the American Association on Mental Deficiency defines it as a '... significantly sub-average

[15] See L Crowley-Smith, 'Intellectual Disability and Mental Illness: A Call for Unambiguous and Uniform Statutory Definitions' (1995) 3(2) *Journal of Law and Medicine* 192–201.

[16] J Ellard, 'The Madness of Mental Health Acts' (1990) 24 *Australian and New Zealand Journal of Psychiatry* 167–174, 170.

intellectual functioning which manifest itself during the developmental period and is characterised by inadequacy in adaptive behaviour'.[17]

This definition of intellectual disability coincides with that of 'mental retardation' in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*[18] which separates mental retardation from clinical disorders and personality disorders.[19]

The definition provided by the American Association on Mental Deficiency however, fails to cover disability which does not arise during the developmental period, but occurs as a result of brain damage or senility.

The definition set out in section 4 of the *Intellectually Disabled Citizens Act* 1985 (Qld) provides a broad definition which takes into account the different causes of intellectual disability. It states that an intellectually disabled citizen is 'a citizen who is limited in his or her functional competence by reason of intellectual impairment which is — (a) of a congenital or early childhood origin; or (b) the result of illness, injury or organic deterioration.'

The NSWLRC Report has not concentrated upon the origins of intellectual disability, but has instead suggested the following definition:

> 'Intellectual disability' means a significantly below average intellectual functioning, existing concurrently with two or more deficits in adaptive behaviour.[20]

This definition echoes that provided by the American Association on Mental Deficiency, but without limiting it to the developmental period. The requirement that there be two or more deficits in adaptive behaviour is important in that it is unsatisfactory to define intellectual disability in terms of intellectual functioning alone. Social criteria also need to be considered as a distinction will often need to be made between those who are able to adapt well to life in the community and those who cannot.

Whether this definition is a workable one of course remains to be seen and there will always be those who argue that there should not be a statutory definition of the term because it is impossible to adequately define. On the other hand, the main benefits of having a uniform statutory definition of the term is that it may promote consistent decision-making and provide guidance for those who must work with the criminal law in this area. The definition suggested by the NSWLRC Report seems to be adequate enough because it is couched in descriptive medical language but is broad enough to cover all origins of the disability.

THE DEFENCE OF MENTAL IMPAIRMENT

In the early part of this decade, The Model Criminal Code Officers' Committee (MCCOC) drafted the *Criminal Code Act* 1995 (Cth) which contains Chapters 1 and 2 of a Criminal Code which is intended to serve as a model for adoption by all

[17] Cited by S C Hayes and R Hayes, *Mental Retardation Law, Policy and Administration* (1982), 3.
[18] (Washington: APA, 1994, 4th edition revised), 39.
[19] Ibid 25.
[20] The NSWLRC Report, 52.

Australian jurisdictions. It is in Chapter 2 which deals with 'General Principles of Criminal Responsibility' that a new defence of 'mental impairment' is found. Section 7.3(1) of the Criminal Code Act 1995 states:

> A person is not criminally responsible for an offence if at the time when he or she carried out the conduct constituting the offence he or she was suffering from a mental impairment that had the effect that:
> (a) the person did not know the nature or quality of his or her conduct; or
> (b) he or she did not know that his or her conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or
> (c) the person was unable to control his or her conduct.

The NSWLRC Report recommends that this defence of mental impairment *not* be enacted in New South Wales. This is an interesting development as other jurisdictions have already enacted their own versions of section 7.3(1).[21] The Report relies on two arguments for this.

First, the addition of part (c) in section 7.3(1) is viewed as too controversial and to some degree irrelevant because the inability to control one's actions may be covered by the defence of diminished responsibility in New South Wales.[22] This seems to be a strange reason for shying away from enacting a reformulated defence. The offending subsection could simply be omitted as is the case in the Victorian legislation.

