Linda Steele
Postgraduate Fellow
Sydney Law School
New Law School Building F10
University of Sydney NSW 2006

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Paul McKnight
Executive Director
NSW Law Reform Commission
GPO Box 5199
Sydney NSW 2001

Dear Mr McKnight

People with Cognitive and Mental Health Impairments in the Criminal Justice System

Thank you for the opportunity to make a supplementary submission to the NSWLRC review: 'People with Cognitive and Mental Health Impairments in the Criminal Justice System'.

In July 2010 I made a submission to the NSWLRC. That submission focussed specifically on the issues raised in Consultation Paper 7, notably the diversion of defendants with cognitive impairment pursuant to s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) (hereafter referred to as 's 32'). This present supplementary submission is of a more general nature. I begin by drawing attention to the socially contingent nature of cognitive and mental health impairments, and then raise the question of whether the forensic mental health system as a whole is discriminatory and should be dismantled on this basis.

I am a PhD candidate at the Sydney Law School researching section 32 as it relates to persons with cognitive impairment. My research includes empirical research of hearings of section 32 applications and associated court files. The views expressed in this submission reflect my views informed by my current research and my prior professional experience representing persons with cognitive impairment. Please note that the views expressed in this submission are still in a process of evolution and development insofar as they are part of a larger long term program of research.

The submission does not reflect the views of the University of Sydney, of any particular organisation or of persons with cognitive impairment themselves.

Although my submission does not specifically engage with the issues for discussion at the Community Roundtable (20 April 2011), I do wish to briefly raise two matters which relate to the Roundtable:

1. Concerns about Therapeutic Jurisprudence

Policy makers, law reform bodies and Magistrates might rely on therapeutic jurisprudence to support the legitimacy and necessity of mental health courts and specialist list initiatives. Therapeutic jurisprudence has operated in a largely self-affirming manner, cocooned from other social and legal theories that would easily present many critiques of the extent to which therapeutic jurisprudence affirms the inequality, disadvantage and disempowerment of persons with cognitive and mental health impairments. If the NSWLRC uses therapeutic jurisprudence in support of its recommendations, I respectfully ask if it could critically reflect on therapeutic jurisprudence, perhaps by reference to questioning:

- whether therapeutic jurisprudence individualises and pathologises complex social problems and as such shifts responsibility for these problems away from the government or broader society;
- whether therapeutic jurisprudence ignores systemic sources of disadvantage experienced by individuals with cognitive and mental health impairments and fails to offer ways to address these;
- insofar as it provides solutions that further embed individuals within the criminal law, whether therapeutic jurisprudence fails to acknowledge, and as such reinforces, the role that the criminal law itself has in promoting inequality and disadvantage in relation to persons with cognitive and mental health impairments; and
- whether therapeutic jurisprudence's reliance on psychological based approaches to defining impairment based 'problems' and 'therapeutic solutions' privileges the views and approaches of psychology and human service disciplines over the views of individuals with impairment themselves, and in doing so denies the ability of persons with cognitive and mental health impairments to speak authoritatively on their lives, needs and identities at the same time that it suspends the psychology and human services disciplines above critique.

2. The Need to Identify and Address Systemic Issues

Whilst I do not support a mental health court or special list, if the NSWLRC does recommend a mental health court or special list, I recommend that there should be a strategy developed for the consistent and thorough practice of identifying and making recommendations for the reform of systemic issues that persons coming before this court or list experience. This is in order to address the risks that such a problem solving list or court individualises problems and might reinforce systemic marginalisation, inequality and social disadvantage. For example, a mental health

court or special list which is limited to placing legal or informal obligations on a defendant to 'fix' their problems will fail to acknowledge, explore and reform problems relating that are beyond an individual's control, eg, the practice of policing, definitions of criminal offences, and service funding issues. This systemic aspect to a special list or court might involve a group of persons (including persons with cognitive and mental health impairment who have experience of the criminal justice system, stakeholders and critical social researchers) working together to critically analyse matters that come before the court, and making recommendations for reform including through communicating with government agencies, producing occasional papers/reports on specific issues, referring issues to the Ombudsman or the NSWLRC for further inquiry, and making submissions to review projects. There would be obvious confidentiality and ethical issues involved which would need to be addressed.

Regards,

Linda Steele

General Comments

1. It is certainly positive that the NSWLRC is undertaking a review project specifically on persons with cognitive and mental health impairments in the criminal justice system. In light of the broad and general nature of its review, I respectfully request that the NSWLRC consider two interrelated issues which it does not explicitly consider in the Consultation Papers.

2. The first issue is the underlying ideas about impairment and disability that inform how the criminal law understands and acts upon persons with cognitive and mental health impairments in the criminal justice system. The NSWLRC seems to have alluded to this in its discussion of definitions and eligibility in its Cognitive Impairment Roundtable on 17 March 2011. In my view this is fundamental to the NSWLRC's review of the legal framework itself and hence within the terms of reference for this review. I suggest that instead of a purely diagnostic approach to understanding cognitive and mental health impairments, we can approach these impairments as socially contingent.

