THE FUTURE OF MENTAL HEALTH, DISABILITY AND CRIMINAL LAW, EDITED BY KAY WILSON, YVETTE MAKER, PIERS GOODING AND JAMIE WALVISCH (ROUTLEDGE, 2023, HARDBACK/EBOOK)

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This collection of essays is subtitled: 'Essays in Honour of Emeritus Professor Bernadette McSherry,' on the occasion of her retirement following an academic career spanning over 30 years. Crucially, the book serves to reflect the fact that McSherry's contribution was limited neither to her home country of Australia, nor to academia, but extended much further, both geographically and 'operationally,' including – most recently, as a Commissioner on the Royal Commission into Victoria's Mental Health System,[1] the subject of several of the essays in the book.

The editors were all (at one stage or another) doctoral students or post-doctoral researchers working with McSherry at the University of Melbourne or Monash University. Their stated goal in the introduction (page xxix) was two-fold: (1) to acknowledge the contribution that McSherry has made to the fields of law and policy covered by the title, especially to promoting interdisciplinary approaches; and (2) to recognise the influences that McSherry has had on the Academy and wider community, including, in particular a determination that those who draw on services[2] are central to research and law reform.

The headline of the review is that they have succeeded in both aims, curating chapters from 23 international contributors (although, notably, none from the Global South[3]), across four broad themes: (1) reforming mental health and disability law; (2) regulating coercion; (3) improving access to justice and the criminal law; and (4) transforming mental health law.

For someone involved in law reform – in the English context – I must confess having found the opening section of particular interest. The chapter by Mary Donnelly on 'Making the Future Happen: Law Reform Lessons from the Victorian Royal Commission' examines the Victorian Royal Commission by reference to the history of law reform

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[1] Available at https://finalreport.rcvmhs.vic.gov.au.

[2] Reflecting the standard language in Australia, the term 'consumer' is used by the editors for those who would most often be called in England & Wales 'service users.'

[3] In passing, it might be thought that this reflects a continuing problem in relation to the CRPD, which forms a central spine to the book: "[f]*or a document that is extremely futuristic and representative of the needs of persons with disabilities, the General Comment on Article 12 is not robust in terms of representation from ultra-vulnerable populations or those from the Global South. This leads to a silencing or abstraction of practical issues faced by the aforementioned population and treatment responses of those states that have ratified it*" (pp122-3): Mrinalini Ravi et al, *Contextualising legal capacity and supported decision-making in the Global South: Experiences of Homeless Women with Mental Health Issues from Chennai, India*, in Mental Health, Legal Capacity and Human Rights (Michael Ashley Stein, Faraaz Mahomed, Vikram Patel and Charlene Sunkel, eds, Cambridge, 2021).

efforts in the mental health zone in England & Wales,[4] and – in my view entirely rightly – suggests that the way in which the Royal Commission proceeded "show[ed] ways in which to think about law reform which expand and reinterpret the telos of mental health law and the kind of legal interventions which might be considered in the mental health sphere" (page 29). Importantly, the editors then counterpose this chapter with a chapter by Penelope Weller examining the ways in which the high hopes of the Royal Commission have not been translated – to date – into the legislative response in Victoria, the Mental Health and Wellbeing Act 2022 (Vic), looking, in particular at the Commission's recommendation that legislation should make the right to health its primary objective. One striking feature of that legislation, which came into force in September 2023, is that combines many of the 'systems' drivers recommended by the Royal Commission to move matters forward, but at the same time very traditional looking provisions relating to compulsory treatment, seclusion, restraint, and advance directives. The mismatch is explicable by the fact that "[w]hen the new [Act] was being written, there were many different ideas about how to change the compulsory assessment and treatment criteria. Ultimately, it was not possible to decide on the best way to change compulsory treatment laws in the limited time available,"[5] such that the Victorian Government commissioned an independent review to examine these areas. If nothing else, Weller's chapter provides an idea of the stakes at play – and can be very usefully read alongside the questions posed in the (now closed) consultation of the independent review.[6]

Peter Bartlett's chapter on the implementation of the Mental Capacity Act 2005 in England & Wales poses important challenges for those seeking to implement the 2022 Act, any further amendments to it, and – more broadly – the CRPD, focusing on four themes: (1) as fundamental rights of those with disabilities are involved, there will need to be judicial oversight, but 'courts behave like courts' (page 55); (2) implementation relies upon professionals; (3) meaningful remedies in the field of social and economic rights require actions by governments often hesitant to take them (and in the context of judicial reluctance to push); and (4) changing the law does not change practice. This last point echoes that made in the foreword by Duncan Cameron, a community member of the Mental Health Tribunal in Victoria, who, noting that a new law is on the horizon in Victoria, asks "what shall we put in it?", but answers:

> To be honest, I don't think it really matters. Having lived through the most recent change [legislation passed in 2014], I've come to the conclusion that that it's not what's *in* the law matters. It's more about people and the attitudes of those who administer the law. If various provisions of *the Act* are routinely ignored with no consequences, then those provisions may well as not be there. If we are to say 'but those provisions are aspirational,' then around we go again – the same parts of the mental health infrastructure comply while the rogue element goes up the river (page xxvii, emphases in the original)

[4] Including the 2017 review led by Sir Simon Wessely, to which I was the legal adviser, and during the course of which I regularly myself continually returning to McSherry's work, such as the book she edited with Ian Freckleton on Coercive Care: Rights and Policy (Routledge, 2013).
[5] As the introduction to the consultation document published by the independent review puts it: https://engage.vic.gov.au/download/document/31331.
[6] https://engage.vic.gov.au/download/document/31331.