Secondly, the NSWLRC Report does not recommend enacting this section because:

> the importation of the Commonwealth Code provision would not ... incorporate the 'glosses' on the M'Naghten defence which have developed in the common law since 1843, as a 'code' provision is designed to be free standing, not interpreted in light of previous case law. Some of the cases which have developed and extended the interpretation of the defence are particularly useful for people with an intellectual disability.[23]

This argument has repercussions for the whole movement towards having uniform criminal code legislation in Australia. It seems to be based on the notion that inserting a reformulated defence of mental impairment into the New South Wales *Crimes Act* 1900 will suddenly codify the law in this area. The *Crimes Act* is not a criminal code and the interpretation of any section in it may necessitate looking at previous case law. It seems odd that the NSWLRC Report does not follow the approach taken in Victorian and South Australian legislation to enact a modified version of the Commonwealth Code provision.

[21] For example, *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic) s 20; *Criminal Law Consolidation (Mental Impairment) Amendment Act* 1995 (SA) s 269C.

[22] The Victorian Parliamentary Committee criticised this arm of the defence of mental impairment and it was specifically omitted from section 20 of the *Crimes (Mental Impairment and Unfitness to Plead) Act* 1997 (Vic). See Victorian Parliamentary Community Development Committee *Inquiry Into Persons Detained at the Governor's Pleasure* (October 1995) 171 and B McSherry, 'The Reformulated Defence of Insanity in the Australian Criminal Code Act 1995 (Cth)' (1997) 20 (2) *International Journal of Law and Psychiatry* 183–197, 189–197 for criticisms of the volitional component of the defence of mental impairment.

[23] The NSWLRC Report 233, reference omitted.

What the NSWLRC Report recommends instead is that all references to the defence in the *Mental Health (Criminal Procedure) Act* 1990 (NSW) use the words 'mental impairment' rather than 'mental illness' so that intellectual disability is more clearly covered by the defence. The question needs to be asked: is this enough? Surely the opportunity to clarify the scope of the defence of mental impairment should be taken up.

It could be argued that the situation regarding the defence of mental impairment in New South Wales differs substantially from that in other jurisdictions because of the operation of the defence of diminished responsibility as a defence to murder. In its Report No 82, the New South Wales Law Reform Commission recommended retaining the defence of diminished responsibility with some amendments. Subsequently, the *Crimes Amendment (Diminished Responsibility) Act* 1997 (NSW) replaced the old defence set out in the *Crimes Act* 1900 (NSW) with a new section 23A. The latter follows closely to the Report's recommendation in allowing for a conviction of manslaughter where the 'person's capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition'. Section 23A(8) then goes on to define an 'underlying condition' as a 'pre-existing mental or physiological condition, other than a condition of a transitory kind'.

The defence of diminished responsibility may be more 'attractive' to defence counsel in a murder trial in comparison with the defence of mental impairment because the term 'abnormality of mind' has been interpreted broadly to include depression,[24] paranoia,[25] epilepsy,[26] schizo-affective illness,[27] antisocial personality disorder[28] and hysteria[29]. A successful defence of diminished responsibility also results in the imposition of a determinate sentence which in the past has been a more attractive option than detention at the Governor's Pleasure.

However, the existence of the defence of diminished responsibility should not of itself prevent a statutory reformulation of the defence of mental impairment. It is interesting to note that the Model Criminal Code Officers' Committee has recently highlighted the conceptual and practical difficulties in distinguishing the defence of diminished responsibility from the defence of mental impairment and has recommended that the defence of diminished responsibility should not form part of the model Criminal Code.[30]

The NSWLRC Report goes on to consider the disposition of those found not guilty on the ground of mental impairment. The insanity defence has traditionally been rarely used because it brought with it the prospect of indeterminate

