Psychiatry, Psychology and Law, 2023
Vol. 30, No. 1, 96–105, https://dx.doi.org/10.1080/13218719.2022.2112102

An analysis of arguments for the retention of the defence of mental impairment

Bernadette McSherry[a*] and Danny Sullivan[b*]

[a]*Melbourne Law School, University of Melbourne, Melbourne, Australia;* [b]*Victorian Institute of Forensic Mental Health (Forensicare), University of Melbourne, Swinburne University of Technology, Melbourne, Australia*

This article summarises the main arguments for the retention of the defence of mental impairment presented in an online debate that took place in August 2021. It canvases the justifications for the defence, rebuts human rights arguments for its abolition and outlines why there is a lack of viable alternatives. It concludes that advances in knowledge should lead to the reform of the defence rather than its abolition.

KEYWORDS: Criminal responsibility; criminal law principles; mental impairment defence.

Introduction

In August 2021, we took part in an online debate organised by the Victorian Branch of the Australian and New Zealand Association of Psychiatry, Psychology and Law and the Victorian Forensic Branch of the Australian and New Zealand Royal College of Psychiatrists. We were invited to argue against the proposition that 'the House moves that we should abolish the defence of mental impairment'. The debate was part of a day-long seminar on the topic of criminal responsibility for lawyers and mental health professionals, and it took a slightly different form to regular debates in that it had two people, one with a medical and one with a legal background, on each side.

This article summarises and analyses the main arguments for retaining the defence of mental impairment that were canvased during the debate.

A principled approach

The defence of mental impairment is based on long-established jurisprudential principles regarding the concept of criminal responsibility. This concept is based on the fundamental notion that individuals possess the ability to make rational choices in acting or refraining from acting. One of the main purposes of the criminal law is to punish those who could choose to refrain from committing a crime but go ahead and do so. Conversely, in the words of Justice Dixon in *The King v Porter* [1933] CLR 182 at 186:

> [i]t is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment; if they cannot understand

Correspondence: Bernadette McSherry, Melbourne Law School, University of Melbourne, Melbourne, Australia. Email: bernadette.mcsherry@unimelb.edu.au
*The authors would like to thank Andrew Simon-Butler for his research and editing assistance.

> what they are doing or cannot understand the ground upon which the law proceeds.

Criminal responsibility is assigned *after* the prosecution has proved all the elements of an offence beyond reasonable doubt. The accused may be criminally responsible for a criminal act (or omission) but nevertheless have a defence which justifies or excuses the crime.[1] The defence of mental impairment is generally classified as an excusatory defence in that it negates the blameworthiness of the accused.[2]

All Australian states, the Australian Capital Territory and the Northern Territory have some form of legislative defence of mental impairment to criminal charges.[3] The legislative conceptions of the defence draw on the common law rules established in the seminal English case of M'Naghten.[4] With one dissent, the judges established what have become known as the M'Naghten Rules, of which the most well-known rule states:

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such defect of reason, from disease of the mind, as not to know the nature and quality of the act he [or she] was doing; or, if he [or she] did know it, that he [or she] did not know he [or she] was doing what was wrong.[5]

The ability to reason

A major criticism of this M'Naghten Rule is its emphasis on cognitive factors (the effect on knowledge), rather than emotional and volitional factors (the effect on the ability to control conduct) which leads to it being limited in its scope.[6] As a result, most Australian jurisdictions[7] broaden legislative iterations of the defence by including a volitional component (with the notable exceptions of both New South Wales and Victoria).[8] For example, section 27 of the *Criminal Code* (Qld) refers to the 'capacity to control a person's actions'.

