IN THE SUPREME COURT OF NEW ZEALAND **SC 10/2023**

I TE KŌTI MANA NUI O AOTEAROA **SC 11/2023**

IN THE MATTER	Of an appeal relating to issues arising from disabilities and a statutorily discriminatory regime
BETWEEN	J (SC10/2023), COMPULSORY CARE RECEIPIENT BY HIS WELFARE GUARDIAN, T Appellant
AND	Attorney-General First Respondent
AND	District Court at Manukau Second Respondent
AND	Family Court at Manukau Third Respondent
AND	CARE CO-ORDINATOR Fourth Respondent
AND	CARE MANAGER Fifth Respondent

Cont.

APPELLANT'S SUBMISSIONS

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SC 11/2023

BETWEEN	J, COMPULSORY CARE RECIPIENT, BY HIS WELFARE GUARDIAN, T APPELLANT
AND	CARE CO-ORDINATOR RESPONDENT

May it Please Your Honours

Introduction

1. The Court of Appeal's (Courtney, Katz, and Clifford JJ, judgment given by Katz J) accurately says at paragraph 77: *J's case is an exceptionally difficult one*.[1]

2. On one level it is difficult: issues around J's *care* are complex . But taking a human rights approach, J's *case* is, with respect, quite simple.

3. It can be distilled into two primary questions: can the Crown detain an intellectually disabled autistic man for 20 years without trial? And if it can, why?

   - is the detention of such a man not an arbitrary detention,
   - Does it not involve an unfair trial, and
   - How is it not discriminatory in line with *Noble v Australia*?[2]

4. Counsel embarked on this case in 2016, some 12 years after the charges against J were laid.

5. As the Court indicated in its grant of leave, this case raises questions around whether the Court of Appeal decision in *RIDCA Central v VM*[3] – upon which the judgments of essentially all the lower Courts rest – should be revisited. It should.

6. In light of advances in the law internationally, particularly in *Noble v Australia*, *RIDCA v VM* has become stale with the effluxion of time. It does not reflect, and in J's case it has meant that the arbitrary detention he has endured has continued for far too long.

7. This Court should align the assessment of the discretion to continue detention under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003

[1] [COA 05.0067].

[2] *Noble v Australia* CRPD/C/16/D/7/2012 (23 August 2016). [Appellant's Authorities, Tab 1]

[3] [2012] 1 NZLR 641. [Appellant's Authorities, Tab 2]

("IDCCRA")[4] with the international approach, and set in train the end of J's compelled detention, directing an end to his status as a compulsory care recipient.

8. Counsel will reply on the jurisdictional issue once submissions of the first and fourth respondents have been filed.

Background

9. J, the intellectually disabled and autistic appellant, has been detained in various forms of detention for the past 20 years, arising from some minor criminal offending[5] (breaking windows valued at $900) which if committed by a person without a disability would likely receive a diversion, or not even prosecution.

10. Few if any persons are detained for 20 years, without a criminal trial, with even extraordinary circumstances e.g. the New Zealand Land Wars, resulting in lesser detentions.

11. On 9 June 2004, he was remanded on bail with a 24 hour curfew, except in company of his mother, next day he was further remanded for 5 days to the Mason Clinic, for an inpatient assessment.

12. He appeared for a bail application on 10 June 2004, and was remanded in custody. After numerous extensions of his compulsory care order, he is currently detained in the Mason Clinic having gone full circle in 20 years.

[4] [Appellant's Authorities, Tab 7].

[5] The Summary of Facts reads in redacted form:

> On the 8th June 2004 at about 6:30pm the DEFENDANT [J] was at the property of [Address]. The property belonging to [Name] the victim in this matter who did not give permission to the DEFENDANT to be on his property at the time of the incident. At the time the DEFENDANT had in his possession a large axe which was used in breaking of two window of the victims garage.
>
> The DEFENDANT continue with his rampage by smashing the axe through the victims work van destroying the vehicles front, rear and side windscreens. Reparation is sought for the replacement of the damaged property, valued at $900.00. The DEFENDANTS actions was witnessed by his moth who later restrained the DEFENDANT from causing any further damage.
>
> Due to the actions of the DEFENDANT his hand was cut by the broken galls which required him to be taken to hospital. When spoken to by Police, [J] was unable to give any reasonable explanation apart from saying that he was "James Bond and licensed to kill".

13. Since the initial habeas application determined by Collins J, the appellant has had name suppression primarily statutorily under the IDCCRA. This should continue, as should the use of "J", for the appellant and "T", for J's mother and Welfare Guardian.

14. Whilst the maximum sentence for wilful damage was 3 months, it took some 20 months detention[6] primarily at Solway[7] and TRT[8] before J was determined unfit to stand trial, and then he was detained for a further 22 months.

15. As General Comment 35/11 of the Human Rights Committee notes:[9]

> The two prohibitions overlap, in that arrests or detentions may be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful. Arrest or detention that lacks any legal basis is also arbitrary.[10] Unauthorized confinement of prisoners beyond the length of their sentences is arbitrary as well as unlawful;[11] the same is true for unauthorized extension of other forms of detention.

16. The Court are well aware of what an arbitrary detention is in both domestic and international law; to be "arbitrary," it "isn't merely that it is interpreted more broadly to include elements of inappropriateness, injustice, predictability, and due process of law.' The HRC has reaffirmed that the legal basis justifying a detention must be accessible, understandable, non-retroactive, and applied in a consistent and predictable way to everyone equally.

17. Detentions here are not applied equally, those with psychosocial disabilities, and insanity are treated differently.

18. GC35/12 says:[12]

[6] The Crown disputes that this was detention, as the Court ordered "J" bailed to Solway Park, but for the restrictions were no different to detention.

[7] An Intellectual Disability facility.

[8] Another Intellectual Disability facility.

[9] CCPR/C/GC/35. [Appellant's Authorities, Tab 4]

[10] 414/1990, *Mika Miha v. Equatorial Guinea*, para. 6.5.

[11] See concluding observations: Brazil (CCPR/C/BRA/CO/2, 2005), para. 16.

[12] CCPR/C/GC/35. [Appellant's Authorities, Tab 4]

> An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. For example, remand in custody on criminal charges must be reasonable and necessary in all the circumstances. Aside from judicially imposed sentences for a fixed period of time, the decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.
>
> 35/13 An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. For example, remand in custody on criminal charges must be reasonable and necessary in all the circumstances. Aside from judicially imposed sentences for a fixed period of time, the decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.

19. General Comment 35/38 continues:

> If the length of time that the defendant has been detained reaches the length of the longest sentence that could be imposed for the crimes charged, the defendant should be released.

20. Whilst that appears obvious, J was not released. A criminal appeal was mounted out of time, together with a judicial review, the first application for a s 102 review since the IDCCRA was enacted, and an appeal from the then most recent Family Court judgment. All were heard before Cull J, over 6 court days, 3-7 and 11 July 2017, and dismissed.

21. No further appeal on the criminal charges was jurisdictionally possible given an extension of time was required to appeal the criminal charges out of time, and this extension was declined. Nevertheless, J asserts his detention was unlawful and arbitrary, from the maximum period (three months) he could have been imprisoned had he not been Intellectually Disabled.

22. The UN Working Group on Arbitrary Detention (WGAD)[13] has adopted Deliberation No. 7 (its equivalent of treaty body General Comments), which

[13] The UN Commission for Human Rights (UNCHR) created the WGAD in 1991 after long investigation by the Sub-Commission on the Prevention of Discrimination Protection of Minorities into the practice of administrative detention. To get a sense of the range of its activities, in 2017, the WGAD under its regular procedure adopted 94 opinions concerning the detention of 225 persons in 48 countries. It transmitted 98 urgent appeals to 45 governments concerning 311 individuals, 48 letters of allegation and other letters to 32 governments. It also conducted country missions to Argentina and Sri Lanka. It visited NZ in 2014. [Appellant’s Authorities, Tab 9]

focuses exclusively on the practice of psychiatric detentions. There are only a very small number of cases in its jurisprudence involving psychiatric detentions, but the WGAD has offered further comments on psychiatric and disability detentions in the context of its country missions that it has conducted.

