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**FITNESS TO PLEAD AND THE
INTELLECTUALLY DISABLED
DEFENDANT**

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*Te Whare Wananga
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ABSTRACT

Since the passage of the Mental Health (Compulsory Assessment and Treatment) Act 1992, alleged offenders with intellectual disabilities alone have, in reality, fallen outside the ambit of the fitness to plead regime in New Zealand. The provisions of the Criminal Justice Act 1985 specifically require that a person must be suffering from a "mental disorder" (as defined in the Mental Health (Compulsory Assessment and Treatment) Act 1992) before a finding of "under disability" is possible. However, this definition is, at least in part, irrelevant to the procedural issue of fitness to plead. It also specifically excludes those with only an intellectual disability. The courts have included intellectually disabled offenders in the regime through a wide interpretation of the definition of "mental disorder", but this strategy has resulted in inappropriate dispositions of such offenders to psychiatric institutions. Two Bills currently before Parliament will, if passed into law, comprehensively overhaul the law in this area, and specifically introduce legislation aimed (for the purposes of this paper) at the "compulsory care" of intellectually disabled offenders. The question is whether the proposed legislation will provide the panacea to the ills of the current fitness to plead regime.

WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 11,970 words.

FITNESS TO PLEAD AND THE INTELLECTUALLY DISABLED DEFENDANT

I INTRODUCTION

The aim of this paper is to consider the issue of fitness to plead in criminal proceedings, and to examine how the New Zealand courts have dealt with intellectually disabled defendants under the Criminal Justice Act 1985 ("the CJA85") and the Mental Health (Compulsory Assessment and Treatment) Act 1992 ("the MH(CAT)A92"). The focus of the research will be on the inability of the current system to take account of the needs of those having only an intellectual handicap and whether the Bills currently before Parliament will provide a panacea. The current regime relies heavily on the definition of "mental impairment" yet, conversely, clearly excludes a person suffering solely from an intellectual handicap. As a means of circumventing this legislative oversight, the courts have interpreted the term very widely to include intellectually disabled defendants. Although a relatively small number of accused people are found to be under disability, the potential impact on those persons is enormous.

In 1994, new legislation was introduced to remedy the then obvious defects in the CJA85. Subsequently, the New Zealand Law Commission was instructed to report on the issue of community safety with regard to mental health and criminal justice issues. In its 1994 report the Commission made

specific recommendations for change in this area. The 1994 amendment Bill did not proceed, the only amendment to date being that of 1999.¹ The two Bills currently before Parliament were introduced in 1999 and adopt many of the 1994 recommendations of the Law Commission.

The primary legislation to be considered will be the CJA85 and the MH(CAT)A92, which between them cover the entire process and are responsible for the injustices outlined above. Ultimately, the aim of the research is to highlight the current problems and to critically analyse the reform Bills.

Before embarking on a discussion of the current state of the fitness to plead regime, the historical development of the concept will be briefly outlined. The purpose is to explain how and why the fitness to plead regime developed and to highlight current reliance on what is fundamentally archaic law. First, however, the contrast between concepts of insanity² and fitness to plead ("under disability" in the terminology of the CJA85) will be discussed. The two concepts are closely related and often confused. Indeed early judicial considerations of fitness to plead included directions to the jury that clearly linked disability with insanity.³

¹ This amendment made changes that aimed at greater involvement of family and whanau. It also replaced the term "intellectual handicap" with "intellectual disability": MH(CAT)A92, s 4(e).

² Crimes Act 1961, s 23.

³ See generally Don Grubin "What Constitutes Fitness to Plead?" [1993] Crim LR 748.

A *Insanity and Fitness to Plead*

Insanity as legally, rather than clinically, defined is concerned with the psychiatric condition of the accused *at the time of the offence*. At trial the defendant may well be outside the parameters of a finding of disability, although it is theoretically possible that both concepts could apply. The issue of disability, on the other hand, arises *at the time of the trial* of the accused. Unlike the insanity defence, disability is a matter of procedural fairness, concerned primarily with the mental health of the accused at the time of the trial. The crux of a disability hearing is to investigate whether the accused is able to participate in a meaningful way in the trial, and in New Zealand does not allow for a determination of the issue of guilt or innocence.⁴ The powers of disposition available to the court in the case of both insanity and disability are broadly similar. Both involve the accused being made the subject of an order under s115 of the CJA85. In addition, the insanity defence begins from the premise that the accused is "presumed sane". There is no such presumption in the case of a disability hearing. Finally, a successful defence of insanity has the effect of exculpating the defendant, whereas a finding of disability may act to merely delay the trial of the substantive matter.

⁴ But see the discussion on the reform Bills below. The new regime includes such a determination.

B Historical Development

The concept of fitness to plead has its origins in medieval law.⁵ At that time, conviction for a serious crime had consequences that went beyond the loss of liberty or capital punishment that could be inflicted upon a convicted person. As well as punishing the miscreant, the law also required that the person's property was automatically forfeited to the Crown. As a method of circumventing this collateral punishment on their families, an accused would often refuse to participate in the trial. In effect, this involved the accused remaining silent, in other words being "mute". In these circumstances a jury was empanelled to decide whether the accused was mute "of malice"⁶ or "by visitation of God".

The latter situation developed into the modern concept of fitness to plead. In the United Kingdom, the judicial direction for fitness to plead hearings is epitomised by *R v Pritchard*,⁷ where Alderson B directed the jury on the three criteria for a finding of disability:

First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence - to know that he might challenge any of you to whom he may object - and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation.

⁵ See generally Warren Brookbanks "A Contemporary Analysis of the Doctrine of Fitness to Plead" [1982] NZ Recent Law 84.

⁶ Crimes Act 1961, s 356(2) deals with situations where a defendant "wilfully refuses to plead", the modern equivalent of "mute of malice".

⁷ *R v Pritchard* (1836) 7 CAR & P 303; 173 ER 135.

C *The Current New Zealand Regime*

The *Pritchard* test is still used in the United Kingdom, and it forms the basis of the New Zealand regime. In New Zealand the law centres upon section 108 of the CJA85:

108. Interpretation - (1) For the purposes of this Part of this Act, a person is under disability if, because of the extent to which that person is mentally disordered that person is unable-

- (a) To plead; or
- (b) To understand the nature or purpose of the proceedings;
- or
- (c) To communicate adequately with counsel for the purposes of conducting a defence.

(2) ...

Section 108 is limited in its application, as there can be no disability finding in respect of minor offences. The relevant offence must be "punishable by imprisonment", as set out in section 111 of the CJA85:⁸

111. Procedure- (1) In any case where a defendant who is charged with an offence punishable by imprisonment or death appears to be under disability and the Judge is satisfied on the evidence of 2 medical practitioners that the defendant is mentally disordered, the Judge shall, after giving the prosecution and the defendant an opportunity to be heard and to call evidence on the matter, determine whether the defendant is under disability.

Of crucial importance in both sections is the term "mentally disordered". This term is not defined in the CJA85, but the dispositions available to those under disability specifically refer to the MH(CAT)A92. In view of this

⁸ See generally Warren Brookbanks, "Judicial Determination of Fitness to Plead - The Fitness Hearing" (1992) 7 Otago LR 520.

interdependence, the established practice of the courts has been to rely on the definition of "mental disorder" contained in section 2 of the MH(CAT)A92.

Here "mental disorder" is defined as:

... an abnormal state of mind (whether of a continuous or an intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it-

(a) Poses a serious danger to the health or safety of that person or of others; or

(b) Seriously diminishes the capacity of that person to take care of himself or herself;-

and "mentally disordered", in relation to any such person, has a corresponding meaning.

It is this definition that has caused problems, particularly in the context of those suffering from an intellectual disability. First, it includes irrelevant considerations in the context of the CJA85, such as the "dangerousness" of the defendant, secondly intellectual disability alone is specifically excluded from the definition,⁹ and thirdly it requires an "abnormal state of mind", the question being whether this abnormality is to be determined on an objective or subjective basis.¹⁰ However, despite the anomalies the courts are left with no practical alternative but to apply this definition to intellectually handicapped defendants. Such defendants may well fall within section 108 of the CJA85, except for the crucial fact that they are *not* mentally disordered.

⁹ MH(CAT)A92, s 4(e).

¹⁰ The question of whether an intellectual disability constitutes an "abnormal" state of mind is discussed below.

II CHANGING ATTITUDES TO MENTAL HEALTH

The problem of including intellectually disabled defendants in the current fitness to plead regime has arisen primarily through a changing attitude towards mental health. In the last 20 to 30 years there has been an international trend towards the humane treatment of those with mental illness. Greater clinical knowledge and understanding of mental illness, along with more successful stratagem for the treatment of such illness, has resulted in a focus on the rights of patients. Prior to these developments, the general rule was that those with a mental illness (very widely defined to include those with intellectual disabilities and other socially "troublesome" afflictions)¹¹ were placed in long term psychiatric institutions as a means of "social control". This virtually disregarded the rights of patients in favour of what may be loosely described as the "protection of the community". In New Zealand, Parliament recognised the very obvious need for reform of the Mental Health Act 1969.¹² Reform work dated back to the early 1980's and resulted in the current legislation, the MH(CAT)A92.