The M'Naghten Rules refers to a 'defect of reason'. There has been a long tradition of assuming those with severe mental impairments and those under a certain age are unable to make rational choices. Aristotle, for example, wrote in the *Eudemian Ethics*:

> For children and the sick and insane have many opinions which no sensible man would discuss.[9]

Henry de Bracton drew on this assumption in writing his treatise of English law in the thirteenth century to excuse those with an inability to reason from criminal responsibility:

> 'The lack of reason in committing the act' excused the 'madman' and the 'innocence of design' protected the 'infant' from the boundaries of the criminal law.[10]

Modern conceptions of the defence of mental impairment are therefore steeped in a long excusatory tradition. The fault and physical elements of a crime may be established, but an accused person experiencing some form of severe mental impairment may nevertheless be excused from criminal responsibility. The issue of what to do with the person who has been found not criminally responsible on this basis is a separate one, and all Australian jurisdictions have processes for dispositions including detention in mental health facilities and/or supervision in the community.[11]

Societal pressure

There are usually compelling reasons to depart from long-held principles of criminal responsibility: it is rare that defences are abolished because of changing societal pressures.[12] This is not to say that the scope or wording of the defence of mental impairment cannot change, along with advances in knowledge. However, the defence itself serves an important function in acknowledging that individuals whose ability to make rational decisions is severely affected by mental illness or psychological condition should not be held to the same legal

standard as individuals whose decision-making ability is not so affected.

It should be acknowledged that public opinion may favour abolishing this particular defence. For example, in 1982, a jury in Washington DC found John Hinckley Jr. not guilty 'by reason of insanity' on all charges relating to the attempted killing of then-President Ronald Reagan. There was a resulting public outcry in the United States. Valerie Hans and Dan Slater conducted a telephone survey of 434 residents of New Castle County, Delaware, in 1983 and found that 'respondents thought the verdict was unfair, believed Hinckley was not insane, had little faith in the psychiatric testimony presented at the trial, and asserted they would have reached a guilty verdict had they been jurors in the trial'.[13] Idaho, Utah and Kansas[14] subsequently abolished the defence, while other states such as Delaware retained the defence but introduced an alternative verdict of 'guilty but mentally ill' to assuage public opinion.[15]

However, members of the general public may not be the best arbiters of legal standards. Sometimes emotional reactions spring from a lack of knowledge of the law and criminal procedure. For example, studies in the United States have found that respondents vastly overestimated how many times the defence was raised in practice.[16] 'Tough on crime' rhetoric may be popular among certain media outlets and with politicians, but there is every indication that an overemphasis on punishment alone is ineffective in reducing crime, and that diversionary and rehabilitative approaches are associated with enhanced public safety.[17]

Long-established principles can, however, adapt to changing public opinion over time; tradition and public opinion should not be seen as dichotomous. The law can adapt to changing perceptions as to how people with mental illness or cognitive disabilities should be viewed and treated. For example, unfettered powers of detention under the *Dangerous Lunatics Act 1843* (NSW) have long been abolished and have now been replaced by carefully delineated powers of detention for the purposes of 'care, treatment and control' under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW).[18]

Perhaps a stronger argument than one based on public opinion for departing from embedded legal principles is that the defence of mental impairment is discriminatory in a twenty-first-century context. The development of international human rights law and the rise of disability rights provides ammunition for there no longer being any moral or lawful basis for people with mental impairment to be treated differently from others under the criminal law. This is examined in the next section, with our subsequent rebuttal then outlined.

Discrimination and disability rights

The United Nations *Convention on the Rights of Persons with Disabilities*[19] (the CRPD), which Australia ratified on 17 July 2008,[20] sets out the obligations on State Parties to promote and protect the rights of persons with disabilities and outlines the steps that should be taken in this regard. In her interpretation of the CRPD, Tina Minkowitz states:

> [u]nfitness to plead, incompetence to stand trial, insanity acquittals, and incarceration in forensic psychiatry as a security or treatment measure, all constitute discrimination based on disability, and violate obligations of formal and substantive equality towards persons with psychosocial disabilities.[21]

This interpretation is based on Article 5(1) of the CRPD, which requires State Parties to 'recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law'. In addition, Article 12(2) requires State Parties to 'recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.