23. No decisions of psycho-social detentions alone are known. However, the two topics tend to overlap.

What others say

24. The UN Committee on Disabilities found in *Noble v Australia*[14] that Mr Noble had no fair trial, and was subject to arbitrary detention, and Discrimination. J adopts that reasoning, noting he is unlike Mr Noble in that he was not facing charges of serious sexual offending.

25. J considers he is at times kept in a cage, including in early June 2024, he is not an animal. This is reminiscent of *Taunoa.*[15] J he said on 6 June 2024, via his mother by email:

> “He said" :Dr came to see me mum, and i was in the cage mum") talking to Dr, i was shocked. so i asked him where??"outside mum and he repeat back to me about him being in the cage. Very, very Sad”.

26. A report dated 13 October 2023 from Dr Peter Johnson, Clinical Psychologist provided to the Court of Appeal said:

> 64. A number of staff members spoken with expressed the view that the situation in which [J] finds himself is unlikely to change unless there was a significant improvement in the staffing level within the unit, and in provision of necessary equipment, such as a suitably fitted-out vehicle that could safely support outings. **Better staffing ratios would permit more frequent social interaction with** [J]**, allowing him to be engaged in a wider range of enjoyable**

[14] *Noble v Australia* CRPD/C/16/D/7/2012. [Appellant’s Authorities, Tab 1].

[15] Dr Korn quoted in Ellis, A, J, “Psychological Torture by the Misuse of Long Term Solitary Confinement in New Zealand Prisons and the Denial of Habeas Corpus: an international and comparative perspective”; M Phil thesis, Essex University, 2005, p.147.

65-6 he said:

> We do not put dangerous animals in the situation that we put the men that I have seen. Just visit the local zoo and the B.C. Penitentiary, how that can be defended by a sovereign state, I don't know.
>
> Finally, he expressed the view that solitary confinement as practiced at the B.C. Penitentiary serves no reasonable or rational penal purpose in terms of deterrent, long range control, treatment or reformation.

activities, and thereby alleviating the prevailing dynamic within which staff contact tends to revolve almost entirely around security and control. It is appreciated however that securing the funding that might allow for improved service delivery is highly problematic at the present time.

65. In conclusion, it is recommended that under Section 79 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 [J] remains a Secure Care Recipient. With respect to options to improve his situation, I can only endorse the views of staff in terms of the objectives noted immediately above.

[**Bold** and **emphasis** added.]

27. The call for a paradigm shift[16] of the treatment of persons with disabilities has fallen on deaf ears in New Zealand, including the Court of Appeal.

28. The Grand Chamber of the ECHR said:

Oliveria v Portugal:[17]

74. The United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health issued a report concerning the right to health for all people with disabilities on 2 April 2015. In respect of the CRPD he found as follows

…

96. The Convention is challenging traditional practices of psychiatry, both at the scientific and clinical-practice levels. In that regard, there is a serious need to discuss issues related to human rights in psychiatry and to develop mechanisms for the effective protection of the rights of persons with mental disabilities. The history of psychiatry demonstrates that the good intentions of service providers can turn into violations of the human rights of service users. The traditional arguments that restrict the human rights of persons diagnosed with psychosocial and intellectual disabilities, which are based on the medical necessity to provide those persons with necessary treatment and/or to protect his/her or public safety, are now seriously being questioned as they are not in conformity with the Convention

…

[16] Prof Peter Bartlett, Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report (Washington: Centre for Human Rights and Humanitarian Law, American University Washington College of Law, 2014) 169-180 http://antitorture.org/wp-content/uploads/2014/03/PDF_Torture_in_Healthcare_Publication.pdf.
Abstract: The passage of the CRPD in 2006 promises a paradigm shift in the rights of people with disabilities. Implementing this paradigm shift is a major undertaking requiring the involvement of a wide range of stakeholders. The required reforms extend across the legal landscape, and attainment of any consensus on many reforms may take many years in some areas. In the interim, people with disabilities remain subject to situations that are indefensible in human rights terms, whether that is understood in the pre- or post-CRPD paradigm. This creates a set of dilemmas: how do human rights advocates argue for the amelioration of manifest abuses in the short to mid-term without undermining the underlying transformative promise of the CRPD's new paradigm; and how is the pressure on states parties to be maintained in the long process of finding ways fully to implement the CRPD? These difficulties are discussed in the context of laws relating to mental disability, both in general and with particular reference to the revisions to the Standard Minimum Rules for the Treatment of Prisoners (SMR) now under consideration.

[17] ECHR, *Fernandes de Oliveira v Portugal*, Appl. No. 78103/14, GC Judgment of 31 Jan. 2019.

> **99. A large number of persons with psychosocial disabilities are deprived of their liberty in closed institutions and are deprived of legal capacity on the grounds of their medical diagnosis**. This is an illustration of the misuse of the science and practice of medicine, and it highlights the need to re-evaluate the role of the current biomedical model as dominating the mental-health scene. Alternative models, with a strong focus on human rights, experiences and relationships and which take social contexts into account, should be considered to advance current research and practice ..."
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> …
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> 112**. At the same time, the Court reiterates that the very essence of the Convention is respect for human dignity and human freedom**. In this regard, the authorities must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned and in such a way as to diminish the opportunities for self-harm, without infringing personal autonomy (see, mutatis mutandis, *Mitić v. Serbia*, no. 31963/08, § 47, 22 January 2013) …
>
> [**Bold and** underline added]

29. Ellis discussing Judge Pinto de Albuquerque says:[18]

> Judge Pinto de Albuquerque, whose dissents are always worthy of reading, in his partial dissent says:
>
> 40. The legal international scenario is confusing, to say the least, signaling tough ongoing discussions on the matter. The Human Rights Committee does not share the views of the CRPD Committee, since it acknowledges that involuntary hospitalisation may be justified. Similarly, the [UN] Subcommittee on the Prevention of Torture expressed the opinion that deprivation of liberty can be justified on grounds of risk of self-harm or harm to others.

30. Having twice pointed out that conflict of International Human Rights Law, counsel had overlooked that the Vienna Convention on the Law of Treaties, Art 30, provides the second treaty to prevail,[19] so the road is signposted to the Disabilities Committee.

31. The respondents, and the courts to date, say J is dangerous. But dangerous persons without Intellectual Disabilities do not get treated the same way. Moreover, what is "dangerous" needs consideration.

32. The Court of Appeal observed:

> Difficulty distinguishing between fantasy and reality
>
> [20] Dr Mhairi Duff, a psychiatrist who is a leading expert on ASD, observed that "[p]art of the presentation of autism for [J] involves restricted and fixated obsessional interests and a

[18] Dr Tony Ellis, A Tale of Two Risks: risk assessments and treatment of two dangerous long-term New Zealand detainees, http://hrp.law.harvard.edu/wp-content/uploads/2020/06/AEllis_WorkingPaper _June2020.pdf [Appellant's Authorities, Tab 5] ["**Ellis**" hereafter].

[19] In essence [Article 30 of the VCLT] provides that: (b) as between parties to one treaty who become parties to a second, the second governs on any point where it is incompatible with the first.

difficulty in differentiating between his 'fantasy' World and the 'real' World particularly as it exists for others around him." Dr Duff reported that J "means no harm to others as he fails to have a core understanding of the permanency of harm" — for example, in relation to his fantasy about cutting off people's feet, Dr Duff recorded that J believes "that his victims will get up and go home after he has cut off their feet". As Dr Duff explained in a 2013 report:

> … [J] is not criminal in his behavioural intent. His level of autism makes his ability to empathise with victims or to appreciate the severity or permanency of harm he may inflict unreliable. He acts out fantasy worlds as if these are real and would, for example see himself as an agent of good in his identification with law enforcement agencies or the secret service.