The Hon. Katherine O'Regan, then Associate Minister of Health, noted in her speech during the second reading of the Mental Health Bill that: "Significant mental health law reforms have been undertaken during the past decade or so in several parts of the world, including North America, the United Kingdom,

¹¹ See Mental Health Act 1969, s 2, "mental disorder"

¹² This Act had numerous amendments during its life and was clearly not operating satisfactorily.

Australia, and now New Zealand".¹³ She went on to identify the "key themes" of reform as:¹⁴

an increased emphasis on the need to protect patients' rights and to ensure that patients are aware of their entitlements; that appropriate review and appeal procedures should be established; the provision of treatment in the least restrictive environment; that patients receiving psychiatric treatment should be treated as much like other patients as possible, and, wherever appropriate, that mental health services should be integrated with general medical services; and that multidisciplinary participation in decisions on the care and treatment of patients is also important.

The gist of current thinking is that it is both unnecessary and undesirable to confine mentally ill people to institutions for prolonged periods of time. Simply put, the mentally ill should be appropriately treated then returned to their community. However, this laudable intention may also disguise political and financial considerations. In the short term it is obviously less costly to rely on "community" care, but this ignores the downstream problems such as the release of "dangerous" offenders.¹⁵

The MH(CAT)A92 takes account reform by incorporating the "key themes" referred to above. In contrast to the 1969 Act, the MH(CAT)A92 is designed with a focus on the rights of the patient rather than as a means of confinement. In introducing the Mental Health Bill (as it was first known), the Minister of Health, the Hon. David Caygill stated that it presented "precise procedural requirements for compulsory detention and treatment of people with *psychiatric disorders*."¹⁶ (emphasis added) It was not intended to

13 (12 March 1992) 522 NZPD 6861.

14 (12 March 1992) 522 NZPD 6861.

15 See generally New Zealand Law Commission *Community Safety: Mental Health and Criminal Justice Issues: R30* (Wellington, 1994). For further discussion on community care see SA Bell and WJ Brookbanks *Mental Health Law in New Zealand* (Brooker's, Wellington, 1998) 183-200.

16 (8 December 1987) 485 NZPD 1629.

include those with intellectual disabilities, a fact specifically referred to by the Minister early in his speech:¹⁷

There is specific exclusion of ... intellectual handicap as reasons on their own for detention. That is intended as a signal to safeguard against any possible abuse of psychiatric hospitals for the purposes of social control.

The fact that the MH(CAT)A92 was (and is) not intended to include those suffering only from an intellectual disability is reinforced by the speech of the Hon. Jenny Shipley, then Minister of Health, when she introduced the Mental Health (Compulsory Assessment and Treatment) Amendment Bill 1994.¹⁸

It is important to note that this Bill does not widen the coverage of the Mental Health Act to include people who have an intellectual handicap. The Bill does not provide a legal framework for the care of people who are intellectually handicapped.

The exclusionary intention of Parliament with regard to those suffering from an intellectual disability could not be clearer.

A *Intellectual Disability*

Before discussing whether an intellectual disability is amenable to treatment in terms of the MH(CAT)A92, it is necessary to examine the clinical definitions of "intellectual disability". The issue was recently considered in some depth by the New South Wales Law Reform Commission.¹⁹ In their

17 (8 December 1987) 485 NZPD 1628-1629.

18 (29 March 1994) 539 NZPD 902.

19 See generally New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System R60* (Sydney, 1996) 56-57.

report the Commission focused on three of the leading clinical definitions of "intellectual disability".²⁰

ICD-10, 1992: Mental retardation is a condition of arrested or incomplete development of the mind, which is especially characterised by impairment of skills manifested during the developmental period, which contribute to the overall level of intelligence, ie cognitive, language, motor, and social abilities.

AAMR, 1992: Mental retardation refers to substantial limitations in present functioning. It is characterised by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

DSM-IV, 1994: The essential feature of Mental Retardation is significantly sub-average general intellectual functioning ... accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: ... The onset must occur before age 18 years ...

The "skill areas" referred to in DSM-IV, 1994 reflect those set out in AAMR, 1992.

It is immediately evident that the focus of all three definitions is on the limitation of intellectual functioning. They take account of the individual's ability to carry out the basic requirements of day to day living, and include an allowance for degrees of "retardation" ranging from "mild" to "profound".²¹ For the purposes of the New South Wales criminal justice system the Commission recommend a standard (simplified) definition as: "a significantly below average intellectual functioning, existing concurrently

²⁰ Here using the generally accepted equivalent of "mental retardation".

²¹ New South Wales Law Reform Commission, above n 19, 55.

with two or more deficits in adaptive behaviour".²² This recommendation will be discussed further in relation to possible reforms in New Zealand.

"Mental disorder" is less easily defined, particularly given the very broad nature of illnesses that may be regarded within the loose concept of that term. The problem is recognised by Bell: "The law relating to psychiatry and mental health has been complicated by lack of agreement on a universally acceptable definition of 'mental disorder' ".²³ And by Shea: " 'Mental health' and 'mental illness' or 'mental disorder' are impossible to define in general terms (a) because they are socially and culturally determined, and (b) because there are both subjective and objective elements involved".²⁴

There are obvious benefits in not defining mental disorder. The width of a comprehensive definition risks the inclusion of everybody: "it is a small step to include within the schema ordinary everyday experience".²⁵ Conversely, too narrow a definition will have the effect of excluding those needing treatment. The issue is further compounded by the competing legal and clinical definitions.

The issue is probably best dealt with on an exclusionary basis, namely by setting out what is *not* a mental illness. This is reflected in the United

²² New South Wales Law Reform Commission, above n 19, 52.

²³ Sylvia Bell "Defining Mental Disorder" in Warren Brookbanks (ed) *Psychiatry and the Law: Clinical and Legal Issues* (Brooker's, Wellington, 1996) 71.

²⁴ Peter Shea *Psychiatry in Court* (2 ed, Hawkins Press, Sydney, 1996) 2.

²⁵ Bell, above n 23, 73.

Nations Principles for the Protection of persons with Mental Illness and the Improvement of Mental Health Care:²⁶

4.2 A determination of mental illness shall never be made on the basis of ... any reason not directly relevant to mental health status.

This exclusionary definition supports the general consensus that an intellectual disability is not a mental illness. It is also echoed in the MH(CAT)A92. Section 4 clearly sets out the exclusion:

The procedures prescribed by Parts I and II of this Act shall not be invoked in respect of any person by reason only of-

... (e) Intellectual [disability].

B Treatment

The MH(CAT)A92 is primarily concerned with the compulsory treatment of mental disorder in the civil context, but also makes provision for the treatment of those disposed of as "special patients" by the criminal courts. The question, for the purposes of this paper, is whether an intellectual disability will respond to treatment as envisaged by the MH(CAT)A92.

The consensus of opinion is that an intellectual disability will not respond to treatment. Although it may be susceptible to *improvement* through behavioural training and support services, it is not *treatable* in the way that the MH(CAT)A92 envisages. Parliament was astute to this point and made specific provision, through section 4(e), for the exclusion of such persons

²⁶ Bell, above n 23, 73.

from the operation of the Act. The legislation could not be clearer. Medical opinion supports this conclusion. For example, in his submission to the New Zealand Law Commission Dr Simpson, then a consultant psychiatrist for the Wellington Regional Psychiatry Service, summarised the difference between the "treatment" of a mental illness and the "management" of an intellectual disability.²⁷

The nature of the care, containment and support that intellectually disabled people require however, is very different from that of the mentally ill. Whilst they require psychological and psychiatric understanding and appropriately structured care, to define such processes as treatment is to miss the difference between the onset of an illness which is largely treatable and reversible in the case of major mental illness [and a condition] which is simply managed by training, allowance of maturation and caring support in the case of an intellectual deficit. This difference rightly requires different legal mechanisms for each group.

In civil proceedings then, there should be no question of attempting to assess or treat an intellectually disabled person under the MH(CAT)A92. However, as will be discussed below, entry to the MHA(CAT)A92 regime *is* possible for intellectually disabled defendants found to be under disability by the criminal courts. In these circumstances the CJA85 disposition options permit an order for detention as a "special patient" under the MH(CAT)A92.²⁸ The result is that in *criminal* proceedings a defendant may fall within the treatment provisions of the MH(CAT)A92, despite such entry being impossible had a *civil* assessment taken place. This form of disposition is obviously convenient for the courts in dealing with intellectually disabled defendants, as the only other option may be a sentence of imprisonment. Imprisonment would be both unfair and defeat the purpose of the fitness to plead regime. The problem, of course, is that as an intellectual disability is

²⁷ New Zealand Law Commission, above n 15, 40.

²⁸ Other options exist under CJA85, s 115(2). These are discussed later.

not treatable it falls outside the ambit of the MH(CAT)A92. The review process²⁹ will inevitably result in a finding to this effect and the person will be discharged, making the initial committal futile.

The root of this unsatisfactory state of affairs lies in the interpretation the courts have been forced to place on an "abnormal state of mind".