[24] *R* v *Morris* [1961] 2 QB 237.
[25] *R* v *Din* [1962] 46 Cr App R 269.
[26] *R* v *Price* [1962] 47 Cr App R 21.
[27] *R* v *Russell* [1964] 2 QB 596.
[28] *R* v *Matheson* (1958) 42 Cr App R 145; *R* v *Byrne* [1960] 2 QB 396; *R* v *Clarke and King* [1962] Crim LR 836; *R* v *Harvey and Ryan* [1971] Crim LR 664; *R* v *Fenton (1975)* 61 Cr App R 261; *R* v *Turnbull* (1977) 65 Cr App R 242; *R* v *Evers* unreported, Court of Criminal Appeal, NSW, 9 June 1993, CCA 60086/92.
[29] *R* v *Harrison*, *The Times*, 19 September 1957.
[30] Model Criminal Code Officers' Committee, *Chapter 5: Fatal Offences Against the Person, Discussion Paper* (Canberra: June, 1998), 113–131.

detention. The Burdekin Report pointed out that such detention 'can be a particularly severe punishment because it is not subject to the normal legal protections which apply to those convicted of crimes'.[31] Various jurisdictions have now reformed the law in this area to allow for more flexible dispositional options, including the prospect of an unconditional release.[32]

The NSWLRC Report recommends that section 39 of the *Mental Health (Criminal Procedure) Act* 1990 (NSW) be amended to remove the requirement that an order for detention in strict custody be made on a finding of not guilty because of mental impairment and that the court should have power to order either a custodial or non-custodial option. If a custodial term is ordered, then the court should be able to set a 'limiting term', being the 'best estimate of the sentence he or she would have considered appropriate if the person had been found guilty of the relevant offence'.[33]

The NSWLRC Report recognises that there are a number of conceptual difficulties with the notion of a limiting term.[34] On a general level, a limiting term confuses the sentencing process, which is based on the premise of criminal responsibility with detention based on the mental state of an individual who has not been found criminally responsible. Tollefson and Starkman write in this regard:

> In sentencing, a judge considers the facts of the case in relation to the offender as well as to the offence, and one of the main considerations in sentencing, ie., the moral culpability of the accused, is specifically found not to exist when the court finds that the accused is incapable of appreciating the nature and quality of the act or of knowing that it was wrong. Moreover, is difficult to apply the principle of specific deterrence to someone who by reason of mental disorder is incapable of relating the penalty to the act.[35]

Despite the concept of a limiting term showing confusion between sentencing and criminal responsibility, the NSWLRC Report recommends it 'as the only pragmatic alternative to indeterminate detention'.[36] The advantages listed are first, that the individual concerned would no longer serve more than the maximum penalty for a guilty verdict for the same offence; secondly, the length of the limiting term could be appealed; thirdly, it may encourage the use of the defence in appropriate cases and finally, it would remove executive involvement in the release of the individual.

These are strong advantages, but perhaps one alternative which might be explored is that of the notion of detention on the basis of a civil commitment legislation.

It seems preferable that a custodial order be based solely on the mental state of the individual rather than on the idea of punishment for an offence for which the individual was not held responsible. The appropriate criteria for committing the

31 Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness, Report of the National Inquiry Into the Human Rights of People with Mental Illness*, Volume Two, (1993) 798.

32 *Crimes Act* 1914 (Cth) s 20BJ-BP; *Crimes Act* 1900 (ACT) ss 428D, 428R; *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic) Part 5; *Criminal Law Consolidation (Mental Impairment) Amendment Act* 1995 (SA) Division 4; *Criminal Law (Mentally Impaired Defendants) Act* 1996 (WA) s 22. See also *Model Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill* 1995 (Cth) and the *Mental Health (Criminal Procedure) Act* 1990 (NSW).

33 The NSWLRC Report, 236.

34 Ibid 237.

35 E A Tollefson and B Starkman, *Mental Disorder in Criminal Proceedings* (1993), 117.

36 The NSWLRC Report, 237.

individual to an approved place should be those for civil commitment. The rationales for involuntary civil commitment are the treatment of the person for his or her health or safety or for the protection of the members of the public. The detention of an involuntary patient is periodically reviewed and must be justified under mental health legislation. It is perhaps worthwhile considering whether such a regime could relate to those found not criminally responsible because of mental impairment.