33. Objectively, various health workers consider him dangerous, actual "victims" such as the van windows owner presumably think he is, but is he? Actual evidence beyond incidence reports are thin on the ground, and Cull J never met J. It's almost delegation of decision-making to detain on the advice of health experts, if not delegation in reality. At the very least it is an arbitrary detention. J's mum T would describe him as a pussy cat who lives in a fantasy world, which would be fair comment for anyone meeting him.

34. Tania Breen, a psychologist, reported J had attacked a fellow student and cut her throat, and was in hospital for 2 weeks.

35. Cull J records:[20]

> *(b) Physical violence risk*
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> [91] Ms Breen reported in her 4 March 2005 risk assessment, that J's first contact with the police occurred in 2000 "after he tied up a fellow student (female), and wounded the neck and throat (requiring plastic surgery) of a female student at [redacted]." J's mother brought to Ms Breen's attention that her record of events was incorrect.
>
> [92] Ms Breen checked with the Care Coordinator, [redacted], who had sent the information by way of email. After making further enquiries of the deputy principal of the school, Ms Breen subsequently reported to the Court on 12 May 2005, that J did not tie the student up but on returning to the playground, cut the back of the neck of the female student. The student was taken to hospital by ambulance and needed stitches before returning to school several days later. In her subsequent report of 12 May 2005, Ms Breen thus corrected the previous information and restated her view on J's disposition. Following the information from the deputy principal,
>
> Ms Breen stated that it: reinforces my belief that [J] can engage in behaviour of a very serious nature, with no apparent triggering events, and that he has no appreciation for the harm that he might cause.
>
> [93] She concluded further, that her previous view that J should receive "community secure" care or "hospital secure" care, if the former was not available, was still her assessment.

[20] [COA 101.0210].

36. The level of dangerousness is considered by the risk assessor to be the same regardless of whether J tied up the victim, whether she was in hospital for days, or weeks, or only had a few stiches, and was released the same day.

37. Interestingly, some years later in 2019,Tania Breen on completing a Doctorate at AUT:[21]

> The past two decades have seen increasing social science and legal interest in the relationship between autism and criminal justice. Most publications have been case study or legal analyses, or focussed on quantitative topics (for example prevalence or offence type). What is noticeable by their relative absence are the voices of autistic people, especially those who have been suspected of or charged with a crime, and for whom legal proceedings occurred in the regular criminal system. This runs counter to the goals of the autism rights movement and critical autism studies which value the experiences and opinions of autistic people, and promote research that will make a positive difference to their lives. **This research investigates the lived experience of 10 autistic adults subject to the Aotearoa New Zealand criminal justice system.** Through interpretative phenomenological analysis, six superordinate themes were identified.
>
> Illustrated through participant quotes, these were: unease with New Zealand Police; overwhelming legal processes; encounters with mental health professionals; the impact on self and others; recommendations from the participants; and adversity across the lifespan. The thesis also identified four factors, power, process, perception and participation, that both influenced how the participants made sense of their experiences and were compelling forces for change.

38. That a leading piece of research is based on interactions with 10 adults in the Criminal Justice System, illustrates the difficulty of becoming an expert in this field. Having joint diagnoses of Autism and Intellectual Disability is another matter altogether.

39. Counsel considers the primary documents in this case of unfair trial, arbitrary detention and discrimination are relatively few: *Noble v Australia*;[22] the Ellis Article;[23] *Fernandes de Oliveira v Portugal*,[24] The judgment of the High Court and Court of Appeal in J's case;[25] And the Concluding Observations and

[21] Tanya Breen, Doctor of Health Science *"This Giant Steamroller That's Moving Inexorably Towards You but Very Very Slowly": An Interpretative Phenomenological Analysis of Autistic Adults' Experiences of the Aotearoa New Zealand Criminal Justice System* (AUT 2021) https://hdl.handle.net/10292/15245.

[22] [Appellant's Authorities, Tab 1].

[23] [Appellant's Authorities, Tab 5].

[24] Appl. No. 78103/14, GC Judgment of 31 Jan. 2019. [Appellant's Authorities, Tab 3]

[25] [COA 101.0178] and [COA 05.0035].

recommendations of CAT in its most recent country report on New Zealand.[26]

40. If J does not secure release here, this seems an ideal case to take to both[27] the UN Working Group on Arbitrary Detention, and/or one of the Treaty Body Committees (HRC, Torture, or Disabilities). Notably, in July 2023, the Torture Committee in its concluding observations on NZ's 7th periodic report called for the repeal of the IDCCRA:[28]

> 42**. The State party should**:
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> (a) **Consider repealing any legislation, including the Substance Addiction (Compulsory Assessment and Treatment) Act of 2017, that enables the deprivation of liberty on the basis of impairment, and that enables forced medical interventions on persons with disabilities, in particular Māori persons with disabilities and persons with intellectual or psychosocial disabilities**;
>
> (b) **Consider repealing provisions within the Intellectual Disability (Compulsory Care and Rehabilitation) Act of 2003 that allow for persons with disabilities to be detained for periods of time exceeding the maximum length of the sentence they would be liable to in the criminal justice system**;
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> [**Bold** in original]

41. Counsel has since the signing and ratification of the Convention for the Rights of Persons with Disabilities, wondered whether he would ever get before that Committee.

42. The facts are in little dispute, the legal interpretation is, and in particular, whether *RIDCA v VM* upon which all Courts below rely, should remain.

Dangerousness

43. Ellis describes at p33, *Noble*[29] and the objective and subjective reasoning needed to establish dangerousness:

> The views of the CRPD who in *Noble v Australia* found Mr Noble's an intellectually disabled person's detention was discriminatory, an unfair trial, and an arbitrary detention, are inspiring, and important in this field, their jurisprudence is embryonic [2019] with less than

[26] July 2023CAT/C/NZL/CO/7 24 August 2023. [Appellant's Authorities, Tab 10]

[27] The WGAD not being a Treaty body, can have cases filed with it without falling foul of the rule not to file a simultaneous communication with another treaty body.

[28] CAT/C/NZL/CO/7: Concluding observations on the seventh periodic report of New Zealand (24 August 2023).

[29] CRPD, *Noble v Australia*. [Appellant's Authorities, Tab 1]

thirty cases decided since 2006, seven from Australia, and none from NZ who only permitted individual communications eight years after ratification of the treaty by ratifying the optional protocol. An Australian Senate inquiry followed on the long-term detention of the mentally impaired. Mr Noble was released.

Criticism of detention on grounds of assessed dangerousness

Terry Carney et al raised a number of serious issues of relevance. That Judicial determinations of civil commitments based solely on medical assessment of a person's need for treatment were a breach of the constitutionally protected right to freedom from arbitrary detention, led to the inclusion of an objective test for compulsory treatment criteria in mental health legislation in United States jurisdictions, and Canadian provinces. For example in *Thwaites v Health Sciences Centre Psychiatric Facility*, the Manitoba Court of Appeal in Canada, which found that the province's civil commitment standard breached section 9 (freedom from arbitrary detention) of the Canadian Charter of Rights and Freedoms, commented that in the absence of objective standards, the possibility of compulsory examination and detention hangs over the heads of all persons suffering from a mental disorder, regardless of the nature of the disorder, and the availability and suitability of alternative and less restrictive forms of treatment.

The Manitoba legislature, and eventually all provincial legislatures, amended their mental health statutes to conform to these Charter requirements, inserting an objective test in place of the former clinical judgment test.

In the influential case *Lessard v Schmidt*, a United States Federal District Court held that: (1) civil commitment could only be based on a finding of 'dangerousness', which required evidence of a recent overt act, and a likelihood of immediate harm without intervention; and (2) due process rights must be applied as stringently in the civil commitment context as in criminal proceedings because the same liberty interests are a stake in both cases. This meant that processes of entry into compulsory treatment should include procedural protections such as notice of the reasons for detention, a right to legal representation, and consideration of less restrictive alternatives.