Legal capacity has two essential components.[22] The first ensures that persons with

disabilities, including individuals with severe mental impairments, have standing before the law. The second refers to legal agency or the ability to act within the framework of the legal system. Whether or not these two components of legal capacity can ever be restricted, particularly due to a perceived lack of mental or decision-making capacity, has been the subject of much debate.[23]

In relation to the dispositional phase following a finding that an accused person is not criminally responsible on the grounds of mental impairment, detention in a mental health facility has been said to breach Article 14 of the CRPD, which mandates 'that the existence of a disability shall in no case justify a deprivation of liberty'.

Minkowitz's interpretation of the Convention is, however, not universally held, because individual paragraphs within certain CRPD articles can be counterbalanced by other paragraphs.

Illustrating this, Article 3(d) of the Convention states that '[r]espect for difference … of persons with disabilities is a fundamental principle'. Further, Article 5(3) holds that '[i]n order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided'. Taken together, these Articles could be interpreted as in fact requiring the existence of a defence of mental impairment.

In her recent book on mental health law, Kay Wilson has argued that equality and non-discrimination as set out in Article 5(3) do not require 'treating differently placed persons with and without mental impairment as "the same"'.[24]

On this reading of equality, it is warranted to take into account an inability to make rational choices to ensure reasonable accommodation for individuals with severe mental disorder who commit crimes.

Taking these principles further, Michael Perlin has argued that the CRPD actually *requires* the existence of the defence of mental impairment.[25] He argues that the call for abolition of the defence constitutes a narrow reading of the right to equal recognition before the law; he contends that the entire Convention, along with the social context of how accused people with severe mental impairment have long been treated, must be taken into account. He focuses on Article 4(4), which states:

> Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State.

Perlin argues that the existing versions of the defence of mental impairment contribute to protecting the rights of accused people with severe mental impairment, and its abolition could lead to inhuman and degrading treatment (in breach of Article 15), as well as violating the rights to physical integrity (Article 17) and freedom from exploitation, violence and abuse (Article 16).

The abolitionist approach also belies the obligation for humane societies to take into account specific needs of certain marginalised groups. That is, treating people in an equitable way requires taking into account individual needs rather than treating all people the same, regardless of how disadvantaged or marginalised some groups have been and continue to be.[26] In this regard, at the federal level, the *Aged Care Act 1997* (Cth) regulates aged care in Australia with the aim of protecting the needs of older people, and each state and territory has laws relating to the welfare of children and young people.[27] It appears incongruous – at a time when there are calls to raise the age of criminal responsibility for children[28] – to prevent minors aged 10–13 being arrested, tried and imprisoned in the same way as adults – that some argue in favour of abolishing a defence designed to take into account the individual circumstances of accused persons with severe mental impairments.

The competing interpretations of the Convention therefore indicate that an argument for the abolition of the defence of mental impairment solely on international human rights grounds is insufficient to overturn traditional principles of criminal law.

The lack of viable alternatives

If the defence of mental impairment were to be abolished, are there viable legal alternatives? There have been three main alternatives proposed. The first is to consider the existence of mental impairment as a way of negating the subjective fault element of a crime. The second is to hold the person guilty and simply consider mental impairment at the sentencing stage. The third is to ensure appropriate dispositional options following a finding of guilt. These alternatives will be considered in turn.

Negating the fault element

The United Nations High Commissioner for Human Rights stated in 2009 that:

> In the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability. Instead, disability-neutral doctrines on the subjective elements of crime should be applied, which take into consideration the situation of the individual defendant.[29]

However, this emphasis on subjective elements reflects a misperception that the defence of mental impairment is connected to a lack of intention; that is, when reasoning abilities are affected by severe mental impairment, it must necessarily follow that actions are not intended.

The case of John Joseph Delling exemplifies the problems with assuming mental impairment negates subjective elements. At the age of 21, Delling killed two former friends in Idaho and attempted to kill another in Tucson, Arizona. At the time of committing these crimes, he was experiencing paranoid delusions that were described by a classmate as 'stealing [his] powers'[30] and trying to 'destroy his brain'.[31]

Idaho's criminal legislation states that '[m]ental condition shall not be a defense to any charge of criminal conduct',[32] but that this restriction is not 'intended to prevent the admission of expert evidence on the issue of any state of mind which is an element of the offense'.[33]

Delling intended to kill his former friends because he believed that was the only way to protect his own life. Under Idaho law, the subjective elements of the crime were established. It was irrelevant that there was clear evidence of delusions and that he was severely affected by them. If a defence of mental impairment had been available, there is every likelihood it would have been established. Accordingly, Delling's counsel argued that the state's abolition of the insanity defence violated his constitutional right to due process.