C Abnormal State of Mind

The scope of the MH(CAT)A92 is limited through the fundamental requirement of an "abnormal state of mind" in the definition of "mental disorder". This immediately begs the question of what is "normal"? Does "abnormal" mean abnormal in comparison to an average person (objective abnormality) or abnormal for the particular person (subjective abnormality)? Logic and common sense dictate that the latter is the correct approach. To attempt to apply an objective definition would be contrary to the purpose of the Act and would defy definition. It may be that a person with a psychiatric illness would respond to treatment, yet would never meet the threshold test of "normal". "Abnormal" must surely apply to the state of mind of the individual subject. If that person has an intellectual disability, then that state of mind is normal for them. No amount of treatment will have any effect on the underlying disability. This line of reasoning is supported by Bell: "A person

²⁹ Orders made under CJA85, ss 115 and s116 are subject to a statutory review programme. MH(CAT)A92, ss 77 and 80 are applicable to the review of special patients.

with an intellectual disability is not suffering from a mental illness, their condition is normal for them".³⁰

In contrast, a psychiatric disorder is truly an "abnormal" state of mind. The person is suffering from a recognised psychiatric illness that will respond to treatment. In turn the treatment will restore that person's mind to "normal" for that person. The distinction between intellectual disability and mental illness is succinctly summarised by Bell:³¹

A person with an intellectual disability will always be intellectually disabled. Mental illness, by comparison, presents with observable symptoms. When a person with a mental illness, for example, exhibits symptoms such as delusions, hallucinations, or severe mood disturbance, there is a well-established body of clinical knowledge and practice to assist decision-making about intervening to prevent harm to self or others.

The New Zealand Law Commission has suggested that the inclusion of an "abnormal" state of mind has not added anything to the 1992 definition and suggested its deletion.³²

The thrust of the MH(CAT)A92 is the compulsory treatment of mental illness and, as has been argued above, it is not concerned with those suffering only from an intellectual disability. The conclusion is that the MH(CAT)A92 definition is being abused by classifying an intellectual disability as an "abnormal state of mind".

Having established the clear intention of the legislature to specifically exclude those with only an intellectual disability from the ambit of the

³⁰ Bell, above n 23, 81.

³¹ Reflecting the provisos in the definition of "mental disorder". Bell, above n 23, 81.

³² New Zealand Law Commission, above n 15, 42-43.

MH(CAT)A92 it is necessary to examine the inadequacies of the current fitness to plead regime.

III INADEQUACIES OF THE CJA85/MH(CAT)A92 FITNESS TO PLEAD REGIME

The problems that have arisen within the current fitness to plead regime are a result of the MH(CAT)A92 failing to take account of the interdependence of the relevant provisions of the CJA85. The crux of the matter lies in the reliance of section 108 of the CJA85 on the MH(CAT)A92 definition of "mental disorder". As discussed above, without a finding of a mental disorder the courts are quite simply unable to find a defendant to be under disability in terms of section 108.

A Reliance on "Mental Disorder"

This crucial importance of the definition of "mental disorder" is that the entire fitness to plead regime is dependent upon it. The court must decide, on the evidence of two medical practitioners,³³ whether that definition applies to the defendant and whether a finding of "under disability" in terms of section 108 is appropriate.³⁴

³³ CJA85, s 111.

³⁴ Psychiatric evidence tends to support the view that no "mental disorder" is present, yet the courts have adopted an interpretation of the definition that favours the contrary view. See the discussion below.

The problem, for the purposes of this paper, is in applying a "mental disorder" to an intellectually disabled defendant. If the defendant is not mentally disordered (as defined) then there is simply no scope for a disability finding. In the case of a defendant suffering from an intellectual disability and nothing more, then (relying on both the terminology of the section 2 definition and the clear exclusion in section 4(e) of the MH(CAT)A92) that person is *not* mentally disordered and there is clearly no scope for such a finding. It is only where the accused is suffering from an "abnormal state of mind" that a finding of disability can be arrived at. However, to ensure that the fitness to plead regime does in fact apply to the intellectually disabled, the criminal courts have resorted to a very wide interpretation of the definition of "mentally disordered".

This problem did not occur under the predecessor to the MH(CAT)A92, the Mental Health Act 1969. The fitness to plead provisions of the CJA85 relied upon this Act until the passage of the MH(CAT)A92. Section 2 of the 1969 Act defined "mental disorder" very widely:

"Mentally disordered", in relation to any person, means suffering from a psychiatric or other disorder, whether continuous or episodic, that substantially impairs mental health, so that the person belongs to one of more of the following classes, namely:

(a) Mentally ill - that is, requiring care and treatment for a mental illness;

(b) Mentally infirm - that is, requiring care and treatment by reason of mental infirmity arising from age or deterioration of or injury to the brain;

(c) Mentally subnormal - that is, suffering from subnormality of intelligence as a result of arrested or incomplete development of mind.

It included psychiatric *or other* disorder, and it is clear from paragraph (c) that those with an intellectual disability were specifically *included*. This legislation generally predated the changing attitude to mental health discussed above, and the stark fact was that those with an intellectual disability were, for the purposes of the 1969 Act, considered to be suffering from a mental disorder. Although this situation was clearly unjust, that is not within the scope of this paper. Suffice to say, the CJA85 fitness to plead provisions worked adequately, and appear to have caused little problem in relation to disability hearings.³⁵ While the 1969 Act was in force the intellectually disabled fell squarely within the definition of "mentally disordered".

The conundrum for the courts since the passing into law of the MH(CAT)A92 is that, as discussed above, on a strict interpretation of the provisions, an intellectually disabled defendant cannot be found to be under disability even if they meet all the other criteria of section 108 of the CJA85. They are simply not "mentally disordered". However, although procedural fairness dictates that such persons should not be required to stand trial, the inability to find them "under disability" would leave no other way of disposing of the case.³⁶ The undesirable result of such an interpretation would be that the court would have no option but to continue to hear the case as if the defendant was not intellectually disabled.³⁷ This dichotomy is a

35 Perhaps because that act overtly condoned the involuntary confinement of intellectually disabled persons in mental institutions.

36 Except by continuing with the trial anyway.

37 There may be scope for the High Court to exercise its inherent jurisdiction, but this option is not open to the District Court. In either case the problem of disposition remains: see generally Warren Brookbanks "Fitness to be tried" [1996] NZLJ 135, 136

result of the failure of Parliament to make appropriate consequential amendments to the CJA85 at the same time as the MH(CAT)A92 was passed. As it stands, the CJA85 fails to take account of the much narrower definition of "mental disorder". In particular it contains no mechanism to deal with the groups excluded by section 4 of the MH(CAT)A92.

The fact that the intellectually disabled are, and should be, excluded from the operation of the MH(CAT)A92 is supported by reference to the "civil" application of that Act. A person could not be made the subject of an order under that Act merely because of an intellectual disability.³⁸ If this same plain reasoning is applied to the operation of the CJA85 "disability" provisions, then an intellectually disabled person could never be found to be under disability unless there was a dual diagnosis.³⁹ The New Zealand Law Commission has recognised this interpretational problem, suggesting that:⁴⁰

In ruling that intellectual handicap can come within the 1992 definition of mental disorder for the purpose of disability hearings, it may be that the courts are stretching the definition to ensure that justice is done.

The Commission was critical of the reliance on the 1992 definition in relation to disability hearings, noting that the purpose of a disability hearing is to ensure procedural fairness.⁴¹ As the Commission noted, the focus should be on the defendant's ability to participate in the trial (as set out in section 108) rather than on the 1992 definition and its concern with dangerousness and inability for self care. These ancillary matters are

38 MH(CAT)A92, s 4(e)

39 An intellectual disability compounded by a recognised psychiatric disorder.

40 New Zealand Law Commission, above n 15, 42-43.

41 See also New Zealand Bill of Rights Act 1990, s 25(a).

pertinent to civil proceedings under the MH(CAT)A92 but irrelevant to disability issues in criminal proceedings.⁴²

It is evident from the above discussion that there is a marked difference between a "mental disorder" and an "intellectual disability". The MH(CAT)A92 clearly recognises the distinction but, due to the failure of the legislature to amend the CJA85, for the purposes of the criminal justice system the two afflictions have been invariably treated by the courts as the same.

B *Approach of the Courts*

The discussion above is brought into sharp focus through a consideration of the approach adopted by the courts in dealing with the problem of classifying an intellectually disabled defendant as "mentally disordered".

⁴² New Zealand Law Commission, above n 15, 45. See generally Ian Freckleton "Assessment of Fitness to Stand Trial" in Legal Research Foundation *Unfitness to Stand Trial: Under Disability in the 90's* (University of Auckland, 1995) 21.

R v T [a mental patient]

The first case to be heard under the "new" MH(CAT)A92 regime was *R v T [a mental patient]*.⁴³ The judgment began with a quote which highlighted the problem that the court faced:⁴⁴

The position of the intellectually handicapped is particularly unclear. They appear to be excluded from the scope of compulsion by s.4(e) [of the MH(CAT)A92] ... Are they covered under s.2 or excluded by s.4(e)? ... It is not possible to give an informed answer to it until these sections have been judicially considered.

In short, the question was whether, in the context of a disability hearing, the MH(CAT)A92 definition of "mentally disordered" encompassed those with only an intellectual disability.