Noble v Australia

The views of the CRPD who in *Noble v Australia* found Mr Noble's an intellectually disabled person's detention was discriminatory, an unfair trial, and 8.3. …As a result of the application of the MID Act, **the author's rights to a fair trial were instead fully suspended, depriving him of the protection and equal benefit of the law.** The Committee therefore considers that the MID Act resulted into a discriminatory treatment of the author's case, in violation of article 5(1) and (2) of the Convention.

8.6. …The Committee considers that while States parties have a certain margin of appreciation to determine the procedural arrangements to enable persons with disabilities to exercise their legal capacity, the relevant rights of the person concerned must be complied with. This did not happen in the author's case, as **he had no possibility and was not provided with adequate support or accommodation to exercise his rights to access to justice and fair trial.** In view thereof, the Committee considers that situation under review amounts to a violation of the author's rights under articles 12(2)-(3) and 13(1) of the Convention.

8.7 …**The author's detention was therefore decided on the basis of the assessment by State party's authorities of potential consequences of his intellectual disability, in the absence of any criminal conviction, thereby converting his disability into the core cause of his detention**. The Committee therefore considers that the author's detention amounted to a violation of article 14 (1) (b) of the Convention according to which "the existence of a disability shall in no case justify a deprivation of liberty".

> 8.9 …Additionally, the Committee notes that the author was detained during more than 10 years, without having any indication as to the duration of his detention. His detention was deemed indefinite in so far as, in compliance with section 10 of the MID Act, "an accused found under this part to be not mentally fit to stand trial is presumed to remain not mentally fit until the contrary is found […]". Taking into account the irreparable psychological effects that indefinite detention may have on the detained person, the Committee considers that the indefinite detention he was subjected to amounted to indefinite character of the author's detention and the repeated acts of violence he was he was subjected to during his detention amount to a violation of article 15 of the Convention by the State party.
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> [**Bold** added]

Cull J's decision not to meet with J

44. The Court of Appeal addressed this at:

> [97] Mr Ellis submitted that J's detention is arbitrary because Cull J did not meet with J. (We note that Judge Wagner subsequently met with J in 2020, albeit via audio-visual link due to COVID-19 restrictions.)
>
> [98] Cull J gave two reasons for not visiting J at his facility:
>
> First, the information and evidence which I had heard from specialist assessors and the other witnesses satisfied the issues I needed to address in this inquiry. Second, I also had particular regard to the evidence of a number of witnesses, Dr Judson and Ms Daysh in particular, who described the anxiety and stress experienced by J, when he learns of impending visits by officials or experts whom he has not previously met.
>
> [99] It was not mandatory under the IDCCR Act for Cull J to meet with J. Section 102 of the IDCCR Act provides that High Court judge may do so as part of an inquiry, but this is not a requirement. The fact that Cull J did not meet with J does not render his detention either unlawful or arbitrary.

45. This analysis is inadequate, and reaches a wrong conclusion. J's detention is though the gateway of a criminal procedure. J is facing a detention on a revolving basis of repeated 3 years terms.

46. International human rights also need consideration. In General Comment 32/35 the HRC has said:

> Paragraph 3 of [article 9 arbitrary detention] requires, firstly, that any person arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power. That requirement applies in all cases without exception and does not depend on the choice or ability of the detainee to assert it.[30]

47. GC32/21 says:

> If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 prohibit a retroactive increase in sentence and a State party may not circumvent that

[30] 1787/2008, *Kovsh* v. *Belarus*, paras. 7.3–7.5.

> prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention.[31]

48. Extending this detention is a retrospective increase, and a double jeopardy.

49. A detention for 3 years is plainly a "criminal" detention not a civil one, and J needed to be brought before a Judge, or a Judge needed to visit him. This did not happen.

50. With respect detaining someone for three years or longer who does not have a disability, and does not see a judge is arbitrary, and it is worse when the person has a disability, whether or not the Act requires presence before a Judge is not the relevant question, it is whether the detention is arbitrary.

51. One might expect detention without appearing before a Judge in Syria, Russia, and other tyrannical places, but not NZ.

52. Ellis, at p 36 citing the US case of *Lessard v Schmidt*, a United States Federal District Court held that:[32] (1) civil commitment could only be based on a finding of 'dangerousness', which required evidence of **a recent overt act,** and a likelihood of immediate harm without intervention; and (2) due process rights must be applied as stringently in the civil commitment context as in criminal proceedings because the same liberty interests are a stake in both cases. This meant that processes of entry into compulsory treatment should include procedural protections such as notice of the reasons for detention, a right to legal representation, and consideration of less restrictive alternatives.

53. Detention on an overt act in 2004 is hardly "recent".

Discrimination

54. In the High Court, three of the proceedings (not all before this Court) addressed discrimination issues, including the judicial review application which included

[31] 1629/2007, *Fardon* v. *Australia*, para. 7.4.

[32] United States District Court for the Eastern District of Wisconsin, *Lessard v. Schmidt*, No. 71-C-602, Judgment of 18 Oct. 1972.

requests for declarations of inconsistency. Given the way the case played out with more focus on the other matters, the consideration of this was relatively brief, and accordingly when the matter went to the Court of Appeal, the requests for formal *Taylor* declarations was abandoned, replaced with a request of *Hansen* indications instead, not least because by then the sections had been amended, and those that had applied in J's case were no longer the law. The Court of Appeal made observations in respect of one aspect (burden of proof) that came somewhat close.

55. The declarations on inconsistency that were initially sought were sought in respect of ss 9 and 14 of the Criminal Procedure (Mentally Impaired Persons) Act. No declaration of inconsistency was sought in respect of the IDCCRA, but rather a declaration that as it was applied in this case, it was inconsistent. This was because the powers detaining J under the IDCCRA are discretionary, and are capable of use in some circumstances that is not discriminatory.

Exercise of Discretion

56. Aspects of this Court's consideration of *Attorney-General v Chisnall*,[33] the declaration of inconsistency case, relating to the exercise of discretions in NZBORA-related contexts may inform aspects of this appeal. Because of the argument in that case, and also some of the argument in *R(SC 64/2022) v Chief Executive of the Department of Corrections*,[34] this is not canvassed again, save for the general observation that exercises of judicial discretion (which are involved in decisions to extend detention under the IDCCRA and in decisions whether to conduct s 102 inquires) must be exercised consistently with NZBORA.

Potential non-discriminatory application of IDCCRA cf. CPMIPA

57. The IDCCRA permits, but does not require, a Court to extend the detention of someone subject to a compulsory care order. When exercised in the case of

[33] SC 26/2022.

[34] [2024] NZSC 47.

someone whose behaviour is found to have amounted to say manslaughter, or a sexual assault, where the maximum sentence for a person without an Intellectual Disability is long, three-yearly Court reconsideration of detention, with six monthly psychologist consideration may be justified in a particular case, so the sections permitting further detention may not be per se unlawfully discriminatory.

58. The sections of the CPMIPA complained of, which have since been amended, albeit not going far enough to fully remedy the discrimination, operate differently, and do not involve the exercise of a discretion. They set, for example, the lesser standard of proof for those unfit to stand trial, and remove the requirement of establishing mens rea.

59. Discrimination was considered further in the Court of Appeal, which mistakenly suggested that some issues raised in that Court were not raised in the High Court. They were, but rather, this argument had not made it through to the judgement.[35] It is an unfortunate confluence of the range of proceedings properly brought together that some matters received less of a focus than they would in a stand-alone proceeding.

60. One matter that was addressed was the appropriate comparator in the discrimination context, but one aspect of it that was not addressed by the Court (because it was not raised by the parties) is the possibility of different comparators for the different aspects said to be discriminatory. This is likely the solution to some of the issues that affected the limited discussion of discrimination in the High Court.