The trial judge rejected this argument and Delling was convicted of second degree murder. He was sentenced to life imprisonment. An appeal to the Idaho Supreme Court was unsuccessful and a majority of the United States Supreme Court declined to hear a further appeal. Three dissenting justices, however, believed that a hearing was warranted.[34]

Christopher Slobogin has argued that there should be a 'subjectification' of intention and criminal defences, in line with an accused person's reasoning processes, such that a person in Delling's position could be found not criminally responsible without resorting to a defence of mental impairment.[35] That is, Delling believed he was acting in self-defence when he killed his former friends and this should be taken into account to exonerate him. He argues this is a way of 'capturing the universe of people who should be excused'.[36] However, this appears to be imposing rationality upon delusional thought processes which seems to offer no benefit in that it is a complicated way of reaching the same outcome

afforded by the current defence of mental impairment.

Shifting mental impairment issues to sentencing

The existence of mental impairment is already able to be taken into account after a finding of guilt.[37] It could be argued that this is sufficient. However, there are three main arguments against this proposal.

The first problem, from a procedural perspective, is that shifting the issue of mental impairment to the sentencing stage reallocates the burden of proof. During a trial, the prosecution bears the persuasive burden of proof to prove beyond reasonable doubt that the accused was not suffering from mental impairment, or that if there was evidence of mental impairment, it did not affect the accused's understanding of the act. If the question of mental impairment is shifted solely to the sentencing stage, the burden of proof is on the accused to prove the existence of mental impairment to the sentencing judge. Such a shift in the persuasive burden offends against the fundamental fair trial principle.[38]

The second problem with this approach is that it shifts considerations of blameworthiness from a jury to a single judge. This may increase the prospect of inconsistent outcomes, and the possibility of mental impairment being presumed to be an aggravating rather a mitigating factor in sentencing, as exemplified by Delling being sentenced to life imprisonment (the maximum sentence in Idaho for second degree murder).

Most importantly, this approach is premised on the assumption of guilt or criminal responsibility, which, as outlined above, is inconsistent with longstanding fundamental principles of criminal law within the common-law world. If considerations of mental impairment are shifted to the sentencing stage, these fundamental principles have already been bypassed.

Ensuring appropriate dispositional options

In 1962, Jay Katz pointed to the 'insanity defense' as 'a device for triggering indeterminate restraint'.[39] The defence is unique in being closely connected to certain dispositional outcomes because of the existence of mental impairment. Under current legislation in Australia, indefinite detention in mental health facilities may be the usual outcome for serious offences, but supervision in the community and unconditional release are also options after a finding that the accused person is not criminally responsible because of mental impairment.[40]

It could be argued that the availability of 'hospital orders' as a sentencing option[41] replaces the need for a defence of mental impairment. However, the same criticisms as for shifting consideration of mental impairment to the sentencing phase arise here. The making of a hospital order will be dependent upon the discretion of the individual judge and the availability of an appropriate mental health facility in which to house the person. In practice, limited availability of long-term secure hospital placements, and their expense, ensures significant policy constraints on such a sentencing disposition. A focus on the availability of a hospital disposition reflects that other purposes of sentencing – such as punishment and deterrence – are not appropriate or relevant: this is already implicit in the finding of mental impairment.

In summary, Stephen Morse and Richard Bonnie have argued that '[a]bolishing this narrowly defined and deeply rooted defense [of mental impairment] could plausibly be justified only if an alternative legal approach could reach the same just result'.[42] We argue that the possible alternatives outlined here are insufficient to justify a wholesale discarding of the current longstanding defence.

Reform rather than abolition

As we indicated in the introduction, arguing against the abolition of the defence of mental

impairment does not mean that the definition or scope of the relevant legislative provision cannot change with advances in knowledge.