3. If we view the criminal law's approach to persons with cognitive and mental health impairments as informed by socially contingent ideas about impairment and disability then new options for reforming the framework open up because it is possible that (i) the law is operating discriminately or negatively towards persons with cognitive and mental health impairments based on these socially contingent views, (ii) the criminal law can be informed by different, more positive views of impairment and disability because the ideas informing the law are socially contingent and hence are open to change rather than being natural, fixed and beyond change, and (iii) reviewing and reforming the criminal law without addressing these underlying ideas about impairment and disability will serve to reify these ideas and limit the extent to which any recommended reforms can address the inequality and disadvantage experienced by persons with cognitive and mental health impairment in the criminal justice system.

4. The second issue that I ask the NSWLRC to consider is whether the forensic mental health system is discriminatory. Seeing the criminal law's approach to persons with cognitive and mental health impairments as informed by socially contingent ideas about impairment and disability raises questions about whether the forensic mental health system is discriminatory. The forensic mental health system exclusively regulates *unconvicted* persons with cognitive and mental health impairments where *unconvicted persons without these impairments* are not so regulated by the forensic mental health system and are incapable of any regulation by the criminal law. I submit below that the existing defensibility of this exceptional system of regulation of persons

with cognitive and mental health impairments is grounded in links between cognitive and mental health impairment and risk and that because these are socially contingent and rely on negative ideas about disability the forensic mental health system is discriminatory.

5. Even if the forensic mental health system is not discriminatory in a strictly legal sense (because of the limited scope of domestic disability discrimination laws), it is submitted that an argument can still be made for its dismantling on social grounds. This is on the grounds that the forensic mental health is still discriminatory in a broader social sense because the system is based on and promotes negative ideas of cognitive and mental health impairments, it reinforces inequality and disadvantage experienced by persons with cognitive and mental health impairments, and is contrary to broad human rights principles.

6. In making this submission, I acknowledge that the number of persons with cognitive and mental health impairments in the forensic mental health system is small compared to those convicted and subject to punishment (notably those in prison) and that we should not focus on the forensic mental health system at the cost of losing sight of this latter group. I submit, however, that a consideration of the discriminatory effect of the forensic mental health system is central to a review of people with cognitive and mental health impairments in the criminal justice system in general. This is because the negative ideas of impairment that the discriminatory forensic mental health system promotes, particularly the link between impairment and risk, can impact on the status of persons with cognitive and mental health impairments in the criminal law and criminal justice system more broadly insofar as they produce particular ideas, discourse and knowledge about cognitive and mental health impairment which can, for example, impact on policing, bail, corrective services and probation and parole.

Considering the Socially Contingent Nature of Cognitive and Mental Health Impairments and of Impairment-Specific Risk

Impairment

7. The NSWLRC in its consultation papers for this review has not considered the socially contingent nature of cognitive and mental health impairments. Its discussion in CP 5 of cognitive and mental health impairments is limited to a factual discussion of the diagnostic definitions associated with these impairments,[1] rather than a broader critical inquiry into the social context of these categories. This narrow diagnostic discussion of cognitive and mental

[1] CP 5, [1.26]-[1.41].

health impairments suggests that cognitive and mental health impairments are scientific, value-neutral concepts that are suspended from social, cultural and political forces and exist outside of power relations. This clinical, asocial approach to cognitive and mental health impairments can be contrasted to the approach taken by the NSWLRC in other law reform projects to legal issues relating to women, where the law is located in historical and social contexts of gender relations, and law reform is recognised as having a role in either reinforcing or addressing negative views and unequal power relations associated with gender related laws.[2]

8. It is submitted that much like identities centred on gender (and race and sexuality), identities centred on cognitive and mental health impairments are socially contingent and an appreciation of the law's treatment of this group can be critically located within social and historical contexts of power relations, disadvantage and marginalisation.

9. By social contingent I mean that how impairment is defined and acted upon in the criminal law and criminal justice context is not limited to the scientific identification of an individual, internal pathology, but rather is in a constant process of change that is informed by (i) shifting ideas of normality, deviancy, risk and criminality, (ii) evolving power relations between individuals with cognitive and mental health impairments and the state and the psychological and human service professions, (iii) societal and legal approaches to acknowledging and responding to disadvantage and inequality such as poverty, childhood trauma and abuse, drug use and homelessness, and (iv) histories and practices of colonisation.

10. This distinction between the treatment in law reform of cognitive and mental health impairments and other socially disadvantaged identities such as gender is strikingly evident through a comparison of the NSWLRC's discussion in CP 6 of infanticide and of the mental illness defence. In its discussion of infanticide the NSWLRC draws attention to the impact of social and historical approaches to gender on the legal approach to women's criminal responsibility:

> The infanticide provisions were developed at a time when "madness" and criminality in women was seen as connected to the female

[2] See, eg, the discussion of women and gender relations in the context of laws relating to the guaranteeing of debts: New South Wales Law Reform Commission, *Guaranteeing Someone Else's Debt* (Report 107, 2006) [2.12], [3.2]-[3.27]; the discussion of the gender specific criminal defence of infanticide: New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* (Report 83, 1997) [3.1]-[3.47]; the discussion of the gendered constructions of self-control and ordinary person's response in the context of the criminal defence of provocation: New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* (Report 83, 1997) [2.65]-[2.72].