61. The Court of Appeal notes that the comparator question met with some sympathy from Cull J (para [107]), but that Her Honour considered the scheme was helpful to those on it (Para [108]) and was therefore not discriminatory.

[35] Equally, the Crown did not file evidence of the type one might expect in a declaration of inconsistency case when seeking to justify limitations on rights.

62. The Court of Appeal differed somewhat, particularly with respect to the burden of proof but the question of comparator is a useful one to consider. Because there are different discriminations, different comparators may be (and it is submitted are) appropriate when assessing the different discriminations.

63. In the Court of Appeal, J argued that the comparator ought to be people without Intellectual Disability facing similar factual allegations to him. That is an appropriate comparator when considering the involvement hearing, which offers a useful exemplar of the issues with the CPMIPA process.

The standard of proof at an involvement hearing

64. Under s 9 of CPMIPA, as it then was (and under section 10-12 as they now are) the standard of proof in a CPMIPA involvement hearing in the civil standard. The Court of Appeal summarised the concerns well:

> [144] Finally, we note our particular concern regarding the lower standard of proof which applies at an involvement hearing under the CPMIP Act. We have set out at [134] above various rationales which have been suggested for the adoption of the civil standard of proof. None of these rationales, in our view, are convincing. Concerns have been expressed regarding the lower standard of proof for many years now. Over ten years ago, Sir Robert Chambers QC, writing extrajudicially, observed that the adoption of the lower civil standard of proof for involvement hearings was "troubling" and that:
>
>> I am not aware of any other jurisdiction which has deviated in this way from the ordinary, criminal standard of proof of beyond a reasonable doubt. McKay and Brookbanks suggest this course was presumably adopted because it was falsely assumed that the s 9 hearing was "in some way analogous to a fitness to plead hearing, in respect of which the common law has always insisted that where the issue [as to unfitness] is raised by the defence, the accused must satisfy the court on the balance of probabilities". But as the two learned professors go on to note, the s 9 procedure is concerned with a completely different issue, namely the defendant's "physical responsibility for the factual ingredients of the offence".
>
> [145] The different standard of proof in involvement hearings does not appear to have been directly raised as an issue in the High Court, however, as it is not addressed in Cull J's very comprehensive decision. Nor was the issue referred to in J's notice of appeal. It was first raised, briefly and without reference to any relevant case law or commentary, in J's written submissions on the appeal. The issue was not directly addressed at all in the Crown's written submissions. In such circumstances it would not be appropriate for us to express a concluded view as to whether the lower standard of proof materially disadvantages ID unfit defendants, although we think that it is strongly arguable that it does.

65. That the Attorney-General made few substantive submissions on this point, elides that J did, including in the High Court. The Court of Appeal's expressions of concern are welcome, but could and should have gone further. Similar issues

arise, for example, with the removal of mens rea, also discussed briefly by the Court of Appeal, but without as strong a conclusion.

Other Comparators

66. As different stages of the process, the comparator when assessing whether there is unjustified discrimination changes, sometimes subtly – the comparator when assessing the initial *disposition* exercise under CPIMPA is people without an Intellectual Disability facing a sentencing for similar conduct, and sometimes more: the comparator when assessing the power in the IDCCRA to extend a compulsory care order are people who are of a similar level of dangerousness, perhaps arising from an intellectual deficit short of a formal Intellectual Disability.

67. This assessment is one Cull J got clearly wrong:

> [380] Despite the difficulties in making this comparison, if a comparator group needs to be identified, the closest group is non-disabled offenders who pose the same degree of risk as J. Both groups have a high level of risk, which allows the Court to assess whether there is a difference in treatment based on J's intellectual disability. Using this comparator, there is a difference in treatment between the two. J, because of his intellectual disability and level of risk, is subject to a compulsory care order in secure care. **Whereas, non-disabled offenders who pose the same degree of risk, will likely be serving a sentence of preventive detention in prison**.
>
> [**Bold** added]

68. The last sentence is both seriously wrong and advances the appellant's case strongly on the grounds of arbitrariness, disproportionality, and discrimination: no one gets Sentencing Act preventive detention for breaking windows. It is not a qualifying offence for non-disabled persons for that type of sentence. Only people like J can effectively get preventive detention for offences against the Summary Offences Act.

69. But, as noted above, the section allowing renewals is not per se discriminatory, as it is also the section that allows a renewal for a person detained as a result of a finding that began as charges, for example of manslaughter. So, this section instead must be assessed as the exercise of a discretion, with an important – perhaps overriding factor (in line with *Noble v Australia*) where the request for an extension will take the detention beyond that allowed for people without the

disability that the detainee has.

Approach in lower Courts devoid of NZBORA considerations

70. The approach by all the lower courts, the Family, High Court, and Court of Appeal are devoid of consideration of NZBORA and its international counterparts: especially to the issues of fair trial, arbitrary detention and discrimination. They are reminiscent of Lord Atkin in *Liversidge v Anderson*:[36]

> One can see examples here of the operation in the United Kingdom of the principle of judicial independence that Professor Aharon Barak emphasizes in his own chapter. Two factors have helped to reinforce the judges' ability to act as guardians. The first was the message conveyed by Lord Atkin's dissenting judgment in *Liversidge v Anderson*. The second was the enactment of the Human Rights Act 1998, which provided the judges with the weapons that they needed to ensure that the Convention rights of everyone, even of those suspected of international terrorism were respected by the executive and by Parliament. And the decision of the House of Lords in *A and others v Secretary of State for the Home* Department, which built on these foundations, served as a stern warning to the executive of the strength and reach of the judges' powers.

71. Consideration of whether to see the detainee, extend the detention over yet another three years, and every other consideration are all exercises of discretion, and therefore need to be NZBORA consistent. There is no room for the approach indicated by the Court of Appeal, which is that the IDCCRA does not require the Judge to see the detainee. The NZBORA is not an optional extra when applying to the Intellectually Disabled.

72. Plato[37] notes that the Guardians need to be properly educated to protect the City's citizen's laws, customs. The same applies 2400 years later.

73. Besides the Judge's position, it is interesting to note that Paul Gruar, Counsel for J in a memo to the Family Court of 23 December 2023, for the first time seriously shifts position, and notes:

> SUITABILITY OF THE CRP

[36] David Hope, The Lord Hope of Craighead, Ch 5 in "Judges as Guardians of Constitutionalism and Human Rights", Eds Martin Scheinin, Helle Krunke, and Marina Aksenova, *Edward Elgar Publishing*, Cheltenham, 2016.

[37] The Republic.

Dr Johnston has undertaken a comprehensive review of compulsory care for [J] the CRP, and the progress of the Care Recipient over the past six months. Dr Johnston describes the CRP as

> "reasonably comprehensive and contains material relevant to the range of adaptive functioning needs, but content is sharply focused on secure management......and continuing thoughtful guidance is provided on how and when restraint and control should be deployed, to ensure that such measures are used affectively, humanly and only to the extent that is essential." – para 48.

In para 51 Dr Johnston confirms "that focused efforts on rehabilitation with [J] have largely stalled."

…**The thrust of the present submissions made by counsel for Subject Person in this report is that the principles and purposes of the Act are not being met in the case of J**. The Court will be aware that the issue of his arbitrary detention under the Act is presently subject to a reserved decision by the Court of Appeal. **However, all those spoken to by counsel for the Subject Person in relation to the present review confirm the inadequacy of present care arrangements for the Subject Person in regard to his long-term rehabilitation…**

In the respectful submission of counsel for Subject Person this is an extraordinary and unacceptable situation.