In the past decade, the Tasmania Law Reform Institute,[43] the Victorian Law Reform Commission,[44] the New South Wales Law Reform Commission[45] and the New Zealand Law Commission[46] have each rejected abolishing the defence. Instead, all opted for various targeted reforms to the defence of mental impairment's scope and matters of disposition.

For instance, New South Wales has enacted the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*, which enables a 'special verdict of act proven but not criminally responsible if the jury is satisfied that the defence of mental health impairment or cognitive impairment has been established'.[47] This replaces the former verdict option of 'not guilty by reason of mental illness' with new terminology which reflects the sensibilities of victims and their families about the outcome in such matters; and although this recent NSW legislation codifies various minor changes, the fundamental legal principles underlying the defence remain unchanged.

Practical realities

On a practical level, there does not appear to be any government across Australasia prepared to abolish the defence of mental impairment. In the absence of strong recommendations for abolition from law reform bodies, government policy is unlikely to support the removal of this excusatory defence.

In addition, current regimes provide for appropriate input from mental health practitioners at the trial stage and in relation to dispositional options. Abolition of the defence would severely curtail the provision of expert evidence. This could have a retrograde effect not only for accused persons living with mental impairment, but also for the legitimate role of mental health professions in assisting with the administration of justice. That is, there is a public interest in mental health professionals being involved in judicial processes that focus on mental states.[48]

Where the defence has been abolished in the United States, there have been calls to reintroduce it because of the detrimental effect of abolition.[49] It may indeed be significantly more likely for persons such as John Joseph Delling to remain imprisoned and untreated in those select United States jurisdictions that have abolished the defence, compared to those who can raise the defence and have the option of being treated in a mental health facility.

Conclusion

The defence of mental impairment is grounded in fundamental legal principles which underpin a humane society. The ability to reason is intrinsic to the assignation of human responsibility. When reasoning is compromised, it is unfair to hold a person with mental impairment to the same legal standard as others. The rich tradition underpinning the concept of criminal responsibility should not be discarded.

Agency, autonomy and responsibility are cherished and valued – but we acknowledge when they are compromised, and recognise that accused persons should not be held to the same legal standard when they lack criminal responsibility.

The development of international human rights law requires that societies take measures to uphold and support the dignity of all persons. However, the CRPD also requires reasonable accommodations to protect and promote the rights of persons with disabilities, including those living with mental impairments. There is an obligation to take into account special circumstances associated with an inability to reason. This is necessary to address innate societal unfairness.

The mental impairment defence does not need to be abolished, but can be perpetually reformed in line with advances in knowledge and policy, while retaining the fundamental

principles of criminal responsibility underpinning the criminal law. Common law and legislation can evolve and adapt to accommodate local circumstances and to reflect and embody community values.

Ethical standards

Declaration of conflicts of interest

Bernadette McSherry has declared no conflicts of interest

Danny Sullivan has declared no conflicts of interest

Ethical approval

This article does not contain any studies with human participants or animals performed by any of the authors.

Ethics approval was not required for this article which analyses existing literature.