This alternative approach has been put into practice in France where the process of civil commitment is brought into play after a person is found not criminally responsible. In that country, if an accused is acquitted on the ground of insanity, he or she is automatically given an unconditional release.[37] The question of whether or not he or she should be hospitalised then becomes a matter that falls under the ordinary law of civil commitment in which case a relative may take steps to have the person committed. Alternatively, the prefect of police may take steps to have the person involuntarily committed on the basis of 'la securité des personnes'.[38]

If a limiting term is imposed and the individual is still found to have a mental impairment after the expiry of the term, civil commitment legislation will most likely come into play. Why not follow the French example and detain those found not criminally responsible on the basis of civil commitment legislation right from the start? It would appear to have all the advantages listed in relation to a limiting term and is an alternative that bears consideration.

The NSWLRC Report further recommends that the Mental Health Review Tribunal have the power to make release and supervision decisions. This departs from the Commonwealth and Victorian models which have the court system controlling these decisions. Having a tribunal decide these issues seems to be a fairer way of assessing disposition because a tribunal consists of a number of persons from different disciplines and having representatives from both the medical and legal fields takes into account the fact that both legal and medical questions are raised by dispositional questions. Given that the tribunal already exists, it may also be less costly for it to handle these issues.

FITNESS TO BE TRIED

The concept of fitness to be tried originated in the procedural formalities of the medieval court of law one of which required that the accused enter a plea. Those who remained mute were confined to a narrow cell and starved until they entered a plea or died, a technique known as *prison forte et dure* or, from 1406, were both starved and gradually crushed under increasing weights until they entered a plea or died. The latter technique was known as *peine forte et dure*.[39] Before resorting to these techniques, the court had to decide whether the accused was mute of malice or mute by the visitation of God, the latter exempting the accused from torture. Examples of the latter included those who were deaf-mute and those who were insane.

[37] G Stefani, G Levasseur and B Bouloc, *Droit penal general* (1994, 15th edition) Para 421, 323.
[38] Art L.348 Code santé publique.
[39] See D Grubin, 'What Constitutes Fitness to Plead?' [1993] Crim LR 748–758, 750.

More modern conceptions of this procedure of fitness to be tried are based on measuring the accused's understanding of the trial proceedings. There are two important problems associated with the law relating to fitness to stand trial. The first is: what criteria should be used to determine fitness; the second: what should be done with the person who is found unfit? These questions are currently being considered in law reform efforts in certain Australian jurisdictions and the NSWLRC Report provides an interesting focal point for discussion in this regard.

A. Criteria for Determining Fitness

The criteria for determining whether or not a person is fit to plead differs between jurisdictions, but in general, such criteria are based on a determination of whether the person is 'able meaningfully to participate in the criminal trial process'.[40]

In *Kesavarajah* v *The Queen*[41] the High Court confirmed that at common law, the test for fitness to stand trial is governed by the criteria set out by Smith J in *R* v *Presser*.[42] In summary, an accused will be held fit where he or she is able to:

- understand the charge;
- plead to the charge and exercise the right of challenge;
- understand generally the nature of the proceedings;
- follow the course of the proceedings;
- understand the substantial effect of any evidence against him or her;
- make his or her defence and his or her version of the facts known to the court; and
- give any necessary instructions to his or her counsel.