> reproductive system, with women depicted as "victims of their own biology". As such, coupled with its dubious medical validity, s 22A can be seen as an anachronistic relic that has little relevance outside of its original historical context. In Report 83, we considered that the benefit to women afforded by a gender-specific provision capable of recognising the physical, social and economic circumstances experienced by women who have recently given birth, is outweighed by the discriminatory basis of the provision and its misplaced assumptions. We also questioned the "wider consequences of a law which makes specific concessions to women based on a notion of inherent 'disabilities'".[3]

Here, the NSWLRC not only identifies the historical and social forces at play in understanding women's criminal responsibility, but questions whether the law through the infanticide defence itself reiterates problematic ideas about women and on this basis whether the infanticide defence should be abolished. It is arguably problematic, however, that in arguing that mental illness is used in the aid of socially constituting the female criminal subject of the infanticide defence, the NSWLRC fails to consider how mental health impairments themselves are also socially constituted.

11. I question why this socially nuanced approach to gender is not taken to the review as a whole in relation to persons with cognitive and mental health impairments, notably how the disability-specific forensic mental health system or its various legal mechanisms reiterate negative ideas about impairment and reinforce unequal power relations.[4] For example, one can compare the analysis of infanticide above to the NSWLRC's consideration of the mental illness defence:

> Given the level of criticism that surrounds its formulation, the question arises whether defence of mental illness is so outdated and fundamentally flawed that it should be rejected altogether as forming part of a modern criminal justice system. That question requires consideration, first of all, as to whether the underlying rationale for the defence remains valid. Is there still a need to provide a legal mechanism for excusing from criminal responsibility those offenders whose mental capacity is significantly impaired, for protecting them from themselves or the community *where their impaired mental capacity makes them susceptible to dangerous behaviour*, and for providing them with the opportunity for treatment, rather than punishment? In the Commission's view, *the answer to that question is uncontroversial*, and the

[3] CP6, [5.28].

[4] Whilst the NSWLRC does avert some consideration to the social basis for diversion ie for a particular mode of regulation, there is no consideration of social factors as a ground to abolish modes of regulation.

> underlying rationale for the defence of mental illness remains as valid today as it did when it first evolved.[5]

In drawing this summary conclusion the Commission does not engage with the rich and diverse literature critiquing cognitive and mental health impairments and the link between impairment and risk (discussed below) which would clearly suggest that the mental illness defence (and the entire forensic mental health system) is *highly* controversial.

12. There is a growing body of literature in law and the humanities which views cognitive and mental health impairment, and impairment and disability generally, as socially contingent.[6] This literature is not homogenous and presents a number of perspectives on the precise significance and effect of social, political and cultural forces on the meaning of impairment and disability. This literature problematises a purely scientific, individualised and asocial understanding of cognitive and mental health impairments, ie a diagnostic understanding. It locates impairment and disability within complex power relations and identifies the significance of multiple social, cultural, economic, political and historical factors on the meaning given to impairment and disability.

13. From this literature we can see how reliance upon diagnostic definitions of cognitive and mental health impairments might not only fail to acknowledge the significance of social, political and cultural factors on understandings of impairment and disability, but also that diagnosis actually masks these factors by presenting a definition of impairment that is scientific and value neutral. This literature also suggests that the notion of impairment itself is grounded in socially contingent norms (rather than naturally, scientifically occurring principles of normality) against which impairments as abnormalities are defined.

14. Based on this diverse literature on impairment and disability, it is arguable that law itself has a role in reiterating problematic notions of cognitive and mental health impairments and it promotes unequal power relations and devalues difference related to impairments, at the same time that law's

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[5] CP 6, [3.14] (my emphasis added).

[6] See, eg, Fiona Kumari Campbell, *Contours of Ableism: The Production of Disability and Abledness* (Hampshire: Palgrave Macmillan, 2009); Licia Carlson, *The Faces of Intellectual Disability: Philosophical Reflections* (Bloomington: Indiana University Press, 2010); Marian Corker and Tom Shakespeare, eds., *Disability/Postmodernity: Embodying Disability Theory* (London: Continuum,2002); Leanne Dowse, "'Some People Are Never Going to Be Able to Do That': Challenges for People with Intellectual Disability in the 21st Century " *Disability & Society* 24, no. 5 (2009); Leanne Dowse, Eileen Baldry, and Phillip Snoyman, "Disabling Criminology: Conceptualising the Intersections of Critical Disability Studies and Critical Criminology for People with Mental Health and Cognitive Disabilities in the Criminal Justice System," *Australian Journal of Human Rights* 15, no. 1 (2009); Shelley Tremain, ed. *Foucault and the Government of Disability* (Ann Arbor: The University of Michigan Press,2005).

reliance on purportedly scientific, value-neutral diagnostic definitions masks or naturalises these effects.

15. As well as the academic literature critiquing impairment, the self-advocacy movement and the consumer-survivor movement provide other perspectives which are articulated by persons with impairments themselves. These individuals and organisations express views are on impairment and disability and contest society's definitions, treatment, regulation and control of them in arguing for greater control over their lives and the acceptance and valuing of their differences.[7]

16. The recent United Nations Convention on the Rights of Persons with Disabilities has been noted for its shift in how it understands disability, away from a medical model focused on individual impairment, to a social model.