[**Bold** added]

74. Additionally, the report dated 13 October 2023 from Dr Peter Johnson, Clinical Psychologist provided to the Court of Appeal said:

> 64. A number of staff members spoken with expressed the view that the situation in which [J] finds himself is unlikely to change unless there was a significant improvement in the staffing level within the unit, and in provision of necessary equipment, such as a suitably fitted-out vehicle that could safely support outings. **Better staffing ratios would permit more frequent social interaction with** [J]**, allowing him to be engaged in a wider range of enjoyable activities, and thereby <u>alleviating the prevailing dynamic within which staff contact tends to revolve almost entirely around security and control.</u> It is appreciated however that securing the funding that might allow for improved service delivery is highly problematic at the present time.**
>
> 65. In conclusion, it is recommended that under Section 79 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 [J] remains a Secure Care Recipient. With respect to options to improve his situation, I can only endorse the views of staff in terms of the objectives noted immediately above.
>
> **[Bold** and **<u>emphasis</u>** added.]

75. Nothing has happened.

Detention Made Arbitrary as a result of Discrimination

76. In *Zaheer Seepersad v. Trinidad and Tobago*, a detainee with physical disabilities was confined to a psychiatric facility for an initial period of two months, and a second stretch of sixteen days. He did not suffer from any mental illness, and the doctor who issued his certificate of confinement had never examined him personally. This was discriminatory, bringing his case under Category V of the

WGAD definition of arbitrary detention:[38]

> When the deprivation of liberty constitutes a violation of the international law for reasons of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability or other status, that aims towards or can result in ignoring the equality of human rights.

77. In *N v. Japan*, the WGAD ruled that the detainee was being imprisoned on the basis of his psychiatric disorder, discrimination which rendered his detention arbitrary under Category V. Although he had been arrested in the act of stealing a soda from a barbecue house, and the WGAD accepted that the police may have been correctly arresting him in flagrante delicto, the subsequent nine months of detention after being transferred to Tokyo Metropolitan Matsuzawa Hospital were arbitrary. As there was no evidence that N had been violent or dangerous to himself or others at the time of his arrest, and his transfer to the hospital had no connection to his initial arrest, his detention could have only been on the basis of his disorder.

78. Likewise, J was dangerous to property at the time of arrest not to persons. He has been detained for 20 years because of his disorder.

79. The WGAD follows the HRC approach to disability by including Intellectual Disability. Genser[39] says the demonstrative case is *A v New Zealand*[40] The WGAD ruled that holding the detainee for a too-prolonged time, after he had fulfilled his sentence, for fear he may reoffend, and without provision of rehabilitative services, was discriminatory and punitive practice based on the applicant's disability.

80. A further WGAD case from NZ took a different view. Genser reported:[41]

> In *Gary Maui Isherwood v. New Zealand*, a number of factors strongly in favor of Government allowed the WGAD to make a very narrow holding permitting thee continued detention of a

[38] https://www.ohchr.org/en/about-arbitrary-detention. Category V is similar to article 26 of the ICCPR.

[39] Jared Genser, *The UN Working Group on Arbitrary Detention*, Cambridge University Press. Cambridge, (2019), p 439.

[40] *A v. New Zealand*, WGAD Opinion No. 21/2015, Adopted Apr. 29,2015,at pp 5-10.

[41] Genser, above, n 39, pp 445-446.

repeat violent sex offender who had served his complete sentence, included the gravity of Isherwood's offense, the likelihood of his committing similar crimes, the unavailability of less restrictive measures, his failure to participate in rehabilitation efforts, and the regular review of his situation by the New Zealand Parole Board that would ward against the possibility of his detention becoming indefinite.

The WGAD also took into account that his right to liberty was counterbalanced by the public's right to safety and security They emphasized, however, that "the present case should not be understood as diminishing the right to liberty and that each case must be considered in its own context." Isherwood stands in contrast to a prior opinion, *A v. New Zealand*, where a man with severe intellectual disabilities was placed in preventative detention with no plan for his rehabilitation. minority opinion of the Human Rights Committee (HR Committee) expressed the view that preventative detention, since not based on past acts but the likelihood of future is always per se arbitrary. However, the WGAD ruled consistently with the HR Committee majority, and found that because Isherwood's preventative detention was "genuinely aimed at [his] rehabilitation and reintegration into society," it was not arbitrary.

Role of the District Inspector and Bias of Cull J

81. As well as being an appeal from a judicial review, this case is also an appeal from an application for an inquiry under s 102 of the IDCCRA. As a matter of technicality that application was refused, albeit evidence akin to that which might be called at a s 102 inquiry was heard. There remain concerns, however that Cull J heard this application without disclosing her involvement with the Intellectual Disability system. Counsel considers that had a s 102 inquiry been properly conducted, the failure of the system of District Inspectors to protect J's interests would have been noted, with recommendations made to ensure that in both his case and others similar issues did not arise again. Sadly, in the time since that hearing, its failure to launch has meant that the system has not adjusted. This appeal is an opportunity for findings to be made to ensure that this is able to be corrected.

82. The Court of Appeal says at paragraphs [161] and [162]:

> [161] For completeness, we note that the notice of appeal raised an allegation of actual or apparent bias on the part of Cull J, due to her having worked as a district inspector under the IDCCR Act prior to her appointment to the High Court. This point was only taken, however, in respect of remedy. Specifically, if this Court remitted the matter to the High Court to determine compensation, a direction was sought that Cull J not preside over the compensation hearing.
>
> [162] Given that we are not remitting the matter to the High Court, it is not necessary for us to address the issue of bias. We note, however, that had it been necessary to consider this issue on its merits, it is highly unlikely that we would have been persuaded that, based on Cull J's previous work as a district inspector, a fair-minded and fully informed lay observer would reasonably apprehend that she might not bring an impartial mind to the resolution of the case.

83. With the greatest of respect, the Court of Appeal have either missed the point, or

simply arrived at a wrong conclusion, or both.

84. The point that Helen Cull QC was a District Inspector was not the point, it was her closeness with the system, ignoring international commentary on their role, and a failure to disclose.

85. The submissions in part said:

> **District Inspectors**
>
> Justice Cull applauds the use of District Inspectors ("D.I."), and considers them a unique safeguard, not available elsewhere internationally.
>
> Her Honour's comment that:
>
> [497] The way in which a District Inspector operates in New Zealand is exemplified in J's case, where a District Inspector, designated under s 144 of the IDCCR Act, is appointed as the liaison District Inspector for J specifically.
>
> [492] In New Zealand, District Inspectors are barristers and solicitors appointed either under the IDCCR Act or the MHCAT Act, or both. They are appointed to ensure that the provisions of these Acts are upheld and provide independent oversight of the general operations of care facilities, hospitals and mental health treatment services. The Ministry of Health guidelines for District Inspectors describes the three main roles of an Inspector:
>
> > ensuring that every individual who is subject to a compulsory assessment and treatment order under the Act is cared for in accordance with the statutory requirements of the Act and the principles of natural justice
> >
> > monitoring of mental health services providing treatment to persons with mental disorders, as defined by the Act, to ensure their continued smooth and efficient operation and assist with quality improvement at the service level through visits to the different services investigating complaints and conducting enquiries.

86. Her Honour waxes lyrical on D.I.'s use, and specifically:[42]

> [496] The Centre for Mental Health Research has also identified that the District Inspector role provided in New Zealand is unique. FN It drew a comparison with other jurisdictions as follows:
>
> Readings of international law suggest the [New Zealand] DI role is unique. Although various jurisdictions permit access to advice regarding individual's legal rights while being detained under mental health legislation, this is not a guaranteed statutory service provided solely by dedicated lawyers.
>
> > [Fn Katey Thom and others Safeguarding the rights of people detained for compulsory psychiatric treatment: The role of the District Inspector (Centre for Mental Health Research, July 2013) at 13.]
>
> [501] In the inquiry hearing before me, I sought a response from the District Inspector about the matters raised with the Ministry of Health over J's status or care Ms Fuata'i filed a memorandum dated 10 July 2017, accompanied by her two memoranda

[42] [COA 101.0331].