Statutory conceptions of the criteria for fitness to stand trial tend to follow this cognitive model very closely.[43] The *Presser* criteria have been criticised by the Victorian Intellectual Disability Review Panel because of the 'possible danger of too readily dismissing the person's capacity to comprehend, and ... the subjective nature of determining the extent to which the person may satisfy the *Presser* criteria. It also fails to consider that the person may benefit from assistance or tutorship, in order to better understand the proceedings.'[44]

The New South Wales statutory regime does not define the criteria for determining fitness and therefore the *Presser* criteria hold sway. The NSWLRC Report is surprisingly silent as to what the criteria should be, concentrating more upon the procedure for finding fitness rather than the substantive law. This is a missed opportunity given that the *Presser* criteria have been criticised as leading to subjectivity and arbitrariness in assessments of competency.[45]

40 I Freckelton, 'Rationality and Flexibility in Assessment of Fitness to Stand Trial' (1996) 19(1) *International Journal of Law and Psychiatry* 39–59, 41.

41 (1994) 68 ALJR 670.

42 [1958] VR 45, 48.

43 See, for example, s 28A *Mental Health Act* 1974 (Qld); s 269H *Criminal Law Consolidation (Mental Impairment) Act* 1995 (SA); s 9 *Criminal Law (Mentally Impaired Defendants) Act* 1996 (WA); s 6 *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic); s 3 *Model Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill* 1995 (Cth).

44 Victorian Intellectual Disability Review Panel, Submission, 17 December 1992, 8, referred to in I Freckelton, 'Rationality and Flexibility in Assessment of Fitness to Stand Trial' (1996) 19(1) *International Journal of Law and Psychiatry* 39–59, 45.

45 I Freckelton, 'Rationality and Flexibility in Assessment of Fitness to Stand Trial' (1996) 19(1) *International Journal of Law and Psychiatry* 39–59; I Freckelton, 'Fitness to Stand Trial, Editorial, (1995) 3(1) *Journal of Law and Medicine* 3–7.

B. Disposition of Persons Found Unfit to Be Tried

A variety of different procedures exist for determining whether or not a person is fit to plead.[46] Until recently, persons found unfit to be tried remained in custody until they became fit.[47] This obviously discriminated against those with a permanent intellectual disability.

The NSWLRC Report largely endorses the existing regime in New South Wales, a regime which was introduced in 1986 as a result of criticism of those found unfit to be tried being detained indefinitely 'at the Governor's pleasure'. In the District and Supreme Courts of New South Wales, any party to the proceedings may raise the issue of fitness, and a fitness inquiry is then carried out by a judge sitting alone or with a jury constituted for the purpose.[48] If the person is found unfit, the person is referred to the Mental Health Review Tribunal consisting of both full-time and part-time members, including lawyers, psychiatrists and other suitably qualified or experienced persons. The Tribunal must determine whether or not, on the balance of probabilities, the person will become fit to be tried during the period of 12 months after the finding of unfitness. If the Tribunal finds that the person will not become fit to be tried within the 12 month period (and this seems likely in the case of those with an intellectual disability), it must notify the Attorney-General who can either direct a 'special hearing' take place or decide not to proceed against the person. This involves the court system once more. The 'special hearing' is conducted like a normal criminal trial before a judge or jury and the verdicts which may be made are:

(a) not guilty of the offence charged;
(b) not guilty on the ground of mental illness;
(c) that on the limited evidence available, the accused person committed the offence charges;
(d) that on the limited evidence available, the accused person committed an offence available as an alternative to the offence charged.[49]

Having a 'special hearing' after a finding of unfit to be tried appears to be a sensible way of testing the prosecution case whilst making allowances for an accused's mental condition. There will of course be practical difficulties in defence counsel obtaining instructions, but it appears essential to have some form of mechanism for testing whether a person found unfit to be tried has committed the physical elements of the offence.

The Model *Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill* 1995 (Cth) provides for a similar regime to that in New South Wales, the most important difference being that the court, not the executive or a Tribunal makes all

[46] *Criminal Code* (NT) s 357(3); *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic) Part 2, *Criminal Law (Mentally Impaired Defendants) Act* 1996 (WA) Part 3; *Criminal Law Consolidation (Mental Impairment) Amendment Act* 1995 (SA) Division 3; *Mental Health (Criminal Procedure) Act* 1990 (NSW) s 17; *Mental Health (Treatment and Care) Act* 1994 (ACT) s 72; *Crimes Act* 1914 (Cth) ss 20BS, 20BV, 20BY; *Mental Health Act* 1974 (Qld) ss 34, 35; *Mental Health Act* 1963 (Tas) s 51.