T faced a charge of assault with intent to commit sexual violation. It was readily accepted that he was mentally retarded⁴⁵ but not mentally ill. Psychiatric reports were presented to the court. One concluded that "[o]ur understanding is that the current law [the MH(CAT)A92] excludes compulsory supervisory care for individuals like T who present as intellectually handicapped, but have no superimposed mental illness".⁴⁶ The other psychiatrist "doubted that psychiatric hospitals are the best places for the intellectually handicapped as they are not geared to deal with this group of people and often become a place of danger and exploitation".⁴⁷

43 *R v T [a mental patient]* [1993] DCR 600.

44 *R v T [a mental patient]*, above n 43, 602.

45 This was the term used by the judge and reflects the terminology used in the American definitions of "mental retardation" discussed above.

46 *R v T [a mental patient]*, above n 43, 603.

47 *R v T [a mental patient]*, above n 43, 607.

Clearly this unanimous medical opinion placed the defendant squarely outside the intended scope of the MH(CAT)A92. However, the court went on to consider whether T's condition indicated that he was "mentally disordered" *for the purposes of section 108* (of the CJA85). It was noted that there was a difference between what psychiatrists understood by the term "mental disorder" and how the MH(CAT)A92 defined it. The conclusion was that as the MH(CAT)A92 definition had its origins in the 1970's it "may not necessarily be using the term 'mental disorder' entirely as it is understood by psychiatrists today".⁴⁸

In finding that a "mentally retarded" person *could* be within the definition of "mentally disordered", Judge McElrea set out eight reasons for finding the defendant to be under disability.⁴⁹ The first issue was whether the fundamental requirement of a "mental disorder" was satisfied.⁵⁰ The Judge held that there was a mental disorder, basing his judgment on the proposition that mental retardation is an "abnormal state of mind". This relies on the "objective" definition of intellectual disability, discussed above and rejected in favour of the "subjective" interpretation. The state of mind of the intellectually disabled person is "normal" for that particular person. Reliance on the objective approach involves a hypothetical interpretation of what is "normal". If a person is classed as having an "abnormal state of mind" simply because their permanent intelligence quotient is below a certain level (ie the "normal" range) then presumably the hypothesis could apply equally at the

48 *R v T [a mental patient]*, above n 43, 609. This clearly rejected the opinions of the two medical practitioners required to advise the court under CJA85, s 111.

49 *R v T [a mental patient]*, above n 43, 610-612.

50 The remainder of the reasoning analyses the operation of the MH(CAT)A92, relying on the assumption that the defendant was mentally disordered.

other end of the range. Those with a permanent IQ *above* the "normal" range would also be classed as having an abnormal state of mind. The only logical conclusion is that the subjective interpretation is the one intended by Parliament. On this ground alone, the finding of the Court could be overturned. If an accused does not have an "abnormal state of mind" then, quite simply, they cannot be "mentally disordered" in terms of the MH(CAT)A92 definition, and further attempts at justifying their inclusion are not tenable.⁵¹

2 Subsequent decisions

Despite the above criticisms, *R v T* reflects the approach of the courts in subsequent decisions as a method of finding intellectually disabled defendants to be "mentally disordered" and therefore within the MH(CAT)A92.⁵² The courts, while recognising the problem, have readily accepted that section 4(e) does not operate to exclude intellectually disabled defendants entering the MH(CAT)A92 regime "[v]ia a back door, opened by the Criminal Justice Act".⁵³

A postscript to *R v T* is found in *Police v M (No 2)*: "shortly after the Court made a compulsory treatment order, an application for review of the patient's

51 See generally Lynda Crowley-Smith "Intellectual Disability and Mental Illness: A Call for Unambiguous and Uniform Statutory Definitions" (1995) 3 J Law & Med 192.

52 However, this "objective" approach has also been adopted by the High Court: "It is my view that abnormal relates to the standard of the community as a whole ...". *R v M (T66/94)* (1994) 12 CRNZ 328, 332 per Neazor J.

53 *Re JNM* [1996] NZFLR 88, 95.

status was brought and T was discharged from compulsory status. Fairly shortly after that, he drowned himself".⁵⁴ This outcome reflects the "downstream" problem in finding an intellectually disabled offender to be mentally disordered. The disposition is clearly inappropriate and merely delays the inevitable: no treatment is available, the person is discharged from compulsory status, there is no provision for compulsory community support, and there is a high likelihood of recidivism.

However, the courts can only work within the parameters of the legislation. The stark choice in *R v T* was to either find the defendant under disability and make the best of an inappropriate range of orders, or continue to try him despite his disability and pass an equally inappropriate sentence.

In *Police v M (No 2)*, the futility of the section 115(1) order that Judge Boshier made was recognised even as it was being made.⁵⁵

I sympathise with the psychiatrists who may be faced with receiving a patient whom they cannot treat in conventional terms. But, nevertheless, the legislature seems to me to give the Court the ability to make such an order.

Recent decisions⁵⁶ demonstrate that finding an intellectually disabled defendant to be "mentally disordered" for the purposes of section 108 is now the norm. A finding that an accused is under disability is certainly of benefit to the court. It allows for disposition of the case without the "almost obscene"⁵⁷ ritual of an intellectually disabled accused attempting to present

54 *Police v M (No 2)* [1994] DCR 388, 396.

55 *Police v M (No 2)*, above n 54, 396.

56 See generally *R v E* (18 August 1999) unreported, High Court, Hamilton Registry, T9823-98, Penlington J. Although the defendant suffered an intellectual disability resulting from meningitis and lead poisoning during infancy the court found him under disability. There appeared to be no dual diagnosis.

57 *R v T [a mental patient]*, above n 43, 611.

their own defence. It also avoids trying and sentencing those who are probably not culpable or able to comprehend the court proceedings. The problem, of course, is the downstream effect of such dispositions. The responsibility is then effectively passed on to those administering the mental health system. It becomes the problem of the psychiatric institutions to attempt to deal with unsuitably placed defendants. The comments of Judge Boshier in *Police v M (No2)* demonstrate the inevitable outcome, namely the release of the patient at the first review.

C Disposition

Under section 111 of the CJA85, for a defendant to be eligible to be found under disability the threshold requirement that the charge is punishable by imprisonment must be met.⁵⁸ Presumably, the question of whether a defendant is under disability does not arise where a lesser charge is laid, or where the offence is one of strict or absolute liability.⁵⁹ This raises the point that when the defendant is brought before the courts the charge is usually serious.⁶⁰

58 The reference to "death" appears superfluous: see Abolition of the Death Penalty Act 1989.

59 In strict and absolute liability offences mens rea will not be an issue. The fact that the defendant is mentally disordered is therefore irrelevant.

60 The cases often concern violent offences and arson. These appear typical of the charges that lead to disability hearings.

Disposition options

Disposition of those found to be under disability is by reference to section 115 of the CJA85.⁶¹

115. Order to be made if person under disability or insane- (1) Subject to subsection (2) and (4) of this section, if a person-

(a) is found to be under disability; or

(b) ...

the court shall make an order that the person be detained in a hospital as a special patient under the [Mental Health (Compulsory Assessment and Treatment) Act 1992].

(2) In any case to which subsection (1) of this section applies, the court, having regard to all the circumstances of the case and being satisfied, after hearing medical evidence, that it would be safe in the interests of the public to make an order under this subsection, may, instead of making an order under subsection (1) of this section,-

(a) Make an order that the person be detained in a hospital as a patient; or

(b) Make an order for the person's immediate release; or

(c) If the person is liable to be detained under any full-time custodial sentence, decide not to make any order under this section.

It is perhaps less difficult to find alternative disposition options when the charge is minor, and in such circumstances the case may be disposed of prior to trial, perhaps through diversion or through the prosecutor electing not to pursue the charge.⁶² It is where the offence is serious and a decision made to

⁶¹ CJA85, s 116 sets out the maximum duration of an order for detention as a special patient.

⁶² For example, previous allegations of sexual assault did not reach the Court in *R v T*:

proceed to trial that the problem of disposition arises. Without recourse to the fitness to plead regime, it is difficult to suggest how a court could deal with the matter. The usual range of sentencing options are obviously not desirable or practical, and to release the defendant without conviction would be technically correct,⁶³ but perhaps socially irresponsible. To continue with the trial would be procedurally unfair, and would still leave the problem of sentencing unresolved.

2 *The problem of dealing with intellectually disabled defendants*

The above discussion raises the vexed question of what to do with intellectually disabled defendants found to be under disability. There is a natural tension between the need for procedural fairness on the one hand (hence the fitness to plead regime), and the need to protect society from potentially dangerous offenders on the other. An intellectually disabled person may well have committed a serious offence but to deal with them in the same way as a "normal" offender would be patently unjust. Instead, the criminal law is flexible enough to recognise degrees of responsibility, for example through the provision of defences to crimes. It also provides for alternatives to prison for those found to be under disability.

The notion of responsibility involves a consideration of the "character conception". The action of the defendant is analysed on a subjective basis.

⁶³ *R v T [a mental patient]*, above n 43, 604.
CJA, s 115(2)(b).