…

[503] The role of the District Inspector is amply demonstrated in this case, where Ms Fuata'i has reported to both the Family Court Judge and to this Court on the issues surrounding J's current care. It highlights that New Zealand has a robust system of oversight and monitoring of care recipients under the IDCCR Act, by qualified and experienced lawyers, who are served with the reports prior to a review hearing and can provide a report to the presiding Judge, when directed. They are independent and undertake an oversight and monitoring role, which is an important safeguard against arbitrary detention and inappropriate treatment of care recipients.

87. The D.I. does not mention arbitrary detention, unsurprising as it is unlikely any Inspector would embark on that type of analysis, possibly beyond jurisdiction. The Inspector limited herself to the quality of care, not the legal issues underlying whether J should be detained. This compounds the arbitrary detention.

88. D.I.'s may well be "unique" but they are not as the Judge asserts "independent". They are appointed and paid for by the Ministry of Health, and inspect facilities funded by the Ministry.

89. Neither is there evidence that there is a robust system of oversight, rather the reverse is true.

90. Justice Cull, neglected to say when complimenting the system, that she was very much part of it, and <u>failed to disclose her involvement</u>, a classic *Sexton* breach.[43]

91. The Centre for Mental Health's report upon which Her Honour relied upon includes:

Acknowledgments

Gathering the information for this report would not have been possible without the generous help and support of a large number of people. We would like to express our gratitude to all of

[43] Prof P A Joseph, "Rule against Bias", *Laws of New Zealand*, Feb 2022, fn 8. *Sexton Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72 [2010] NZLR 35:

Headnote (i) (per Blanchard and Tipping JJ) Judges in New Zealand are encouraged to make disclosure in writing through the Registrar of anything which, at first blush, might attract attention so that the parties can consider the situation and either indicate lack of concern or make an application for recusal upon which full consideration can be given to the matter. Disclosure is not acknowledgment that the circumstances give rise to a reasonable apprehension of bias but merely indicates the need for the matter to be considered on an informed basis by clients and counsel. A judge who makes such disclosure is to ensure that the parties have enough information, shorn of unnecessary detail, to make up their minds whether to make an application for recusal. Parties and counsel should not be placed in the embarrassing position of seeking more information from the judge (see paras [31], [32], [34], [48]).

> the District Inspectors who so generously gave of their time by taking part in this study and being available to provide further feedback and clarity on our findings.
>
> Special thanks must be extended to the Senior Advisory District Inspector, Helen Cull QC, who we consulted during this study and who remained supportive throughout.

92. It is as plain that the last passage required disclosure, and was not disclosed.

93. Neither in the 2018, or 2020, hearings before Judge Goodwin, and Judge Wagner, respectively, did the D.I. file any memorandum, or noticeably participate. The judgments are silent on her participation. She was merely recorded as being present, which has been the norm in J's case.

94. Notably, Justice Cull giving a good character reference to the District Inspectorate, at paragraph [492] and onwards, is with respect out of date relying on a 2013 study, and not referring to criticism of the Inspectorate system in later years.[44]

95. Her Honour says:

> [495] The Centre for Mental Health research has commented that the role of the District Inspector fits well under the United Nations Convention on the Rights of Persons with Disabilities. As the Convention calls for a codification of broad rights to advocacy in relation to decision-making of patients under mental health legislation, the Centre identifies that the District Inspector role meets this purpose.
>
> …
>
> [503] The role of the District Inspector is amply demonstrated in this case, where Ms Fuata'i has reported to both the Family Court Judge and to this Court on the issues surrounding J's current care. It highlights that New Zealand has a robust system of oversight and monitoring of care recipients under the IDCCR Act, by qualified and experienced lawyers, who are served with the reports prior to a review hearing and can provide a report to the presiding Judge, when directed. They are independent and undertake an oversight and monitoring role, which is an important safeguard against arbitrary detention and inappropriate treatment of care recipients.

96. Genser says[45]:

> 1 Psychiatric and Disability]
>
> In Azerbaijan, the WGAD observed its domestic law allowed for the deprivation of liberty based on disability, involuntary hospitalization, and forced institutionalization, including of children and adults with intellectual and psychosocial disabilities. It expressed grave concern about these practices, noting: [M]any patients in psychiatric institutions were held against

[44] Katey Thom and others *Safeguarding the rights of people detained for compulsory psychiatric treatment: The role of the District Inspector* (Centre for Mental Health Research, July 2013) at 13. [Appellant's Authorities, Tab 8]

[45] Above, n 39, p 376.

their will. Even those who might have voluntarily entered the facilities could not leave freely. The Working Group did not receive any information on the establishment of an independent monitoring system for such facilities that would ensure that all places where people with intellectual and psychosocial disability are held for involuntary treatment are regularly visited to guarantee the proper implementation of the safeguards. Report of the Working Group on Mission to Azerbaijan, para 31,46.

While the courts in Norway oversee its system of preventive detention, it expressed serious concern that: Preventive detention could, in the extreme, amount to indefinite detention... A related matter is the lack of certainty about the date of release, if any, for prisoners necessarily attached to a system of preventive detention with a minimum and a maximum period of the judiciary has to rely on the assessment and information provided by the correctional services authorities. It also appears to be difficult for the prisoners concerned to have decisions to their detriment reversed on appeal. Report of Working Group on Mission to Norway, at 80,

97. With respect her Honour's view exhibits bias, or its appearance, and is anyway in error.

98. The appellant makes no adverse comment on the role of Ms Fuata'i, as D.I. Nevertheless, Cull J with her very able sojourn as the leading Inspector—Senior Advisory District Inspector of Mental Health, has looking at the system with rose tinted glasses. With respect, she rather over ices the cake in her general observations of District Inspectors.

99. District Inspectors are lawyers appointed under the Mental Health Act. Their role is to assist people who are being assessed or treated under the Act by providing information, and support to ensure the patient's rights under Part 6 of the Act are being upheld. This is an important safeguard of the rights of patients being treated under the Act. There does, however, seem like in other areas of the law the failure to weave in the NZBORA.[46]

100. A 2016 report from the Ministry of Health[47] informed us that the role of the

[46] Sian Elias, "Human Rights in Middle Age" Catherine Branson Lecture, Radford Auditorium Art Gallery of South Australia, Adelaide, 18 April 2018, p 16: Sir Robin Cooke's view that the New Zealand Bill of Rights Act was intended to be woven into the fabric of New Zealand law is not yet realised, despite early authorities, which showed some promise. But there is powerful recent authority in in the United Kingdom supportive of the view that human rights do not stand apart.

Fn *R v Good*win [1993] 2 NZLR 153 (CA) at 156. Fn *Regina (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115, particularly at [54]–[63] per Lord Reed (with whom Lord Neuberger, Baroness Hale, Lord Kerr and Lord Clarke agreed).

[47] The Mental Health Act and Human Rights a discussion document. Ministry of Health 2016, p 22.

District Inspector is generally not well understood by clinicians, tangata whaiora/service users, and families and whānau, and that this may prevent people from approaching district inspectors for assistance. There is also a view that district inspectors have a limited mandate to require change, if they think it is needed.

101. They further say in a study on how District Inspectors work in practice, based on material generated from 20 semi-structured interviews with district inspectors during 2011, a number of challenges for the role were identified:

> Clinical staff's misunderstandings about the nature of the [district inspector] role made it difficult for them to present themselves as detached from clinical decision-making and not a patient advocate. At times patients, their families and clinical staff lacked necessary information and some [district inspectors] felt that this led to complaints going unheard. This was particularly relevant in the community, where patients were not visited as frequently by [district inspectors], even though the Mental Health Act prioritises the community as the site for compulsory assessment and treatment. (Thom and Prebble 2013)

102. The study suggests that more education is needed on the District Inspector role.

103. The Mental Health Foundation in the same context noted:

> It was also found that most complaints were addressed through informal means. Inquiries were rare, with only a small number of DI's having completed one, and the study being unable to ascertain why that is. In fact, since 2003 there have only been 17 inquiries in total, none completed during 2013 and none reported for 2014).