[47] See W Brookbanks, 'A Contemporary Analysis of the Doctrine of Fitness to Plead' (1982) *Recent Law* 84; W Brookbanks, 'Judicial Determination of Fitness to Plead — The Fitness Hearing' (1992) 7 *Otago Law Review* 520.

[48] Sections 5–12 *Mental Health (Criminal Procedure) Act* 1990 (NSW).

[49] Section 22(1) *Mental Health (Criminal Procedure) Act* 1990 (NSW).

relevant decisions concerning a person's fitness to stand trial. The Victorian, West Australian and South Australian regimes all follow along the lines of the Commonwealth model, with the court making all relevant decisions.[50] The Victorian legislation does, however, set up a Forensic Leave Panel to hear all applications for leave of absence by forensic residents who are subject to supervision orders.[51]

The NSWLRC Report recommends removing executive discretion in relation to decisions regarding forensic patients. This appears eminently sensible given that under the present regime, the executive government simply relies upon the Tribunal's recommendations and reports.[52] This requirement seems to be a hangover from the old process of indeterminate detention according to the Governor's pleasure and should be removed.

Perhaps more importantly, the NSWLRC Report recommends that the Mental Health Review Tribunal rather than the court continue to decide the issue of whether or not a person will become fit to stand trial within 12 months of the initial finding. The rationale for this is listed as follows:

- the varied expert membership of a tribunal allows for more expertise in the area of mental impairment and dangerousness;
- the adversarial system of the courts is inappropriate for the consideration of issues such as continuing fitness and dangerousness;
- the court has no continuing role after sentencing in the detention of 'fit' defendants; and
- a tribunal is generally quicker and less formal than the courts which has particular advantages for this group of defendants.[53]

These arguments are persuasive. It does seem more logical for a specially constituted panel which includes members with experience in the forensic arena to decide the question of fitness rather than for a judge or jury to decide the issue. The primary problem, however, is that because the New South Wales system involves the transferral of a person found unfit to be tried between the criminal justice and health systems, there may be considerable delays in hearing the case.[54] This is perhaps the reason why the New South Wales model has not been adopted in other jurisdictions.[55]

The NSWLRC Report also recommends that a 'limiting term' be placed on the detention of those found unfit to be tried after a finding at a special hearing that the person committed the offence. As for the limiting term recommended in relation

[50] *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic) Part 2, *Criminal Law (Mentally Impaired Defendants) Act* 1996 (WA) Part 3; *Criminal Law Consolidation (Mental Impairment) Amendment Act* 1995 (SA) Division 3. For a commentary on the Victorian Act see S Delaney, 'Controlling the Governor's Pleasure – Some Gain, Some Pain' (1998) 72(1) *Law Institute Journal* 46–7.

[51] *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 ss 59, 60.

[52] The NSWLRC Report, 184.

[53] The NSWLRC Report, 187.

[54] New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues*, Discussion Paper 35, (Sydney: NSWLRC, 1994) 108.

[55] For a critical discussion of the New South Wales model, see Community Development Committee, Parliament of Victoria, *Inquiry into Persons Detained at the Governor's Pleasure* (Melbourne, Victorian Government Printer, October 1995) 122–126.

to the defence of mental impairment, this is defined as 'the best estimate of the sentence the Court would have considered appropriate if the special hearing had been a normal trial.'[56]

The NSWLRC Report recognises that 'the concept of setting a limiting term is somewhat artificial, since a judge has to fashion a sentence when criminal culpability has not been fully determined'[57] but sees this as the only alternative to indeterminate detention. The same conceptual confusion between criminal responsibility and sentencing issues which occurs with those found not criminally responsible on the basis of mental impairment also occurs here. Surely a limiting term is another expression for a sentence of a finite time. But on what philosophical basis can we punish a person found unfit to be tried? Could civil commitment legislation or guardianship legislation have a role here, rather than criminal detention?