Risk and Impairment

17. This literature critiquing impairment and disability critiques the link between cognitive and mental health impairments and risk. Impairment-specific risk is problematised as socially contingent, rather than as a scientifically calculable and naturally occurring phenomenon.[8] The relationship between impairment and risk is related to socially constructed ideas of normality, rather than any kind of objective, neutral and asocial scientific measure.[9] That is, there is no inherent existence or truth to risk because risk is dependent on power relations and social contexts for its definition and calculation.[10]

18. Prior to the social and political act of defining and calculating risk in relation to a particular group, there is an earlier preliminary discretionary decision made about which groups we invest with the capacity for risk. We do not

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[7] For a general overview of the self advocacy movement, see Leanne Dowse, ""Stand up and Give 'Em the Fright of Their Life": A Study of Intellectual Disability and the Emergence and Practice of Self-Advocacy" (PhD, University of New South Wales, 2007). For an overview of the history, experiences and values of a recently formed international coalition of consumer/user organisations, Interrelate, see Anne Beales, Susie Crooks, Dan Fisher, Noreen Fitzgerald, Connie McKnight, Shaun MacNeil and Jenny Speed, 'Interrelate: A New International Mental Health Consumer/Survivor Coalition' <http://www.interrelate.info/index.htm> last accessed 5 May 2011.

[8] See, eg, Dowse, "'Some People Are Never Going to Be Able to Do That': Challenges for People with Intellectual Disability in the 21st Century " 576-578.

[9] See, eg, Anne Waldschmidt, "Who Is Normal? Who Is Deviant?: "Normality" and "Risk" in Genetic Diagnostics and Counselling," in *Foucault and the Government of Disability*, ed. Shelley Tremain (Ann Arbor: The University of Michigan Press, 2005).

[10] See Ryan's discussion of sanism in the context of his argument that civil mental health laws are discriminatory: Christopher Ryan, "One Flu over the Cuckoo's Nest: Comparing Legislated Coercive Treatment for Mental Illness with That for Other Illness," *Bioethical Inquiry* 8(2011) 91.

even identify as risky (and hence attempt to define or calculate risks) many other groups of individuals within society, even where, for example, the behaviour that is identified as risky when engaged in by persons with cognitive or mental health impairment is exactly the same as that carried out by other persons without impairment (eg when the risk attributed to persons with cognitive and mental health impairments relates to drug use, violence, gambling or reckless financial decisions). Risk is therefore potentially discriminatory insofar as it is inextricably related to impairment itself, as opposed to any behaviour or action.

19. Pursuant to this approach, identifying risk provides a rationale for regulating and normalising individuals, including through coercive and repressive criminal justice responses, which might otherwise be considered inappropriate incursions on liberal values of freedom, privacy and non-coercion. Because risk rationalises individual criminal justice responses, attention is shifted away from systemic and complex social, economic and cultural disadvantage and marginalisation that can characterise the lives of persons with cognitive and mental health impairment within the criminal justice system. Regulatory and normalising responses to risk further produce problematic ideas of risk and abnormality about persons with cognitive and mental health impairments and come at the cost of society confronting the standards of normality it sets, working towards acceptance of difference and enhancing the realisation of social, economic and cultural equality in relation to persons with cognitive and mental health impairments.

20. It is on these bases that I submit that the NSWLRC's diagnostic approach to cognitive and mental health impairments which underlies its review of the law is oversimplified because it overlooks the complex issues relating to marginalisation, power and inequality that emerge from an appreciation of the social contingency of cognitive and mental health impairments and impairment-specific risk.

21. I respectfully request that the NSWLRC engage with the question of cognitive and mental health impairments as socially constituted identities, question the effects of the criminal law's reliance on diagnostic approaches to impairment, and question the effect of the links between impairment and risk on the criminal legal framework relating to persons with cognitive and mental health impairments.

22. I submit that an approach to cognitive and mental health impairments as socially contingent suggests that the forensic mental health system as a whole is discriminatory, to which I now turn.

Questioning the Discriminatory Nature of the Forensic Mental Health System

23. Following on from the discussion above, I request that the NSWLRC engage with the question of whether the forensic mental health system is discriminatory and whether it should be dismantled instead of merely reformed. I ask this on the basis that:

    a. The forensic mental health system only regulates unconvicted persons with cognitive and mental health impairments,

    b. The rationale for the exclusive regulation of persons with cognitive and mental health impairments is impairment-specific risk,[11]

    c. Persons without cognitive or mental health impairments cannot be regulated by this system, and

    d. Persons who come before the criminal law on criminal charges but are ultimately not convicted on some basis other than those related to the forensic mental health system (eg the mental illness defence or unfitness) are no longer capable of regulation by the criminal law.

24. In making this argument, I acknowledge that the discriminatory effect of the forensic mental health system may have no legal significance because the scope of domestic disability discrimination law is limited to discrimination in particular areas of public life. Despite this, it is submitted that the forensic mental health system is still discriminatory on a more general level because it is based on and promotes negative and false ideas of cognitive and mental health impairment which promote inequality, disadvantage and marginalisation of persons with cognitive and mental health impairments. Given that the NSWLRC is not limited to questions of the legal validity of laws but also their broader social relevance, it could recommend that the forensic mental health system be dismantled on this broader social basis. This is particularly so because the NSWLRC has itself identified the significance of human rights to its review[12] and non-discrimination and equality before the law are important human rights for persons with cognitive and mental health impairments.[13]

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[11] The argument of risk-based legislation as discriminatory has been developed by Ryan in the context of civil mental health laws. He argues that harm based mental health laws are discriminatory and should be replaced by a capacity based test: ibid. Note that it could be questioned whether a capacity-based test that applies only to persons with disability, eg NSW guardianship laws, is also discriminatory to some extent.