The defendant must know that the action is wrong and be able to have acted differently before they may be said to be truly responsible for their actions.⁶⁴

[A]ctions for which we hold a person fully responsible are those in which her usual character is centrally expressed ... Actions performed by a person suffering from a long term mental incapacity, whilst they call for a different reactive response in terms of traditional conceptions of blameworthiness, still appear to call for some controlling intervention on the part of the state.

In this model, responsibility is based on the "usual" character of the defendant. An intellectually disabled offender may have no perception of the moral wrongfulness of the offence nor have been able to rationally choose to have acted differently. Consequently the usual range of sentences available to the court will be of little use, either as a deterrent measure or as a humane means of containment. To sentence an intellectually disabled offender to a prison sentence would be of no benefit other than for containment and such a defendant would be very likely to suffer abuse in such an environment. However, it would not be desirable to simply ignore the deviant behaviour: "The action cannot be said to be a mere aberration on the part of the accused, the risks of repetition may be high".⁶⁵ This risk of recidivism and the need for the courts to do "something" has led to the development of particular dispositional options for those with a mental disorder, but these options are clearly not suitable for offenders with only an intellectual disability

64 Nicola Lacey *State Punishment: Political Principles and Community Values* (London, Routledge, 1988) 66.

65 Lacey, above n 64, 66.

The ineffectiveness of the available orders currently available has become more evident as the case law develops. For example, in *Police v P*⁶⁶ the defendant was not new to the court process. Judge Moore was obviously exasperated with the process, opening his judgment with "Mr P is yet again before the Court".⁶⁷ It was not a question of whether P was still under disability in relation to the fresh charges, but rather how to dispose of the case. The judge commented that to make an order under section 115(1) for someone like Mr P would be: "to make an order for their destruction ... it would require that they be confined with the criminally insane".⁶⁸ He went on to highlight the problems of "trying to find the most appropriate of a series of inappropriate solutions"⁶⁹ in cases such as this, noting that it would be "obscene" to make P a special patient. The result was that P was ordered to be detained as a "patient" under s115(2)(a) of the CJA85. Judge Moore recognised that what happened after P was reviewed was "not a matter over which I have any control", and that it highlighted the: "lack of controlled facilities [meaning caregivers having the powers of constraint and restraint where required] for the intellectually handicapped".⁷⁰ It is perhaps this latter point that is of the greatest importance in suggesting any meaningful reform to the current system. Whatever powers are given to the court by Parliament must be worthwhile and amount to more than mere social control.

66 *Police v P* [1997] DCR 823.

67 *Police v P* above n 66, 824.

68 *Police v P* above n 66, , 826.

69 *Police v P* above n 66, 827.

70 *Police v P* above n 66, 827.

As an alternative to section 115(1) orders, some courts are using the dispositional options under section 115(2)(b). In two cases the defendants were found to be under disability but then released back into the community. *Police v Navarett*⁷¹ involved an accused charged with indecent assault being released (under s115(2)(b)) due to the inappropriateness of any other of the available orders. Similarly, *Police v P*⁷² involved assault on a female and attempted arson. The accused had a mental capacity of below average, and a marginal ability to plead. He was also unable to communicate with counsel and was, as a consequence, found to be under disability. Again, due to the lack of any appropriate alternative, the accused was released under s115(2)(b).

While this is, perhaps, a sensible way of dealing with such cases, it does rather jar with the concept of "mentally disordered" as defined. It also fails to deal with the problems highlighted by Lacey and discussed above. To be mentally disordered involves an abnormal state of mind, but then also requires that as a result of such an abnormal state of mind, that person:⁷³

(a) poses a serious danger to the health or safety of that person or of others; or

(b) Seriously diminishes the capacity of that person to take care of himself or herself.

It is difficult to reconcile the concepts of posing a serious danger or of possessing a seriously diminished capacity for self care with an order for

71 *Police v Navarett* (3 September 1996) unreported, District Court, Otahuhu, CRN 0648017116, Judge Moore,

72 *Police v P* (3 December 1996) unreported, District Court, Otahuhu, CRN 6058021202, CRN 6048021203, CRN 6004037558, Judge Moore. This was the precursor to the reported case of *Police v P* above n 66.

73 MH(CAT)A92, s 2, "mental disorder".

immediate release under s115(2)(b).⁷⁴ The point is that the courts are quite simply unable to effectively deal with intellectually disabled defendants found to be under disability. This again highlights the need for reform.

4 *The review process*

Any order made by the court is subject to review under the provisions of the MH(CAT)A92.⁷⁵ As these reviews are carried out by mental health professionals, rather than the courts, the opinion that intellectual disability does *not* constitute a mental disorder will inevitably prevail. *Re JNM*⁷⁶ demonstrates this mental health perspective and highlights the downstream problems of disposition referred to above.

JNM had been before the District Court on charges of intentional damage, and, despite suffering only an intellectual disability, was found to be under disability and disposed of by way of a compulsory treatment order. A statutory review was subsequently undertaken, with psychiatric opinion being that JNM should not be detained under the MH(CAT)A92. The reviewing psychiatrist had concerns as to what implications the release would have, both on the patient and on the community, and asked the Tribunal to decide the issue.

74 The problem is compounded by the lack of enforceable orders available to ensure that the order is actually carried out: "... consequent upon the last order having been made, no action at all occurred on the part of Waitemata Health": *Police v M (No 2)*, above n 54, 394 per Judge Boshier.

75 MH(CAT)A92, s 80.

76 *Re JNM* above n 53.

The problem for the Tribunal was summed up as follows:⁷⁷

The significance of the applicant's entry into the system is that he has not yet been dealt with pursuant to Part I of the Act and therefore the question of whether s4(e) of Part I applies has not been considered.

[T]he applicant suffers from intellectual disability, he has no superimposed mental illness and while he may satisfy the test of mental disorder under s2 of the Act, he cannot be held pursuant to a compulsory treatment order because of the provisions of s4(e).

The result was that the Tribunal had no alternative but to order JNM's release. In doing so they noted the "distressing and predictable" consequences of this action:⁷⁸

[T]he applicant is placed back in a vulnerable situation where it is likely that he will again come to the notice of the police through some act on his part which may place himself or others in danger. In that event the circle for him will be repeated ... The legislation is such that no alternative is available to us.

The Tribunal concluded by recording their: "grave concerns for the applicant's welfare and for the safety of other who may come into contact with the applicant, once discharged".⁷⁹

This case demonstrates the inevitable outcome of disposing of intellectually disabled defendants by way of the MH(CAT)A92. The court order merely delays the release of the defendant back into the community. It is clear that Parliament did not intend intellectually disabled defendants to be compulsorily detained under the MH(CAT)A92, and to use the CJA85 as a route to such detainment is flawed, although perhaps understandable. The courts are dealing with intellectually disabled defendants in the best way they

⁷⁷ *Re JNM* above n 53, 93.

⁷⁸ *Re JNM* above n 53, 95.

⁷⁹ *Re JNM* above n 53, 96.

are able under the manifestly inappropriate current legislative regime, but the problem then passes to those administering the mental health system. Neither system can accommodate or deal with the problem. Legislative intervention appears to be the only route to a solution.

IV REFORM BILLS

Having discussed at some length the shortcomings of the present fitness to plead regime as it applies to those with only an intellectual disability, it is necessary to examine the reforms that are currently before Parliament. The purpose of this discussion is to consider the extent to which the problems with the current regime will be overcome.

Parliament's answer to the problem has been to take a completely fresh look at the fitness to plead regime, with particular emphasis on how to deal with intellectually disabled offenders. The proposed reforms are contained in two Bills, the Criminal Justice Amendment Bill (No.7)⁸⁰ ("the CJAB") and the Intellectual Disability (Compulsory Care) Bill⁸¹ ("the ID(CC)B"). These Bills have evolved over several years and reflect the recommendations of the New Zealand Law Commission.⁸² They received their second reading on 5 October 1999,⁸³ and were referred to the Health Committee for consideration. The Committee's report is due on 30 November 2000.⁸⁴

80 No 328-1.

81 No 329-1.

82 New Zealand Law Commission, above n 15, 54-55. See generally Warren Brookbanks "Fitness to Plead and the Intellectually Disabled Offender" 1 *Psychiatry, Psychology and Law* (1994) 171.

83 (5 October 1999) 580 NZPD 19695 (ID(CC)B); (5 October 1999) 580 NZPD

The Bills herald major changes to the current fitness to plead regime. The CJAB replaces Part VII of the CJA85 in its entirety, and includes dedicated disposition options for offenders with intellectual disabilities. These provisions are linked to the ID(CC)B, which is designed to provide "compulsory care" for such offenders. It is the reliance on an inappropriate definition and the lack of dispositional options that have caused the problems discussed above. The panacea is to be in the CJAB/ID(CC)B regime.

Most of the provisions discussed below are specific to the needs of intellectually disabled offenders. However, although some amendments are of a general nature they are too important to pass without comment.