Cameron's salutary reminder also provides important context for – to me – one of the most concretely 'useful' chapters in the book, that by Simon Katterl and Sharon Friel in Part III – on developing a human rights and mental health regulatory framework; it also provides context for the chapters in Part II, on regulating coercion and restrictive practice. The chapters in this section are (at one level) more narrowly jurisdiction-specific, to Australia and New Zealand, but Ian Freckleton's chapter, in particular, on reforming the use of chemical restraint in health care and disability settings has wider resonance given how often recourse is had to this, and, as he identifies, how often it is tangled up with questions of whether the medication in question is serving a therapeutic purpose.

McSherry is well known for her work straddling both the civil and criminal fields of mental health law, strands of thinking which sometimes sit too much in their own silos. To this end, it is particularly good that the book contains three chapters in part III specifically thinking about criminal law in this context, one (by Jamie Walvisch and others) on causal explanations in sentencing offenders with mental health problems (primarily focused on Australia); one (by Christopher Slobogin) thinking about finetuning a jurisprudence of risk;[7] and the third a particularly stimulating chapter by Lisa Waddington and Paul Harpur on a rather different aspect of the right to equal access to justice contained in Article 13 CRPD, namely the rights of persons with sensory disabilities to participate in juries.

Part IV of the book opens with a chapter by Anna Arstein-Kerslake on using Articles 12 and 14 of the CRPD as a framework to deconstruct and reimagine mental health law. As Donnelly had noted in her chapter earlier in the book, whilst many states have taken steps to reduce the use of compulsion, no State Party to the CRPD "has (yet) entirely repealed all aspects of compulsion under mental health law" (page 14). In characteristically elegant and forthright terms, Arstein-Kerslake restates the position that the CRPD does not permit of substitute decision-making or of involuntary treatment/detention. For those reading the book in sequence, however, it is striking how in the chapters between those of Donnelly and Arstein-Kerslake the majority of the contributors have simply side-stepped these issues, for instance acknowledging that there remains an 'unresolved debate' (Weller, at page 40) or that 'views differ' (Walvisch and colleagues in relation to the criminal aspect at page 182). That side-stepping could be simply pragmatic, on the basis that it is necessary to engage with systems as they are, and to nudge them into a slightly better place whilst working for further reforms. It could also be a recognition that the ethical arguments in favour of the hardest-edge interpretations of the CRPD are not clear-cut. In this regard, and whilst not wanting to rehash arguments of 'naysayers' (as Arstein-Kerslake puts it at page 238), I did find myself looking in vain in her chapter for a discussion of the duty on the State to secure the right to life, which applies equally to those with disabilities

[7] When I saw his name in the contributor list, I was, I should say, perhaps expecting – and in some ways hoping – to see a contribution building on his previous work such as his article *Eliminating mental disability 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 International Journal of Law and Psychiatry, 36-42. That is not to downplay how stimulating (if, I must confess, to me at least not entirely convincing) his chapter in the current volume is.

as it does to those without.[8] And, as so often,[9] I did find myself wondering whether the solutions proposed to address situations of mental ill-health are equally well-fitted to address situations of, for instance, dementia.

Any consideration of the future of the law – in any area – cannot ignore the seemingly irresistible rise, if not of the robots, then of AI, and the chapter by Piers Gooding and Yvette Maker on the digital turn in mental health law sounds a number of important warnings about the use of AI in risk assessment in the forensic mental health setting.

Importantly placed within the section on transforming the future of mental health law, the last substantive chapter is a powerful examination by Erandathie Jayakody and Malitha Perera of how to move beyond the 'deficit' lived experience narrative in the mental health context.

The book is broadly conceived: whilst most of the chapters focus primarily on situations of mental ill-health, some strayed very much more into what I would call 'capacity law' territory; most obviously those by Bartlett, but also those by Kate Diesfeld about safeguarding residents in aged care facilities in New Zealand from abuse in neglect and by John Dawson and Frances Matthews, about the potential for arbitrary detention of elderly people in secure rest home care (again in New Zealand). In this light, it is interesting to this reader, close as I am to the 'fusion' land of Northern Ireland,[10] that there appears to be no place in the future envisaged by this book at least for the elimination of separate mental health legislation – or 'mental health law' as a discipline.

In conclusion, this very stimulating book serves as a fitting tribute to a person whose influence has been and continues to be hugely significant, and who we hear from directly in an afterword giving her reflections on her work prompted by the contents of the book.

[8] See further Alex Ruck Keene, *Deprivation of liberty and disability- its meaning and (il)legitimacy?*, available at https://www.mentalcapacitylawandpolicy.org.uk/deprivation-of-liberty-and-disability-its-meaning-and-illegitimacy/.

[9] See further Ruck Keene et al., *Mental Capacity – why look for a paradigm shift*, (2023) 31 Medical Law Review 340–357, https://doi.org/10.1093/medlaw/fwac052.

[10] Albeit that it is somewhat stalled, with the Mental Capacity Act (Northern Ireland) 2016 only partially implemented.