Notes

1. S Bronitt and B McSherry, *Principles of Criminal Law* (Thomson Reuters 2017, 4th ed) 348.
2. V Tadros, *Criminal Responsibility* (Oxford University Press 2005) 117.
3. *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 28; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20; *Criminal Code* (Qld) s 27; *Criminal Code* (WA) s 27; *Criminal Law Consolidation Act 1935* (SA) s 269C; *Criminal Code* (Tas) s 16; *Criminal Code* (ACT) s 28; *Criminal Code 1983* (NT) s 43C.
4. *R v M'Naghten* (1843) 10 Cl and Fin 200.
5. Ibid 210.
6. H Fingarette, *The Meaning of Criminal Insanity* (University of California Press 1972) 144; A Goldstein, *The Insanity Defense* (Yale University Press 1967) 47–49; F McAuley, *Insanity, Psychiatry and Criminal Responsibility* (Round Hall Press 1993) 23.
7. *Criminal Code* (Cth) s 7.3(1)(c); *Criminal Code* (Qld) s 27(1); *Criminal Code* (WA) s 27(1); *Criminal Law Consolidation Act 1935* (SA) s 269C(1)(c); *Criminal Code (*Tas) s 16(1)(b); *Criminal Code* (ACT) s 28(1)(c); *Criminal Code* (NT) s 43C(1)(c).
8. *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 28; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20.
9. Aristotle, *The Eudemian Ethics on Virtues and Vices*, edited and translated by H Rackman (Harvard University Press 1971) 205, [1215a].
10. H de Bracton, *The Digest of Justinian*, edited and translated by Mommsen T, Krueger P and Watson A (Book FortyEight 1985) 8.12.
11. *Mental Health Act 2007* (NSW) Pts 2 and 3; *Mental Health Act 2014* (Vic) Pt 4; *Mental Health Act 2016* (Qld) Ch 5; *Mental Health Act 2014* (WA) Pts 6-8; *Mental Health Act 2009* (SA) Pts 4 and 5; *Mental Health Act 2013* (Tas) Pts 3-5; *Mental Health Act 2015* (ACT) Ch 5; *Mental Health and Related Services Act 1998* (NT) Pts 6 and 7.
12. One example where changing attitudes have resulted in the abolition of an excuse-based defence relates to the partial defence of provocation, which reduces murder to manslaughter. It was abolished in Tasmania in 2003, Victoria in 2005 and Western Australia in 2007 in response to concerns that it was gender-biased and open to abuse because the accused's version of events is the sole source of evidence of provocation: see Bronitt and McSherry (n 1) 338ff.
13. VP Hans and D Slater, 'John Hinkley Jr. and the Insanity Defense: The Public's Verdict' (1983) 47(2) Publ Opin Quar 202, 209.
14. Idaho abolished the defence in 1982 and Utah in 1983. Kansas abolished it in 1995. Montana had previously abolished the defence in 1979.
15. C Slobogin, 'The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come' (1984–85) 53 George Wash Law Rev 494.
16. E Silver, C Cirincione, and HJ Steadman, 'Demythologizing inaccurate perceptions of the insanity defense' (1994) 18 Law and Human Behavior 63; see also RD Mackay, 'The insanity defence in operation' (2014) 65 Northern Ireland Legal Quar 153.
17. See e.g. WJ Sabol and ML Baumann, 'Justice Reinvestment: Vision and Practice' (2020) 3 Annu Rev Criminol 317.
18. *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 69.
19. UN GAOR, 61st sess, 76th plen mtg, UN Doc A/RES/61/106 (24 January 2007);

opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

20. While Australia has ratified the *Convention on the Rights of Persons with Disabilities*, its articles do not form part of Australian law unless they are specifically incorporated by the Commonwealth Parliament into domestic law: *Kioa v West* (1985) 159 CLR 550, 570. Such incorporation has not to date occurred.
21. T Minkowitz, 'Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond' (2014) 23 Griffith Law Rev 434, 462.
22. B McSherry, 'Legal Capacity under the Convention on the Rights of Persons with Disabilities' (2012) 20(1) J Law Med 22; B McSherry and A Butler, 'Support for the Exercise of Legal Capacity: The Role of the Law' (2015) 22(4) J Law Med 739.
23. See e.g. the literature discussed in B McSherry and K Wilson, 'The Concept of Capacity in Australian Mental Health Law Reform: Going in the Wrong Direction?' (2015) 40 Int J Law Psychiatr 60; B McSherry and L Waddington, 'Treat with Care: The Right to Informed Consent for Medical Treatment of Persons with Mental Impairments in Australia' (2017) 23(1) Austr J Hum Rights 109.
24. K Wilson, *Mental Health Law: Abolish or Reform* (Oxford University Press 2021) 29.
25. M Perlin, '"God Said to Abraham/Kill Me a Son": Why the Insanity Defense and the Incompetency Status are Compatible with and Required by the Convention on the Rights of Persons with Disabilities: Human Rights Brinksmanship or Evidence it Does Not Work? (2017) 54 Am Crim Law Rev 141.
26. E.g. in the oft-quoted words of Anatole France from *The Red Lily* (1894), 'the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread'.
27. See *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Children, Youth and Families Act 2005* (Vic); *Child Protection Act 1999* (Qld); *Children and Community Services Act 2004* (WA); *Children and Young People Safety Act 2017* (SA); *Children, Young Persons and their Families Act 1997* (Tas); *Children and Young People Act 2008* (ACT); *Care and Protection of Children Act 2007* (NT).
28. See 'Raise the Age', <https://www.raisetheage.org.au/> accessed 14 November 2021.
29. Human Rights Council, *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*, 10th sess, UN Doc A/HRC/10/48 (26 January 2009) 15, <https://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.48.pdf> accessed 14 November 2021.
30. Associated Press, 'Classmate Slaying Suspect Called Erratic', The Oklahoman, 12 April 2007, <https://www.oklahoman.com/article/3038640/classmate-slaying-suspect-called-erratic> accessed 14 November 2021.
31. MW Pearce and LJ Butts, 'Insanity in the State of Idaho' (2013) 44(2) Monitor Psychol 28, 28.
32. Idaho Code § 18–207(1).
33. Idaho Code § 18–207(3).
34. *John Joseph Delling v Idaho* 568 US (2012).
35. C Slobogin, 'Eliminating Mental Disorder as a Legal Criterion in Deprivation of Liberty Cases: The Impact of the Convention on the Rights of Persons with Disabilities on the Insanity Defense, Civil Commitment and Competency Law' (2015) 40 Int J Law Psychiatr 36.
36. Ibid 39.
37. J Walvisch, 'Sentencing offenders with impaired mental functioning: Developing Australia's "most sophisticated and subtle" analysis' (2010) 17 Psychiatr Psychol Law 187; J Walvisch, '"Mental Disorder" and Sentencing: Resolving the Definitional Problem' (2018) 26(1) J Law Med 159; J Walvisch, 'Defining "Mental Disorder" in Legal Contexts' (2017) 52 Int J Law Psychiatr 7.
38. Bronitt and McSherry (n 1) 135ff.
39. J Goldstein and J Katz, 'Abolish the "Insanity Defense" - Why Not?' (1963) 72(5) Yale Law J 853, 868.
40. See e.g., *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 23.
41. B McSherry, 'Hospital Orders for Offenders with Mental Illnesses: An Appropriate Diversionary Option' (2009) 16(4) J Law Med 568.
42. SJ Morse and RJ Bonnie, 'Abolition of the Insanity Defense Violates Due Process'

(2013) 41(4) J Am Acad Psychiatr Law 488, 490.

43. Tasmania Law Reform Institute, *Review of the Defence of Insanity in s 16 of the Criminal Code and Fitness to Plead* (Issues Paper No 27, February 2019) <https://www.utas.edu.au/__data/assets/pdf_file/0016/1201093/Insanity_IP_A4_03_print.pdf> accessed 14 November 2021.
44. Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Report, June 2014) <https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/Review_of_the_Crimes_Mental_Impairment_and_Unfitness_to_be_Tried_Act_0.pdf> accessed 14 November 2021.
45. New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences* (Report 138, May 2013) <https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-138.pdf> accessed 14 November 2021.
46. New Zealand Law Commission, *Mental Impairment Decision-Making, and the Insanity Defence* (Report R120, 22 December 2010) <https://www.lawcom.govt.nz/our-projects/criminal-defences-insanity-partial-defences> accessed 14 November 2021.
47. s 30.
48. L Groning, UK Haukvik, SJ Morse and S Radovic, 'Remodelling Criminal Insanity: Exploring Philosophical, Legal, and Medical Premises of the Medical Model Used in Norwegian Law' (2022) 81 Int J Law Psychiatry 101766.
49. See e.g. A Knox, 'Will Utah Alter Its Insanity Defence?', KSL.com, 29 September 2019, <https://www.ksl.com/article/46647758/will-utah-alter-its-insanity-defense> accessed 14 November 2021.