[12] CP 5, [1.42]-[1.50].

[13] See, eg, Convention on the Rights of Persons with Disabilities, Arts 3(b), 5.

25. My argument about the discriminatory nature of the forensic mental health system begins by first separating the legal framework of this system into two tiers, which I refer to as the 'exclusion tier' and the 'alternative regulation tier'.

Exclusion Tier

26. In general, the criminal law's imposition of coercion and punishment over individuals is not at large but rather is limited by various principles that delineate the legitimacy of this imposition. These principles include those that construct the legitimate subject of the criminal law along psychological lines as capable of understanding the criminal process, capable of forming an intention to engage in criminal conduct, and capable of being individually responsible for their actions. These principles manifest in the legal mechanisms of fitness, mens rea, and the mental illness defence ('exclusion mechanisms'). These particular exclusion mechanisms sit alongside other exclusion mechanisms, which are similarly informed by a principled delineation of the legitimacy of the criminal law's power, but which are not psychological or impairment-specific. These other exclusion mechanisms include those relating to rules of evidence, criminal process and other defences such as self defence etc.

27. The effect of the application of an exclusion mechanism itself is not to channel an individual into an alternative system of criminal regulation, in fact their very purpose is to place limits on criminal regulation through punishment and hence such exclusion mechanisms generally result in persons subject to them being free of criminal regulation. That is to say, the effect of the application of a common law psychological or impairment specific exclusion mechanism is not itself to place an individual with cognitive or mental health impairment into practices of detention and coercive treatment characteristic of the forensic mental health system.

Alternative Regulation Tier

28. Distinct from the common law exclusion mechanisms, there is a *legislative* system for the subsequent regulation specifically of persons with cognitive and mental health impairments who are subject to psychological or impairment specific exclusion mechanisms such as mental illness defence or unfitness. This alternative system of regulation consists of those legislative provisions in the *Mental Health (Forensic Provisions) Act 1990* (NSW) for the 'care, treatment and control' of persons who are subject to the mental illness defence and unfitness and subsequently outside of the scope of detention and regulation through criminal punishment.

29. This second tier of regulation is not inextricably related to the first tier of exclusion from punishment (ie it has no bearing on the legitimacy of the criminal law's operation) but rather is a legislative response to political and social concerns around the risk associated with persons with cognitive and mental health impairments. The operation of the first tier of the forensic mental health system (the common law exclusion mechanisms) is not dependent on the existence and application to an individual of this alternative system of regulation. This is evident in the endurance of common law rules of fitness (ie a fitness exclusion mechanism) in the NSW Local Court as part of broader principles of fairness of trial and abuse of process, despite an absence of a Local Court legislative scheme for special hearings and limiting terms for those found unfit (ie despite the absence of a system of alternative regulation).[14]

30. The fact that the two tiers of the forensic mental health system are separate and that the first is common law whilst the second is legislative is an important point. This legislative scheme in the second tier, whilst having expanded over time and prompted the development of entire specialised services, professions and intellectual disciplines, remains a legislative creature and is distinct from the common law principles. As such it could arguably be dismantled through legislative repeal without unsettling the common law principles (of the first tier) that relate to criminal responsibility and criminal trial and are at the core of the criminal legal framework as a whole.

31. In order to elaborate on this distinction, it is useful to reflect on the 1800 decision in *Hadfield's Case* which was the precursor to the forensic mental health legislative scheme (ie the second tier discussed above).

Hadfield's Case

32. In England prior to the nineteenth century, persons acquitted on the basis of insanity were 'legally entitled to their released'.[15] The 'criminal law had no direct power over them' and it was up to the civil law, specifically vagrancy legislation, to confine or otherwise regulate them.[16] This system was considered ineffective because it 'was mainly informal and irregular, and it

[14] See, eg, *Mantell v Molyneux* [2006] NSWSC 955 (18 September 2006), [24]-[25]. See also the discussion in other Australian jurisdictions: *Pioch v Lauder* (1976) 27 FLR 79, 85-86 (Forster J); *R v Ngatayi* (1980) 147 CLR 1, 7-8 (Gibbs, Mason & Wilson JJ).

[15] Richard Moran, "The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)," *Law & Society Review* 19, no. 3 (1985) 487.

[16] Ibid 487-488.

was difficult to detain insanity acquittees for long periods of time'.[17] The perceived inadequacy of the existing civil and criminal legal frameworks to detain 'dangerous' lunatics and idiots, which came to a head in the 1800 *Trial of James Hadfield*, was the impetus for the origins of the forensic mental health system.