A The Criminal Justice Amendment Bill (No 7)

The current problem of having to find intellectually disabled offenders to be mentally disordered to enable a finding of "under disability" could have been avoided by a simple amendment to section 108 of the CJA85 at the time the finding of disability without any requirement for an examination of the strength of the case against the person who is the subject of the order.⁸³ The CJAB has attempted to remedy this problem by requiring that the court must be satisfied of the defendant's involvement in the offence before a finding of unfitness to stand trial is made.⁸⁴ This provision represents a significant

⁸³ 19703. This was the last day of sitting for the old Parliament and the Bills were carried over to the new Parliament.

⁸⁴ (28 August 2000) Parliamentary Bulletin, 8. The report was originally due on 1 September 2000.

MH(CAT)A92 was enacted. For example, the section could have simply been amended to read:

... a person is under disability if, because of the extent to which that person is mentally disordered [or **intellectually disabled**] that person is unable ...

This would have solved the problems experienced by the courts over the last eight years, but would, of course, leave the fundamental problem of how to dispose of such offenders unanswered.

Before embarking on a discussion of whether the proposed regime will remedy the problems discussed above, an important innovation of the CJAB should be briefly discussed.

1 Involvement in the Offence

A major omission in the current fitness to plead regime is that it does not require, or in fact allow, a consideration of the defendant's involvement in the offence. In *Police v P* Judge Moore noted that "an order can be made on a finding of disability without any requirement for an examination of the strength of the case against the person who is the subject of the order".⁸⁵ The CJAB has attempted to remedy this problem by requiring that the court must be satisfied of the defendant's involvement in the offence before a finding of unfitness to stand trial is made.⁸⁶ This innovation represents a significant

⁸⁵ *Police v P* above n 66, 826.

⁸⁶ Clause 111 This reflects the overseas trend: see for example Criminal Procedure (Insanity and Fitness to Plead) Act 1991 (UK), s 4; Mental Health (Criminal Procedure) Act 1990 (NSW), s 22(1). The procedure to be followed is set out in cls 111A to 111F.

step forward in the protection of the rights of mentally impaired defendants. However, this clause has been subject to criticism on the ground that the standard of proof required is "on the balance of probabilities". The argument is that clause 111 effectively discriminates against those with mental impairments and should be redrafted to require the same standard as that applicable to any other offender, namely "beyond reasonable doubt".⁸⁷

In practice, however, this is probably not a practical or desirable option. To satisfy such an evidential burden would involve all the evidence being heard and tested in the usual adversarial manner. It would obviously amount to a full trial and would contradict the very purpose of the fitness regime and render it redundant. If a full trial has taken place, then it suggests that either the defendant was fit to stand trial or has been tried unjustly. The fitness regime would then be reduced to an exercise in semantics, and the only real issue would be one of disposition. Such a trial would do no service to the mentally impaired offender nor to justice. In the very special circumstances of a fitness to stand trial regime, the lower standard of proof may be seen as discrimination of a justifiable nature.

Even though peripheral to this paper, clause 111 cannot be ignored. It is the threshold that must be passed before the issue of unfitness is considered. The following discussion assumes that the defendant has been found to have been involved in the offence.

⁸⁷ See generally Human Rights Commission "Submission of the Human Rights Commission on the Criminal Justice Amendment Bill (No 7), 4-5.

The starting point for the new fitness regime is clause 108 of the CJAB:

108. Interpretation - (1) For the purposes of the Part, "unfit to stand trial" means an inability, due to mental impairment, to conduct a defence or to instruct counsel to do so.

(2) For example, a person is unfit to stand trial if, due to mental impairment, the person is unable-

(a) To plead:

(b) To adequately understand the nature of purpose or possible consequence of the proceedings:

(c) To communicate adequately with counsel for the purposes of conducting a defence:

(d) To make an informed decision whether or not to give evidence.

As in the current regime, a finding of unfitness to stand trial is available only where the accused is charged with an imprisonable offence.⁸⁸

Clause 108 introduces the term "unfit to stand trial" instead of the current "under disability". The reason for this change in terminology is not given in the explanatory note to the Bill, but it perhaps serves to emphasise the distinction between "under disability" and "intellectual disability".

⁸⁸ CJA85, s 111; CJAB, cl 108A.

Of central importance to this new interpretation clause is the substitution of the term "mental impairment" for the current definition of "mental disorder". It is this latter term that has caused the problems discussed above, namely that the term, as defined in the MH(CAT)A92, specifically excludes intellectual disability. The CJAB deliberately refrains from defining "mental impairment",⁸⁹ instead leaving it up to the court to determine what is or is not included. The clear intention is to allow the inclusion of both "mental disorder" and "intellectual disability",⁹⁰ but to also leave open the possibility of including other manifestations of mental impairment.

Despite the intentions of the drafters, all the submissions that deal with clause 108 were critical of the intention to leave "mental impairment" undefined.⁹¹ In his submission to the Health Committee, Warren Brookbanks highlighted the problems encountered in New South Wales, namely that the courts could interpret the term narrowly to exclude "unmeritorious" cases".⁹² Whether the New Zealand courts would in fact adopt this limited approach is a moot point, but it does support the argument for providing a clear definition, if only to avoid confusion.

89 As recommended by the New Zealand Law Commission, above n 15, 127.

90 CJAB, explanatory note, ii.

91 It is interesting to note that only eight submissions were received on the CJAB. This perhaps reflects a lack of knowledge of the impact this bill may have on those unfit to stand trial.

92 Warren Brookbanks "Submission to Parliamentary Select Committee considering the Criminal Justice Amendment Bill (No 7) 1999" 1.

Other submissions call for a definition on the basis that "mental impairment" could be used to include offenders who do not fall within the ambit of either the MH(CAT)A92 or the ID(CC)B. Although this appears to be the intention of the drafters, it could lead to the detention of defendants in an inappropriate environment.⁹³ These submissions suggest that "mental impairment" should be defined as being either a mental disorder (MH(CAT)A92) or an intellectual disability (ID(CC)B). Although perhaps more limiting on the courts in terms of what constitutes a "qualifying" impairment, the suggestion does have merit. For example, it would ensure that the term was consistent with the dispositions available under clauses 115A and B of the CJAB. These clauses are discussed below, but basically rely on either the MH(CAT)A92 or the ID(CC)B. If these orders are used, then logic dictates that the offender must be either "mentally disordered" (which could include a "dual diagnosis") or "intellectually disabled". As both of these impairments are clearly and comprehensively defined there appears to be little scope for the inclusion of other "impairments". This is reinforced by the specific exclusions set out in the explanatory note to the ID(CC)B.⁹⁴

Leaving "intellectual impairment" undefined is appealing in that it will allow the court some degree of flexibility in interpreting the term. However, for the sake of clarity, it may be preferable to define mental impairment as

⁹³ See generally Mental Health Commission "Submission on Criminal Justice Act Amendment Bill (number 7)" 1. This may have the effect of transposing the current problem from intellectually disabled offenders to another group of mentally impaired offenders.

⁹⁴ ID(CC)B, explanatory note, iii. The exclusions relate to impairments caused after age 18, those covered by the MH(CAT)A92, and personality disorders. This contrasts with the New South Wales Law Reform Commission definition which includes such impairments as dementia and brain injury acquired after age 18: above n 19, 52.

encompassing both intellectual disability and mental disorder. This could be achieved by the use of a non-exhaustive definition such as "mental impairment *includes* ...". The adoption of a definition such as this would serve to specifically include those with an intellectual disability or mental disorder, yet would still be wide enough to allow the courts to ensure procedural fairness by finding a defendant unfit to stand trial through an impairment that does not meet the strict criteria of the either definition. However, even with a definition such as this, the limited scope of the dispositions under the CJAB⁹⁵ and the specific exclusions in the ID(CC)B make it difficult to envisage what else the courts would be able to include as a qualifying mental impairment. If the term is to be more widely interpreted, then there would be a need for a greater range of orders, perhaps adding to clause 115B an option allowing the court to make an "appropriate order".

Despite the competing arguments on whether this new term should be defined, it is gratifying to note that it represents a significant improvement for those with only an intellectual disability. Even if left undefined, "mental impairment" clearly includes those with only an intellectual disability. The courts will no longer be required to artificially find that an intellectually disabled offender suffers from a mental disorder.⁹⁶

⁹⁵ CJAB, cls 115A and B are discussed below.

⁹⁶ The explanatory notes verify this: CJAB, explanatory note, ii.

Although not specifically aimed at intellectually disabled offenders, clause 108 places the focus on an "inability ... to conduct a defence or to instruct counsel to do so".⁹⁷ This is an extension of the current section 108(1)(c), and appears to greatly lower the threshold currently required for a disability finding. At the lowest level, it is arguable that the requirement is simply that the offender is *personally* unable to conduct a defence due to mental impairment. This will obviously include virtually all intellectually disabled offenders, whether or not they fall within the definition of "intellectual disability". The fact that "mental impairment" is undefined supports this contention.