104. No D.I. inquiries over a period of two years in 2013, and 2014 whilst J was detained, is worrying, and 17 inquiries in 10 years since hardly rate as a shining international example.[48] It was only notably that only after the Welfare Guardian appointed counsel, that the District Inspector wrote a memorandum. That level

[48] 9A.15 District inspectors: s 95, 97, 98, 101, 144, Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, LexisNexis Family Law Service Sept 2022:

> Inquiries are into breaches of the Act not into breaches of the NZBORA:
>
> In addition, a district inspector may inquire into an alleged breach of the Act or regulations made under the Act or an alleged breach of duty on the part of a director, employee or agent of a service provider. The district inspector may also inquire into whether the care recipient's condition is being reviewed under s 77 of the Act. Inquiries can also be made in relation to any other matter relating to a care recipient or the management of a service. The powers of the district inspector in relation to the inquiry are the same as those conferred on commissions of inquiry.

The Ministry document Human Rights and the Mental Health (Compulsory Assessment and Treatment) Act 1992, 2020 does not mention DI's at all.

of inaction is only trumped by this case raising the first s 102 High Court Inquiry. No District Inspector raised that statutory power since enactment of the IDCCRA in 2003.

105. The report of the UN Working Group on Arbitrary Detention's visit to New Zealand in 2014 noted:[49]

> The Working Group met with district inspectors, whose role is akin to that of an ombudsman and whose core functions include providing information to persons with "compulsory" status, checking documentation, conducting visits to and inspections of mental health facilities, and investigating complaints. The independence and accessibility of district inspectors have been raised as issues of concern. **While district inspectors are supposed to be detached from mental health services, they are often perceived as not being completely independent from clinical decision-making processes, especially when they have worked in a small community for a long period of time**. Also, patients and their family members may not be sufficiently aware of the role and functions of the district inspectors to submit complaints to them.
>
> [**Bold** added]

106. With respect to Her Honour's views, the Inspectors are not "independent" any more than the Independent Police Conduct Authority are.[50] They are appointed by the Ministry, and inspect Ministry facilities, which limits their independence.

107. Her Honour does not comment on the absence of any reports from the Inspector[51] prior to the Welfare Guardian challenging J's detention, some 10 years into the detention. The District Inspector was in any event a watchdog with a silent bark, and no bite, at least for 10 years.

[49] A/HRC/30/36/Add.2. para 81.

[50] Independent Police Conduct Authority. The UN Committee Against Torture in 2015 said CAT/C/NZL/CO/6: [Appellant's Authorities, Tab 11]

> 10. The Committee is concerned at the mandate of the Independent Police Conduct Authority which does not allow this institution to fully investigate and initiate prosecution of perpetrators.
>
> The Committee is also concerned that the law leaves to the police the power to initiate investigations on the police itself, raising questions about the independence of such investigations.(art. 4, 9, 11, 13)
>
> The State party should ensure that the Independent Police Conduct Authority is equipped with a broader mandate and full independence in order to investigate promptly, effectively and impartially all reports of violence. **In particular, such investigations should not be undertaken by or under the authority of the police or military, but by an independent body.**
>
> [**Bold** in original]

[51] How long Ms Fuata'i had been a D.I. of this case is unknown, and in the current context does not matter, when she did act, she was a useful addition.

108. Her Honour's views on the District Inspector and the robust system of review will either have, or have had the appearance of infecting her views (in the eyes of a well-informed independent observer) on the robust oversight of persons detained such as J, i.e. exhibits actual, or the appearance of bias.[52] That must have affected her entire approach to the case before Her Honour.

109. Given the appellant wished to progress the case, he took this point only in respect of remedy—compensation, if the Court of Appeal remitted the case, it should not have been to Justice Cull.

110. Water has passed under that bridge, now that Justice Cull has retired.

111. Given that Justice Cull applauds Katey Thom's report on the value of District Inspectors, and was at the same time applauded by Katey Thom for her support—*Special thanks must be extended to the Senior Advisory District Inspector, Helen Cull QC, who we consulted during this study and who remained supportive throughout*.[53] Justice Cull was not independent or impartial as to the District Inspector's, or the robust system of review.

112. The Court of Appeal itself says at the paragraph 161:[54]

> it is highly unlikely that we would have been persuaded that, based on Cull J's previous work as a district inspector, a fair-minded and fully informed lay observer would reasonably apprehend that she might not bring an impartial mind to the resolution of the case.

113. Regrettably, the reasoning of the Court of Appeal is defective, or more accurately, non-existent on why it would not have been persuaded, the decision fails to address the point raised, and plucks from thin air without reasons it's views, without proper disclosure its conclusion. It was wrong in law.

[52] Philip Joesph, Feb 2022, Laws of New Zealand, and see *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No 2)* [2000] 1 AC 119 ; [1999] 1 All ER 577 Lord Hoffmann was disqualified from the panel of Law Lords for having had an involvement with Amnesty International, an organisation which had made personal allegations against Pinochet, and which was an intervener in Pinochet's claim for sovereign immunity. No allegation of actual bias was made against Lord Hoffmann.

[53] [Appellant's Authorities, Tab 8].

[54] [COA 05.0101].

114. Any fully informed observer seeing the UN Working Group on Arbitrary detention visiting New Zealand, would query the independence of District Health Inspectors, together with the analogous views of the Committee Against Torture on its views of the IPCA, versus the researcher, and Senior D.I Cull QC, who pat each other on the back, would conclude this issue was dealt with in a biased fashion.

115. How that might have infected the entire hearing cannot now be resolved in the way sought. It is now compounded by the Court of Appeal's analysis sadly absent any reason why they would not be persuaded. After 20 years of litigation, it would be pointless sending the judgment back. It is necessary for the Supreme Court to determine the question, and its effect.

116. In *Vincent v the New Zealand Parole Board*, the remedy for Mr Vincent directed:[55]

> [114] I make an order that Mr Vincent is to be released. This order is to lie in Court for a period of three months from the date of this judgment to enable the Crown to find somewhere for Mr Vincent to receive appropriate care on his release. I reserve leave to bring this period forward if appropriate care is found for Mr Vincent earlier than that (as I hope it is). I also reserve leave to apply to extend the three month period if it is necessary to do so in Mr Vincent's best interests. The parties are to file memoranda in two months from the date of this judgment updating the Court on the steps that are being taken to enable Mr Vincent's release into appropriate care.

117. A similarly crafted remedy would be appropriate here. to enable matters to proceed so that J can move to a civil client regime with some expedition.

Remedies

118. Counsel submits that the judgment of the Court of Appeal should be reversed. The Court should make declarations of breach of s 25(a) fair trial, s 9 Arbitrary Detention, and s 19 Discrimination. Questions of compensation should be remitted to the High Court. The Court should direct that J's status as a compulsory care recipient cease in line with *Vincent*, above: J has been a care recipient in the community previously. His care under a non-compelled status with the civil assistance of Intellectual Disability Health Providers is appropriate.

[55] [2020] NZHC 3316. [Appellant's Authorities, Tab 6]

119. Bias of Cull J in respect of the D.I. should be found, and any remitted matters therefore heard by a different judge in the High Court.

120. Costs in this Court should be awarded. Costs in other courts should be referred to those courts to be resolved in light of any judgment in favour of J.

121. Neither J, nor T, has been legally aided in any court.

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Dr Tony Ellis / Graeme Edgeler
Counsel for Appellant
11 July 2014

To:	The Registrar of the Supreme Court of New Zealand
And to:	K Laurenson, M J McKillop and R E R Gavey for the First and Fourth Respondents

Counsel confirm that these submissions are suitable for public release. They contain no suppressed material.