33. Hadfield appeared before the Court of King's Bench on a charge of high treason, having allegedly fired a pistol at George III at the Theatre Royal in Drury Lane. Hadfield suffered head injuries and was described by his defence counsel as having a 'species of insanity more resembling what has been described as idiocy' and 'from its very nature, incurable'.[18] The Court was satisfied that pursuant to established principles relating to criminal responsibility, Hadfield could be acquitted on the grounds of insanity.[19] The dilemma facing the Court was the fact that if acquitted, because the criminal law would no longer be able to regulate him, he posed a '*most dangerous member of society*'[20] and '*for the sake of the community*, undoubtedly, he must somehow or other be taken care of'.[21] The issue was ultimately resolved by the jury returning a verdict of not guilty 'he being under the influence of insanity at the time the act was committed',[22] the Attorney General suggesting that on the basis of some existing common law this would provide 'a legal and sufficient reason for [Hadfield's] future confinement'. [23] Hadfield was subsequently returned to Newgate Prison.[24]

1800 Criminal Lunatics Act

34. 'Hadfield's acquittal caused considerable judicial concern since the law's power over him remained unclear'[25] and within weeks of his acquittal, the Parliament passed *An Act for the Safe Custody of Insane Persons Charged with Offences* ('the 1800 Criminal Lunatics Act'). This Act provided that persons acquitted on the grounds of insanity of murder, treason and felony charges

[17] Richard Moran, "The Modern Foundations of the Insanity Defense: The Cases of James Hadfield (1800) and Daniel Mcnaughtan (1843)," *The Annals of the American Academy* 477, no. 1 (1985) 32.

[18] *Trial of James Hadfield* 1321 Erskine.

[19] 1353-1354 Lord Kenyon.

[20] 1354.

[21] 1355.

[22] 1356.

[23] 1356.

[24] Moran, "The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)" 508.

[25] Ibid. 509.

were to be kept in strict custody for such length and in such conditions at his Majesty's pleasure.[26] Its retrospective application meant it also legitimised Hadfield's confinement following his acquittal.[27] The 1800 Act went beyond the particular scenario in the *Trial of James Hadfield* and also provided, inter alia, for preventive detention of insane defendants charged with or suspected of committing criminal offences.[28]

35. The 1800 Criminal Lunatics Act provided the basis of the legislative framework of the forensic mental health system in New South Wales, which began in 1843 with the *Act to Make Provision for the Safe Custody of and Prevention of Offences by Persons Dangerously Insane and for the Care and Maintenance of Persons of Unsound Mind* ('the 1843 Lunacy Act'), and continued with subsequent NSW legislation through the 19th, 20th and 21st centuries.[29] Whilst the current *Mental Health (Forensic Provisions) Act 1990* (NSW) might be more sophisticated in its legal processes and provide more rights to persons within the system, its exclusive application to non-convicted persons with cognitive and mental health impairment ultimately does not depart from the rationale of regulating individuals because of an impairment-specific risk.

36. The NSWLRC in CP 6 interprets the origins of the forensic mental health legislative scheme as a development of the common law mental illness defence and unfitness rule and sees the 1800 Act as establishing two rationales for this one body of law: the inability of the criminal law to try or hold criminally responsible an individual with cognitive or mental health impairment and secondly the need to ensure the safety of the community.[30] This approach by the NSWLRC collapses the two tiers I have identified above and sees the legislative scheme as inseparable from the common law principles, and sharing rationales.

37. Contrary to the NSWLRC's view, I argue that the origins of the forensic mental health system discussed above clearly show that the legislative scheme for the regulation of persons with cognitive and mental health impairments who have not been convicted on the basis of the mental illness defence or unfitness was introduced to address a perceived gap in criminal

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[26] 1800 Criminal Lunatics Act s 1.

[27] Nigel Walker, *Crime and Insanity in England: Volume One: The Historical Perspective* (Edinburgh: Edinburgh University Press, 1968) 78.

[28] 1800 Criminal Lunatics Act s 2.

[29] *Act to Consolidate and Amend the Law Relating to the Insane*, 42 Vic No 7, 1878 ('1878 Lunacy Act'), *Act to Consolidate the Law Respecting the Insane*, Act No 45, 1898 ('1898 Lunacy Act'), *Mental Health Act 1958* (NSW), *Mental Health Act 1983* (NSW) & Part XIA of the *Crimes Act 1900* (NSW) (introduced in 1983), and the *Mental Health (Criminal Procedure) Act 1990* (NSW) (subsequently renamed in 2008 the *Mental Health (Forensic Provisions) Act 1990* (NSW)) & chapter 5 of the *Mental Health Act 1990* (NSW).

[30] CP 6, [6.7].

legal regulation of these individuals related to social and political[31] perceptions of their risk, rather than being related to a further delineation of the legitimacy of the criminal law. As such this exclusive system of regulation is distinct in origins, legal form and rationale to the common law principles relating to the mental illness defence and unfitness. I argue that the two rationales that the NSWLRC identifies are in fact two separate rationales for two distinct legal tiers within the forensic mental health system and that one tier is common law and the other is legislative: the inability of the criminal law to try or hold criminally responsible is the rationale for the common law principles, and the dangerousness of impairment is the rationale for the distinct alternative system of regulation.