Certainly, a return to the old regime of indeterminate detention must be avoided at all costs. The idea of a special hearing and limiting terms does go a long way in redressing the inequities of the past, but perhaps alternative systems need also be considered.

SPECIFIC SEXUAL OFFENCES

One of the most challenging issues raised in the NSWLRC Report deals with whether or not there should exist specific offences relating to sexual assaults against those with an intellectual disability and, by implication, those with some form of mental illness. This is a very unclear area of the law, given that there are many discrepancies between the laws in the eight Australian criminal law jurisdictions and the issue of capacity to consent raises some very difficult questions of human rights.

At present, in New South Wales, a person may be given a substantially heavier sentence for a sexual assault committed 'in circumstances of aggravation'.[58] The latter includes circumstances in which the victim has a serious physical or intellectual disability.[59] The term 'serious intellectual disability' is not defined. The policy behind this provision which was introduced in 1989 seems to be that there should be a higher sentence in relation to crimes which the community perceives as particularly abhorrent.[60]

The NSWLRC Report recommends that the inclusion of the term 'intellectual disability' be abolished as a circumstance of aggravation first, because of the lack of clarity in relation to what is meant by the term 'serious intellectual disability', secondly, because it is uncertain whether or not the accused's knowledge that the victim had a serious intellectual disability is an element of the offence and thirdly,

56 The NSWLRC Report 180.
57 Ibid 182.
58 *Crimes Act* 1900 (NSW) s 61J.
59 *Crimes Act* 1900 (NSW) ss 61J(2)(f) and (g).
60 New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 28 November 1989, Hon J R A Dowd, Attorney-General, Second Reading Speech, 13569–13570.

because the aggravated offences relating to intellectual disability are not used often in practice. The MCCOC has also pointed out a number of problems with this section dealing with serious intellectual disability as a circumstance of aggravation, one of which is the decision to confine it to those with serious physical or intellectual disabilities and not those with a mental illness or other forms of mental impairment such as that caused by brain injury.[61] The MCCOC has also recommended that this provision be abolished and it does appear that this section contains too many anomalies for it to remain in the *Crimes Act*.

General provisions dealing with non-consensual sexual intercourse or touching have been recognised as providing insufficient protection where the victim lacks the capacity to consent.[62] Many jurisdictions have enacted provisions which made it an offence to have intercourse with individuals with mental impairment.[63] The New South Wales provision states that:

> Any person who has sexual intercourse with another person who has an intellectual disability, with the intention of taking advantage of the other person's vulnerability to sexual exploitation, shall be liable to penal servitude for 8 years.[64]

The NSWLRC Report recommends the abolition of this section. This is a particularly difficult area as the positive rationales for the existence of this section and other similar blanket provisions are to protect vulnerable individuals from sexual exploitation, to get around problems with proving incapacity to consent and, by focusing on the accused's knowledge, to enable a prosecution to take place without the victim having to give testimony in court. On the other hand, the Victorian Law Reform Commission criticised such blanket provisions on the basis that they do not allow for the sexual autonomy of individuals with mental impairment.[65] Similarly, the MCCOC has rejected having a blanket provision preventing sexual intercourse with such individuals.[66]

The NSWLRC has also swung the balance in favour of protecting sexual autonomy in advocating the abolition of section 66F(3). The Report recognises the difficulty in finding an appropriate balance by expressing sympathy towards the argument that the section does have some value in aiming to prevent the sexual exploitation of those with an intellectual disability. What the Report does recommend preserving, with some amendment, is the 'carer's offence' set out in section 66F(2) of the *Crimes Act* 1900. This states:

61 Model Criminal Code Officers' Committee, *Chapter 5: Sexual Offences Against the Person Discussion Paper* (Canberra: November, 1996) para 8.11, 289.