The remainder of the current definition is relegated to subclause (2), as *examples* of what may lead to a person being found unfit to stand trial. It also introduces a new example, an inability "[t]o make an informed decision whether or not to give evidence".⁹⁸ It is difficult to understand why this particular matter should be specifically included as an example or what it adds to the definition in totality.⁹⁹

Other changes include the addition of "... adequately ..." and "... or possible consequences . . .". in clause 108(2)(b).¹⁰⁰ Although these changes do not add a great deal to the clarity of the current definition, they do perhaps indicate a more benevolent attitude to a mentally impaired defendant than the

97 CJAB, cl 108(1).

98 CJAB, cl 108(2)(d).

99 This point was also raised in the Brookbanks submission, above n 92, 2.

100 As additions to the current s 108(1)(b).

current section 108(1)(b). It appears that it would support a finding of unfitness to stand trial even where an offender was able to adequately understand the nature or purpose of the proceedings, but not the possible consequences.¹⁰¹

No explanation is given for the amended format of clause 108, but the obvious conclusion is that the examples in clause 108(2) are intended to allow the court more flexibility than it currently has. However, the current section 108 is clearly understood by the courts and appears to have caused little problem to date. The semantic changes introduced by clause 108 generally add little to the current definition and have a large potential to cause confusion and unnecessary argument. With appropriate amendments to the terminology, the current section 108 could continue to be used. The proposed definition has the potential to upset a settled area of the law, and it would perhaps be appropriate to reconsider the drafting of this clause before it passes into law.

5 *Disposition*

The current regime has led to intellectually disabled offenders being inappropriately placed in psychiatric hospitals. The CJAB aims to overcome

¹⁰¹ Although the chance of this happening in practice seems remote.

this problem through the introduction of new dispositions, principally in clause 115A.¹⁰²

115A. Detention of defendant found unfit to stand trial ... as ... special care recipient - (1) When the court has sufficient information on the condition of a defendant found unfit to stand trial ... the court must-

(a) Consider all the circumstances of the case; and

(b) Consider the evidence of 1 or more health assessors as to whether the detention of the defendant in accordance with 1 of the orders specified in subsection (2) is necessary; and

(c) Make 1 of the orders referred to in paragraph (b) if it is satisfied that the making of the order is necessary in the interests of the public or any person or class of person who may be affected by the court's decision.

(2) The orders referred to in subsection (1) are that the defendant be detained-

(a) . . .

(b) In a secure facility as a special care recipient under the Intellectual Disability (Compulsory Care) Act 1999.¹⁰³

Provision is made for the assessment of a defendant by a health assessor.¹⁰⁴

This clause appears to solve the dispositional problem, but has been criticised on the basis that "health assessor" is not defined,¹⁰⁵ and therefore no account is taken of the different skills required in dealing with intellectually disabled

102 CJAB, cl 115B offers an alternative disposition of intellectually disabled offenders as "civil care recipients" under the ID(CC)B. Many of the considerations discussed with regard to cl 115A apply equally to cl 115B.

103 If the court is not satisfied that such an order is necessary, it *must* make an order under CJAB, cl 115B.

104 CJAB, cls 121 to 123.

105 See generally Royal Australian and New Zealand College of Psychiatrists "Oral Submission: Criminal Justice Amendment Bill (No 7)" 3.

and mentally disordered offenders.¹⁰⁶ The concern is that an inappropriately qualified assessor may be used. Despite this criticism, the clause clearly makes provision for the appropriate disposition of intellectually disabled offenders found unfit to stand trial.¹⁰⁷

B *The Intellectual Disability (Compulsory Care) Bill*

The true test of the proposed regime for the intellectually disabled offender will be in the effectiveness of the dispositions under the ID(CC)B. The ID(CC)B is a complex¹⁰⁸ and completely new piece of proposed legislation. It mirrors the MH(CAT)A92 in providing for compulsory intervention where an intellectually disabled person refuses to voluntarily accept care or is found "unfit to stand trial". Perhaps predictably, the ID(CC)B attracted a far greater number of submissions than the CJAB,¹⁰⁹ with the overwhelming criticism relating to the powers of "civil" compulsory care and the infringement of human rights.¹¹⁰ However, some submissions did welcome the new Bill, particularly in the criminal context.¹¹¹ There is no escape from the fact that this Bill is controversial.

¹⁰⁶ A psychologist would be appropriate for the former, a psychiatrist for the latter.

¹⁰⁷ The question of how effective the "care" regime will be in practice is one that obviously remains open. Only when the system is operational will its success (or otherwise) be known.

¹⁰⁸ Consisting of 183 clauses.

¹⁰⁹ A total of 66.

¹¹⁰ See generally the submissions of the Human Rights Commission "Submission of the Human Rights Commission on: The Intellectual Disability (Compulsory Care) Bill". The matter was also the subject of vigorous debate in Parliament: see for example the speech of Jenny Bloxham (5 October 1999) 580 NZPD 19700. Many of the concerns expressed are equally applicable to offenders.

¹¹¹ For example, the Howard League "... fully support the development of stand-alone legislation to address the needs of those intellectually disabled people who commit criminal offences": The Howard League for Penal Reform "Submission to Health

The entry point to the ID(CC)B is through the definition of "intellectual disability". Although in the context of the CJAB reliance will be on "mental impairment", the court will still need to consider whether that impairment is in fact an intellectual disability.

The problem with any definition of intellectual disability lies: "in providing a definition which will have meaning for both the legal and medical professions".¹¹² This difficulty is reflected in the decision of the New Zealand courts. For example, in *Police v M (No 2)*,¹¹³ the court had to face the problem of dealing with an intellectually disabled defendant. The judgment highlights the differences between the medical and legal concepts of mental disorder.¹¹⁴ The evidence of the two psychiatrists was that: "a patient might be considered to be mentally disordered within s2 if the patient had a known psychiatric illness which could be treated".¹¹⁵ Judge Boshier rejected this finding as not being within the "pure meaning" of the section 2 definition and held that mentally disabled persons are not excluded:¹¹⁶

even though they may not be treatable patients within recognised branches of psychiatry. If such persons have an abnormal state of mind, and the other criteria in the definition apply, they are by definition mentally disordered.

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- 112 Select Committee on Intellectual Disability (Compulsory Care) Bill" 1.
Bernadette McSherry "A Review of the new South Wales Law Reform Commission's Report People with an Intellectual Disability and the Criminal Justice System" (1999) 25 Monash ULR 166, 168.
- 113 *Police v M (No 2)*, above n 54.
- 114 *Police v M (No 2)*, above n 54, 392.
- 115 *Police v M (No 2)*, above n 54, 392.
- 116 *Police v M (No 2)*, above n 54, 393.

The Judge, like Judge McElrea in *R v T*, relied on the objective meaning of "abnormal" to arrive at this conclusion, but was critical of the regime: "I do not think that the mental health definition of "mentally disordered" fits at all comfortably with an inquiry initiated through the Criminal Justice Act 1985".¹¹⁷

The drafters of the ID(CC)B attempt to overcome this problem in future through the following definition:¹¹⁸

20. Meaning of "intellectual disability" - (1) A person has an intellectual disability if the person has a permanent impairment that-

(a) Results in significantly sub-average general intelligence as measured by standard psychometric tests generally used by clinicians; and

(b) Results in significant deficits, as measured by tests generally used by clinicians, in at least 2 of the skills listed in subsection (3); and

(c) Became apparent during the developmental period of the person.

(2) For the purposes of subsection (1)(a), and intelligence quotient of 70 or less is indicative of significantly sub-average general intelligence.

(3) The skills referred to in subsection (1)(b) are [concerned with day-to-day living]

(4) For the purposes of subsection (1)(c), the developmental period of a person generally finishes when the person turns 18 years.

¹¹⁷ *Police v M (No 2)*, above n 54, 393.

¹¹⁸ This definition is based on the 1992 American Association for Mental Retardation definition: ID(CC)B, explanatory note, v.

This section is subject to clause 21, which provides that a person does not have an intellectual disability simply because of a mental disorder or because he or she does not feel shame or remorse about harm they have caused to others.

The intention of the drafters was to provide consistency with the standard clinical definitions, and to be of use in a legal context. However, it is interesting to contrast this comprehensive definition with that recommended by the New South Wales Law Reform Commission:¹¹⁹

"Intellectual disability" means a significantly below average intellectual functioning, existing concurrently with two or more deficits in adaptive behaviour.

Both definitions are intended to achieve the same effect in fitness to plead proceedings,¹²⁰ and the fact remains that both definitions will be interpreted by the courts on the basis of expert evidence. It is realistic to expect a similar outcome no matter which definition is used. The more thorough ID(CC)B definition in effect only codifies what an expert witness would consider in any event.

One significant difference between the Australian and New Zealand definitions is the deliberate omission of the requirement that the disability became apparent during the "developmental period".¹²¹ The Australian version omitted this requirement to allow the inclusion of disabilities that manifest after the age of 18 years. This would have the effect of *including*

119 New South Wales Law Reform Commission, above n 19, 64-65.

120 Although it should be noted that the ID(CC)B also applies to civil care recipients. This perhaps explains the need for greater complexity.

121 Clause 20(1)(c), 20(4).

brain damage acquired in later life or dementia. The explanatory note to the ID(CC)B clearly sets out that such disabilities are to be *excluded* from what would otherwise appear to fall squarely within the meaning of "mental impairment":¹²²

The bill does not apply to-

Persons whose intellectual impairment has been caused by some event after the developmental period (18 years or older).