The Relevance of the Two Tiered Approach to the Discriminatory Character of the Forensic Mental Health Legislative System

38. I submit that this suggested two tiered approach to the forensic mental health system enables us to fully appreciate the discriminatory character of the forensic mental health system:

    a. Identifying and divorcing the two tiers of the forensic mental health system enables us to remove the exceptionality that generally is associated with how the criminal law deals with persons subject to fitness or the mental illness defence, such as seeing it as a special, unique and acceptable annexe to the criminal law, because we can see these defences as mere examples of a larger set of legal mechanisms resulting from the delineation of the legitimacy of the criminal law. As such, we can then easily compare how persons with cognitive and mental health impairments are treated by the criminal law following their exclusion from conviction and punishment, to how persons who are subject to different exclusion mechanisms are treated. This comparative exercise foregrounds the status of persons with cognitive and mental health impairments in the forensic mental health system as *unconvicted* and in doing so: (i) raises questions about why the criminal law should continue to regulate them if they have not been convicted, and (ii) effectively highlights the stark differences in how the criminal law treats persons with cognitive and mental health impairments compared to other non convicted persons.

[31] It is important to acknowledge that Hadfield's alleged crimes threatened the power of the sovereign and that the 1800 Act was initially drafted to include treason provisions as well as the forensic mental health provisions. Moran suggests that this initial legislative connection between treason and the insanity defence highlights the 'concern for protection and social order that has always been central to the insanity defense.': Moran, "The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)" 511-512..

b. We can now see how the rationale for the specific alternative system of regulation found in the forensic mental health legislative system (second tier), being the impairment related risk posed by persons with cognitive and mental health impairment, is discriminatory because (i) persons subject to other exclusion mechanisms are not regulated on the basis of risk, combined with (ii) the discussion above of social contingency of impairment-specific risk.

c. The forensic mental health legislative system is a legislative system and arguably could be dismantled through repeal without disturbing the fundamental common law rules about exclusion (eg mental illness defence and unfitness)[32] that are the precursor to their movement into this legislative system because the legislative and common law aspects of the forensic mental health system are separate and of different legal form and origins.

Conclusion

39. On the basis of this structural dissection of the forensic mental health system and, significantly, the divorcing of the legislative alternative system of regulation from the common law principles that exclude persons with cognitive and mental health impairments from conviction and punishment, I argue that the forensic mental health legislative system (the second tier) is discriminatory. As such I respectfully ask the NSWLRC to consider recommending the dismantling of the forensic mental health legislative system through legislative repeal. Consideration of this involves removing the exceptionality and naturalness of the way that persons in the forensic mental health system are treated by the criminal law and asking why unconvicted persons with cognitive and mental health should be regulated by the criminal law when persons who are not convicted on grounds other than the mental illness defence and unfitness are not regulated, particularly if the existing reasons for this differential treatment are discriminatory?

40. When thinking of the comparator for the discrimination, the comparator is not persons with cognitive and mental impairments who are convicted

[32] It should be noted that debates could also be had about the first tier of the forensic mental health system, ie whether those exclusion mechanisms that effectively define the legitimacy of criminal regulation along psychological lines are problematic because they exclude the significance of social, political, racial, economic factors in criminal responsibility and punishment: see, eg, the argument developed by Norrie: Alan W Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (London: Butterworths, 2001). For example, one could consider how the focus on internal psychological factors masks both the fact that the criminal law involves the unequal application of the criminal law and the inequalities that govern individuals' involvement in the criminal justice system. This tension emerges in the NSWLRC's discussion of the possibility that a disability neutral fitness rule would be problematic because it would be 'over-inclusive' and include persons who are intimidated by the justice system or cannot afford necessary legal representation: CP 6, [1.19].

(although in some instances these individuals do serve lesser times in prison than those subject to the forensic mental health system which is perhaps another reason for the discriminatory nature of the forensic mental health legislative system) but rather other non-convicted persons, that is other persons who are charged but subsequently not convicted and excluded from the criminal law's power of punishment on bases other than the mental illness defence and unfitness all of whom are not subject to an alternative system of regulation. To fail to use this group as a comparator on the basis that persons with cognitive and mental health impairments are somehow exceptional or too different and hence incapable of comparison with other non-convicted persons falls back onto discriminatory views about the links between impairment and risk which this very exercise of comparison seeks to unearth.

41. Any purported benefits that might accrue to an individual through the treatment or services provided through the forensic mental health system can be accessed through the community voluntarily (or coercively through civil mental health or guardianship legislation)[33] such that it is discriminatory to use the criminal law to coerce persons with cognitive or mental health impairments to engage in particular treatment or services when other members of the community including other persons with cognitive and mental health impairments not within the forensic mental health system would be given the choice to access these services, and could access these services without the negative consequences associated with the criminal justice system.

42. In CP 5 the NSWLRC states that a discriminatory criminal legal framework for persons with cognitive and mental health impairments may be reasonable:

> In determining the answer to this question, we need to ensure the integrity of the criminal justice system by balancing a just outcome for society generally victims of crime, with a fair outcome for the perpetrators. In situations where the perpetrator has a mental illness or cognitive impairment, what best meets the interests of justice may differ from the outcome that would be appropriate in ordinary circumstances. This is *particularly the case where an offender's criminal actions can be attributed wholly to his or her impairment*.[34]

43. I argue that this is not a valid basis for discrimination because the linking of criminal actions and impairment is problematic and likely to be informed by negative socially contingent ideas of impairment discussed above. That is, it

[33] That is not to say that these civil mechanisms are not discriminatory. For a critique of the discriminatory nature of civil mental health legislation, see Ryan, "One Flu over the Cuckoo's Nest: Comparing Legislated Coercive Treatment for Mental Illness with That for Other Illness."