62 B McSherry, ' Sexual Assault Against Individuals with Mental Impairment: Are Criminal Laws Adequate?' (1998) 5(1) *Psychiatry, Psychology and Law* 107-116.

63 *Criminal Code* (NT) s 130(1) (mentally ill or handicapped person); Crimes Act 1900 (NSW) s 66F(3) (person with an intellectual disability); *Crimes Act 1971* (NZ) s 138 (severely subnormal woman or girl); *Criminal Code* (Qld) s 216 (intellectually impaired person); *Criminal Code* (Tas) s 126(1) (insane female), s 126(2) (defective female); *Criminal Code* (WA) s 330(1) (incapable person).

64 Section 66F(3) *Crimes Act* 1900 (NSW).

65 Law Reform Commission of Victoria, Report No 15, *Sexual Offences Against People with Impaired Mental Functioning*, (1988) 24-29.

66 Model Criminal Code Officers' Committee, *Chapter 5: Sexual Offences Against the Person, Discussion Paper* (1996) 145.

> Any person who has sexual intercourse with another person who —
> (a) has an intellectual disability; and
> (b) is (whether generally or at the time of the sexual intercourse only) under the authority of the person in connection with any facility of programme providing services to persons who have intellectual disabilities,
> shall be liable to penal servitude for 10 years.

The NSWLRC Report recommends that this be redrafted to ensure that it covers all relevant carers, including volunteers and staff providing home-based care, but not prohibit sexual relations between consumers of the same service. The retention of such a provision is important. The MCCOC points to the policy reasons defending the enactment of such sections as follows:

> One [reason] is that a person with impaired mental functioning may not want a sexual relationship but, due to power imbalance or institutional setting, may find it difficult to refuse. Other concerns include the psychological harm which may result from such a relationship as well as the breach of trust put to the caregiver by, say, the victim's family.[67]

It is important that any law reforms in the area of sexual assault as it relates to individuals with an intellectual disability be based on the principle that individual autonomy be respected to the greatest possible degree. Any interference with an individual's expression of his or her sexuality should only be justified where it is shown that the interference is clearly necessary for the protection of the person concerned. With this in mind, the NSWLRC Report appears to have found an appropriate balance in this area in its recommendation to abolish the blanket provision prohibiting sexual intercourse with individuals with an intellectual disability and its recommendation to retain an amended version of the carer's offence.

CONCLUSION

This review has provided an overview of some of the difficult areas of law reform dealt with in the NSWLRC Report. The latter provides comprehensive research and recommendations in relation to how criminal laws should be reformed in the four areas discussed and will provide an essential starting point for those working in the law reform arena in other Australian jurisdictions.

Overall, the recommendations are well formulated, subject to some notable exceptions such as the decision not to enact a statutory defence of mental impairment and the omission of a definition of the criteria for determining fitness to be tried.

What is important now is to ensure that the NSWLRC recommendations are considered and acted upon. The enactment of legislation cannot stand on its own in this regard. Byrnes has pointed out:

[67] Ibid.

> Education is probably the most critical element of any strategy designed to overcome the disadvantages suffered by people with an intellectual disability within the criminal justice system.[68]

At the time of writing, an interdepartmental committee is still considering the implications of the NSWLRC Report and no legislation based on the Report's model *Criminal Procedure Amendment (Mental Impairment) Bill* has been placed before Parliament.[69] It is to be hoped that all the time and effort put into the NSWLRC Report and its earlier literature on the topic of those with an intellectual disability and the criminal justice system will result in changes to the present law as well as a lessening of the present injustices such individuals face on a daily basis.

[68] L Byrnes, 'Justice and Intellectual Disability' (1997) 22(5) *Alternative Law Journal* 243-247, 246.

[69] Telephone conversation with Mr Peter Hennessy, Executive Director, the New South Wales Law Reform Commission, 28th July 1998.