The reason for this exclusion is not given in the explanatory note, and appears to contradict the reason for not defining "mental impairment" so that: "the courts are free to interpret the term in line with the overall purpose of ensuring procedural fairness".¹²³

It is difficult to reconcile this statement with the specific exclusion of those with an intellectual disability caused after the developmental period. The relative simplicity and flexibility of the Australian definition appears preferable. It gives the court the power to interpret the term to ensure procedural fairness. This is a sensible approach. The court will be in the best position to consider the circumstances of a particular case and make its decision on the basis of expert evidence. Expert evidence will, by its very nature, be highly likely to rely on current trends in diagnosing and dealing with intellectual disability. To define the disability so closely risks it remaining in force despite possible major shifts in the view of professionals dealing with intellectual disability. Amendment would be unlikely to occur to keep pace, as is evident from the current reliance on "mental disorder".

122 ID(CC)B, explanatory note, iii.

123 ID(CC)B, explanatory note, vi

For the purposes of a fitness to stand trial hearing in New Zealand, the reliance on an undefined "mental impairment" suggests that a much wider interpretation of intellectual disability is possible, and that an intellectually disabled offender not falling strictly within the clause 20 definition could still be found unfit to stand trial. This may lead to confusion in practice. For example, in appropriate circumstances the court could include an intellectually disabled offender with an IQ of more than 70 by finding them to be mentally impaired, although not intellectually disabled. This appears to render the careful definition of "intellectual disability" virtually pointless for the purposes of finding a defendant unfit to stand trial.¹²⁴

A number of submissions to the Health Committee also criticised this definition. It is particularly interesting to note that both legal and mental health professionals agree that the term is not "an absolute concept",¹²⁵ and referred to the difficulties the Victorian Supreme Court experienced in interpreting a similar definition of "intellectual disability", particularly with regard to the requirement of an IQ of below 70.¹²⁶

It is clear even at this stage that the definition of "intellectual disability" is one which will cause problems to the courts if it is not amended to allow a greater degree of interpretive flexibility. However, it is gratifying to note that

124 Although it would still apply in the civil context.

125 Mental Health Commission "Submission on the Intellectual Disability (Compulsory Care) Bill" 6; New Zealand Law Society Family Law Section "Submissions on the Intellectual Disability (Compulsory Care) Bill" 1.

126 *Clancy v Director-General of the Department of Community Services, Victoria* [1994] 1 VR 45.

the proposed regime applying to intellectually disabled defendants appears to no longer require the irrelevant consideration of "dangerousness".¹²⁷

2 *Definition of "special care recipient"/"secure facility"*

Where an intellectually disabled offender is found unfit to stand trial, the court may dispose of that person as a "special care recipient" in a "secure facility".¹²⁸

The ID(CC)B adds little to the meaning of "special care recipient" defining it as (including) a person found unfit to stand trial and subject to an order under clause 115A of the CJAB.¹²⁹ More interestingly, a "secure facility" is defined as a facility that:¹³⁰

(a) Has particular features that are designed to prevent persons required to stay in the facility from leaving the facility without authority; and

(b) Is operated in accordance with systems that are designed to achieve that purpose.

A "facility" is:¹³¹

[A] place that is used by a service for the purpose of providing care to persons who have an intellectual disability (whether or not the place is also used for other purposes).

127 This issue was criticised above in relation to the current regime. However, the reference in CJAB, cl 115A(1)(c) to the "... interests of the public or any person or class of person ..." may suggest the contrary will apply in practice. The reference to dangerousness in the ID(CC)B appears in isolation and will logically apply only to those entering the system through the "civil" route: ID(CC)B, cl 19.

128 CJAB, cl 115A(2)(b)

129 ID(CC)B, cl 18(3)(a)

130 ID(CC)B, cl 22(2)

131 ID(CC)B, cl 22(1)

All that can be said for sure is that a prison is *not* a facility.¹³²

It is these definitions that hold the key to solving the dispositional problem that has troubled both the courts and the health system for so many years. A "secure facility" is defined widely enough to include virtually anything that is secure and not a prison. The only other requirement is the provision of "care". "Care" includes the preparation of a "care plan" which allows for a great deal of discretion. For example, a "care plan" need only identify:¹³³

[T]he extent to which, and the manner in which, the needs [of the proposed care recipient] can be met.

It is quite conceivable that costs or staffing issues will dictate that a psychiatric hospital will suffice. Submissions to the Health Committee have recognised: "[the] pressing need for the development of adequate services and skills to meet the needs of those with ... intellectual disability",¹³⁴ and that the Bill "makes no provision for the running of facilities, nor does it impose on the owners/operators of those facilities any legally enforceable responsibilities".¹³⁵ This is reinforced by the definition of "service" as:¹³⁶

[A]n organisation that provides services for person who have an intellectual disability (*whether or not it also provides services for persons who do not have an intellectual disability*). (Italics added).

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- 132 ID(CC)B, cl 22(3)
133 ID(CC)B, cl 55(2)
134 Royal Australian and New Zealand College of Psychiatrists "[Submission on] Intellectual Disability (Compulsory Care) Bill" 3.
135 New Zealand Law Society "Submissions on the Intellectual Disability (Compulsory Care) Bill" 4.
136 ID(CC)B, cl 17.

This definition of "service" appears to have its roots in the New Zealand Law Commission's 1994 report:¹³⁷

Given New Zealand's small population and the desirability of keeping people near their own communities and families where possible, it is probably inevitable that existing psychiatric hospitals and hospitals for the intellectually handicapped will continue to play a role in suppling the learning, security and other needs of dangerous intellectually handicapped people. Settings could therefore include *psychiatric hospitals* . . . (Italics added)

After the long struggle to finally gain recognition of the differences between mental disorder and intellectual disability, and the move towards deinstitutionalisation, it would be a disaster to revert to the days when New Zealand incarcerated its intellectually disabled citizens in psychiatric institutions as a means of "social control". Only the terminology will have changed. There must be dedicated facilities for the care of intellectually disabled defendants found unfit to stand trial. The definition of "service" should recognise this by specifically excluding psychiatric units.

V CONCLUSION

The conclusion of this paper is that the current fitness to plead regime clearly fails to take account of the needs of intellectually disabled defendants. However, the proposed regime specifically addresses these problems and, assuming adequate funding and other resources, is likely to provide an appropriate remedy.

¹³⁷ New Zealand Law Commission, above n 15, 52.

The current problems have arisen primarily through Parliament's failure to make appropriate amendments to the CJA85 at the same time as the MH(CAT)A92 was passed. The crucial failures of the CJA85/MH(CAT)A92 regime may be distilled into two areas. First, intellectually disabled defendants are treated as "mentally disordered" by the criminal courts for the purposes of the CJA85. Although this enables the courts to ensure procedural fairness, by finding such defendants to be "under disability" and therefore not required to stand trial, it avoids the fact that this group is clearly excluded by section 4(e) of the MH(CAT)A92. This leads to the second problem, namely that the dispositional options available to the courts are manifestly inappropriate. As argued in this paper, disposition of intellectually disabled defendants to psychiatric institutions as "special patients" does no service to society or the defendant. The result of such dispositions is merely to delay the inevitable. The "patient" will be discharged following the first review. They are simply not "mentally disordered" nor are they susceptible to the "treatment" envisaged by the MH(CAT)A92.

New legislation is the only realistic remedy to the current problems. Parliament's answer has been through the introduction of two new Bills, the CJAB and the ID(CC)B. The CJAB totally overhauls Part VII of the CJA85. It also introduces a requirement that the court is satisfied the defendant was involved in the offence. This reflects the overseas approach and provides a further procedural safeguard for the defendant. Significantly, the CJAB also replaces the problematic term "mental disorder", with the undefined "intellectual impairment". This new term has been subject to criticism, particularly with regard to the interpretation the courts may place upon it. However, for the purposes of this paper, it is inconceivable that the courts

would interpret it to exclude intellectually disabled defendants. A new definition of "intellectual disability" has been included in the ID(CC)B which, although subject to criticism, reflects the definition generally adopted by health professionals. This definition appears to be divorced from the irrelevant consideration of "dangerousness" that persists in the MH(CAT)A92 definition of "mental disorder". Other changes to section 108, however, have the potential to confuse the clearly understood considerations as to what is required for a finding of "under disability".

The dispositional options available to the courts have been widened by the CJAB to include orders under the new "sister" Act to the MH(CAT)A92, the ID(CC)B. Although the ID(CC)B has been criticised for its complexity it will, if it operates as intended, provide appropriate options to the courts in disposing of intellectually disabled defendants found "unfit to stand trial". The caveat is whether the care envisaged under this Bill will be funded adequately and appropriate staff and facilities provided. If not, then the iniquity of using psychiatric units for the "social control" of intellectually disabled defendants will continue.

Despite the criticisms set out in this paper, the CJAB/ID(CC)B represents a great improvement in the fitness to stand trial regime as far as intellectually disabled defendants are concerned. The CJAB contains all the elements necessary to overcome the definitional problems in the current regime, and the ID(CC)B, by providing appropriate dispositional facilities, will remedy the downstream problems currently faced by the courts and health services. The true test of the proposed regime will, of course, be in its practical operation.

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