[34] CP 5, [0.5]

is not sound to defend differentiation against arguments of discrimination by reference to reasons informed by discriminatory ideas.

44. In a context where the forensic mental health system is discriminatory, the 'special' treatment of persons with cognitive and mental health impairments can only meet the interests of justice if the discrimination is some kind of 'specific measure', eg a measure 'necessary to accelerate or achieve de facto equality of persons with disabilities'.[35] It is submitted that the forensic mental health legislative system cannot be viewed as a specific measure for four reasons. First, the system is based on discriminatory views about impairment and disability and the link between impairment and risk which reinforces negative views of persons with cognitive and mental health impairments which in turn promotes inequality rather than equality. Secondly the purported benefits of treatment and services can be accessed voluntarily in the community making the restrictive and oppressive criminal framework unnecessary to realise any purported equality that might be achieved through the access to treatment or services in the forensic mental health legislative system. Thirdly, coercive treatment and detention in a criminal context denies many human rights which are central to the realisation of equality for persons with cognitive and mental health impairments such as those relating to liberty, community inclusion and self-determination.[36] Fourthly, the broader social effects of unnecessarily criminalising and detaining persons (eg estrangement from family and friends, loss of parental responsibility of children, loss of housing, accruing debts, development of mental illness and vulnerability to physical and sexual abuse in detention) are further indications of how the forensic mental health legislative system exacerbates rather than remedies inequality.

45. In a recent report the United Nations Office of the High Commissioner for Human Rights ('OHCHR') argues that the mental illness defence and the practice of confinement of persons with disabilities as a discrete category on the basis of the danger they pose to the community are discriminatory and should be made disability-neutral.[37] The World Network of Users and Survivors of Psychiatry has similarly argued that the mental illness defence is discriminatory and should be replaced with a disability-neutral defence.[38]

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[35] Convention on the Rights of Persons with Disabilities, Art 5(4).

[36] See, eg, Convention on the Rights of Persons with Disabilities, Arts 3(c), 14, 28-30

[37] Office of the United Nations High Commissioner for Human Rights, "Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities," (Geneva: United Nations High Commissioner for Human Rights, 2009) 15-16.

[38] World Network of Users and Survivors of Psychiatry, *Implementation Manual for the United Nations Convention on the Rights of Persons with Disabilities* <www.wnusp.net> accessed 5 May 2011.

46. The OHCHR Report also notes that institutionalisation without the free and informed consent of the person with disability should be abolished because insofar that 'such measures are partly justified by the person's disability, they are to be considered discriminatory and in violation of the prohibition of deprivation of liberty on the grounds of disability, and the right to liberty on an equal basis with others prescribed by article 14'. The Report argues that 'legal grounds upon which restriction of liberty is determined must be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis'.[39] Although the OHCHR is not specifically discussing the forensic mental health system, it is arguable that its arguments about discrimination resonate with the arguments I have developed above.

47. It is possible that the suggestions by the OHCHR and the WNUSP can be construed more broadly to suggest two options that are available to the NSWLRC formulate recommendations in relation to the forensic mental health system that (i) confirm rather than negate the human rights of persons with cognitive and mental health impairments and (ii) are non-discriminatory. The first option is to recommend the dismantling of the forensic mental health system through legislative repeal. The second is to recommend retaining the forensic mental health legislative system without its 'impairment-specific' character such that it becomes a system that could regulate any unconvicted individual who is considered dangerous and that there would need to be careful scrutiny of how dangerousness is defined and assessed so that risk is itself delinked from impairment. Of course, this second option is unlikely to eventuate because of the strong civil liberty arguments against such a system and the importance society and the law places on the limits of the exercise of coercive state power through the criminal law.[40] If this is so, then this makes the first option of dismantling of the forensic mental health system seems the only viable option of these two.

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[39] Office of the United Nations High Commissioner for Human Rights, "Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities" 15-16.

[40] The likely fruitlessness of the second option again confirms the extent of the discrimination inherent in the forensic mental health legislative system because no such strong civil liberties protest is levelled at it. Related to this observation, attempts to legislatively extend the scope of the criminal law in relation to other categories of unconvicted persons such as sex offenders, dangerous offenders and terrorists have been critiqued by reference to the framework of legitimacy of the criminal law, such as individual criminal responsibility as a basis for punishment, the presumption of innocence, and proportionality in sentencing.: see, eg, Bernadette McSherry, Patrick Keyzer, and Arie Freiberg, "Preventive Detention for 'Dangerous' Offenders in Australia: A Critical Analysis and Proposals for Policy Development," (Melbourne: Monash University, 2006) 75-85. If such critiques are possible in relation to these other groups of persons, it is arguable that similar critiques can and should be developed in relation to persons with cognitive and mental health impairments in the forensic mental health system.

48. I therefore ask the NSWLRC to consider whether the forensic mental health system is discriminatory and whether it should be dismantled rather than merely finetuned. This will likely raise uncomfortable questions about how the law and how society, after 210 years, still view and treat people with cognitive and mental health impairments and might challenge the relevance of entire disciplines, services, and professions that have been built up on what began in 1800 with the *Trial of James Hadfield*. Until this is done, however, it is likely that the forensic mental health system will continue to discriminate against persons with cognitive and mental health impairments, and in so doing negate their human rights and promote their disadvantage, inequality and marginalisation in society.